

IN THE
COURT OF APPEAL OF THE STATE OF CALIFORNIA
IN AND FOR THE
FIFTH APPELLATE DISTRICT

CHELSEA BECKER,

Petitioner,

v.

THE SUPERIOR COURT OF KINGS
COUNTY,

Respondent;

THE PEOPLE,

Real Party in Interest.

F081341

(Kings Super. Ct. No. 19CM-5304)

ORDER

BY THE COURT:*

Petitioner requests review of the trial court's ruling on her demurrer. A demurrer to an accusatory pleading raises a question of law as to the sufficiency of the accusatory pleading and only tests those defects appearing on its face. (Pen. Code, § 1004.) The accusatory pleading states: The "crime of Murder Of Human Fetus in violation of PC187(a), a Felony, was committed in that the said defendant, ..., did unlawfully, and with malice aforethought murder a human fetus." Petitioner fails to make a prima facie showing the accusatory pleading is defective on its face. Her petition is denied. Her request for a stay of proceedings in the superior court is also denied. Our denial does not preclude petitioner from seeking writ relief once the facts of her case become part of the record.



Levy, A.P.J.



Detjen, J.

* Before Levy, A.P.J., Detjen, J. and Peña, J., Dissenting

Dissent, J. Peña,

I vote to issue an order to show cause before this court as to why the relief prayed for in the above entitled matter should not be granted.

The sole issue presented by the petition, which the parties agree is a pure question of law, is whether Penal Code section 187, subdivision (b)(3) categorically prohibits the state from charging a mother with the murder of her own fetus.¹ Petitioner demurred to the criminal complaint, which charged her with the murder of a fetus under “PC 187(a),” and moved to dismiss the complaint. In opposition to the demurrer, the People stated the facts it would prove at trial included the following: “On September 10, 2019, Defendant gave birth to a stillborn child at Hanford Adventist Medical Center whom she had already named Zachariah Joseph Campos. [D]efendant delivered the stillborn baby at 36 weeks gestational, which, at that age, could have resulted in a viable living human being outside of the womb.... [¶] The Coroner’s report attached hereto as Exhibit 1, revealed Zachariah Joseph Campos’[s] cause of death was ‘Acute Methamphetamine Toxicity.’ It also revealed a level of .02 grams % blood ethyl alcohol.... Blood work conducted on the Defendant ‘showed positive for methamphetamine.’ (Exhibit 1 at p. 1.) ... [¶] Defendant’s mother told Hanford Police that Defendant admitted to using methamphetamine during this pregnancy as she had during her three previous pregnancies.... [D]efendant’s other children tested positive for methamphetamine at birth and were adopted out of Defendant’s care as newborns. Defendant herself admitted ... that she did use methamphetamine while pregnant this time”

After noting no California cases have ruled on the question of whether section 187 applies to a mother who allegedly killed her own fetus, the trial court overruled petitioner’s demurrer, concluding the plain language of the statute did not specifically exclude mothers in the death of their own fetuses and the Legislature could have easily done so. Notably absent from the People’s written opposition, their oral argument to the court, or the court’s ruling, was the issue of the sufficiency of the pleading, a purported lack of defects appearing on its face, or citation to section 1004.

With no opportunity provided to petitioner to address these issues, my colleagues have determined, *sua sponte*, and with no legal analysis to support the conclusion, that petitioner fails to make a *prima facie* showing the accusatory pleading is defective on its face. I do not approve of this approach in this case because I am not convinced the conclusion is correct. Equally important, I am doubtful the conclusion reached by the trial court was correct.

First, in my opinion, the question of the sufficiency of the pleading is not so black and white when one considers the following: What is the role of subdivision (b) on the sufficiency of the pleading, which provides for various exclusions or exceptions to subdivision (a) where the death of a fetus is charged? In the murder of a fetus case, is a

¹ Further undesignated statutory references are to the Penal Code.

criminal complaint defective or insufficient if it fails to allege that subdivision (b) does not apply? If asked, might petitioner have other possible arguments to support a prima facie case? Was the People's failure to make the argument a tactical decision that implicates waiver and forfeiture principles? An order to show cause with requests for additional briefing would provide a more complete vetting of these questions and perhaps a different conclusion.

Of greater concern, which causes me to exercise my discretion to vote for the issuance of an order to show cause, is the uncertainty in the law, the correctness of the court's ruling on the sole question of law that was considered, and the magnitude and importance of the issue to this and future cases where the mother is alleged to have committed murder pertaining to the death of her own fetus.

Section 187 and Fetal Murder

Section 187, subdivision (a), defines murder as "the unlawful killing of a human being, or a fetus, with malice aforethought." Subdivision (b) provides an exception for acts that result in the death of a fetus if any of the following apply:

"(1) The act complied with the Therapeutic Abortion Act, Article 2 (commencing with Section 123400) of Chapter 2 of Part 2 of Division 106 of the Health and Safety Code.

"(2) The act was committed by a holder of a physician's and surgeon's certificate, as defined in the Business and Professions Code, in a case where, to a medical certainty, the result of childbirth would be death of the mother of the fetus or where her death from childbirth, although not medically certain, would be substantially certain or more likely than not.

"(3) The act was solicited, aided, abetted, or consented to by the mother of the fetus."

Section 187 was amended in 1970 in response to *Keeler v. Superior Court* (1970) 2 Cal.3d 619, which held that a fetus is not a "human being" within the meaning of the former version of section 187, and therefore the defendant could not be prosecuted for the murder of his estranged wife's fetus. (*People v. Davis* (1994) 7 Cal.4th 797, 803.) The 1970 amendment added the words "or fetus" to subdivision (a), and added the exceptions listed in subdivision (b). (Stats. 1970, ch. 1311, § 1, p. 2440.) The applicability or scope of these exceptions is not well defined, as they have not been interpreted by any published California cases. The exceptions were also added prior to *Roe v. Wade* (1973) 410 U.S. 113 (*Roe*). Subdivisions (b)(1) and (b)(2) appear to carve out narrow exceptions for medical abortions in certain circumstances, but it is unclear what significance, if any, those sections carry following *Roe*. Moreover, the Therapeutic Abortion Act referenced in subdivision (a) has been repealed and replaced by the broader Reproductive Privacy Act. (Stats. 2002, ch. 385, § 2.)

Statutory Interpretation

Petitioner's statutory interpretation claims are based solely on the exception set forth in section 187, subdivision (b)(3). Petitioner makes several arguments that this subdivision categorically prohibits the prosecution of a mother for the murder of her fetus. First, petitioner claims the plain language of the statute prohibits such a prosecution because any intentional act committed by the mother was inherently "consented to by the mother of the fetus." (§ 187, subd. (b)(3).) Second, petitioner contends the legislative history of section 187 and subsequent attempts to pass legislation that would otherwise criminalize conduct by a mother impacting her fetus indicates the Legislature did not intend to permit such prosecution. Third, petitioner claims interpreting section 187 in this way would lead to absurd results, including the prosecution of expectant mothers for many other types of conduct that are arguably dangerous to the health of a fetus.

Plain Language

Petitioner argues that a mother cannot be prosecuted for the death of her fetus pursuant to section 187, subdivision (b)(3), asserting that where a mother has engaged in a volitional or voluntary act, she has by definition "consented" to the act. The California Attorney General has filed an amicus curiae brief supporting this interpretation, contending that "[a] woman necessarily consents to an act that she herself voluntarily undertakes, free of fraud, duress, or mistake." Although perhaps not conclusive, this interpretation of the language appears to me to have some persuasive force.

Legislative History

Petitioner contends that the legislative history of section 187 supports the interpretation of subdivision (b)(3) that a mother cannot be prosecuted for the murder of her fetus. Petitioner submits an affidavit from Assemblyman W. Craig Biddle, who was the primary author of the 1970 amendment to section 187. In the affidavit, Biddle states that the sole purpose of the amendment was to "make punishable as murder a third party's willful assault on a pregnant woman resulting in the death of her fetus." (Exhibit 13.) With respect to subdivision (b)(3), he explains: "[T]his latter exception would include illegal abortions obtained by a pregnant woman. While such illegal abortions would, at the time, still be punishable under the state's consensual abortion law (Penal Code § 275), they would not be punishable as murder." (*Ibid.*) He concludes the affidavit by stating that no legislator ever suggested that the 1970 amendment "could be used to make punishable as murder conduct by a pregnant woman that resulted in the death of her fetus." (*Ibid.*)

Petitioner also points to four failed attempts to enact legislation creating criminal liability for mothers who use drugs while pregnant. In 1987, the Legislature rejected a bill that would have expanded the definition of criminal child endangerment to include substance use during pregnancy. (Sen. Bill No. 1070 (1987–1988 Reg. Sess.)) In 1989, the Legislature rejected a bill that would have made use of a controlled substance during pregnancy resulting in fetal demise punishable as manslaughter. (Sen. Bill No. 1465

(1989–1990 Reg. Sess.) In 1991, the Legislature rejected a bill that would have subjected to criminal liability a mother who abused substances during pregnancy that had an impact on her child’s health after birth. (Assem. Bill No. 650 (1990–1991 Reg. Sess.) Finally, in 1996, the Legislature rejected a bill that would have criminalized “fetal child neglect.” (Assem. Bill. No. 2614 (1995–1996 Reg. Sess.)

This legislative history tends to support petitioner’s argument. Although Biddle’s opinion regarding the scope of subdivision (b)(3) of section 287 is not conclusive and may have limited relevance, it provides context that helps explain the Legislature’s intent in amending section 187. Based on Biddle’s affidavit, it appears the Legislature intended to exempt mothers who obtain illegal abortions from liability for murder, but not from other statutes criminalizing illegal abortions. This interpretation is bolstered by the failed attempts at criminalizing drug use while pregnant, as it suggests that the authors of the rejected legislation recognized that additional legislation would be necessary to punish pregnant mothers who use drugs, because they cannot be prosecuted for murder under section 187.

Conclusion

The 1970 amendments to the homicide statute are clumsily written and outdated. They were drafted for a pre-*Roe* world, with less than precise statutory language to delineate between lawful and unlawful conduct. Although petitioner presents additional arguments to support her position, it is unnecessary to consider them here. Based on the statutory language and the legislative history of section 187, petitioner presents a strong case that in enacting subdivision (b) when amending the murder definition in section 187 to include the unlawful killing of a fetus, the Legislature did not intend to include the acts of the mother in the death of her own fetus. This case provides an excellent opportunity for this court to answer this important question of law.