

APPENDIX A

NOTICE: Summary decisions issued by the Appeals Court pursuant to its rule 1:28, as amended by 73 Mass. App. Ct. 1001 (2009), are primarily directed to the parties and, therefore, may not fully address the facts of the case or the panel's decisional rationale. Moreover, such decisions are not circulated to the entire court and, therefore, represent only the views of the panel that decided the case. A summary decision pursuant to rule 1:28 issued after February 25, 2008, may be cited for its persuasive value but, because of the limitations noted above, not as binding precedent. See Chace v. Curran, 71 Mass. App. Ct. 258, 260 n.4 (2008).

COMMONWEALTH OF MASSACHUSETTS

APPEALS COURT

18-P-1675

COMMONWEALTH

vs.

RICHARD FELTON.

MEMORANDUM AND ORDER PURSUANT TO RULE 1:28

The defendant appeals from the order denying his fifth motion for new trial, in which he argued that the unpublished decision pursuant to our rule 1:28 in Commonwealth v. Felton, 87 Mass. App. Ct. 1134 (2015) (Felton II),¹ applying the procedural waiver doctrine in the context of a court room closure claim, violated due process and that his appellate counsel was ineffective for failing to raise this argument at the time. We affirm.

In Felton II, a panel of this court reversed the order allowing the defendant's second motion for new trial, in which the defendant asserted that members of his family had been

¹ The defendant's direct appeal was consolidated with the appeal from the order denying his first motion for new trial, and decided in an unpublished decision, Commonwealth v. Felton, 78 Mass. App. Ct. 1118 (2011), from which the defendant did not appeal.

excluded from the court room during jury empanelment, in violation of his right to public trial. The motion judge (who had also been the trial judge) had allowed the motion because he concluded, based on existing law including Commonwealth v. Alebord, 80 Mass. App. Ct. 432 (2011), that despite the doctrine of waiver, he was required to grant relief because the error was structural. On the Commonwealth's appeal, the panel concluded otherwise, pointing to Commonwealth v. Wall, 469 Mass. 652, 672-673 (2014), and Commonwealth v. LaChance, 469 Mass. 854, 857 (2014), both of which were decided after the denial of the defendant's second motion for new trial. See Felton II. The Supreme Judicial Court denied the defendant's application for further appellate review of Felton II, see 473 Mass. 1108 (2015), and the United States Supreme Court denied the defendant's petition for certiorari review, 137 S. Ct. 212 (2016).

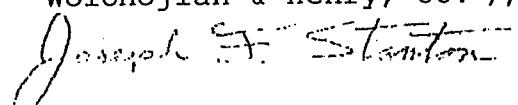
In this appeal, the defendant argues that "retroactive" application of Wall, 469 Mass. at 672-673, and LaChance, 469 Mass. at 857, violated his due process rights, and that his appellate counsel was ineffective for failing to make that argument. But the defendant's appeal in Felton II was pending when LaChance -- the case specifically addressing the question involved here about a "substantial risk of a miscarriage of justice" -- was decided, and the rule of LaChance must apply to

the defendant's case, just as it did in LaChance. In that case, at a time prior to October 21, 2014, when Alebord, 80 Mass. App. Ct. 438-439, remained good law, the motion judge heard the defendant's motion for new trial in which LaChance asserted that the unpreserved court room closure claim required a new trial because a substantial risk of a miscarriage of justice must be presumed because the error was structural. Nonetheless, on appeal, the Supreme Judicial Court did not announce that the rule was prospective only, which would have given LaChance the benefit of Alebord, supra. Rather, the court held that he was not entitled to a presumption of prejudice. LaChance, supra.

The defendant's claim in this case stands in precisely the same posture: at the time his claim was heard by the motion judge, Alebord was good law. Indeed, the motion judge reluctantly granted relief. See Felton II. On appeal, a panel of this court applied the intervening decisions in LaChance and Wall, concluded that the defendant was not entitled to a presumption that there was a substantial risk of a miscarriage of justice, and, as in LaChance, applied that rule despite the state of the law at the time of the motion judge's decision. Whether described as a "retroactive" application of LaChance and Wall or not, the decision in Felton II therefore was correct, the defendant's due process claim lacks merit, and the defendant's appellate counsel in Felton II was not ineffective.

for failing to argue that Wall and LaChance should not apply retroactively.²

Order dated August 6, 2018,
denying fifth motion for
new trial affirmed.

By the Court (Rubin,
Wolohojian & Henry, JJ.³),

Clerk

Entered: January 16, 2020.

² Contrary to the Commonwealth's position (and the motion judge's conclusion), a claim of ineffective assistance of appellate counsel can be brought via a motion pursuant to Mass. R. Crim. P. 30, as appearing in 435 Mass. 1501 (2001). Bates v. Commonwealth, 434 Mass. 1019, 1020 (2001) ("A claim of ineffective assistance of appellate counsel may be made in a motion pursuant to Mass. R. Crim. P. 30").

³ The panelists are listed in order of seniority.

APPENDIX B

COMMONWEALTH OF MASSACHUSETTS**ESSEX, ss.****SUPERIOR COURT
CRIMINAL
NO. 2007-00263****COMMONWEALTH****vs.****RICHARD FELTON**

**MEMORANDUM AND ORDER ON DEFENDANT'S
THIRD MOTION FOR NEW TRIAL**

Defendant Richard Felton ("Felton") was convicted by a jury on March 10, 2008, on charges of rape, kidnaping, indecent assault and battery, and assault and battery. He was sentenced by the trial judge (Lowy, J.) to six to eleven years in state prison, followed by a period of probation. Conviction was just the beginning of this litigation marathon. His first motion for new trial was denied and its appeal was consolidated with his direct appeal. Judgment was affirmed by the appeals court. Felton's second motion for new trial was allowed by the court (Lowy, J.), but appealed to the appeals court. The appeals court reversed the allowance of the second new trial motion. While the appeal was pending, Felton was released on bail, but then his bail was revoked and he was returned to custody. Felton took the revocation of his bail to the Supreme Judicial Court. His petition was denied, and then his three

motions for reconsideration were also denied.

Felton filed his third motion for new trial on January 26, 2016. [D. 138]. He represents himself *pro se*. The motion was over ninety pages in length. The court (Lowy, J.) requested and received a written opposition memorandum from the Commonwealth. [D. 145]. A non-evidentiary hearing was held. On May 2, 2016, the court (Lowy, J.) denied the motion with the following endorsement: “For the reasons stated in the Commonwealth’s opposition motion and based upon *Commonwealth v. Britto*, 433 Mass. 596, 608 (2001), the motion for new trial is DENIED.” In *Britto*, the Court rejected the defendant’s challenge to the failure of the trial court to hold an evidentiary hearing on a new trial motion. The Court stated: “For reasons we have discussed, the motion and affidavits are not adequate to cast doubt on the effectiveness of counsel’s performance. They do not, therefore, raise a substantial issue, and the judge properly decided the motion on the basis of the affidavits and his familiarity with the trial.” *Id.* at 608. Judge Lowy left the superior court and was appointed as an Associate Justice of the Supreme Judicial Court in August 2016. Because of Judge Lowy’s unavailability, the undersigned associate justice has been assigned by the Regional Administrative Justice to perform any remaining duties in this case. See Mass. R. Crim. P. 37(c). The court is satisfied that it can properly perform those duties, despite not presiding at trial.

Felton then filed a motion for reconsideration of the denial of his third motion for new trial which could fairly be considered a fourth motion for new trial, although without any proffered reasons why the purportedly new arguments could not have been included in his third motion for new trial, if not his first or second. [D. 162]. In any event, no substantial issue was raised, whether calling the motion one for reconsideration or a fourth new trial motion, and the motion was denied for reasons stated in the Commonwealth's opposition memorandum [D. 145], as well as additional reasons stated in the court's (Feeley, J.) memorandum decision and order. [D. 163]. A timely appeal of the court's decision was filed. [D. 164]. The appeal has been docketed and is stayed pending filing and adjudication of Felton's fifth motion for new trial. [D. 178, 179].

Now before the court is Felton's fifth motion for new trial pursuant to Mass. R. Crim. 30(b). [D. 174]. In fact, Felton's fifth motion for new trial is not a new trial motion at all. It does not challenge any decision by the trial court. Rather, it challenges the appeals court's decision reversing the trial court's allowance of his second new trial motion, which had challenged the courtroom closure during impanelment. Further appellate review of the appeals court's decision was denied by the Supreme Judicial Court, and Felton's petition for writ of certiorari was denied by the United States Supreme Court. He has no recourse in this court for his

dissatisfaction with the appeals court's public trial/waiver decision. As no substantial issue is raised by the motion or affidavits, the motion will be **DENIED** without a hearing. Mass. R. Crim. P. 30(c)(2).

ORDER

Felton's fifth motion for new trial [D. 174] is **DENIED**.

Timothy Q. Feeley
Timothy Q. Feeley
Associate Justice of the Superior Court

August 6, 2018

APPENDIX C

Supreme Judicial Court for the Commonwealth of Massachusetts

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RE: Docket No. FAR-27325

COMMONWEALTH
vs.
RICHARD FELTON

Essex Superior Court No. 0777CR00263
A.C. No. 2018-P-1675

NOTICE OF DENIAL OF APPLICATION FOR FURTHER APPELLATE REVIEW

Please take note that on March 12, 2020, the application for further appellate review was denied. (Lowy, J., recused)

Francis V. Kenneally, Clerk

Dated: March 12, 2020

To: Catherine L. Semel, A.D.A.
Kenneth E. Steinfield, A.D.A.
Richard Felton

APPENDIX D

87 Mass.App.Ct. 1134

Unpublished Disposition

NOTICE: THIS IS AN UNPUBLISHED OPINION.

Appeals Court of Massachusetts.

COMMONWEALTH

v.

Richard FELTON.

No. 12-P-792. | July 2, 2015.

By the Court (MEADE, HANLON & BLAKE, JJ.⁴).

**MEMORANDUM AND ORDER
PURSUANT TO RULE 1:28**

*1 After an evidentiary hearing, a judge of the Superior Court allowed the defendant's second motion for a new trial.¹ See Mass.R.Crim.P. 30(b), as appearing in 435 Mass. 1501 (2001). The Commonwealth appeals, claiming that the defendant waived his right to a public trial and that he was not deprived of the assistance of counsel. We reverse.

The Commonwealth claims that by failing to object to a court room closure during jury empanelment, and by failing to raise the issue in his first motion for new trial, the defendant waived his right to a public trial. We agree.

Contrary to the defendant's claims, this case is controlled in all material respects by *Commonwealth v. Wall*, 469 Mass. 652 (2014), and *Commonwealth v. LaChance*, 469 Mass. 854 (2014). The judge reluctantly allowed the defendant's second motion for a new trial based on the state of the law in 2012. Before *LaChance* and *Wall*, it was not clear that the defendant had waived his right to a public trial by failing to object when his family members were asked to leave the court room during jury empanelment. The judge also felt constrained to allow the defendant's motion even though the claim was made for the first time in his second motion for a new trial. *LaChance* and *Wall* have since addressed both of those issues. "Where counsel fails to lodge a timely objection to the closure of the court room, the defendant's claim of error is deemed to be procedurally waived." *Commonwealth v. LaChance*, *supra* at 857. Also, "[a] procedural waiver may occur where the failure to object is inadvertent." *Commonwealth v. Wall*, *supra* at 672-673. Furthermore, "[w]here defense counsel did

not object to any alleged court room closure at trial, and the defendant failed to raise the claim in his first motion for new trial, ... the defendant's right to a public trial during jury empanelment has been waived." *Id.* at 673.

Because the defendant waived his right to a public trial, our review is limited to determining whether a substantial risk of a miscarriage of justice was created. *Commonwealth v. LaChance*, *supra*. The closing of the court room occurred during jury empanelment, as was the common practice in the Superior Court at that time. Because there is no "serious doubt whether the result of the trial might have been different" had the court room not been closed to the defendant's family members, *Commonwealth v. Randolph*, 438 Mass. 290, 297 (2002), quoting from *Commonwealth v. Azar*, 435 Mass. 675, 687 (2002), the defendant has not shown he was prejudiced by the closure, and thus there is no risk that justice miscarried.^{2, 3}

Finally, the defendant claims that he was actually or constructively deprived of the assistance of counsel. He does so in an attempt to establish his case as one of the "limited circumstances" where prejudice can be presumed. *Commonwealth v. LaChance*, *supra* at 859. The defendant does not claim he received *ineffective* assistance of counsel, but that he was entirely deprived of his attorney's assistance because she was unaware of the court room's closure, and thus unable to object. We disagree. The defendant was represented by competent, well-prepared counsel at all critical stages of the proceedings, including jury empanelment. See *United States v. Cronic*, 466 U.S. 648 (1984). "Constructive denials of counsel rising to a level of structural error occur only where the defendant essentially is denied the assistance of any qualified attorney who could theoretically represent him in a way that does not undermine our trust in the adversary system." *Commonwealth v. Valentin*, 470 Mass. 186, 197 (2014). That did not happen here; counsel was not prevented from assisting the defendant during empanelment because, as the motion judge (who was also the trial judge) found, the defendant did not inform his counsel or the judge when he saw his family being escorted from the court room. The defendant's additional claim that his appellate counsel was *ineffective* is without merit.

*2 *The order allowing the second motion for new trial is reversed.*

A new order shall enter denying the motion.

All Citations

87 Mass.App.Ct. 1134, 33 N.E.3d 1267 (Table), 2015 WL 4006156

Footnotes

- 4 The panelists are listed in order of seniority.
- 1 The judge also reported questions to this court, which are moot, as discussed *infra*.
- 2 The fact that counsel was not aware of the closing of the court room is immaterial to determining whether the right has been procedurally waived. *Commonwealth v. Jackson*, 471 Mass. 262, 268–269 (2015).
- 3 Presuming prejudice here “would ignore the distinction, one long recognized by [our courts], between properly preserved and waived claims.” *Commonwealth v. LaChance*, *supra* at 857.

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