

COMMONWEALTH OF MASSACHUSETTS

SUFFOLK, SS.

SUPREME JUDICIAL COURT
FOR SUFFOLK COUNTY
No. SJ-2009-0203

COMMONWEALTH

vs.

CORIE STOKES

MEMORANDUM AND ORDER ON
DEFENDANT'S PETITION FOR LEAVE TO APPEAL

The defendant, Corie Stokes, was convicted of murder in the first degree on theories of joint venture and felony murder. This court affirmed the conviction on the defendant's direct appeal. *Commonwealth v. Stokes*, 440 Mass. 741 (2004). Substantially after the rescript had entered with respect to the direct appeal, the defendant filed a motion for a new trial, which the trial judge denied in March of 2009. The defendant now brings this petition pursuant to G. L. c. 278, § 33E, to seek authorization to appeal to the full court from the judge's denial. See G. L. c. 278, § 33E, final sentence ("If any motion is filed in the superior court after rescript, no appeal shall lie from the decision of that court upon such motion unless the appeal is allowed by a single justice of the supreme judicial court on the ground that it presents a new and substantial question which ought to be determined by the full court"). For the reasons briefly set out below, I conclude that the defendant's petition should be denied.

The defendant was indicted on charges of murder in the first degree, armed home invasion, illegal possession of a firearm, and conspiracy to commit armed robbery. At trial, the judge included instructions on murder in the first degree by deliberate premeditation; felony murder in the first degree, with the underlying felony being armed robbery or attempted armed robbery (there was no armed robbery or attempted armed robbery indictment); murder in the second degree (but not felony murder in the second degree); armed home invasion; illegal possession of a firearm; and conspiracy to commit armed robbery. He also included instructions on principal and joint venture liability. The jury found the defendant guilty of murder in the first degree on a theory of felony murder as a joint venturer; of armed home invasion as a principal; of conspiracy to commit armed robbery; and of illegal possession of a firearm. The principal basis of the defendant's motion for a new trial was that the trial judge erred in not instructing the jury on murder in the second degree on a theory of felony murder with the predicate felony being armed home invasion, G. L. c. 265, § 18C. He argues that the trial judge (as well as the parties and their counsel, and, it seems, this court on direct appeal) assumed that armed home invasion was a life felony, which was an incorrect assumption.¹ Because, the argument continues, G. L. c. 265, § 18C, at the relevant time in fact provided only for a twenty-year maximum sentence, it should have been the basis of a second degree felony murder

¹ The defendant is correct that the life felony assumption was wrong. On August 9, 1999, the date on which the homicide at issue in this case was committed, a 1998 amendment to G. L. c. 265, § 18C, provided that if the armed home invasion involved a firearm, a twenty-year sentence was the maximum sentence. See St. 1998, c. 180, § 57. See also *Commonwealth v. Burton*, 450 Mass. 58 (2007).

instruction to the jury, and the absence of such an instruction requires a new trial or reduction in the verdict pursuant to G. L. c. 278, § 33E.

The judge below denied the new trial motion on a ground that was independent of any issue concerning the maximum sentence for armed home invasion. He ruled that on the facts of this case, the doctrine of merger precluded the armed home invasion serving as the basis of felony murder (implicitly including both in the first or second degree), citing *Commonwealth v. Gunter*, 427 Mass. 259, 272-274 (1998). The brief description of the facts of the case found in *Commonwealth v. Stokes, supra*, 440 Mass. at 742-743, support the judge's conclusion:² it appears from the decision that the victim's girl friend, Crystal Rego, opened the door to her apartment in response to a knock; the defendant and one other man barely entered through the door; and a shot was immediately fired by one of them that hit and killed the victim. From this brief description, it appears reasonably clear that this firing of the fatal shot at the victim also constituted the only use of force or intentional causing of injury that is a necessary element of the crime of armed home invasion.³ In the circumstances, the armed home invasion merged with the homicide. Cf.

² The record before me does not include any materials that provide more information about the evidence at trial.

³ General Laws c. 265, § 18C, which defines the crime of armed home invasion, provides in relevant part:

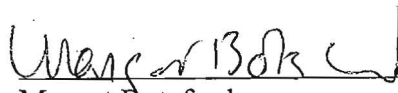
“Whoever knowingly enters the dwelling place of another knowing or having reason to know that one or more persons are present within or knowingly enters the dwelling place of another and remains in such dwelling place knowing or having reason to know that one or more persons are present within while armed with a dangerous weapon, uses force or threatens the imminent use of force upon any person within such

Commonwealth v. Gunter, 427 Mass. at 273-274 (discussing armed assault in dwelling with intent to commit a felony, G. L. c. 265, § 18A, and need for felony forming basis of felony murder to be “independent” of homicide: “If the acts constituting that assault also cause the homicide, we could not conclude that the felony defined in G. L. c. 265, § 18A, is separate from the acts of personal violence that constitute a necessary part of the homicide itself”).

Based on my review of the defendant’s petition and supporting arguments, the judge’s decision on the motion for a new trial and the Commonwealth’s opposition to the defendant’s petition, I conclude that the defendant has not presented “a new and substantial question which ought to be determined by the full court.” G. L. c. 278, § 33E. See *Commonwealth v. Ambers*, 397 Mass. 705, 706-708 (1996).

ORDER

For the foregoing reasons, the defendant’s petition for leave to appeal is DENIED. Judgment is to enter dismissing the petition.



Margot Botsford
Justice of the Supreme Judicial Court

DATED: August 5, 2009

dwelling place whether or not injury occurs, *or intentionally causes any injury to any person within such dwelling place* shall be punished . . .” (emphasis supplied).