

Appendix A

COMMONWEALTH OF MASSACHUSETTS

SUFFOLK, ss.

SUPREME JUDICIAL COURT  
FOR SUFFOLK COUNTY  
No. SJ-2018-0101

HAMPDEN SUPERIOR COURT  
No. 9979CR1813

COMMONWEALTH

vs.

PETER CRUZ

MEMORANDUM OF DECISION AND ORDER ON DEFENDANT'S PETITION FOR  
LEAVE TO APPEAL UNDER G. L. c. 278, § 33E

The defendant was indicted for being an accessory before the fact to murder, in violation of G. L. c. 274, § 2, and for being an accessory before the fact to armed robbery while masked, in violation of that same statute, and, following a jury trial in 2001, was found guilty of both offenses. Having been convicted of felony-murder as an accessory before the fact to an armed robbery while masked, his conviction of accessory before the fact to armed robbery while masked was dismissed because it was a lesser-included offense of the felony-murder. His felony-murder conviction was affirmed by the Supreme Judicial Court in 2004, which concluded that "[t]he defendant's presence at the murder scene was not a fact necessary to his conviction," and that "[t]he jury obviously believed the Commonwealth's evidence establishing that the defendant masterminded the plan to rob

[the victim] that led to the final shooting." Commonwealth v. Cruz, 442 Mass. 299, 312 (2004). The court concluded that he was entitled to plenary review under the standard set forth in G. L. c. 278, § 33E, but determined that "there is no ground on which to order a new trial or to reduce the level of his guilt."

Id.

The defendant filed a motion for a new trial in November, 2011; however, the record before me fails to reflect whether a ruling was made on this motion. In January, 2018, the defendant moved for a required finding of not guilty, pursuant to Mass. R. Crim. P. 25 (b) (2), arguing, in essence, that the evidence did not support a finding beyond a reasonable doubt that he had the intent required to prove any of the three prongs of malice. The motion judge (who was also the trial judge) denied the motion for a required finding of not guilty.

The defendant now petitions for leave to appeal the denial of that motion to the full court under the gatekeeper provision of G. L. c. 278, § 33E. I conclude that the defendant has failed to raise a "new and substantial" question justifying further review, and therefore deny leave to appeal to the full court. See G. L. c. 278, § 33E ("no appeal shall lie . . . unless . . . it presents a new and substantial question which ought to be determined by the full court").

Discussion. 1. "New and substantial." Under G. L. c. 278, § 33E, a defendant whose conviction of murder in the first

degree has been affirmed by this court after the plenary review afforded in § 33E, may appeal the denial of a postconviction motion only where the defendant presents "a 'new and substantial' issue that this court could not have considered in the course of plenary review." Commonwealth v. Gunter, 459 Mass. 480, 487 (2011), cert. denied, 565 U.S. 868 (2011). "The statute's 'new and substantial' test does not contemplate revisiting the decision in a [murder in the first degree] appeal merely to reconsider issues that were decided in the direct appeal, which the defendant claims were incorrectly decided, or to entertain arguments and theories that could have been, but were not, previously raised by the defendant." Id. at 490.

An issue is "new" within the meaning of § 33E, where it was not raised at trial or on direct review, was not argued or addressed on appeal, and reasonably could not have been addressed because the evidence on which it was based was not in the record or the applicable law was not sufficiently developed at the time of trial or direct appeal. Id. at 487-488, and cases cited. An issue is "substantial" if it is "a meritorious issue in the sense of being worthy of consideration by an appellate court." Id. at 487.

The defendant's motion presents neither a new nor a substantial issue. The issue is not new because the full court in his direct appeal understood that he was convicted only of felony-murder, with the underlying felony being accessory before

the fact to armed robbery while masked. See Cruz, 442 Mass. at 300. The issue is not substantial because, at the time of trial, the only intent required for felony-murder was the intent to commit the underlying felony (here, accessory before the fact to armed robbery while masked), and the court concluded that there was abundant evidence to support the jury's finding that he "masterminded the plan" to commit the robbery that ultimately led to the victim's killing. See id. at 312. See also Commonwealth v. Brown, 477 Mass. 805, 812 (2018) ("To convict the defendant of felony-murder on a theory of accomplice liability, the Commonwealth was required to prove beyond a reasonable doubt that the defendant knowingly participated in the commission of one of the underlying felonies, alone or with others, with the intent required for that offense"). Our narrowing of the felony-murder rule to require proof of one of the three prongs of malice applies prospectively -- that is, only to felony-murder cases that commence after the date of our decision in Brown -- and therefore would have no application to the defendant's conviction. See id. at 834 (Gants, C.J., concurring).

Conclusion. For the reasons stated above, it is ORDERED that the defendant's petition for leave to appeal is DENIED.

  
Ralph D. Gants  
Chief Justice

Entered: April 13, 2018

Appendix B  
COMMONWEALTH OF MASSACHUSETTS

SUFFOLK, SS.

SUPREME JUDICIAL COURT  
FOR SUFFOLK COUNTY  
No. SJ-2018-101

Hampden Superior Court  
No. 9979CR1813

**COMMONWEALTH**

v.

**PETER CRUZ**

**ORDER**

This matter came before the Court, Gants, C.J., on the defendant's request for rehearing of the April 13, 2018 order denying his petition for leave to appeal under G.L. c. 278, § 33E.

Treating the filing as a motion for reconsideration, and upon consideration thereof, it is ORDERED that the request be, and the same hereby is, DENIED.

By the Court, (Gants, C.J.) *MD*

*Maura S. Doyle*  
Maura S. Doyle, Clerk

Dated: May 1, 2018

**Additional material  
from this filing is  
available in the  
Clerk's Office.**