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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION EIGHT

THE PEOPLE,

Plaintiff and Respondent,

v.

ZIMBABWE ABDUL-MALIK,

Defendant and Appellant.

B306876

(Los Angeles County  
Super. Ct. No. GA045631)

APPEAL from an order of the Superior Court of Los Angeles County. Terry Smerling, Judge. Reversed and remanded with directions.

Marilee Marshall, under appointment by the Court of Appeal, for Defendant and Appellant.

Matthew Rodriguez, Acting Attorney General, Lance E. Winters, Chief Assistant Attorney General, Susan Sullivan Pithey, Assistant Attorney General, Amanda V. Lopez and Nicholas J. Webster, Deputy Attorneys General, for Plaintiff and Respondent.

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Defendant and appellant Zimbabwe Abdul-Malik appeals from the denial of his petition for resentencing pursuant to Penal Code section 1170.95. We reverse and remand with directions to the superior court to issue an order to show cause and conduct an evidentiary hearing pursuant to section 1170.95, subdivision (d)(3).

## **BACKGROUND**

In 2001, defendant was charged with murder (Pen. Code, § 187, subd. (a)) and carjacking (§ 215, subd. (a)). Robbery and gang special circumstance allegations were alleged as to the murder count (§ 190.2, subd. (a)(17) & (22)). Firearm use and gang allegations were alleged as to both counts (§ 12022.53, § 186.22). The charges arose from an incident in December 2000, in which defendant and two codefendants confronted the victim while he was parked in his car in the driveway of his mother's home. An altercation ensued during which the victim was fatally shot. The victim's car was stolen and found crashed into a pole a short distance away. (*People v. Devore* (Mar. 21, 2006, B170095) [nonpub. opn.].)

The jury found defendant guilty of murder and carjacking. They found not true the special circumstance allegations and the allegation defendant personally used a firearm. The jury found true the gang allegation and the allegation that a principal used a firearm in the commission of the offenses. The trial court sentenced defendant to an indeterminate term of 50 years to life.

In an unpublished decision, we affirmed defendant's conviction and ordered correction of the abstract of judgment to reflect defendant's minimum parole eligibility was 15 years and not 25 years and that the firearm use enhancement was pursuant to Penal Code section 12022.53, subdivision (e)(1). (*People v. Devore, supra*, B170095.)

In 2018, Senate Bill 1437 (2017–2018 Reg. Sess.) was passed. Penal Code section 1170.95 was enacted as part of the legislative changes effected by Senate Bill 1437 and became effective January 1, 2019. (Stats. 2018, ch. 1015, § 4.)

In early 2019, defendant filed in propria persona a petition for resentencing pursuant to Penal Code section 1170.95 (erroneously titled petition for writ of habeas corpus), requesting resentencing on the grounds he was convicted of murder under a felony murder theory. The court appointed counsel for defendant. The People were granted several extensions of time within which to file a response and filed their response in April 2020. Defendant, through counsel, filed a reply and a supplemental brief regarding new case law.

At a hearing on July 27, 2020, defendant was present and represented by appointed counsel. No new evidence was presented. The court entertained argument from the parties on briefing alone.

The court denied defendant's petition, explaining there was sufficient evidence to conclude reckless indifference and, to a lesser extent, aiding and abetting remained viable theories upon which defendant could be guilty of murder.

Defendant appealed. Defendant requested we take judicial notice of our prior opinion affirming his conviction. Respondent joined in that request and also requested we take judicial notice of the court file. We grant those requests.

## **DISCUSSION**

In amending the law regarding vicarious murder liability, Senate Bill 1437 created a specific procedure “for retroactive application of its ameliorative provisions. [Penal Code] [s]ection 1170.95 lays out a process for a person convicted of felony murder or murder under a natural and probable consequences

theory to seek vacatur of his or her conviction and resentencing.” (*People v. Gentile* (2020) 10 Cal.5th 830, 853.)

There is no dispute here that defendant’s murder conviction falls within the purview of the Penal Code section 1170.95.

Respondent concedes the jury was instructed on felony murder liability. Defendant was appointed counsel and the parties briefed the eligibility issues for the court.

Respondent also concedes that defendant made a prima facie showing of eligibility for relief, that defendant’s ineligibility could not be established as a matter of law and that the trial court therefore erred in not issuing an order to show cause in accordance with Penal Code section 1170.95 and holding an evidentiary hearing pursuant to section 1170.95, subdivision (d)(3).

We agree. Penal Code section 1170.95, subdivision (c) provides that “[i]f the petitioner makes a prima facie showing that he or she is entitled to relief, the court shall issue an order to show cause.” The statute further provides that “[a]t the hearing to determine whether the petitioner is entitled to relief, the burden of proof shall be on the prosecution to prove, beyond a reasonable doubt, that the petitioner is ineligible for resentencing. If the prosecution fails to sustain its burden of proof, the prior conviction, and any allegations and enhancements attached to the conviction, shall be vacated and the petitioner shall be resentenced on the remaining charges. The prosecutor and the petitioner may rely on the record of conviction or offer new or additional evidence to meet their respective burdens.” (§ 1170.95, subd. (d)(3).)

Because the record of conviction here does not establish as a matter of law that defendant is not eligible for relief, an evidentiary hearing should have been conducted. We are not persuaded by defendant’s argument that the jury’s not true finding on the special allegations warrant an order under Penal Code section 1170.95,

subdivision (d)(2) vacating his murder conviction and ordering resentencing.

At the evidentiary hearing, the trial court shall act as an independent fact finder and apply the beyond a reasonable doubt standard of proof. (See, e.g., *People v. Lopez* (2020) 56 Cal.App.5th 936, 949, review granted Feb. 10, 2021, S265974; *People v. Rodriguez* (2020) 58 Cal.App.5th 227, 243-244, review granted Mar. 10, 2021, S266652 & *People v. Clements* (2021) 60 Cal.App.5th 597, 615, review granted Apr. 28, 2021, S267624.) Pending guidance from the Supreme Court, we adopt the analyses in these decisions and decline to follow *People v. Duke* (2020) 55 Cal.App.5th 113, review granted January 13, 2021, S265309, which concluded the relevant standard is akin to the substantial evidence test.

## **DISPOSITION**

The order denying defendant's resentencing petition is reversed and the case remanded to the superior court to issue an order to show cause and conduct an evidentiary hearing pursuant to Penal Code section 1170.95, subdivision (d)(3).

GRIMES, Acting P. J.

WE CONCUR:

STRATTON, J.

OHTA, J.\*

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\* Judge of the Los Angeles Superior Court, assigned by the Chief Justice pursuant to article VI, section 6 of the California Constitution.