

People v. Mendoza

Decided May 3, 2021

B307382

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05-03-2021

THE PEOPLE, Plaintiff and Respondent, v.
JOHNNY MENDOZA, Defendant and Appellant.

Kathy R. Moreno, 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, Idan Ivri and Noah P. Hill, Deputy Attorneys General, for Plaintiff and Respondent.

GRIMES, J.

NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS

California Rules of Court, rule 8.1115(a), prohibits courts and parties from citing or relying on opinions not certified for publication or ordered published, except as specified by rule 8.1115(b). This opinion has not been certified for publication or ordered published for purposes of rule 8.1115. (Los Angeles County Super. Ct. No. BA396381) APPEAL from an order of the Superior Court of Los Angeles County. Charlaine F. Olmedo, Judge. Affirmed. Kathy R. Moreno, 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, Idan Ivri and Noah P. Hill, Deputy Attorneys General, for Plaintiff and Respondent.

* * * * *

Defendant and appellant Johnny Mendoza appeals from the denial of his petition for resentencing pursuant to [Penal Code section 1170.95](#). We affirm.

In 2013, defendant was charged with two counts of first degree murder ([Pen. Code, § 187, subd. \(a\)](#)), one count of attempted murder (§ 187, subd. (a), § 664) and one count of assault with a firearm (§ 245, subd. (a)(2)). Lying in wait, gang and multiple-murder special-circumstance allegations were alleged as to both murder counts (§ 190.2, subd. (a)(3), (15) & (22)). Firearm use and gang allegations were alleged as to all counts (§ 12022.5, § 12022.53, § 186.22).

The charges arose from a series of acts undertaken by defendant and his fellow Cypress Park gang member and codefendant, Albert Arzate. Defendant and Arzate ambushed two brothers and their cousin who were walking down the street in a rival gang neighborhood. The two brothers were shot at close range and killed. Their cousin was shot several times and seriously wounded but survived. Defendant and Arzate also assaulted and threatened a fourth victim—the girlfriend of a fellow gang member who was incarcerated at the time. They accused her of cheating on their friend with a rival gang member. (*People v. Arzate* (Sept. 29, 2016, [B259259](#)) [nonpub. opn.]

Defendant was found guilty on all four counts. The jury found true all three special circumstance allegations as to both murders and also found true the gang allegations. The jury found not true the allegation that defendant personally used a firearm

in the commission of the offenses. Codefendant Arzate was also convicted on all counts, including a fifth charge for making criminal threats against their female victim. The jury *3 found true the firearm use allegations as to Arzate. (*People v. Arzate, supra*, B259259.)

Defendant was 17 at the time the crimes were committed. Prior to imposing sentence, the trial court conducted a hearing pursuant to *Miller v. Alabama* (2012) 567 U.S. 460. Thereafter, the court sentenced defendant to consecutive terms of life without the possibility of parole on each of the murder counts, plus a determinate term of 18 years.

In an unpublished decision, we affirmed defendant's and Arzate's convictions. (*People v. Arzate, supra*, B259259.)

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 2020, defendant filed a petition for resentencing pursuant to Penal Code section 1170.95. The People filed a response opposing defendant's petition.

On August 5, 2020, the trial court summarily denied defendant's petition without appointing counsel. The trial court concluded defendant had not stated a prima facie case for relief under the statutory scheme.

Defendant appealed. We granted respondent's request to take judicial notice of the case file.

Defendant contends the trial court's summary denial of his resentencing petition was in error and violated his rights to due process and the assistance of counsel. He argues the court engaged in improper factfinding in reviewing the case file and that reversal is warranted so that he may have the assistance of counsel and an evidentiary

4 hearing. *4

The trial court did not commit error by summarily denying defendant's petition without first appointing him counsel. Penal Code section 1170.95, subdivision (c) provides 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." The statutory language, read in context, contemplates an initial eligibility determination by the court. Several courts have interpreted the statutory language and have concluded that a defendant seeking resentencing is entitled to appointment of counsel only *after* demonstrating a prima facie case. The Supreme Court is considering the issue. (See, e.g., *People v. Lewis* (2020) 43 Cal.App.5th 1128, review granted Mar. 18, 2020, S260598; *People v. Cornelius* (2020) 44 Cal.App.5th 54, review granted Mar. 18, 2020, S260410; *People v. Verdugo* (2020) 44 Cal.App.5th 320, review granted Mar. 18, 2020, S260493 & *People v. Tarkington* (2020) 49 Cal.App.5th 892, review granted Aug. 12, 2020, S263219.)

Pending guidance from the Supreme Court, we adopt the persuasive analyses in these decisions. The statutory framework supports the trial court's authority to make an initial eligibility determination as a matter of law without appointing defendant counsel. Further, as we explained in *People v. Falcon* (2020) 57 Cal.App.5th 272, 279, review granted January 27, 2021, S266041, the denial of counsel at this stage in the proceedings does not infringe on a defendant's constitutional rights or amount to structural error.

Moreover, the trial court did not engage in improper factfinding. Rather, the court made a threshold legal determination based on undisputed facts in the record that *5 establish defendant could not, as a matter of law, state a basis for relief under Penal Code section 1170.95.

"Senate Bill 1437 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).)" (*People v. Martinez* (2019) 31 Cal.App.5th 719, 723.)

Defendant was prosecuted as a direct aider and abettor in the shootings. The jury was not instructed on felony murder or natural and probable consequence theories. In finding defendant guilty, the jury found true the lying-in-wait special circumstance allegation as to both murders. In so doing, the jury necessarily found defendant acted with the intent to kill. (*People v. Sandoval* (2015) 62 Cal.4th 394, 416 ["'Lying in wait is the functional equivalent of proof of premeditation, deliberation, and intent to kill.'"]).

Defendant also is not entitled to sentencing relief as to his conviction for attempted murder. Penal Code section 1170.95, subdivision (a) provides, in plain language, that only persons "convicted of felony murder or murder under a natural and probable consequences theory" may file a petition seeking resentencing. "When we interpret statutes, giving effect to legislative purpose is the touchstone of our mission." (*People v. Valencia* (2017) 3 Cal.5th 347, 409.) "The text of the statute is integral to our understanding of the statute's purpose." (*Ibid.*) "We must take 'the language . . . as it was passed into law, and [we] must, if possible without doing violence to the language and *6 spirit of the law, interpret it so as to harmonize and give effect to all its provisions.' " (*Id.* at pp. 409-410.)

The Courts of Appeal are divided on the question of whether the statutory language may be interpreted as encompassing convictions for *attempted* murder. Our Supreme Court is currently considering the issue. (Compare *People v. Lopez* (2019) 38 Cal.App.5th 1087 [attempted murder not within scope of statute], review granted Nov. 13, 2019, S258175; *People v. Muñoz* (2019) 39

Cal.App.5th 738 [same], review granted Nov. 26, 2019, S258234; *People v. Dennis* (2020) 47 Cal.App.5th 838 [same], review granted July 29, 2020, S262184 & *People v. Love* (2020) 55 Cal.App.5th 273 [same], review granted Dec. 16, 2020, S265445, with *People v. Larios* (2019) 42 Cal.App.5th 956 [concluding Senate Bill 1437 abrogated the natural and probable consequences doctrine for attempted murder but that section 1170.95 does not provide relief for attempted murder convictions that have become final], review granted Feb. 26, 2020, S259983; *People v. Medrano* (2019) 42 Cal.App.5th 1001 [amended statutory language applies to attempted murder and retroactive relief provisions are applicable to nonfinal attempted murder convictions], review granted Mar. 11, 2020, S259948 & *People v. Sanchez* (2020) 46 Cal.App.5th 637, review granted June 10, 2020, S261768 [same].)

Pending guidance from the Supreme Court, we believe *Lopez*, *Muñoz*, *Dennis* and *Love* are better reasoned and adopt their analyses. *7

DISPOSITION

The order denying defendant's resentencing petition is affirmed.

GRIMES, J.

WE CONCUR:

BIGELOW, P. J.

STRATTON, J.

