

Commonwealth of Massachusetts

Appeals Court for the Commonwealth

At Boston,

In the case no. 02-P-318

COMMONWEALTH

vs.

MICHAEL G. ELBERRY.

Pending in the Superior

Court for the County of Worcester

Ordered, that the following entry be made in the docket:

Order denying motion for
new trial affirmed.

By the Court,

Ashley Ahear

, Clerk

Date March 10, 2003.

NOTE:

The original of the within rescript
will issue in due course, pursuant
to M.R.A.P.23

APPEALS COURT

COMMONWEALTH OF MASSACHUSETTS

APPEALS COURT

02-P-318

COMMONWEALTH

vs.

MICHAEL G. ELBERRY.✓

MEMORANDUM AND ORDER PURSUANT TO RULE 1:28

We affirm the motion judge's denial of Elberry's motion for a new trial and request for an evidentiary hearing. The facts in this case are set forth in succinct manner in our decision affirming the defendant's conviction on direct appeal.

Commonwealth v. Elberry, 38 Mass. App. Ct. 912 (1995). The motion judge determined that certain of the defendant's claims, (claims of judicial misconduct, prosecutorial misconduct, inadequate jury instructions, errors in the admission of evidence, errors in sentencing, and claim that the verdicts were against the weight of the evidence), were waived, as they had not been raised in his direct appeal. For the reasons and upon the authorities set forth in the motion judge's memorandum of decision, and in the Commonwealth's brief, especially at pages twenty through twenty-three, we agree that the defendant's claims were waived by his failing to raise them in his direct appeal.

✓ Although the defendant, in his pro se brief, spells his name "Elbery," we follow our editorial convention of adhering to the spelling in the indictment.

In his motion, Elberry also claimed ineffective assistance of both his trial and appellate counsel. The motion judge found that he had waived any claim to ineffective assistance of trial counsel, again, because that claim was not raised in his direct appeal. We agree. See Commonwealth v. Chase, 433 Mass. 293, 298-299 (2001).

With regard to the defendant's claim of ineffective assistance of appellate counsel, the motion judge appropriately reviewed the trial record to determine whether trial counsel was in fact ineffective and thus appellate counsel would have been ineffective if he failed to raise trial counsel's ineffectiveness on appeal. Our review of the trial record leads us the same conclusion as that reached by the motion judge: that trial counsel was not ineffective, and therefore appellate counsel had no reason to raise the issue on direct appeal.

For the reasons and upon the authorities set forth in the motion judge's memorandum of decision, and for those set forth in the Commonwealth's brief, especially at pages twenty-three through forty-three, we affirm the motion judge's denial of the defendant's motion in this regard. We further conclude that there was no abuse of discretion in the motion judge's refusal to grant an evidentiary hearing, as the defendant raised no

substantial issue. See Mass.R.Crim.P. 30(c)(3), 378 Mass. 901 (1979).

Order denying motion for new
trial affirmed.

By the Court (Laurence, Gelinas
& Mills, JJ.),

Ashley Ahearn
Clerk

Entered: March 10, 2003.