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SJC-12011

RAYMOND P. VINNIE vs. COMMONWEALTH.

September 12, 2016.

Supreme Judicial Court, Superintendence of inferior courts. Practice, Criminal, Capital case. Mandamus. Practice, Civil, Action in nature of mandamus, Fraud. Fraud.

The defendant, Raymond P. Vinnie, was convicted of murder in the first degree in 1993. In his first motion for a new trial he argued, among other things, that his trial counsel erred in not requesting, and the judge erred in not giving, an instruction to the jury that it could return a verdict of guilty of murder in the second degree. The motion judge, who was also the trial judge, denied the motion. The defendant's appeal from that denial was consolidated with his direct appeal, and we affirmed both the conviction and the denial of the motion for a new trial. Commonwealth v. Vinnie, 428 Mass. 161 (1998), cert. denied, 525 U.S. 1007 (1998). Since then, the defendant has filed numerous additional postconviction motions, the latest of which was a "petition in the nature of mandamus pursuant to G. L. c. 249, § 5," which he filed in the county court in 2015. A single justice denied the petition on the basis that mandamus relief was not appropriate because the defendant had another adequate remedy. The single justice also noted that even if he were to treat the petition as a subsequent motion for a new trial and, accordingly, consider it pursuant to the gatekeeper provision of G. L. c. 278, § 33E, he would deny it because the jury instruction issue was not "new and substantial."

After the single justice denied the petition, the defendant filed a notice of appeal, and, after his appeal was entered in this court, a brief. The Commonwealth subsequently filed a

motion to dismiss, arguing that there is no right to appeal from the denial of a gatekeeper petition pursuant to G. L. c. 278, § 33E. The defendant, in turn, filed an opposition to the Commonwealth's motion, arguing that what he filed in the county court was not a gatekeeper petition but, rather, a mandamus petition. Regardless whether we consider the petition pursuant to G. L. c. 249, § 5, or G. L. c. 278, § 33E, the defendant is not entitled to relief.

As the Commonwealth correctly notes, a single justice's decision, acting as a gatekeeper pursuant to G. L. c. 278, § 33E, is final and unreviewable. Commonwealth v. Scott, 437 Mass. 1008 (2002). Commonwealth v. Ambers, 397 Mass. 705, 710-711 (1986), and cases cited. To the extent that the defendant's petition in the county court was, in essence, a motion for a new trial, and to the extent it was therefore subject to G. L. c. 278, § 33E, his appeal from the single justice's decision is not properly before us.

Treating his petition as a request for mandamus relief, pursuant to G. L. c. 249, § 5, the defendant fares no better. "Relief in the nature of mandamus is extraordinary, and is granted in the discretion of the court where no other relief is available." Murray v. Commonwealth, 447 Mass. 1010, 1010 (2006), citing Forte v. Commonwealth, 429 Mass. 1019, 1020 (1999). This is not a circumstance where no other relief was available. The defendant raised the issue regarding the jury instruction in his motion for a new trial; it was considered and rejected by the judge, after an evidentiary hearing; and it was considered and rejected by this court on appeal. See Vinnie, supra at 179-180. Furthermore, mandamus relief "is not appropriate where the acts in question are discretionary rather than ministerial." Boxford v. Massachusetts Highway Dep't, 458 Mass. 596, 606 (2010), citing Murray, supra. The act that the defendant seeks to compel -- that his motion for a new trial be allowed -- is not ministerial. There is, in any event, no basis for a new trial. In short, there is no merit to the defendant's argument that the trial judge committed a "fraud" on this court. We have reviewed the relevant portions of the transcript of the hearing on the motion for a new trial and are satisfied that the judge properly denied the motion. The judge was entitled to credit the testimony of the defendant's trial counsel and to make findings adverse to the defendant, which he did. There was no "fraud" on the court, as the term is understood in this context.

Judgment affirmed.

The case was submitted on briefs.

Raymond P. Vinnie, pro se.

Tracey A. Cusick, Assistant District Attorney, for the  
Commonwealth.