Filed 5/12/21 P. v. Richardson CA1/5

NOT TO BE PUBLISHED IN OFFICIAL REPORTS

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FIRST APPELLATE DISTRICT

DIVISION FIVE

THE PEOPLE, Plaintiff and Respondent, v. EUGENE RICHARDSON, Defendant and Appellant.	A159828 (Alameda County Super. Ct. No. 164916B)

In January 2012, a jury found Eugene Richardson guilty of first degree felony murder. (Pen. Code, §§ 187, subd. (a), 189.)[1] He was sentenced to 35 years to life in prison. In June 2013, this court affirmed the judgment. (*People v. Richardson* (June 4, 2013, A134783) [nonpub. opn.].) In January 2019, Richardson filed a petition for writ of habeas corpus citing section 1170.95, which the trial court treated as a petition for resentencing. After a hearing in March 2020, the trial court denied the petition.

Richardson appeals. In our view, the trial court correctly found that Richardson was a major participant in the felony who acted with reckless

[1] Undesignated statutory references are to the Penal Code.

indifference to human life. (§ 189, subd. (e)(3).) As a result, Richardson is ineligible for resentencing. Accordingly, we affirm.[2]

BACKGROUND

I. *The Robbery, Trial, Verdict, and Sentence*

To facilitate our review, we incorporate the facts from our prior opinion, *People v. Richardson, supra*, A134783, which stated as follows:

"On the evening of October 15, 2009, Wayl Al Junaidi's mother gave him $20 and sent him to buy milk at a Walgreen's near their residence. When he left home, he had a brown trifold wallet and a diamond ring. Later that evening, a police officer . . . discovered the wounded Al Junaidi in a parking lot . . . in Oakland. Al Junaidi later died at Highland Hospital, and a forensic pathologist testified that the cause of death was a gunshot wound. No money, wallet, or jewelry were recovered from the location at which the victim was found.

"At Richardson's trial, [Rodrigo C.] testified that on the night of October 15, 2009, he was cleaning up in the parking lot when he saw a red van pull up. Three men got out of the van and ran past him. [Rodrigo C.] saw the victim walking along Foothill Boulevard and then heard a loud pop. He saw the victim fall, and then the three men ran back to the red van. One man carried a silver pistol about six to eight inches in length. The red van then drove away. [Rodrigo C.] approached the victim, who was bloody but still alive. The entire incident lasted only three to five minutes.

"[Rodrigo C.] later repeated his story to a police investigator. He told the investigator he saw three men come out of a red van . . . and walk past him as he was cleaning up the parking lot. [Rodrigo C.] identified Richardson

---

[2] By separate order filed this date, we deny Richardson's petition for writ of habeas corpus (case No. A162474) raising claims of ineffective assistance of counsel.

and another suspect from photo lineups. [Rodrigo C.] had identified the same two suspects at the preliminary examination. He said Richardson stood over the victim and was carrying the gun when the men returned to the van.

"[Margarita A.'s] bedroom window looked out over the parking lot. She was home on October 15, 2009 before 11:00 p.m., and when she looked out at her car in the parking lot, she saw the tops of three men's heads. She heard a loud bang and looked out the window again. [Margarita A.] saw one man running away toward the red van, one man standing by a dumpster, and a third man struggling and arguing with the victim. The man struggling with the victim was trying to 'put his hands into the victim's sides' and 'was putting his hand in one area and another as if he were looking for something[.]' The man was bent over the victim, and it looked as though he was trying to take something from him. The man with the victim wore dark pants and a dark jacket and had shoulder-length braids. After about a minute the man with the victim and the man near the dumpster ran to the red van where the third man had the engine running. [Margarita A.] saw the victim take a step and then fall to the ground.

"[Margarita A.] later identified Richardson as the man struggling with the victim. At trial she remembered his face although his hairstyle was different from the braids he had worn on the night of the murder. Her identification was based on Richardson's face, which she had seen clearly when he passed by her window.

"[S.R.] testified she knew Richardson for about two months because he was dating her sister. She could not identify Richardson in court, but she had identified him earlier from a police photograph. [S.R.] said Richardson had showed her a large man's ring with multiple diamonds on it and had

asked her opinion about its value. He told [S.R.] he had gotten the ring in a robbery when he killed 'an Arabian boy.' "

At his trial, the jury found Richardson guilty of first degree felony murder. (§§ 187, subd. (a), 189.) The jury did not find that Richardson intentionally discharged a firearm (§ 12022.53, subds. (c),(d)), but it did find he used a firearm. (§ 12022.53, subd. (b).) The trial court sentenced Richardson to 25 years to life for murder and to a consecutive 10-year term for the firearm use enhancement.

II. *Section 1170.95 Petition*

In 2019, Richardson petitioned for resentencing. The trial court found that Richardson made a prima facie showing of entitlement to relief under section 1170.95. In its response to the petition, the prosecutor argued that "[a]lthough the jury was not convinced beyond a reasonable doubt Petitioner was the actual killer (although he likely was), he was at the very least a major participant in the robbery, and his actions show reckless indifference to human life." In his brief in support of resentencing, Richardson argued there was insufficient evidence to prove beyond a reasonable doubt that he exhibited reckless indifference to human life.[3]

At the hearing on Richardson's petition, the trial court found the facts supported "a verdict beyond a reasonable doubt that he is the actual killer." In addition, the trial court noted that Richardson conceded he was a major participant in the robbery, and the evidence showed he acted with reckless indifference to human life. Accordingly, the trial court denied the petition. Richardson appeals.

---

[3] Richardson's first attorney filed a reply to the prosecution's response, but this attorney subsequently withdrew. The court appointed new counsel for Richardson, who filed an additional brief in support of resentencing.

DISCUSSION

On appeal, Richardson makes three arguments. First, he claims the trial court "tried to overrule the jury's finding that petitioner had not been the actual killer" based on "a selective review of the record." Second, he contends the trial court's finding that he exhibited reckless indifference to human life was "premised on an inadequate inquiry." Third, based on his age at the time of the crime, Richardson argues it was "inherently unfair to measure a juvenile's recklessness by the same measure as an adult offender."

We agree with the trial court that the prosecutor proved beyond a reasonable doubt that Richardson was a major participant in the robbery who displayed reckless indifference to human life. (§ 189, subd. (e)(3).) As a result, Richardson is ineligible for resentencing whether or not he was the actual killer. We deem Richardson's argument based on his age forfeited because he did not raise it below. Accordingly, we affirm.

I. *Governing Law and Standard of Review*

"Senate Bill No. 1437, which became effective on January 1, 2019, was enacted to 'amend the felony murder rule . . . 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).) 'Under the felony-murder rule as it existed prior to Senate Bill 1437, a defendant who intended to commit a specified felony could be convicted of murder for a killing during the felony . . . without further examination of his or her mental state.' " (*People v. Lopez* (2020) 56 Cal.App.5th 936, 945, review granted Feb. 10, 2021, S265974 (*Lopez*).)

" 'Senate Bill 1437 restricted the application of the felony-murder rule . . . by amending' sections 188 and 189." (*Lopez*, *supra*, 56 Cal.App.5th

at pp. 945–946, rev. granted.) " 'Section 189, subdivision (e), as amended, provides that a participant in a specified felony is liable for murder for a death during the commission of the offense only if one of the following is proven: "(1) The person was the actual killer. [¶] (2) The person . . . , with the intent to kill, aided, abetted, . . . or assisted the actual killer . . . . [¶] (3) The person was a major participant in the underlying felony and acted with reckless indifference to human life . . . ." ' " (*Id.* at p. 946.)

A defendant convicted of first degree felony murder may file a petition with the sentencing court to have the murder conviction vacated and be resentenced. (§ 1170.95, subd. (a).) A petitioner may seek relief if three conditions are met: (1) the prosecution proceeded under a felony-murder theory; (2) the petitioner was convicted of first degree murder following a trial; and (3) the petitioner could not be convicted of first degree murder because of the changes to section 188 or 189. (§ 1170.95, subd. (a)(1)–(3).)

If the petitioner makes a prima facie showing of entitlement to relief (§ 1170.95, subd. (c)), then the trial court must hold a hearing to determine whether to vacate the murder conviction and to recall the sentence. (§ 1170.95, subd. (d)(1).) "At the hearing . . . , the burden of proof shall be on the prosecution to prove, beyond a reasonable doubt, that the petitioner is ineligible for resentencing. If the prosecution fails to sustain its burden of proof, the prior conviction, and any allegations and enhancements attached to the conviction, shall be vacated and the petitioner shall be resentenced on the remaining charges. The prosecutor and the petitioner may rely on the record of conviction or offer new or additional evidence to meet their respective burdens." (§ 1170.95, subd. (d)(3).)[4]

[4] Courts of Appeal have taken divergent views as to how the prosecutor must prove a petitioner is ineligible for resentencing. (Cf. *People v. Duke*

We review a trial court's order denying a section 1170.95 petition for substantial evidence. (*Lopez*, *supra*, 56 Cal.App.5th at pp. 953–954, rev. gr.; *People v. Rodriguez*, *supra*, 58 Cal.App.5th at p. 238, review granted.) "The record must disclose substantial evidence to support the verdict—i.e., evidence that is reasonable, credible, and of solid value—such that a reasonable trier of fact could find the defendant guilty beyond a reasonable doubt." (*People v. Zamudio* (2008) 43 Cal.4th 327, 357.) " 'In applying this test, we review the evidence in the light most favorable to the prosecution and presume in support of the [order] the existence of every fact the [superior court] could reasonably have deduced from the evidence.' " (*People v. Williams* (2020) 57 Cal.App.5th 652, 663.)

II. *Richardson Is Ineligible for Resentencing*

Here, at the section 1170.95 hearing, Richardson conceded he was a major participant in the robbery, and the trial court found the prosecutor proved beyond a reasonable doubt that he acted with reckless indifference to human life. Substantial evidence supports the trial court's finding. Accordingly, we uphold the trial court's ruling without addressing the trial court's additional finding that Richardson was the actual killer. (*People v. Rodriguez*, *supra*, 58 Cal.App.5th at p. 238, rev. gr. ["As appellate courts generally do, we apply a deferential standard of review in determining whether the evidence supports any of the superior court's factual findings."].)

(2020) 55 Cal.App.5th 113, 123, review granted Jan. 13, 2021, S265309 [substantial evidence of petitioner's liability for murder under amended statutes], with *Lopez*, *supra*, 56 Cal.App.5th at p. 951, rev. gr.; *People v. Rodriguez* (2020) 58 Cal.App.5th 227, 243–244, review granted Mar. 10, 2021, S266652 [prosecutor must prove elements of liability for murder under amended statutes beyond a reasonable doubt].) That issue is not before us in this case.

A. *Reckless Indifference to Human Life*

"Reckless indifference to human life has a subjective and an objective element. [Citation.] As to the subjective element, '[t]he defendant must be aware of and willingly involved in the violent manner in which the particular offense is committed,' and he or she must consciously disregard 'the significant risk of death his or her actions create.' [Citations.] As to the objective element, ' "[t]he risk [of death] must be of such a nature and degree that, considering the nature and purpose of the actor's conduct and the circumstances known to him [or her], its disregard involves a gross deviation from the standard of conduct that a law-abiding person would observe in the actor's situation." ' [Citations.] 'Awareness of no more than the foreseeable risk of death inherent in any [violent felony] is insufficient' to establish reckless indifference to human life; 'only knowingly creating a "grave risk of death" ' satisfies the statutory requirement. [Citation.] Notably, 'the fact a participant [or planner of] an armed robbery could anticipate lethal force might be used' is not sufficient to establish reckless indifference to human life." (*In re Scoggins* (2020) 9 Cal.5th 667, 677 (*Scoggins*).)

Courts analyze the totality of the circumstances to determine whether a defendant acted with reckless indifference to human life. (*Scoggins*, *supra*, 9 Cal.5th at p. 677.) "Relevant factors include: Did the defendant use or know that a gun would be used during the felony? How many weapons were ultimately used? Was the defendant physically present at the crime? Did he or she have the opportunity to restrain the crime or aid the victim? What was the duration of the interaction between the perpetrators of the felony and the victims? What was the defendant's knowledge of his or her confederate's propensity for violence or likelihood of using lethal force? What efforts did the defendant make to minimize the risks of violence during the

felony? [Citation.] ' "[N]o one of these considerations is necessary, nor is any one of them necessarily sufficient." ' [Citations.]" (*Ibid*.)

B. *Applying the Scoggins Factors*

Considering these factors, there can be no reasonable doubt Richardson acted with reckless indifference to human life. Although the jury did not find that Richardson intentionally discharged a firearm, it did find he used a firearm. At trial, a witness testified that one of the three participants in the robbery had a gun and, in a photo lineup, the witness identified Richardson as the person with the gun. As explained in *People v. Clark* (2016) 63 Cal.4th 522, 618, "[a] defendant's *use* of a firearm, even if the defendant does not kill the victim or the evidence does not establish which armed robber killed the victim, can be significant to the analysis of reckless indifference to human life." In addition, Richardson was the only participant in the robbery observed to be in possession of a firearm. As a result, it is reasonable to infer Richardson brought the firearm to the robbery and that it was the source of the fatal shot. (*People v. Williams*, *supra*, 57 Cal.App.5th at p. 663 [courts presume in support of the order every fact that can be reasonably deduced from the evidence].)

Unlike the defendant in *Scoggins*, *supra*, 9 Cal.5th at page 678, Richardson was physically present at the crime scene. The United States Supreme Court has "stressed the importance of presence to culpability." (*People v. Clark*, *supra*, 63 Cal.4th at p. 619, discussing *Tison v. Arizona* (1987) 481 U.S. 137, 158.) Even if Richardson did not shoot the victim, Richardson's " ' "presence gives him an opportunity to act as a restraining influence on murderous cohorts. If the defendant fails to act as a restraining influence, then the defendant is arguably more at fault for the resulting murder[]." ' " (*Scoggins*, at p. 678.) Here, there is no indication Richardson

was a restraining influence. To the contrary, after the victim was shot, Richardson struggled with the victim, put his hands in the victim's pockets, and tried to take the victim's possessions. Richardson's conduct indicates he was " 'utterly indifferent to the fact that the desire to rob may have the unintended consequence of killing the victim as well as taking the victim's property.' " (*Id.* at p. 676.)

Richardson's failure to render aid to the victim also casts a negative light on his frame of mind. (*Scoggins*, *supra*, 9 Cal.5th at pp. 679–680.) Richardson claims "there is nothing to suggest aid was delayed by petitioner's actions." But the relevant consideration is whether Richardson helped the victim, who was still alive after the shooting. He did not; instead, Richardson struggled with the wounded victim and put his hands into the victim's sides or pockets as if he were looking for something. When Richardson ran off, the victim fell to the ground and began crawling. At this time, the victim was still alive and suffering. Richardson's decision to continue to search for and take the wounded victim's belongings, rather than providing or seeking assistance, weighs heavily in favor of a finding of reckless indifference to human life. (*People v. Clark*, *supra*, 63 Cal.4th at pp. 619, 621–622.)

Regarding the remaining factors, the duration of the robbery was short, and there is no evidence Richardson was aware of his cohorts' propensity for violence, but this factor deserves little weight because Richardson was the only person observed struggling with the victim. Clearly, Richardson made no effort to minimize the risk of violence during the robbery. (*Scoggins*, *supra*, 9 Cal.5th at p. 677.) At the resentencing hearing, Richardson conceded he was a major participant in the robbery, which lends further support to the finding of reckless indifference to human life. (*Tison v. Arizona*, *supra*, 481 U.S. at p. 153 ["the greater the defendant's participation

in the felony murder, the more likely that he acted with reckless indifference to human life"].) Based on these factors, there was ample evidence for the trial court to find beyond a reasonable doubt that Richardson was a major participant in the robbery who acted with reckless indifference to human life.[5]

III. *The Trial Court's Review of the Record*

Richardson complains the trial court reviewed "only those portions of the transcripts that supported" the prosecutor's case and, as a result, the trial court was left "with an incomplete understanding of [the] facts of the case," and was "unable to properly evaluate the criteria for a finding of reckless indifference" to human life. According to Richardson, "[i]t would seem obvious that . . . a factual finding by the trial court on whether there was proof beyond a reasonable doubt of the contested element of reckless indifference to human life . . . would at the minimum require the trial court to read all of the record rather than the parts suggested by the prosecution."

We disagree. At the hearing to determine whether a petitioner is entitled to relief, "[t]he prosecutor and the petitioner may rely on the record of conviction or offer new or additional evidence to meet their respective burdens." (§ 1170.95, subd. (d)(3).) As this statute indicates, it was Richardson's responsibility to draw the trial court's attention to any evidence he felt was relevant to his petition for resentencing. The trial court was not

---

[5] In *People v. Banks* (2015) 61 Cal.4th 788, when considering whether an accomplice qualified as a major participant, our high court focused on factors including whether the defendant had a role in planning the criminal enterprise. (*Id.* at pp. 805–807.) Here, Richardson argues there was no evidence he planned the crime. But Richardson concedes he was a major participant in the robbery, so this factor carries little or no weight. According to the probation officer's report, the manner in which the crime was carried out indicated planning.

required to read the entire record irrespective of its relevance to the questions the trial court had to decide.

More importantly, what material facts or evidence did the trial court allegedly overlook or fail to take into consideration? Richardson argues he could not have shot the victim because he was in front of the victim and the forensic pathologist testified that the victim was shot from behind. In addition, Richardson claims a jury question, and the jury's verdict on the section 12022.53 enhancement, indicate the jury had doubts about whether Richardson was the shooter.[6] But these considerations do not call into question or undermine the finding that Richardson was a major participant in the robbery who acted with reckless indifference to human life. (§ 189, subd. (e)(3).) As a result, they are not grounds for reversing the denial of Richardson's section 1170.95 petition.

Even if there is some evidence that could support Richardson's claim regarding his positioning, substantial evidence supports the trial court's findings. Rodrigo C. heard a gunshot and then he saw three men, one with a gun, running back to a van. Margarita A. heard a loud bang, and when she looked out her window, she saw the victim standing next to a wall struggling with Richardson while the other two participants in the robbery were further away. She testified Richardson was "bending over" the victim trying to take something from him. Substantial evidence supports the trial court's finding that Richardson was a major participant in this robbery who acted with reckless indifference to human life. (*People v. Zamudio*, *supra*, 43 Cal.4th at

---

[6] Richardson also questions the credibility of the witness who said Richardson told her he killed an Arabian boy. The trial court was aware of that concern because Richardson challenged her credibility in his brief in support of resentencing.

p. 357 [“ ‘We resolve neither credibility issues nor evidentiary conflicts; we look for substantial evidence.’ ”].)

IV. *Richardson’s Age at the Time of the Crime*

For the first time on appeal, Richardson argues it was unconstitutional for the trial court to find he engaged in conduct exhibiting reckless indifference to human life without considering that Richardson was 16 years old at the time of this crime. Relying primarily on studies of brain development, Richardson contends it was unfair or unconstitutional to hold him to the same standard of reckless indifference to human life that applies to adults.

We are not persuaded. Constitutional claims may be raised for the first time on appeal if the new arguments do not involve facts or legal standards different from what was raised below. (*People v. Boyer* (2006) 38 Cal.4th 412, 441, fn. 17.) The new argument must assert “that the trial court’s act or omission, insofar as wrong for the reasons actually presented to that court, had the additional *legal consequence* of violating the Constitution.” (*Ibid*.) However, “[a] party cannot argue the court erred in failing to conduct an analysis it was not asked to conduct.” (*People v. Partida* (2005) 37 Cal.4th 428, 435.)

Here, Richardson’s challenge based on his age at the time of the crime involves facts or legal standards that are different from what was argued below. His failure to raise this issue in the trial court has resulted in its forfeiture on appeal.[7]

---

[7] Richardson’s age may be relevant for other purposes. Here, the trial court dismissed Richardson’s petition for writ of habeas corpus seeking to preserve evidence for an eventual youth offender parole hearing pursuant to *People v. Franklin* (2016) 63 Cal.4th 261, 284, without prejudice to Richardson seeking to do so by filing a section 1203.1 motion. (*In re Cook* (2019) 7 Cal.5th 439, 458.)

We further note that our high court recently addressed the standard of reckless indifference to human life at length, and there is no indication it intended to apply a different standard based on the defendant's age. (See *Scoggins*, *supra*, 9 Cal.5th at pp. 676–683.) Indeed, in *Scoggins*, at page 675, our high court discussed *Tison v. Arizona* (1987) 481 U.S. 137, a case involving 19- and 20-year-old defendants, but the United States Supreme Court did not identify their youth as a relevant factor when considering whether their mental state was one of reckless indifference to the value of human life. (*Id.* at pp. 142, 151–152, 158.)

At oral argument, Richardson relied upon *People v. Harris* (2021) 60 Cal.App.5th 939, review granted April 28, 2021, S267802 (*Harris*). In this recent case, the Court of Appeal remanded the matter for an evidentiary hearing on the defendant's section 1170.95 petition. (*Harris*, at p. 945.) In doing so, the Court of Appeal noted that "given Harris's youth at the time of the crime, particularly in light of subsequent case law's recognition of the science relating to adolescent brain development [citations], it is far from clear that Harris was actually aware 'of particular dangers posed by the nature of the crime, weapons used, or past experience or conduct of the other participants.' [Citation.]" (*Id.* at p. 960.)

But *Harris* does not stand for the proposition that a 16 year old cannot be found to be a major participant in a robbery who acted with reckless indifference to human life. Instead, *Harris* simply required the trial court to consider the defendant's youth on remand. (*Harris*, *supra*, 60 Cal.App.5th at p. 960, review granted.) Here, by contrast, Richardson had an evidentiary hearing, he conceded he was a major participant in the robbery, and he was observed struggling with and stealing from the victim after the victim was shot.

At oral argument, counsel for Richardson also relied upon the United States Supreme Court's recent decision in *Jones v. Mississippi* (2021) __ U.S. __ [141 S.Ct. 1307]. This case does not help Richardson. In *Jones*, the majority observed that if the sentencing judge "has discretion to consider the defendant's youth, the sentencer necessarily *will* consider the defendant's youth, especially if defense counsel advances an argument based on the defendant's youth." (*Id.* at p. __ [141 S.Ct. at p. 1319].) Applying that reasoning here, we can infer the judge at the section 1170.95 hearing was aware of Richardson's youth. At the hearing, when discussing S.R.'s testimony about what Richardson said to her, defense counsel argued "it could be a 16-year-old bragging to [S.R.]."

As explained *ante*, numerous factors support the trial court's finding that Richardson's conduct during the robbery displayed reckless indifference to human life. Even if the trial court had more explicitly addressed Richardson's age, this factor would not have tipped the scales in Richardson's favor. It does not undermine the trial court's finding that Richardson is ineligible for resentencing.

DISPOSITION

We affirm the order denying Richardson's petition for resentencing.

_____
Rodriguez, J.*

WE CONCUR:

_____
Needham, Acting P. J.

_____
Burns, J.

A159828

* Judge of the Superior Court of Alameda County, assigned by the Chief Justice pursuant to article VI, section 6 of the California Constitution.