

SUPREME COURT COPY

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In the Supreme Court of the State of California

THE PEOPLE OF THE STATE OF
CALIFORNIA,

Plaintiff and Respondent,

v.

CUITLAHUAC TAHUA RIVERA,

Defendant and Appellant.

CAPITAL CASE

Case No. S153881

SUPREME COURT
FILED

SEP 28 2015

Frank A. McGuire Clerk

Deputy

Colusa County Superior Court Case No. CR46819
The Honorable S. William Abel, Judge

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DEATH PENALTY

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STATEMENT OF THE CASE

On May 2, 2005, the Merced County District Attorney filed a first amended information in case number 29331 charging appellant, Cuitlahuac Tahua Rivera, with the following offenses: count I, first degree murder (Pen. Code,¹ § 187); counts II and VII, possession of a firearm by a prohibited person (§ 12021, subd. (a)(1)); counts III and IV, shooting at an occupied vehicle (§ 246); and counts V and VI, assault with a semiautomatic firearm (§ 245, subd. (b)). Three special circumstances were alleged as to count I: (1) that appellant intentionally killed a peace officer who was engaged in the course of performance of his duties (§ 190.2, subd. (a)(7)); (2) that he intentionally killed the victim while appellant was an active participant in a criminal street gang (§ 190.2, subd. (a)(22)); and (3) that appellant committed the murder for the purpose of avoiding or preventing a lawful arrest, or perfecting or attempting to perfect an escape from lawful custody (§ 190.2, subd. (a)(5)). The information also contained a special allegation as to count I that the victim was a peace officer who was killed while engaged in the performance of his duties, that appellant knew, or reasonably should have known, that the victim was a peace officer engaged in the performance of his duties, and appellant either (1) intended to kill the peace officer, (2) intended to inflict great bodily injury on a peace officer within the meaning of section 12022.7, or (3) personally used a firearm in the commission of the offense within the meaning of section 12022.5 (§ 190, subd. (c)). It was further alleged as to all counts that appellant committed the crimes for the benefit of, in association with, or at the direction of a criminal street gang with the specific intent to promote, further or assist criminal conduct by gang

¹ All further statutory references are to the Penal Code unless otherwise specified.

members (§ 186.22, subd. (b)(1)). It was further alleged as to count I that appellant intentionally and personally discharged a firearm proximately causing great bodily injury within the meaning of section 12022.53, subdivision (d). As to counts III and IV, the information contained special allegations that appellant personally and intentionally discharged a firearm within the meaning of section 12022.53, subdivision (c).² It was further alleged as to counts III through VI that appellant carried a firearm with a detachable magazine within the meaning of section 12021.5, subdivision (b). As to counts V and VI, the information set forth special allegations that appellant personally used a firearm within the meaning of section 12022.5, subdivision (a)(1). The information also contained special allegations that appellant had served a prior prison term within the meaning of section 667.5, subdivision (b). (3 CT 551-559.) On that day, appellant entered pleas of not guilty and denied the allegations. (3 CT 565.)

On August 2, 2005, appellant filed a motion for a change of venue. (4 CT 820-853.) On August 11, 2005, the parties stipulated to, and the court approved, a change of venue from Merced County to Colusa County. (4 CT 854-856.)

A jury was sworn to try the case on April 12, 2007. (45 CT 13069.) On May 3, 2007, the jury found appellant guilty on all counts and found all the special circumstance and enhancement allegations to be true, except that it found the gang special circumstance to be not true. (47 CT 13582-13603.) On May 22, 2007, the jury found that the aggravating circumstances substantially outweighed the mitigating circumstances and

² The first amended information was later amended by interlineation to change the firearm enhancement in count III from section 12022.53, subdivision (c), to section 12022.53, subdivision (d). (47 CT 13559-13560.)

the appropriate penalty to be imposed on count I was death. (48 CT 13765, 13769.)

On June 14, 2007, appellant filed a motion to dismiss for failure to disclose exculpatory evidence. (49 CT 13940-13953.) Appellant also filed a motion for new trial on that date. (49 CT 13954-13980.) The prosecution filed responses to both motions. (49 CT 13981-13988.) On June 21, 2007, the court denied both motions. (49 CT 13989-13990.) The court set aside the section 190, subdivision (c) true finding. (49 CT 13991.) The court also set aside and struck duplicate section 667.5, subdivision (b) true findings. (49 CT 13991.)

The trial court issued a statement of reasons for the denial of the automatic motion to modify the sentence under section 190.4. (49 CT 13993-13996.) It imposed the death penalty on count I. (49 CT 13997-14000.) The trial court sentenced appellant to state prison for an aggregate indeterminate term of 80 years to life based on consecutive terms of 15 years to life on counts III and IV and 25 years to life on the firearm enhancements in counts I and III. The court also sentenced appellant to a consecutive aggregate determinate term of 37 years 8 months based on five years on count II and the corresponding gang enhancement, one year eight months on count VII and the corresponding gang enhancement, 10 years on the gang enhancement in count I, 20 years on the firearm enhancement in count IV, and one year on the prior prison term enhancement.³ Appellant was sentenced to 19 years each on counts V and VI and the corresponding

³ The court orally pronounced a sentence of 20 years on the section 12022.53, subdivision (c) firearm enhancement on count IV. (14 RT 3058.) The minute order and abstract of judgment incorrectly reflect a sentence of 20 years to life on that enhancement. (49 CT 14004, 14007.) If the minute order or abstract of judgment conflicts with the trial court's oral judgment, the trial court's oral pronouncement of judgment controls. (*People v. Mitchell* (2001) 26 Cal.4th 181, 185.)

enhancements, to be stayed pursuant to section 654. The section 12021.5, subdivision (b) enhancements in counts III and IV were also stayed pursuant to section 12022.53, subdivision (f). (49 CT 14003-14004, 14007-14010, 14036-14037.)

STATEMENT OF FACTS

A. Guilt Phase – The People’s Case

1. Background

Appellant, of Mexican and black heritage, lived in Merced in April 2004. (47 CT 13391.) He was on parole. (6 RT⁴ 1226; 47 CT 13331.) He had been a member of the Merced Gangster Crips street gang for years. (5 RT 1017; 6 RT 1224, 1229; 9 RT 1628.) He associated with other gang members often. (6 RT 1227; 7 RT 1511.) His girlfriend, Jamilah Peterson, tried to convince him to change his life and move away from the gang lifestyle, but appellant did not change his ways. (6 RT 1229-1230.)

2. Appellant’s prior contacts with Officer Stephan Gray

Merced Police Department Officer Stephan Gray was a member of the Gang Violence Suppression Unit (GVSU). (5 RT 955, 1014; 9 RT 1824; 10 RT 1941.) He was specifically assigned to monitor the Merced Gangster Crips gang. (9 RT 1825.)

Appellant and his family claimed that Officer Gray was always harassing him. (6 RT 1236.) In fact, appellant told his stepbrother that he was “going to do something” to Officer Gray because he was tired of being harassed by him. (7 RT 1442.)

⁴ Respondent will refer to the volumes of reporter’s transcript containing the trial proceedings in Colusa County as “RT.” Respondent will refer to the two separately-paginated volumes of reporter’s transcript containing the pretrial proceedings in Merced County as “Pretrial RT.”

LaDonna Davis-Turner described a pre-2001 incident during which Officer Gray arrested appellant in her presence. (7 RT 1499.) Appellant had been drunk and was very aggressive. (7 RT 1499.) It took Officer Gray a minute to get appellant to calm down, and he had to slam appellant to the ground to do so, but he acted professionally. (7 RT 1499-1501.)

Peterson described another encounter between appellant and Officer Gray during which Officer Gray conducted a parole search of appellant and his residence because he was looking for Freddie Mays, another Merced Gangster Crip gang member. (5 RT 958-959, 979-980, 987, 6 RT 1237.) Officer Gray simply explained to appellant that he would be watching appellant and would come get appellant if he was caught doing anything wrong. (6 RT 1236-1237.) According to Peterson, Officer Gray acted professionally during the contact. (6 RT 1236.) Based on her observations, Peterson did not believe Officer Gray was harassing appellant or acting unprofessionally. (6 RT 1238.)

In March 2004, appellant ran from Officer Gray when Gray attempted to contact him. (6 RT 1138-1139.) Appellant abandoned Peterson's car on the side of the road so that he would not be stopped by Officer Gray. (6 RT 1232.) Peterson called Officer Gray to get her car back, and Officer Gray told her she could have it back if appellant would talk to him. (6 RT 1232-1233.) Appellant refused to talk to Officer Gray. (6 RT 1233.)

3. The shooting of Aaron McIntire and Kimberly Bianchi on April 11, 2004 (Counts III through VII)

On Easter Sunday, April 11, 2004, appellant and Peterson were at a family function at the park. (6 RT 1259-1260.) Appellant, fellow Merced Gangster Crips gang member Gustavo Reyes, and Peterson's stepfather Anton Martin left in Peterson's car to retrieve items from their apartment. (6 RT 1260-1262.) As they were driving, they stopped at an intersection at the same time as a vehicle driven by Aaron McIntire. (9 RT 1640-1646,