

MASSACHUSETTS SUPREME JUDICIAL COURT

Commonwealth v. Walczak

463 Mass. 808 (2012) · Decided December 12, 2012

OPINION

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PER CURIAM.

By the Court. The Commonwealth appeals from an order of a judge in the Superior Court dismissing an indictment that charged the defendant with murder in the second degree. There was evidence before the grand jury that the defendant, who was sixteen years old at the time of the offense, stabbed the victim, Rene Valdez, in an altercation that began when the victim and an accomplice attempted to rob the defendant. The judge dismissed the indictment on the ground that the Commonwealth had presented insufficient evidence to the grand jury to support an indictment of murder in the second degree. See *Commonwealth v. McCarthy*, 385 Mass. 160 (1982). We granted the defendant's application for direct appellate review and now affirm the order dismissing the indictment. The court unanimously agrees with the Commonwealth, contrary to the Superior Court judge's ruling, that the evidence before the grand jury supported the indictment for murder in the second degree. On this point, all Justices agree with the reasoning set forth in part 3.b of Justice Lenk's concurring opinion, post at 817-822 (Lenk, J., concurring). Four Justices also agree with the defendant, however, that there is an alternative basis on which to uphold the judge's order: namely, that the grand jury should have been, but were not, instructed by the prosecutor on the elements of murder and on the legal significance of the mitigating circumstances raised by the evidence. The Justices who subscribe to this result do so for differing reasons. As reflected in her opinion, Justice Lenk is of the view that, in any case where the Commonwealth seeks to indict a juvenile for murder, the grand jury must be properly instructed by the prosecutor on the elements of murder, and if there are mitigating circumstances and defenses (other than lack of criminal responsibility) raised by the evidence, the grand jury must be instructed as to those as well. As explained in his opinion, Justice Gants, joined by Justices Botsford and *810Duffly, would hold that in cases where the Commonwealth seeks an indictment for murder and there is substantial evidence before the grand jury of mitigating circumstances or defenses (other than lack of criminal responsibility) — evidence sufficiently strong that the integrity of the grand jury would be impaired if it were withheld — the grand jury must be instructed on the elements of murder and on the mitigating circumstances and defenses, regardless of whether the subject of the grand jury's investigation is a juvenile or an adult. Post at 837 (Gants, J., concurring). Three Justices, Justice Spina, joined by Chief Justice Ireland and Justice Cordy, do not agree with the alternative basis for

upholding the order dismissing the indictment. They do not subscribe to the view that instructions to the grand jury on mitigating circumstances and defenses were necessary in this case, and they would make no change in the existing law concerning grand jury procedure in cases such as this. These Justices would vacate the order dismissing the indictment and remand the case to the trial court for further proceedings. Post at 844 (Spina, J., concurring in part and dissenting in part). By a majority of the court, therefore, the order dismissing the indictment is affirmed. In future cases, where the Commonwealth seeks to indict a juvenile for murder and where there is substantial evidence of mitigating circumstances or defenses (other than lack of criminal responsibility) presented to the grand jury, the prosecutor shall instruct the grand jury on the elements of murder and on the significance of the mitigating circumstances and defenses. The instructions are to be transcribed as part of the transcription of the grand jury proceedings. So ordered.