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SJC-12387

RONALDO CEPEDA vs. COMMONWEALTH.

January 12, 2018.

Supreme Judicial Court, Superintendence of inferior courts. Practice, Criminal, Indictment, Dismissal. Youthful Offender Act.

The petitioner, Ronaldo Cepeda, appeals from a judgment of a single justice of this court denying his petition pursuant to G. L. c. 211, § 3. We affirm.

Cepeda has been indicted for murder in the second degree, stemming from an incident that occurred on October 22, 2015. Cepeda was sixteen years old at the time. He moved to dismiss the indictment on the basis that "the Commonwealth failed to present material exculpatory and mitigating evidence to the grand jury, and that the grand jury was not properly instructed regarding the impact of a developing brain on threat response and decision making of a juvenile." A judge in the Superior Court denied the motion. Cepeda then filed his G. L. c. 211, § 3, petition in the county court.

In his petition, he argued, among other things, that, following this court's decision in Commonwealth v. Walczak, 463 Mass. 808 (2012), when the Commonwealth seeks to indict a juvenile the grand jury must be instructed on the basic differences between juvenile and adult brains. In the Walczak case, the court concluded that

"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 mitigating circumstances and defenses."

Id. at 810. In Cepeda's view, the required instructions will only be effective if the grand jury are also instructed on juvenile brain development. Essentially, his concern lies with the difference between an indictment for murder, pursuant to which the Commonwealth would proceed against him as an adult in the Superior Court, and an indictment for manslaughter, pursuant to which the Commonwealth would proceed against him in the Juvenile Court. In other words, if the grand jury were presented with information related to juvenile brain development, they would be better able to assess whether to indict the defendant as an adult (for murder) or as a juvenile (for manslaughter).

The single justice denied the petition without a hearing, and the case is now before us pursuant to S.J.C. Rule 2:21, as amended, 434 Mass. 1301 (2001). That rule applies where, as here, a single justice has denied relief from a challenged interlocutory ruling of the trial court, and requires Cepeda to show that "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." S.J.C. Rule 2:21 (2). Cepeda argues that he has no adequate alternative remedy because if the indictment for murder stands, and the Commonwealth thus proceeds against him as an adult, he will lose the protections that would otherwise be afforded to him if he were instead tried on a charge of manslaughter in the Juvenile Court.

His argument is unavailing. We have said repeatedly that "[t]he denial of a motion to dismiss in a criminal case is not appealable until after trial, and we have indicated many times that G. L. c. 211, § 3, may not be used to circumvent that rule. Unless a single justice decides the matter on the merits or reserves and reports it to the full court, neither of which occurred here, a defendant cannot receive review under G. L. c. 211, § 3, from the denial of his motion to dismiss." Bateman v. Commonwealth, 449 Mass. 1024, 1024-1025 (2007), quoting Jackson v. Commonwealth, 437 Mass. 1008, 1009 (2002). See Ventresco v. Commonwealth, 409 Mass. 82, 83-84 (1991), and cases cited. In other words, while a single justice may, in his or her discretion, entertain a petition on the merits, the petitioner is not entitled as a matter of right to require the single justice to do so.

Furthermore, we recently considered and rejected arguments similar to those that Cepeda makes here in N.M. v. Commonwealth, 478 Mass. 89 (2017). In that case, we addressed "whether a juvenile, who ha[d] been indicted as a youthful offender, [was] entitled as of right to interlocutory review of a denial of a motion to dismiss that indictment." Id. at 89. We concluded that there is no such entitlement. See id. In doing so, we recognized that

"the ordinary appellate process will not restore the protective nature of juvenile proceedings if it is later determined that the juvenile has been erroneously tried as a youthful offender. Nonetheless, [the] claims are not akin to a 'right not to be tried,' a right we have protected by recognizing a very limited exception to the general rule against interlocutory appeal for a petition from relief from the denial of a motion to dismiss on double jeopardy grounds."

Id. at 92, citing Forlizzi v. Commonwealth, 471 Mass. 1011, 1013 (2015). As in N.M., supra at 93, Cepeda's claims here "involve a . . . right to be tried in a different forum, not the right not to be tried at all, and the limited exception [in cases involving a right not to be tried] does not apply." There is no reason why the issues that Cepeda raises cannot adequately be addressed in an appeal from any conviction, which would provide appropriate relief if warranted.

The single justice did not err or abuse her discretion in denying relief under G. L. c. 211, § 3.¹

Judgment affirmed.

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

Veronica J. White for the petitioner.

¹ To the extent that Cepeda raises a second issue, relative to whether a grand jury actually reviews certain evidence presented to it (in this case, a surveillance video recording), he has provided no argument as to the lack of any adequate alternative remedy, and, in any event, we see no reason why this issue could not be addressed in an appeal from any adverse judgment.