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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION ONE

THE PEOPLE, Plaintiff and Respondent, v. DONALD MATTHEWS, Defendant and Appellant.	B299219 (Los Angeles County Super. Ct. No. A367138)

APPEAL from an order of the Superior Court of Los Angeles County, Ronald S. Coen, Judge. Affirmed.

Derek K. Kowata, under appointment by the Court of Appeal, for Defendant and Appellant.

Xavier Becerra, Attorney General, Lance E. Winters, Chief Assistant Attorney General, Susan Sullivan Pithey, Assistant Attorney General, David E. Madeo and Thomas C. Hsieh, Deputy Attorneys General, for Plaintiff and Respondent.

In 1981, petitioner and appellant Donald Matthews pleaded guilty to one count of murder, and the trial court sentenced him to 15 years to life. In 2019, petitioner filed a petition for resentencing pursuant to Penal Code section 1170.95 (section 1170.95), which allows a petitioner to obtain retroactive relief based on recent changes in the murder law. Senate Bill No. 1437 (2017–2018 Reg. Sess.) (Stats. 2018, ch. 1015), effective January 1, 2019, " 'amend[ed] 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).)" (*People v. Verdugo* (2020) 44 Cal.App.5th 320, 325 (*Verdugo*), review granted Mar. 18, 2020, S260493.)

"Prior to the enactment of Senate Bill No. 1437 . . . both the felony murder rule and the natural and probable consequences doctrine provided theories under which a defendant could be found guilty of murder without proof of malice." (*People v. Lee* (2020) 49 Cal.App.5th 254, 260 (*Lee*), review granted July 15, 2020, S262459.) The law with respect to murder did not change as it applies to a defendant who directly aided and abetted a murder. (*People v. Lewis* (2020) 43 Cal.App.5th 1128, 1135 (*Lewis*), review granted Mar. 18, 2020, S260598; Pen. Code, § 189, subd. (a)(2).)

Relying on the plea colloquy and petitioner's admissions recounted at the preliminary hearing, the trial court concluded that petitioner failed to establish a prima facie case of eligibility for resentencing under section 1170.95. Petitioner does not dispute that taken together, the plea colloquy and preliminary

hearing testimony show that he directly aided and abetted the murder. Instead, petitioner argues that the trial court erred in considering any testimony including petitioner's admissions recounted at the preliminary hearing. Pending guidance from our high court, we adhere to *Lewis*, *supra*, 43 Cal.App.5th 1128, review granted, under which the trial court properly considered both petitioner's plea and petitioner's admissions as recounted at the preliminary hearing. (See also *Lee*, *supra*, 49 Cal.App.5th at p. 263, review granted [following *Lewis*]; *Verdugo*, *supra*, 44 Cal.App.5th at p. 323, review granted [trial court may consider record of conviction in evaluating petition for resentencing under section 1170.95].)

We affirm the trial court's order denying petitioner's petition for resentencing.

BACKGROUND

Our record does not include the information or abstract of judgment.

1. *Preliminary Hearing*

Counsel represented petitioner at a preliminary hearing in April 1981. Police Officer William Holcomb testified that he interviewed petitioner in Louisiana. Petitioner told Holcomb that a month earlier on March 16, petitioner observed two of his friends, whose monikers were Snipper and Mugga, with a .12 gauge shotgun. When Mugga told petitioner that they were going to "bust on some Six-Deuces," petitioner volunteered to drive them. Petitioner "then stated that himself along with several of his friends entered a car that he had stolen the day prior and drove around the area of 60th and San Pedro looking for some Six-Deuces to shoot." When his friends exited the car to

shoot the Six-Deuces, petitioner "remained at the location with the doors open and the engine running . . . so that they could make a fast getaway." After the shooting, petitioner drove his friends home.

2. *Plea and Sentence*

Petitioner pleaded guilty to murder in violation of Penal Code section 187. Defense counsel and the prosecutor stipulated that the murder was in the second degree. At the plea hearing, petitioner described the murder as follows: Knowing their purpose to shoot Andre Purnell, petitioner drove Robin and Donnie Henning to Purnell. Petitioner "drove the car with that in mind," that being "their purpose in going over to shoot Andre Purnell." Petitioner knew that the Hennings had a shotgun in the car with them. Petitioner waited in the car during the shooting and then drove away.

At the hearing in which petitioner pleaded guilty, defense counsel stated: "He's 19. But he was not the shooter, and he openly admits it. He admitted it to the officers when they picked him up in Louisiana. He's been no problem. He's admitted it at all times."

After the Youth Authority denied him admission, the trial court sentenced petitioner to 15 years to life.

3. *Petition for Resentencing*

On April 17, 2019, petitioner filed a petition for resentencing pursuant to section 1170.95. In his petition, petitioner described his offense as follows: "On March 16, 1981, gang members of the Six Deuce Crips were at the corner of 61st Street and San Pedro Avenue. Rival gang members of the Five Deuce Crips drove by that corner and parked nearby. The

Hennings and Jessie Owens got out of the car driven by 19-year old Petitioner who remained in the car as the getaway driver." Petitioner's confederates killed one person and seriously wounded another.

Petitioner attached his declaration stating that an information was filed against him that allowed the prosecution to proceed under the felony murder rule or the natural and probable consequences doctrine. Petitioner stated, "I did not, 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." Petitioner declared that he was eligible for resentencing. Petitioner requested the appointment of counsel.

4. *The Trial Court Denied the Petition for Resentencing*

After reviewing the preliminary hearing transcript and plea colloquy, the trial court concluded that petitioner was not eligible for relief under section 1170.95. The trial court denied the petition without appointing counsel or holding a hearing. The court relied on petitioner's admissions as recounted at the preliminary hearing. The court also relied on petitioner's statements during the plea colloquy. The court explained: "Based on the record of conviction, there is no evidence of a natural and probable consequence theory. By his own admission, petitioner acted with express malice.[1] As such, he is not eligible for Penal Code section 1170.95 relief."

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[1] Express malice requires an intent to kill. (*People v. Soto* (2018) 4 Cal.5th 968, 970.)

DISCUSSION

Senate Bill 1437 made statutory changes that no longer permit a defendant to be convicted of murder without proof of malice. (*Lee*, *supra*, 49 Cal.App.5th at p. 260, review granted.) The legislation also established a procedure codified in section 1170.95 that permits a defendant who has sustained a murder conviction that arguably rests on a felony murder or a natural and probable consequences theory of liability to petition the sentencing court to vacate the murder conviction if inconsistent with the now-governing law. (Section 1170.95; see also *Lee*, *supra*, at p. 257.) The procedure, codified in section 1170.95, allows persons convicted of felony murder or murder under a natural and probable consequences theory to file a petition to have the petitioner's murder conviction vacated and to be resentenced on any remaining counts. (*People v. Turner* (2020) 45 Cal.App.5th 428, 433–434; *People v. Medrano* (2019) 42 Cal.App.5th 1001, 1016, review granted Mar. 11, 2020, S259948.)

A person is eligible for relief under section 1170.95 only if the following conditions are established: "(1) A complaint, information, or indictment was filed against the petitioner that allowed the prosecution to proceed under a theory of felony murder or murder under the natural and probable consequences doctrine[;] [¶] (2) The petitioner was convicted of first degree or second degree murder following a trial or accepted a plea offer in lieu of a trial at which the petitioner could be convicted for first degree or second degree murder[;] [¶] [and] (3) The petitioner could not be convicted of first or second degree murder because of changes to [Penal Code] Section 188 or 189 made effective January 1, 2019." (§ 1170.95, subd. (a)(1)–(3).) Those changes

affected the mental state requirement for murder under the felony murder rule and the natural and probable consequences doctrine. (*People v. Lamoureux* (2019) 42 Cal.App.5th 241, 262.)

Section 1170.95 sets forth the first step in determining eligibility as follows: "The 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 has requested counsel, the court shall appoint counsel to represent the petitioner. The prosecutor shall file and serve a response within 60 days of service of the petition and the petitioner may file and serve a reply within 30 days after the prosecutor['s] response is served. These deadlines shall be extended for good cause. 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).) Thus, under the statute, if the petitioner made a prima facie showing of eligibility, the trial court shall issue an order to show cause. The statute describes additional steps, irrelevant to the current appeal, if the petitioner sets forth a prima facie case.

A petitioner is ineligible for relief under section 1170.95 as a matter of law if the petitioner "was convicted on a ground that remains valid notwithstanding Senate Bill [No.] 1437's amendments to [Penal Code] sections 188 and 189." (*Verdugo*, *supra*, 44 Cal.App.5th at p. 330, review granted.) Consistent with these principles, it is undisputed that if as a matter of law, petitioner directly aided and abetted the murder of Purnell, petitioner would not be entitled to resentencing under section 1170.95. Petitioner does not dispute that a trial court may dismiss a resentencing petition "if the court is aware of facts that indisputably refute the allegations of eligibility in the petition."

Petitioner points out that "the superior court may also dismiss the petition at this stage if the court is aware of facts in the record of conviction that indisputably show the petitioner is ineligible for relief as a matter of law."

Instead, petitioner argues: "Here, the superior court erred because . . . there was no record of conviction which indisputably showed appellant was ineligible for relief." Petitioner contends that the plea colloquy was insufficient to demonstrate ineligibility as a matter of law because "[t]here was no admission by appellant that he knew 'Termite,' the victim of the murder was going to be shot or even present." Petitioner argues the trial court could not rely on the preliminary hearing transcript to supply this information because it was not part of petitioner's plea and was not part of the record of conviction. Petitioner's arguments are unpersuasive.

A. Petitioner's Admissions at the Plea Hearing Indicated He Was Ineligible for Resentencing

At the plea hearing, petitioner admitted directly aiding and abetting the murder. He explained that he drove his friends to the scene of the shooting knowing that they would shoot Andre Purnell, the victim. Petitioner waited for his friends during the shooting and then drove away. Petitioner answered the following question affirmatively: "Did you know their purpose in going over to shoot Andre Purnell?" Petitioner's current claim that he did not know the victim would be shot is inconsistent with his affirmative response at the plea hearing.

In short, we conclude that the factual basis recounted at the plea colloquy demonstrates that petitioner is ineligible for relief under section 1170.95. As respondent points out, in pleading guilty, petitioner admitted that he drove the shooter to

the shooting and knew the shooter intended to shoot the victim. By his own admissions, petitioner's plea shows petitioner had the intent to kill.

B. The Trial Court Properly Relied on Petitioner's Admissions Recounted in the Preliminary Hearing Transcript

Petitioner argues that the trial court erred in considering the preliminary hearing transcript. This court has held that the trial court may consider the record of conviction and its own file in evaluating a petition for resentencing pursuant to section 1170.95. (*Lewis*, *supra*, 43 Cal.App.5th at p. 1138, review granted.) The preliminary hearing transcript is part of the court's own file. We explained: "Allowing the trial court to consider its file and the record of conviction is also sound policy. As a respected commentator has explained: 'It would be a gross misuse of judicial resources to require the issuance of an order to show cause or even appointment of counsel based solely on the allegations of the petition, which frequently are erroneous, when even a cursory review of the court file would show as a matter of law that the petitioner is not eligible for relief. For example, if the petition contains sufficient summary allegations that would entitle the petitioner to relief, but a review of the court file shows the petitioner was convicted of murder without instruction or argument based on the felony murder rule or [the natural and probable consequences doctrine], . . . it would be entirely appropriate to summarily deny the petition based on petitioner's failure to establish even a prima facie basis of eligibility for resentencing.' " (*Ibid.*; see also *People v. Drayton* (2020) 47 Cal.App.5th 965, 979 (*Drayton*) [prima facie case under section 1170.95 similar to prima facie case in petition for writ of habeas

corpus where the court may consider the record "including the court's own documents"]; *Verdugo*, *supra*, 44 Cal.App.5th at pp. 329–330, review granted [trial court should consider record of conviction in determining petitioner's eligibility].) Petitioner does not acknowledge the relevant discussion in *Lewis* and offers no reason to depart from it.[2]

Citing *People v. Gallardo* (2017) 4 Cal.5th 120, 137, petitioner argues that the trial court erred in relying on the preliminary hearing transcript. In *Gallardo*, our high court did not evaluate a petition for resentencing under section 1170.95. *Gallardo* concerned whether a trial court could consider a preliminary hearing transcript to determine whether a defendant's prior assault conviction included a deadly weapon for purposes of determining whether the defendant suffered a prior strike conviction. (*Id.* at p. 137.) When she pleaded guilty to the prior crime, the defendant did not state that she used a deadly weapon. (*Ibid.*) The high court applied the Sixth Amendment—which " 'contemplates that a jury—not a sentencing court—will find' the facts giving rise to a conviction, when those facts lead to the imposition of additional punishment under a recidivist sentencing scheme." (*Id.* at p. 134.) At the same time, our high court acknowledged that a trial court may rely on a defendant's admissions in pleading guilty: "Because the relevant facts were neither found by a jury nor admitted by defendant when entering her guilty plea, they could not serve as the basis for defendant's increased sentence." (*Id.* at p. 120.)

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[2] Petitioner does not object to any specific portion of the preliminary hearing transcript. He argues only that, as a matter of law, the trial court could not rely on the preliminary hearing transcript at all.

Gallardo does not assist petitioner. Fundamentally, as respondent points out, *Gallardo* interpreted the Sixth Amendment's right to a jury trial, a right inapplicable to a petition pursuant to section 1170.95 to vacate or reduce a sentence. (*People v. Anthony* (2019) 32 Cal.App.5th 1102, 1156–1157.) Additionally, here the trial court did not rely on a victim's statements that jurors could have rejected; the trial court relied on petitioner's admissions.[3] Petitioner offers no theory under which his prior admissions would be inadmissible as evidence of his intent to kill Purcell.

In short, petitioner does not show that the trial court erred in considering the preliminary hearing transcript. Even if arguendo the trial court erred in relying on the preliminary hearing transcript, petitioner's admission of a factual basis for his plea, standing alone, demonstrates that petitioner directly aided and abetted the murder.

C. Other Authority Petitioner Cites Demonstrates No Error in the Order Denying His Petition for Resentencing

Citing *People v. Torres* (2020) 46 Cal.App.5th 1168, review granted June 24, 2020, S262011, petitioner argues that so long as he was potentially eligible for resentencing, the court must appoint counsel and order briefing. *Torres* holds that the

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[3] At the preliminary hearing, Holcomb testified that petitioner admitted that he volunteered to drive his friends who were going to shoot some gang members. When petitioner's friends exited the car to shoot the Six-Deuces, petitioner "remained at the location with the doors open and the engine running . . . so that they could make a fast getaway." After the shooting, petitioner drove his friends home.

trial court erred in relying on the jury's finding robbery-murder special circumstance to determine ineligibility because the law with respect to that special circumstance had changed. (*Id.* at pp. 1179–1180.) Even assuming arguendo *Torres* were correctly decided, petitioner offers *no* basis to conclude he is even potentially eligible for resentencing. Petitioner therefore fails to show how *Torres* aids his cause.

Similarly, in *Drayton*, *supra*, 47 Cal.App.5th 965, the court held that "the trial court should accept the assertions in the petition as true unless facts in the record conclusively refute them as a matter of law. . . . In assessing the petitioner's prima facie showing, the trial court should not weigh evidence or make credibility determinations." (*Id.* at p. 968.) "The trial court should not evaluate the credibility of the petition's assertions, but it need not credit factual assertions that are untrue as a matter of law . . . ." based on "readily ascertainable facts from the record." (*Id.* at p. 980.) Here, the trial court did not make any credibility findings or weigh evidence, but as *Drayton* acknowledges is proper, denied the petition because petitioner was ineligible for relief under section 1170.95 as a matter of law based on the record of his admissions.[4]

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[4] The reference to a preliminary hearing in *Drayton* arose in responding to whether after counsel was appointed, the trial court erred in not setting an order to show cause in which the People would have had the burden to show beyond a reasonable doubt that the petitioner was not entitled to section 1170.95 relief. The *Drayton* court concluded the trial court erred in basing a finding that the petitioner was a major participant who showed reckless indifference to human life on the preliminary hearing transcript. "As there had been no prior finding by a fact finder or admission by Drayton to that effect, the district

In this case, as a matter of law, the record conclusively refutes petitioner's assertion that he is eligible for resentencing. Although petitioner implies that the trial court improperly made credibility determinations, he fails to identify a single such purported finding. Petitioner, (now represented by counsel), offers *no* theory under which there is " 'room for debate' " whether he directly aided and abetted Purnell's murder. (*Drayton*, *supra*, 47 Cal.App.5th at p. 972.) Both in his petition, which described the facts of his crime, as well as on appeal, petitioner offers *no* basis upon which one could conclude that petitioner's conviction was based either on a felony murder theory or the natural and probable consequences doctrine. For all of these reasons, the trial court properly denied petitioner's petition for resentencing.

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attorney made arguments based on testimony at the preliminary hearing and urged the trial court to evaluate the evidence and make a credibility finding adverse to the facts asserted in Drayton's petition." (*Drayton*, *supra*, 47 Cal.App.5th at pp. 981–982.)

DISPOSITION

The order denying Matthews' petition for resentencing is affirmed.

NOT TO BE PUBLISHED.

BENDIX, J.

We concur:

ROTHSCHILD, P. J.

SINANIAN, 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.