

NOTICE: Summary decisions issued by the Appeals Court pursuant to M.A.C. Rule 23.0, as appearing in 97 Mass. App. Ct. 1017 (2020) (formerly known as 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 23.0 or 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

20-P-1322

COMMONWEALTH

vs.

JAIME RESENDE.

MEMORANDUM AND ORDER PURSUANT TO RULE 23.0

The defendant was convicted after a jury trial of armed home invasion and armed assault with intent to rob. After the Supreme Judicial Court affirmed his convictions on appeal, see Commonwealth v. Resende, 476 Mass. 141 (2017), the defendant filed two pro se motions in the Superior Court -- one for release from unlawful restraint (rule 30 [a] motion) and the other for a new trial (rule 30 [b] motion). See Mass. R. Crim P. 30 (a), (b), as appearing in 435 Mass. 1501 (2001). Two different judges denied the motions, and the defendant appeals.¹

¹ The first motion judge denied the defendant's rule 30 (a) motion on January 2, 2019, and his motion for reconsideration on January 23, 2019. The defendant filed a timely appeal, which was stayed pending disposition of the rule 30 (b) motion. The second motion judge denied the rule 30 (b) motion on June 25, 2020, and the defendant timely moved for reconsideration within thirty days. After the second motion judge denied reconsideration on September 11, 2020, the defendant filed a

The narrow question before us is whether the motion judges abused their discretion in concluding that direct estoppel or waiver barred the defendant's claims. We discern no abuse of discretion and therefore affirm.

Background. The facts underlying the convictions are set out in the Supreme Judicial Court's opinion, see Resende, 476 Mass. at 143-144, and we do not repeat them here. For purposes of this appeal, it suffices to provide a brief summary of the prior proceedings.

In 2010 a jury convicted the defendant of murder in the first degree on a theory of felony-murder, armed home invasion, and armed assault with intent to rob. At sentencing the trial judge dismissed the conviction of armed home invasion as duplicative of the felony-murder conviction. The defendant moved for a new trial, which the judge allowed as to the felony-murder conviction only. At the second trial in 2015, a jury found the defendant not guilty of felony-murder.

The defendant then moved for release from unlawful restraint, arguing that his original convictions of armed home invasion and armed assault with intent to rob (original convictions) should be vacated in light of the second jury's verdict. For its part the Commonwealth filed a motion to

second timely appeal. The appeals were then consolidated in this court. The defendant is represented by counsel on appeal.

reinstate the conviction of armed home invasion, arguing that it was no longer duplicative. After the defendant's motion was denied and the Commonwealth's allowed, the defendant appealed from those rulings and from the original convictions. On direct appellate review, the Supreme Judicial Court affirmed. The court rejected the defendant's arguments that the original convictions violated double jeopardy principles, see id. at 146-147; that the original convictions should be vacated as legally or factually inconsistent with the second jury's verdict, see id. at 147-149; and that they should be vacated in the interest of fundamental fairness, see id. at 149. On this last point, the court observed that "[t]he defendant was found guilty of both offenses by a fair and impartial jury in the first trial" and "[t]he second trial . . . cannot spare the defendant from the consequences of convictions properly decided by a different jury." Id.

Nearly two years later, the defendant filed his current rule 30 (a) motion, again arguing that his acquittal in the second trial invalidated his original convictions. After denying the motion without comment, the first motion judge explained in his decision denying reconsideration that the issues raised by the defendant "were addressed in [the] defendant's appeal" and "[t]he Supreme Judicial Court affirmed the convictions." Similarly, in denying the defendant's rule

30 (b) motion, the second motion judge concluded that the Supreme Judicial Court had "thoroughly addressed" most of the defendant's arguments and that he had waived any arguments that were not raised on appeal.

Discussion. While this case has a long and complex history, our review is confined to determining whether the motion judges committed a significant error of law or otherwise abused their discretion in concluding that the defendant's claims were procedurally barred. See Commonwealth v. Robideau, 464 Mass. 699, 701-702 (2013). Two procedural doctrines are at issue. First, the doctrine of direct estoppel prevents a defendant from relitigating issues that were "already litigated and determined" in a prior proceeding where "such determination was essential to the . . . conviction" and "the defendant had an opportunity to obtain review of the determination."

Commonwealth v. Arias, 488 Mass. 1004, 1006 (2021), quoting Commonwealth v. Watkins (No. 1), 486 Mass. 801, 806 (2021).

Second, the doctrine of waiver addresses the consequences of a defendant's failure to raise issues that "'could have been raised, but were not raised' on direct appeal or in a prior motion for a new trial." Commonwealth v. Watson, 409 Mass. 110,

112 (1991), quoting Commonwealth v. Deeran, 397 Mass. 136, 139 (1986).²

The primary claim that the defendant seeks to raise is that his appellate counsel was ineffective for not seeking invalidation of the original convictions on the ground of issue preclusion. The gist of the defendant's issue preclusion argument is that, because the Commonwealth relied on the same evidence and the same joint venture theory in both trials, the original convictions had to be vacated once the second jury acquitted the defendant of felony-murder on retrial. But as the motion judges properly recognized, this is in substance a repackaging of the central claim raised by appellate counsel before the Supreme Judicial Court -- namely, "that, as a result of the acquittal on the felony-murder charge, [the defendant] has been deemed innocent of all of the [original] felony charges, because they involved the same acts that underlay the murder indictment." Resende, 476 Mass. at 146. Although appellate counsel did not specifically frame his arguments in terms of issue preclusion, the crux of the appeal was whether the acquittal in the second trial required invalidation of the

² "While a judge does have the discretion to rehear such questions, [the Supreme Judicial Court] has recommended restricting the exercise of that power to 'those extraordinary cases where, upon sober reflection, it appears that a miscarriage of justice might otherwise result.'" Watson, supra, quoting Commonwealth v. Fogarty, 406 Mass. 103, 107-108 (1989).

original convictions. The defendant is estopped from relitigating that issue through a postconviction motion. See Arias, 488 Mass. at 1006 (direct estoppel barred claims that "were predicated on the central claim that was rejected on direct appeal"); Commonwealth v. Balliro, 437 Mass. 163, 170-171 (2002) (defendant could not relitigate claims that were, in substance, reassertions of claims that had previously been resolved against him). This is so even though the defendant raises the argument under the rubric of ineffective assistance of counsel. See Balliro, supra at 170, quoting Commonwealth v. Silva, 25 Mass. App. Ct. 220, 228 (1987) ("When an appellate court has already reviewed the defendant's convictions, a claim based on the same issues 'but newly attired in the garb of ineffective assistance of counsel is [duplicative]'").

Furthermore, even assuming that the defendant's ineffective assistance claim is procedurally proper, he still would not be entitled to relief. The doctrine of issue preclusion bars relitigation of an issue "in a subsequent action" between the same parties where that issue was previously litigated and essential to a final judgment. Commonwealth v. Rodriguez, 443 Mass. 707, 710 (2005). The doctrine does not operate to undo a prior judgment, and any such argument would have been futile. Appellate counsel was therefore not ineffective for failing to raise the argument, nor did his performance deprive the

defendant of a substantial ground of defense. See Commonwealth v. Saferian, 366 Mass. 89, 96 (1974).³

The defendant next argues that Commonwealth v. Bell, 460 Mass. 294 (2011), did not allow the Commonwealth to keep the original convictions in place while simultaneously retrying him on the felony-murder charge. But the Supreme Judicial Court considered Bell in the defendant's appeal and held that "double jeopardy principles [did] not require the Commonwealth to choose between a retrial on all of the charges . . . or no retrial at all." Resende, 476 Mass. at 147. The defendant is estopped from relitigating that issue. See Rodriguez, 443 Mass. at 710. To the extent his current argument varies from his arguments on appeal, we discern no miscarriage of justice. See Watson, 409 Mass. at 112-114.

Finally, direct estoppel bars the defendant's argument that the second trial judge erred by not vacating the original convictions once the second jury returned their verdict. The Supreme Judicial Court considered and rejected this argument,

³ Contrary to the defendant's assertion, appellate counsel did not belatedly raise issue preclusion in the petition for rehearing that he filed with the Supreme Judicial Court. The petition makes no mention of issue preclusion (or collateral estoppel). Likewise, the email messages sent to appellate counsel by an associate and a legal intern do not identify issue preclusion as a potential appellate argument. In any event, as we have determined, issue preclusion would not have been a substantial ground of defense.

which was central to the appeal. See Resende, 476 Mass. at 145-146.

Conclusion. The order dated January 2, 2019, denying the defendant's rule 30 (a) motion and the order dated January 23, 2019, denying his motion for reconsideration are affirmed. The order dated June 25, 2020, denying the defendant's rule 30 (b) motion and the order dated September 11, 2020, denying his motion for reconsideration are affirmed.

So ordered.

By the Court (Sullivan,
Massing & Shin, JJ.⁴),



Clerk

Entered: May 13, 2022.

⁴ The panelists are listed in order of seniority.