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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FIRST APPELLATE DISTRICT

DIVISION FIVE

THE PEOPLE, Plaintiff and Respondent, v. MICHAEL C. PERKINS, Defendant and Appellant.	A157253 (San Francisco County Super. Ct. No. SCN128140)

Appellant Michael Perkins appeals the trial court's denial of his petition for resentencing under Penal Code section 1170.95.[1] Appellant's counsel has raised no issue on appeal and asks this court for an independent review of the record to determine whether there are any arguable issues. (*Anders v. California* (1967) 386 U.S. 738; *People v. Wende* (1979) 25 Cal.3d 436.) Appellate counsel advised appellant of his right to file a supplementary brief to bring to this court's attention any issue he believes deserves review. (*People v. Kelly* (2006) 40 Cal.4th 106.) Appellant has not filed such a brief. We have independently reviewed the entire record. We find no arguable appellate issues and therefore affirm.

BACKGROUND

In 1989, appellant pled guilty to second degree murder (§ 187) and admitted an allegation of personal use of a deadly weapon (§ 12022, subd. (b)).

[1] All undesignated section references are to the Penal Code.

In 2019, appellant filed a petition seeking relief under section 1170.95, alleging that he pled guilty instead of going to trial because he believed he could have been convicted of murder at trial pursuant to the felony murder rule or the natural and probable consequences doctrine, and he could not now be so convicted because of newly-effective changes to sections 188 and 189. The petition also alleged that appellant "assumed he had only knocked the victim . . . out, and had no intent to kill him" and that appellant, "after being grabbed and repeatedly pomelled [sic] by [the victim], which [the victim] was also in possession of the very glass bottle that the prosecution deemed a 'deadly weapon', reacted from that fear, took the bottle from him and began to fight back. Once [the victim] stopped fighting, petitioner stopped punching, thinking he had knocked him out." Appellant's petition requested the appointment of counsel and the court appointed counsel.

The People filed an initial response, arguing that appellant was the actual killer and could still be convicted for felony murder under the amended statute. The People attached, and requested judicial notice of, the information, preliminary hearing transcript, and a transcript of appellant's police interview.[2] The information alleged appellant used a bottle as a deadly and dangerous weapon and also charged him with first degree robbery and first degree burglary. Testimony at the preliminary hearing provided appellant was seen leaving the victim's home with a VCR and a blood-covered towel on his hand; broken glass bottles and appellant's right palm print were found at the scene; and the victim died from multiple traumatic injuries apparently inflicted by a sharp-edged weapon. In the transcript of appellant's police interview, appellant admitted that he struck the victim with a bottle and took the victim's VCR.

Appellant, represented by counsel, filed a reply stating that "[i]t appears without dispute that petitioner was the actual killer, not an aider and abettor." Appellant objected to consideration of the testimony contained in the preliminary hearing transcript on

[2] The People also submitted the probation report, which the trial court declined to consider.

hearsay grounds and objected to the transcript of appellant's police interview on authenticity grounds.

The trial court found no prima facie case and denied the petition.

DISCUSSION

Senate Bill 1437, which became effective on January 1, 2019, "was enacted to 'amend the felony murder rule and the natural and probable consequences doctrine, as it relates to murder, 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.' (Stats. 2018, ch. 1015, § 1, subd. (f).) Substantively, Senate Bill 1437 accomplishes this by amending section 188, which defines malice, and section 189, which defines the degrees of murder, and as now amended, addresses felony murder liability." (*People v. Martinez* (2019) 31 Cal.App.5th 719, 723.)

Senate Bill 1437 also added section 1170.95, which authorizes petitions for resentencing on the ground that the petitioner was either convicted of murder or accepted a plea "in lieu of a trial at which the petitioner could be convicted for first degree or second degree murder," and the petitioner "could not be convicted of first or second degree murder because of changes to Section 188 or 189 made effective January 1, 2019." (§ 1170.95, subd. (a).) The trial court "shall review the petition and determine if the petitioner has made a prima facie showing that the petitioner falls within the provisions of this section. . . . If the petitioner makes a prima facie showing that he or she is entitled to relief, the court shall issue an order to show cause." (§ 1170.95, subd. (c).)

Section 189, as amended by Senate Bill 1437, provides the following in relevant part: "A participant in the perpetration or attempted perpetration of a felony listed in subdivision (a) [including robbery and burglary] in which a death occurs is liable for murder only if one of the following is proven: [¶] (1) The person was the actual killer." (§ 189, subd. (e).) Appellant conceded below that he was the actual killer. Even assuming consideration of the preliminary hearing testimony and police interview transcript was impermissible, appellant's own petition alleged he was the actual killer,

stating he "assumed he had only knocked the victim . . . out, and had no intent to kill him" and "took the bottle from [the victim] and began to fight back. Once [the victim] stopped fighting, petitioner stopped punching, thinking he had knocked him out." Appellant failed to demonstrate a prima facie case of entitlement to relief under section 1170.95.

DISPOSITION

The order is affirmed.

SIMONS, J.

We concur.

JONES, P. J.

NEEDHAM, J.

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