

MASSACHUSETTS SUPREME JUDICIAL COURT

Commonwealth v. Johnson

461 Mass. 1 (2011) · Decided November 22, 2011

SUMMARY

The Massachusetts Supreme Judicial Court considered whether an alleged error in jury instructions concerning provocation constituted a "new and substantial" question under G. L. c. 278, § 33E. The court held that the issue had already been considered on direct appeal, was not new, and in any event did not create a substantial risk of a miscarriage of justice; it remanded for entry of an order denying leave to appeal.

OPINION

SPINA, J.

Spina, J. The defendant filed an application in the county court under G. L. c. 278, § 33E, for leave to appeal from the denial of his second motion for a new trial. A single justice reserved and reported the case to the full court on the question whether a so-called Acevedo error in the jury instructions on the burden of proof on provocation presents a "new and substantial" question under the statute, *Commonwealth v. Acevedo*, 427 Mass. 714, 717 (1998) (Acevedo), and if it does, whether the error created a substantial risk of a miscarriage of justice.

See *Commonwealth v. Randolph*, 438 Mass. 290, 296-297 (2002) (after direct appeal in capital case, claims of error are reviewed for substantial risk of miscarriage of justice). "An issue is not 'new' within the meaning of G. L. c. 278, § 33E, where either it has already been addressed, or where it could have been addressed had the defendant properly raised it at trial or on direct review." *Commonwealth v. Ambers*, 397 Mass. 705, 707 (1986).

The defendant presents precisely the same issue now as he did in his direct appeal. See *Commonwealth v. Johnson*, 426 Mass. 617, 621 (1998). The defendant argues that the question is new and substantial because in his direct appeal, decided five months before Acevedo, the court was "not yet prepared to adopt" the Acevedo analysis, and therefore "his argument was never properly considered." See *Mains v. Commonwealth*, 433 Mass. 30, 32-34 (2000); *Commonwealth v. Smith*, 427 Mass. 245, 248-249 (1998).

We disagree. We recently stated in *Commonwealth v. Smith*, 460 Mass. 318, 325 (2011), that Acevedo "did not create a new rule, but applied an established principle that the malice necessary for murder and reasonable provocation are mutually exclusive," and that for this principle the

court in *Acevedo* relied on *Commonwealth v. Boucher*, 403 Mass. 659, 661-662 (1989), which was decided several years before the defendant's direct appeal.

Moreover, in *Commonwealth v. Torres*, 420 Mass. 479, 488-489 & n.8 (1995), decided before *Acevedo*, and cited by the defendant in his brief on direct review, we expressly *3stated that the instruction in question was incorrect.

The issue was adequately developed for consideration by the court in the defendant's direct appeal, and it was considered. The issue is not "new." The defendant next argues that even if "in its most literal sense the present claim... is not 'new,' " it was wrongly decided in his direct appeal. "The statute's 'new and substantial' test does not contemplate revisiting the decision in a capital appeal merely to reconsider issues that were decided in the direct appeal, which the defendant claims were incorrectly decided..." *Commonwealth v. Gunter*, 459 Mass. 480, 490, cert. denied, 132 S. Ct.

218 (2011). Moreover, the defendant did not file a petition for rehearing after his direct appeal was decided. Even if the question were new and substantial, the defendant would not prevail. Where the only evidence of provocation in this case was provided by the testimony of the defendant, and where the jury convicted him of murder in the first degree under the theory of extreme atrocity or cruelty as well as deliberate premeditation, they necessarily rejected his version of events and his theory of provocation, i.e., fright.

Commonwealth v. Johnson, supra at 618. Thus, there was no substantial risk of a miscarriage of justice. See *Commonwealth v. Randolph*, supra at 301. See also *Commonwealth v. Vinton*, 432 Mass. 180, 189-190 (2000) (direct appeal, no substantial likelihood).

We conclude that the defendant's claims are not new and substantial within the meaning of G. L. c. 278, § 33E. We continue to adhere to the principle that single justices, whose decisions under § 33E are final and unreviewable, see *Commonwealth v. Gunter*, 456 Mass. 1017 (2010), faced with gatekeeper applications under § 33E, will allow cases to proceed to the full court in all meaningful matters.

See *Commonwealth v. Francis*, 411 Mass. 579, 584-585 (1992); *Leaster v. Commonwealth*, 385 Mass. 547, 550 (1982). The case is remanded to the county court where an order shall enter denying the defendant's application for leave to appeal. So ordered.