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SJC-12221

PAUL CUCINELLI vs. COMMONWEALTH.

Supreme Judicial Court, Superintendence of inferior courts. Practice, Criminal, Appellate Division, Sentence.

May 3, 2017.

Paul Cucinelli appeals from a judgment of the county court dismissing his petition for relief under G. L. c. 211, § 3, from a decision of the Appellate Division of the Superior Court increasing his sentence for armed robbery.<sup>1</sup> He has filed a memorandum pursuant to S.J.C. Rule 2:21, as amended, 434 Mass. 1301 (2001), which requires a party challenging an interlocutory ruling of the trial court to "set forth the reasons why review of the trial court decision cannot adequately be obtained on appeal from any final adverse judgment in the trial court or by other available means."<sup>2</sup> Rule 2:21 does not apply here, as the decision of the Appellate Division was not an interlocutory ruling. See Jones v. Commonwealth, 461 Mass. 1005, 1005 (2012). Nonetheless, it is evident on the record before us that relief was properly denied. Cucinelli argues that he has no right to appeal directly to the appellate courts from the Appellate

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<sup>1</sup> The petition was the second one filed by Cucinelli to challenge the same decision. In his first G. L. c. 211, § 3, petition, Cucinelli argued that he received ineffective assistance of counsel before the Appellate Division. A different single justice of this court denied relief, and Cucinelli did not appeal from that judgment.

<sup>2</sup> Cucinelli has not filed an appendix as required by the rule, despite being granted an extension of time in which to do so. This presents a further reason not to disturb the decision of the single justice.

Division's decision. That is correct. G. L. c. 278, § 28B (decision of Appellate Division "shall be final"). That, however, does not mean that he is entitled to review under G. L. c. 211, § 3. "Rarely should we employ our superintendence power to review rulings in matters in which the Legislature has expressly stated that the decision of another court or judge 'shall be final.'" Commonwealth v. Barros, 460 Mass. 1015, 1015 (2011), quoting Hurley v. Superior Court Dep't of the Trial Court, 424 Mass. 1008, 1009 (1997). The single justice neither erred nor abused her discretion by denying relief.<sup>3</sup>

Judgment affirmed.

The case was submitted on the papers filed, accompanied by a memorandum of law.

Paul Cucinelli, pro se.

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<sup>3</sup> To the extent that Cucinelli may be claiming that the new sentence ordered by the Appellate Division is illegal, he would have an adequate alternative means of obtaining review of his sentence. Under Mass. R. Crim. P. 30 (a), as appearing in 435 Mass. 1501 (2001), Cucinelli "may at any time, as of right, file a written motion requesting the trial judge to release him . . . or to correct the sentence then being served upon the ground that the confinement or restraint was imposed in violation of the Constitution or laws of the United States or of the Commonwealth of Massachusetts." If such a motion is denied, Cucinelli will have the right to appeal to the Appeals Court from the denial. Cucinelli offers no reason why this would not be an adequate alternative remedy.