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SJC-12771

COMMONWEALTH vs. FREDERICK H. PERRY.

October 17, 2019.

Practice, Criminal, Capital case, Postconviction relief, Appeal.

The defendant, Frederick Perry, was convicted of murder in the first degree by reason of extreme atrocity or cruelty. See Commonwealth v. Perry, 432 Mass. 214 (2000). In February 2019, he filed, in the Superior Court, his fourth motion for a new trial, which was denied. He then applied to a single justice of this court for leave to appeal from the denial, pursuant to G. L. c. 278, § 33E. The single justice denied the application. Perry has appealed from the single justice's ruling and the Commonwealth has moved to dismiss the appeal.¹

Perry has no right to appeal from the single justice's ruling. "A single justice, acting as a gatekeeper pursuant to G. L. c. 278, § 33E, may allow an appeal to the full court to proceed under that statute if the appeal presents a 'new and substantial' question." Commonwealth v. Anderson, 482 Mass. 1027, 1027 (2019), citing Commonwealth v. Gunter, 459 Mass. 480, 487, cert. denied, 565 U.S. 868 (2011). "If the appeal fails on either count, and the single justice denies the application, that decision 'is final and unreviewable.'" Anderson, supra, quoting Commonwealth v. Gunter, 456 Mass. 1017, 1017 (2010).

¹ Each of the defendant's previous motions for a new trial was similarly denied in the trial court, as were his subsequent applications to a single justice for leave to appeal from the denials pursuant to G. L. c. 278, § 33E. This is the first time that he has sought to appeal to the full court from a single justice's ruling denying an application for leave to appeal.

Perry's attempt to appeal from the single justice's denial of his application must therefore be dismissed.

Appeal dismissed.

Frederick H. Perry, pro se.

Thomas H. Townsend, Assistant District Attorney, for the Commonwealth.