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SJC-12928

COMMONWEALTH vs. TYRIEK BROWN.

April 14, 2021.

Supreme Judicial Court, Superintendence of inferior courts.
Evidence, Firearm.

The defendant, Tyriek Brown, has been indicted for possession of a firearm during the commission of a felony and other offenses. The defendant moved that the Commonwealth's test firing of the alleged firearm be observed by a defense expert. A nonevidentiary hearing on the motion took place. On March 27, 2019, a judge in the Superior Court denied the defendant's request to have his own expert be present at the test firing, but ordered that the test firing be audio-visually recorded and that the recording be provided to the defendant. Four months later, on August 2, 2019, the Commonwealth filed a motion for reconsideration. That motion was denied on September 3, 2019. Another four months later, on January 15, 2020, the Commonwealth filed a petition under G. L. c. 211, § 3, seeking relief from the judge's order. A single justice of this court denied relief without a hearing, and the Commonwealth appeals. We affirm.

As we have explained, "[a] single justice considering a petition filed pursuant to G. L. c. 211, § 3, performs a two-step inquiry. . . . The first step requires the single justice to decide 'whether to employ the court's power of general superintendence to become involved in the matter,' . . . or, stated differently, to 'decide, in his or her discretion, whether to review "the substantive merits of the . . . petition.'" (Citations omitted.) Commonwealth v. Dilworth, 485 Mass. 1001, 1002 (2020), quoting Commonwealth v. Fontanez, 482 Mass. 22, 24 (2019). "The single justice need not take the

second step (which is to resolve the petition on its substantive merits) 'if the petitioner has an adequate alternative remedy or if the single justice determines, in his or her discretion, that the subject of the petition is not sufficiently important and extraordinary as to require general superintendence intervention.'" Dilworth, supra, quoting Fontanez, supra at 24-25. See Commonwealth v. Rodriguez, 484 Mass. 1047, 1049 (2020). "Our role on appeal . . . is to determine whether [the single justice] abused [his] discretion by declining to intervene. . . . We give considerable deference to the single justice's exercise of discretion, and it is not for us to substitute our judgment for that of the single justice." Dilworth, supra.

Here, the single justice denied relief without addressing the substantive merits of the Commonwealth's petition. On appeal, it is incumbent on the Commonwealth to show that on the record before him, the single justice was required to exercise the court's superintendence power: that is, that the Commonwealth had no adequate alternative remedy and that the single justice abused his discretion by failing to reach the merits of its petition in the circumstances of this case. As to alternative remedies, we have repeatedly stated that, as a general rule, interlocutory orders pertaining to discovery are not immediately appealable, see, e.g., Commonwealth v. Ware, 471 Mass. 85, 92 (2015), citing Cronin v. Strayer, 392 Mass. 525, 528 (1984), and the Commonwealth has no right to appeal from a final judgment of acquittal. Although appellate review of an interlocutory order can sometimes be had by disobeying the order and appealing from any judgment imposed as a sanction, we do not require the Commonwealth to take this approach. See Commonwealth v. Bing Sial Liang, 434 Mass. 131, 133-134 (2001).¹

Regardless, the Commonwealth has not demonstrated that this case presented exceptional circumstances that required the single justice to reach the merits of its petition. The Commonwealth argues that the Superior Court judge's order will

¹ The Commonwealth may have a means of obtaining review that would not require it to disobey the judge's order: it could decline to conduct the testing and appeal from any resulting dismissal or required finding of not guilty based on insufficient evidence that the weapon was a "firearm" within the meaning of G. L. c. 140, § 121 (requiring, inter alia, that "a shot or bullet can be discharged"). The Commonwealth has not addressed in its brief the possibility of obtaining appellate review of the judge's order by this means.

effectively terminate the prosecution because State police policy prohibits recording the test firing of a weapon. As a result, the Commonwealth argues, it faces an untenable choice: either forgo test firing the weapon, and thus be unable to prove that it is a "firearm"; or test fire the weapon without recording the process, violating the judge's order and risking exclusion of the weapon from the evidence at trial. Accordingly, the Commonwealth contends that the judge's order will leave it unable to prosecute the defendant for firearm offenses and that in these exceptional circumstances, the single justice was obligated to grant extraordinary relief.

We disagree. "While a single justice might be warranted in finding exceptional circumstances when, for example, the Commonwealth's petition . . . concerns a ruling that effectively forecloses the prosecution," Dilworth, 485 Mass. at 1003, citing Fontanez, 482 Mass. at 26, we do not agree that the judge's order in this case was such a ruling. By its plain terms, the judge's order does not exclude any evidence; it merely imposes a requirement on the Commonwealth's ballistics testing. Moreover, the Commonwealth has not shown that the State police department's policies have the force of law or supersede any court order.² We see no reason why the Commonwealth could not carry out the test firing in compliance with the judge's order, or why the State police could not be ordered to permit recording of such testing should they refuse to do so.³

Even apart from these considerations, the Commonwealth's unexplained delay in seeking relief provides a further reason not to disturb the single justice's decision. Nearly ten months passed between the issuance of the judge's order and the filing of the Commonwealth's petition. In the interim, the Commonwealth moved in the Superior Court for reconsideration. However, it took four months after the judge issued his order for it to do so, and after reconsideration was denied, it took another four months to seek extraordinary relief. The Commonwealth has offered no reason for this delay. The Commonwealth's failure to seek relief promptly undermines its

² According to the judge's order, the State police were given the opportunity to participate in the hearing on this matter and declined to do so.

³ The parties disagree as to whether any alternate location is available to conduct the test firing, so as not to run afoul of the State police department's policy. We need not resolve that dispute here.

claim that the circumstances here compelled the single justice to exercise the court's extraordinary superintendence power. In these circumstances, the single justice was not required to reach the substantive merits of the Commonwealth's petition. There was no error or abuse of discretion in the denial of relief under G. L. c. 211, § 3.

Judgment affirmed.

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

Travis H. Lynch, Assistant District Attorney, for the Commonwealth.

Joseph N. Schneiderman for the defendant.