

NOTICE: All slip opinions and orders are subject to formal revision and are superseded by the advance sheets and bound volumes of the Official Reports. If you find a typographical error or other formal error, please notify the Reporter of Decisions, Supreme Judicial Court, John Adams Courthouse, 1 Pemberton Square, Suite 2500, Boston, MA, 02108-1750; (617) 557-1030; SJCRreporter@sjc.state.ma.us

SJC-13306

COMMONWEALTH vs. TOMMY BIRKS.

October 13, 2022.

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

The defendant, Tommy Birks, was convicted of murder in the first degree on a theory of joint venture. See Commonwealth v. Birks, 435 Mass. 782, 783 (2002). In February 2019, he filed in the county court a "Petition to Supreme Judicial Court Requesting Relief in the Form of an Order to the Trial Court to Correct the Record" and a "Motion Requesting Leave to Enter Petition on the Docket of the Supreme Judicial Court," purportedly pursuant to G. L. c. 278, § 33E. The single justice dismissed the petition "[o]n the basis that Birks had not first sought the requested postconviction relief in the Superior Court, and that there thus was no Superior Court decision from which Birks sought leave to appeal." Commonwealth v. Birks, 484 Mass. 1014, 1014 (2020). Birks appealed, and we affirmed the single justice's judgment. See id.

Thereafter, Birks filed, in the Superior Court, a "Motion to Correct and Modify the Record Pursuant to [Mass. R. A. P.] 8 (e)," as appearing in 481 Mass. 1611 (2019). After a judge in that court denied the motion, Birks returned again to the county court, filing an application for leave to appeal from that denial pursuant to G. L. c. 278, § 33E. The single justice denied the application. Birks filed a notice of appeal in the county court and, after his appeal was entered in this court, a "Motion Requesting Leave to Enter Petition on the Docket of the Supreme Judicial Court," essentially seeking leave to appeal from the single justice's decision. The Commonwealth, in turn, moved to dismiss the appeal.

Birks has no right to appeal from the single justice's ruling, regardless of whether he asks this court for leave to do so. "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). "A defendant who is denied leave to appeal from a single justice acting as a gatekeeper pursuant to the last sentence of G. L. c. 278, § 33E, has no right to appeal from the single justice's ruling denying leave." Commonwealth v. Companonio, 472 Mass. 1004, 1005 (2015), and cases cited. Birks's attempt to appeal from the single justice's denial of his application must therefore be dismissed.

Appeal dismissed.

Tommy Birks, pro se.
Cynthia Cullen Payne, Assistant District Attorney, for the Commonwealth.