

APPENDIX

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Description: "SUPREME COURT" (CAL) Denio

Pages — 1

SUPREME COURT
FILED

JAN 2 2020

Jorge Navarrete Clerk

S257780

Deputy

IN THE SUPREME COURT OF CALIFORNIA

En Banc

In re MARLON BLACHER on Habeas Corpus.

The petition for writ of habeas corpus is denied.

CANTIL-SAKAUYE

Chief Justice

APPOINTMENT

APPOINTMENT

Description: "Suspension Count" denial

pages ~ 9

FILED
FEB 14 2019

X CLERK OF THE COURT
SUPERIOR COURT OF CALIFORNIA
COUNTY OF CONTRA COSTA

Superior Court of the State of California

In and For the County of Contra Costa

No. 5-080631-5

Order denying Defendant's
"Petition to Vacate Murder
Conviction and for
Resentencing (Penal Code
§ 1170.95)"

The People of the State of California

v.

Marlon Blacher,

The court takes judicial notice of the underlying docket, and the unpublished decision in *People v. Blacher*, 2010 Cal. App. Unpub. LEXIS 9525 affirming the judgment in the underlying docket by Division One of the First Appellate District (docket A124164). (See Cal. Evid. Code § 452; Cal. Rules of Court rule 8.111(b).)

I. Background

Factual background

On the afternoon of July 7, 2007, at the Toys "R" Us store in Pinole Store] cashier Taniesha Turner testified that she asked defendant if he needed help. Defendant, who was holding what appeared to be a credit card in his hand, told her that he wanted to buy a PlayStation3 (PS3). Turner took a PS3 out of a locked case and handed it to defendant. When defendant started walking away with the PS3, Turner told him that he needed to pay for the item in the electronics department, but he kept walking. When

Turner followed him, he began to run. He ran out the door of the store with Turner in pursuit, yelling for help.

Jessie Edmunds, who was working next to the store entrance, and Michael Cantu, another store employee, joined in the chase and followed defendant and Turner out into the parking lot. Edmunds overtook Turner, who stumbled on the curb. As he chased defendant, Edmunds saw a man, later identified as Segura's husband, Jose Crus, move into defendant's path and wave his arms back and forth. Edmunds testified that Crus moved out of defendant's way as defendant approached, but defendant shifted his weight, turned toward Crus, and punched Crus in the face with a balled fist. The blow lifted Crus' feet off the ground and knocked him onto his back. Edmunds saw Crus fall, but "didn't pay attention to what exactly happened to [him]," and turned his attention back to defendant, who continued to flee.

Other eyewitnesses in the parking lot gave differing accounts of what transpired before the punch, and further descriptions of the punch's effects. Brian Koch and Landry Walker testified that Crus reached for defendant before defendant struck him. Eric Jones, the sole defense witness, testified that Crus chased defendant and was reaching to get hold of defendant when defendant turned and hit him. Walker said that Crus "crumbled" as a result of the blow, like "a puppet [with] the strings . . . cut." Koch saw Crus fall straight back and hit his head on the ground very hard; Jones recalled Crus' head bouncing on the ground. Walker and Jones ran to Crus, found him unconscious, and called 911.

....
Crus was airlifted to the hospital and died four days later without regaining consciousness. The cause of death was determined to be blunt force injury from a severe impact to the back of his head. Crus' injuries were consistent with having suffered a disabling concussion that prevented him from taking any action to break his fall.

(*People v. Blacher*, 2010 Cal. App. Unpub. LEXIS 9525 at *2-*6.)

Procedural background

On June 2, 2008, defendant was charged by information with one count of murder (Pen. Code § 187); two counts of attempted robbery (Pen. Code § 211/664) and one count of 2nd degree burglary. (Pen. Code § 459.)

On December 12, 2008, a jury found defendant guilty of first degree murder and guilty on all other counts.

On February 9, 2009, Judge Theresa Canepa sentenced defendant to 25 years to life on the first degree murder conviction. The sentence imposed on the other charges was stayed.

Defendant appealed, and the appellate court affirmed defendant's judgment in a 2010 decision. (*People v. Blacher*, 2010 Cal. App. Unpub. LEXIS 9525.) Relevant to the instant petition, the appellate court said the following:

- "[T]he assault on Crus occurred during perpetration of a robbery within the meaning of section 189." (*Id.* at *12.)
- "The killing and the felony happened at virtually the same time and place, and the killing was committed in aid of defendant's escape with the stolen property....Accordingly, we reject defendant's argument that he could not have been convicted of felony murder in the perpetration of a robbery." (*Id.* at *20-*21 (emphasis added).)
- "In addition to the first degree felony-murder instruction (CALJIC No. 8.21, fn. 1, *ante*), the murder instructions given to defendant's jury included: CALJIC Nos. 8.10 ("Murder--Defined"), 8.11 ("Malice Aforethought"--Defined"), 8.70 ("Duty of Jury as to Degree of Murder"), and 8.71 ("Doubt Whether First or Second Degree Murder"). (*Id.* at *38 (emphasis added).)
- 'Malice' may be either express or implied. [P] Malice is express when there is manifested an intention unlawfully to kill a human being. [P] Malice is implied when: [P] The killing resulted from an intentional act; [P] The natural consequences of the act are dangerous to human life; and [P] The act was deliberately performed with knowledge of the danger to, and with conscious disregard for, human life." (*Id.* at *37-38, fn. 7 (emphasis added).)

- "[I]t is not reasonably likely, in view of the other instructions given, that the jury would have mistakenly believed that implied malice murder was murder of the first degree. ...Since the jury was apprised that murder was a killing committed either with malice or during the specified felonies (CALJIC No. 8.10), and that felony murder was first degree murder (CALJIC No. 8.21), the jury would likely have deduced that second degree murder was a killing with implied malice--no other option was presented under the instructions as a whole." (*Id.* at *38-*39 (emphasis added).)
- "The closing arguments of counsel would have prevented any contrary misunderstanding. The prosecutor stated that the blow to Crus "evidences implied malice. And therefore the defendant at a minimum for that reason alone is guilty of second degree murder." (*Id.* at *39-*40 (emphasis added).)
- "The defense also identified a killing with implied malice as second degree murder... If that single blow was so depraved that you would know that the natural consequences of that act would be to cause a life (sic), he's guilty of second degree murder. [P] If that single blow was not such a depraved act that that single blow results in second degree murder, he is guilty of voluntary (sic) manslaughter." (*Id.* at *39-*40 (emphasis added).)
- "Since the jury would have understood that implied malice murder was second degree murder, and the jury convicted defendant of murder in the first degree, it never reached the implied malice theory. Thus, it is immaterial whether the evidence supported instructions on that theory, and any error in the giving of such instructions was harmless." (*Id.* at *40 (emphasis added).)

On January 10, 2019, defendant filed the instant petition, contending that "absent the felony-murder doctrine, [he] would not have been convicted of such murder... [and the] felony-murder prosecutions have...been abolished throughout the state." (Notice Regarding Herewith Presented Petition for Resentencing, Pet. at p. 5:25-26-6:1-2.) He further contends that he "could not be convicted of first or second degree murder" because of changes to the Penal Code §§ 188, 189. (Petition for Resentencing at p. 2:5-9.)

A proof of service attached to the petition indicates that petitioner had attempted service by mail on the Contra Costa County District Attorney's office.

Senate Bill 1437

On September 30, 2018, Governor Jerry Brown signed Senate Bill 1437 (SB 1437), which makes some changes to criminal liability for murder in California.

Section 1(f) of SB 1437 explains:

It is necessary 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.

(emphasis added)

Section 2 of SB 1437 amended Penal Code § 188, which now provides:

(a) For purposes of Section 187, malice may be express or implied.

(1) Malice is express when there is manifested a deliberate intention to unlawfully take away the life of a fellow creature.

(2) Malice is implied when no considerable provocation appears, or when the circumstances attending the killing show an abandoned and malignant heart.

(3) Except as stated in subdivision (e) of Section 189, in order to be convicted of murder, a principal in a crime shall act with malice aforethought. Malice shall not be imputed to a person based solely on his or her participation in a crime.

(b) If it is shown that the killing resulted from an intentional act with express or implied malice, as defined in subdivision (a), no other mental state need be shown to establish the mental state of malice aforethought. Neither an awareness of the obligation to act within the general body of laws regulating society nor acting despite that awareness is included within the definition of malice.

(emphasis added)

Section 3 of SB 1437 amended the principle of felony-murder liability in California, amending Penal Code § 189 to read:

189. (a) All murder that is perpetrated by means of a destructive device or explosive, a weapon of mass destruction, knowing use of ammunition designed primarily to penetrate metal or armor, poison, lying in wait, torture, or by any other kind of willful, deliberate, and premeditated killing, or that is committed in the perpetration of, or attempt to perpetrate, arson, rape, carjacking, robbery, burglary, mayhem, kidnapping, train wrecking, or any act punishable under Section 206, 286, 288, 288a, or 289, or murder that is perpetrated by means of discharging a firearm from a motor vehicle, intentionally at another person outside of the vehicle with the intent to inflict death, is murder of the first degree.

(b) All other kinds of murders are of the second degree.

.....

(e) A participant in the perpetration or attempted perpetration of a felony listed in subdivision (a) in which a death occurs is liable for murder only if one of the following is proven:

(1) The person was the actual killer.

(2) The person was not the actual killer, but, 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.

(3) The person was a major participant in the underlying felony and acted with reckless indifference to human life, as described in subdivision (d) of Section 190.2.

Section 4 of SB 1437 added § 1170.95 to the Penal Code. Section 1170.95(a) provides:

A person convicted of felony murder or murder under a natural and probable consequences theory may file a petition with the court that sentenced the petitioner to have the petitioner's murder conviction vacated and to be resentenced on any remaining counts when all of the following conditions apply:

(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.

(3) 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.

(emphasis added)

I. Discussion

Section 1170.95(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. 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 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.

In December 2018, retired California Superior Court Judge J. Richard Couzens¹ published a primer on SB 1437 and some of the many issues it creates.

Couzens recommends “consider[ation] . . . [of] other readily available information such as the court’s file” when determining “whether a prima facie basis has been shown”, because “[i]t would be a gross misuse of judicial resources to require the issuance of an [OSC] or even appointment of counsel based solely on the allegations of the petition . . . when even a cursory review of the court file would show as a matter of law that petitioner is not eligible for relief.” (Couzens at p.26.)

¹ Judge Couzens is a widely-respected expert in California criminal law. (See *People v. Johnson* (2015) 61 Cal. 4th 674, 685 [citing Judge Couzens’s (and Presiding Justice Tricia Bigelow’s) publication on Three Strikes Sentencing]; *People v. Sherow* (2015) 239 Cal. App. 4th 875, 879 [citing the publication by Couzens and Bigelow on Proposition 47].)

After a review of the instant petition, the court file, and the decision of the First Appellate District, it is clear that petitioner has not made a prima facie showing that he falls within the provisions of section 1170.95. It is clear that defendant cannot satisfy the third condition of Penal Code section 1170.95(a) – that he “could not be convicted of first or second degree murder because of changes to Section 188 or 189 made effective January 1, 2019.”

The record in this case is clear that any reasonable trier of fact, properly instructed under the current law, would reach a guilty verdict on a charge first degree murder. (*Cf. In re Bennett* (2018) 26 Cal.App.5th 1002, 1118 [“In a habeas corpus challenge to the sufficiency of the evidence to support a special circumstance finding, the standard of review is whether, when evidence that is reasonable, credible, and of solid value is viewed in the light most favorable to the prosecution, any rational trier of fact could have found the essential elements of the allegation beyond a reasonable doubt. The standard is the same under the state and federal due process clauses”] (internal quotation marks, citations, and ellipses omitted).)

Under § 189(e)(1), any reasonable jury would reach a guilty verdict on the charge of first degree murder, because the defendant “was the actual killer.” (§ 189(e)(1).) On appeal, defendant did not dispute that he punched the victim when the victim attempted to stop him as he fled with the stolen property. The Court of Appeal concluded that the killing occurred during the perpetration of an attempted robbery. (*People v. Blacher*, 2010 Cal. App. Unpub. LEXIS 9525 at *12, 21 29.) After being hit with such force as to lift the victim off his feet and knock him onto his back, the victim died four days later without regaining consciousness. (*Id.*, at *3.) There was no question that “a death occurred” as a direct result of defendant’s acts. (Penal Code § 189(a), (e).)

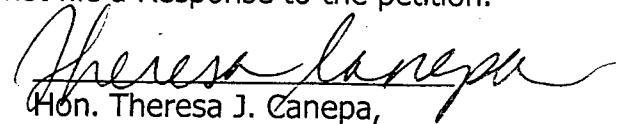
Because the court concludes defendant could be convicted of first degree murder under the new provisions of Penal Code § 189(a), (e), it declines to address whether defendant could be convicted of second degree murder under Penal Code § 188(a)(2)².

² See *People v. Spring* (1984) 153 Cal. App. 3d 1199 [single blow to the victim was too weak to knock victim off his feet or render him unconscious and victim died 17 days later; there was some provocation as victim attempted to deny defendant entry in to building; held, slight provocation combined with facts did not support a finding that the punch arose from an “abandoned and malignant heart” sufficient to support a conviction for second degree murder]; See *People v. Roberts* (1992) 2 Cal. 4th 271, 317 [“liability for second degree murder will attach if the circumstances of an act show...implied malice, which...may be found ‘when the circumstances attending the killing show an abandoned and malignant heart’ (§ 188).”]

III. Disposition

Petition summarily denied. The People need not file a Response to the petition.

Dated: Feb. 14, 2019


Hon. Theresa J. Canepa,
Judge of the Superior Court

Cc:

Petitioner
Office of the District Attorney for Contra Costa County
Contra Costa Public Defenders

**Additional material
from this filing is
available in the
Clerk's Office.**