

Filed 12/22/25 P. v. Mixon CA2/1

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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA
SECOND APPELLATE DISTRICT
DIVISION ONE

THE PEOPLE,

B339249

Plaintiff and Respondent,

(Los Angeles County
Super. Ct. No. A975733)

v.

ERIC MIXON,

Defendant and Appellant.

APPEAL from an order of the Superior Court of Los Angeles County, Ray G. Jurado, Judge. Reversed and remanded with directions.

Keilana Truong, under appointment by the Court of Appeal, for Defendant and Appellant.

Rob Bonta, Attorney General, Charles C. Ragland, Chief Assistant Attorney General, Susan Sullivan Pithey, Assistant Attorney General, Scott A. Taryle and David A. Voet, Deputy Attorneys General, for Plaintiff and Respondent.

Eric Mixon appeals from the superior court’s order denying his petition for resentencing under Penal Code section 1172.6 (former section 1170.95)¹ as to his second-degree murder conviction by a no-contest plea. The court denied the petition at the *prima facie* stage without appointing counsel, concluding Mixon was not entitled to relief as a matter of law. The People concede the court erred and the error was prejudicial. We agree and thus reverse.

FACTUAL AND PROCEDURAL BACKGROUND

A. *Evidence at the 1988 Preliminary Hearing*

The victim’s husband testified that as his wife was walking on the sidewalk, a car drove up alongside her. Two passengers exited the car and approached his wife. He heard a gunshot and saw his wife drop to the ground. The two passengers got back into the car, and the car sped away. Another eyewitness testified that appellant (Mixon) was the driver.

Mixon admitted to a detective that as he was driving a group of acquaintances, one of them said she wanted to do some “jacks,” which Mixon understood to refer to robbery. He stopped the car once, and two of the passengers exited the car and he saw them commit a robbery. The passengers then jumped back into the car and they continued driving. When “they” saw the victim, Mixon parked the car and three of the passengers exited the car and approached the victim. Mixon heard a gunshot, saw the victim fall to the ground, and saw that one of the passengers had

¹ Effective June 30, 2022, section 1170.95 was renumbered to section 1172.6 with no change in text. (Stats. 2022, ch. 58, § 10.) All statutory references are to the Penal Code.

a handgun. Mixon sped off and took his passengers home. Mixon admitted he was aware of the handgun after the first robbery, and said he did not expect that anybody would be shot.

B. *Charges, Plea, and Sentence*

In 1988, the People charged Mixon with murder, and alleged a principal used a firearm. (§§ 187, subd. (a), 12022, subd. (a).) In 2011, Mixon pleaded no contest to second degree murder and admitted a principal was armed with a firearm. The trial court sentenced Mixon to 16 years to life.

C. *Petition for Resentencing*

In 2024, Mixon filed, pro se, a petition for resentencing under section 1172.6 as to his murder conviction. He used a pre-printed form petition wherein he checked boxes next to statements that correspond to statutory requirements for relief. He also checked a box next to a statement indicating that he wanted court-appointed counsel to represent him.

The superior court summarily denied the petition in chambers without appointing counsel or issuing an order to show cause. The court denied relief, and stated in its minute order, “The court finds, without reaching any inferences from the facts, that defendant was an aider and abettor in the shooting and was a major participant in the offense and acted with reckless indifference to human life.”

Mixon timely appealed.

DISCUSSION

A. *Relevant Legal Principles*

Effective 2019, Senate Bill No. 1437 (2017-2018 Reg. Sess.) eliminated the natural and probable consequences doctrine as a basis for finding a defendant guilty of murder and narrowed the felony-murder rule. (*People v. Patton* (2025) 17 Cal.5th 549, 558; *People v. Gentile* (2020) 10 Cal.5th 830, 842-843.) Section 188, subdivision (a)(3), now prohibits imputing malice based solely on one's participation in a crime and requires proof of malice to convict a principal of murder, except under the revised felony-murder rule as set forth in section 189, subdivision (e). Section 189, subdivision (e), provides that a “participant in the perpetration or attempted perpetration of a [specified felony] in which a death occurs” can be liable for murder only if “[t]he person was the actual killer”; “[t]he person was not the actual killer, but, with the intent to kill, aided, abetted, counseled, commanded, induced, solicited, requested, or assisted the actual killer in the commission of murder in the first degree”; or “[t]he person was a major participant in the underlying felony and acted with reckless indifference to human life.” (§ 189, subd. (e)(1)-(3).)

To provide relief to those with existing murder convictions based on now-invalid theories, the Legislature created a path to resentencing. (§ 1172.6, subd. (a); Stats. 2021, ch. 551, § 1.) To be eligible for relief, the petitioner must meet the following conditions: “(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)(1)-(3).) The petition must also include whether the petitioner requests appointment of counsel. (§ 1172.6, subd. (b)(1)(C).)

If a section 1172.6 petition contains all the required information, the sentencing court must appoint counsel to represent the petitioner if requested. (§ 1172.6, subd. (b)(1)(A), (3); see *People v. Lewis* (2021) 11 Cal.5th 952, 962-963 (*Lewis*.)) The prosecutor must then file a response to the petition, the petitioner may file a reply, and the court must hold a hearing to determine whether the petitioner has made a *prima facie* showing that the petitioner is entitled to relief. (§ 1172.6, subd. (c).) If the petitioner makes that showing, the court must issue an order to show cause and hold an evidentiary hearing to determine whether to vacate the conviction and resentence the petitioner on any remaining counts. (*Id.*, subds. (c), (d)(1).)

B. *The Superior Court’s Denial of Mixon’s Petition Was Erroneous and Prejudicial*

1. *The superior court erred in failing to appoint counsel*

Mixon contends, the People concede, and we agree the superior court erred in summarily denying Mixon’s petition for resentencing without appointing counsel. Under *Lewis, supra*, 11 Cal.5th 952, when a petitioner files a facially sufficient

petition under section 1172.6 and requests appointment of counsel, the superior court must appoint counsel before conducting a *prima facie* review under section 1172.6, subdivision (c). (See § 1172.6, subd. (b)(3) [“Upon receiving a petition in which the information required by this subdivision is set forth . . . , if the petitioner has requested counsel, the court shall appoint counsel to represent the petitioner”]; *Lewis*, at p. 963 [“petitioners who file a complying petition requesting counsel are to receive counsel upon the filing of a compliant petition”].) Because Mixon filed a facially sufficient petition, the court erred in denying his petition without first appointing counsel.

2. *The error was prejudicial*

Failing to appoint counsel for a petitioner at the *prima facie* review stage is “state law error only, tested for prejudice under *People v. Watson* (1956) 46 Cal.2d 818.” (*Lewis, supra*, 11 Cal.5th at pp. 957-958.) “[A] petitioner ‘whose petition is denied before an order to show cause issues has the burden of showing “it is reasonably probable that if [he or she] had been afforded assistance of counsel his [or her] petition would not have been summarily denied without an evidentiary hearing.”’” (*Id.* at p. 974.) “[T]he error in failing to appoint counsel is harmless only if we can determine that the record of conviction ‘‘ ‘contain[s] facts refuting the allegations made in the petition.’’’” (*People v. Mejorado* (2022) 73 Cal.App.5th 562, 572; see *id.* at p. 574 [concluding failure to appoint counsel was not harmless and remanding with instructions to appoint counsel for defendant, issue an order to show cause and hold an evidentiary hearing].)

The People concede, and we agree, the court’s error was prejudicial because “it is reasonably probable that appellant could have demonstrated entitlement to an order to show cause

and evidentiary hearing if he had been appointed counsel.” First, the evidence introduced at the preliminary hearing suggests that Mixon was not the actual shooter, and indeed, the People did not proceed on this theory. Second, based on the evidence adduced at the preliminary hearing, whether Mixon had the requisite intent to kill as an aider or abettor of the robbery would require factual findings (i.e., a credibility determination against Mixon) not appropriate at the *prima facie* stage. Finally, to the extent the evidence suggests that the murder occurred during a botched robbery, factual findings as to whether Mixon was a major participant who acted with reckless indifference would again be appropriate only after the trial court issued an order to show cause. A trial court must not engage in “factfinding involving the weighing of evidence or the exercise of discretion” during the *prima facie* stage. (*Lewis, supra*, 11 Cal.5th at p. 972; *People v. Duchine* (2021) 60 Cal.App.5th 798, 815 [remand was necessary where a trial court made major participant and reckless indifference findings at the *prima facie* stage which entailed weighing evidence, drawing inferences, and assessing credibility]; *People v. Curiel* (2023) 15 Cal.5th 433, 463 [to aid and abet a murder, the aider and abettor must aid in the commission of the fatal act].)

DISPOSITION

The order denying Mixon’s section 1172.6 petition is reversed. On remand, the court is directed to appoint counsel for

Mixon, and conduct further proceedings in accordance with section 1172.6, subdivision (c).

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M. KIM, J.

We concur:

ROTHSCHILD, P. J.

BENDIX, J.