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STATE OF CONNECTICUT *v.* MARK J. DESPRES
(AC 45614)

Bright, C. J., and Suarez and Seeley, Js.

Syllabus

The defendant, who had been convicted, on a plea of guilty, of murder and conspiracy to commit murder, appealed to this court from the judgment of the trial court dismissing his motion to correct an illegal sentence. The defendant claimed that his sentence was imposed in an illegal manner pursuant to the applicable rule of practice (§ 43-22) because the trial court had denied his motion to represent himself at his sentencing hearing and because F, his defense counsel, had failed to provide him with certain documents related to his defense. *Held:*

1. The trial court correctly concluded that it lacked subject matter jurisdiction with respect to the defendant's claim regarding F's failure to provide him with certain documents related to his defense and properly dismissed the defendant's motion to correct an illegal sentence with respect to that claim; the defendant's claim was not a colorable claim under Practice Book § 43-22, as it was a claim of ineffective assistance of counsel and did not challenge the defendant's sentence or sentencing proceedings.
2. The trial court erred in its determination that it lacked subject matter jurisdiction with respect to the defendant's claim regarding the denial of his right to self-representation at his sentencing hearing, and, consequently, it improperly dismissed his motion to correct with respect to that claim: pursuant to the sixth amendment to the United States constitution, a defendant has the right to represent himself at all critical stages of the criminal proceedings and, because the sentencing hearing is a critical stage of the criminal proceedings, the defendant's claim that the court impermissibly failed to allow him to represent himself at the sentencing hearing plausibly challenged the sentencing proceeding itself, rather than the defendant's underlying conviction, and, as such, satisfied the threshold for subject matter jurisdiction set forth in *State v. Ward* (341 Conn. 142); accordingly, the case was remanded to the trial court to make factual determinations relating to the merits of that claim.

Argued April 10—officially released July 25, 2023

Procedural History

Substitute information charging the defendant with the crimes of capital felony murder, murder, and conspiracy to commit murder, brought to the Superior Court in the judicial district of New London, where the defendant was presented to the court, *Clifford, J.*, on a plea of guilty to the charges of murder and conspiracy to commit murder; judgment of guilty in accordance with the plea; thereafter, the state entered a nolle prosequi as to the charge of capital felony murder; subsequently, the court, *Clifford, J.*, denied the defendant's motion to represent himself at his sentencing hearing; thereafter, the court, *Strackbein, J.*, denied the defendant's motion to correct an illegal sentence, and the defendant appealed to this court. *Reversed in part; further proceedings.*

Mark J. Despres, self-represented, the appellant (defendant).

Linda F. Rubertone, senior assistant state's attorney, with whom, on the brief, was *Paul Narducci*, state's attorney, for the appellee (state).

Opinion

SEELEY, J. The self-represented defendant, Mark J. Despres, appeals from the judgment of the trial court dismissing his motion to correct an illegal sentence filed pursuant to Practice Book § 43-22.¹ On appeal, the defendant claims that the court improperly concluded that it lacked jurisdiction to hear his motion. Specifically, the defendant argues that the court improperly determined that his claims regarding the sentencing court's denial of his motion to represent himself at that proceeding and his attorney's failure to turn over documents did not fall within the ambit of Practice Book § 43-22. We agree with the defendant that the trial court improperly concluded that it lacked jurisdiction with respect to his claim regarding the denial of his request for self-representation and disagree with respect to his claim regarding his attorney's failure to turn over the aforementioned documents. Accordingly, we affirm in part and reverse in part the judgment of the court.

The following facts, either as set forth by this court in a prior appeal or as undisputed in the record, and procedural history are relevant to our resolution of this appeal. On March 10, 1994, the defendant shot and killed Anson B. Clinton III, as part of a conspiracy with Beth Ann Carpenter and Haiman Long Clein. The defendant was charged with capital felony murder, murder, and conspiracy to commit murder. On March 25, 1996, Attorney Michael Fitzpatrick was appointed as counsel for the defendant. In May, 1997, the defendant entered into an agreement with the state to plead guilty to murder and conspiracy to commit murder. As part of the plea agreement, the defendant agreed to cooperate fully with the state, including by “testifying truthfully in any subsequent trial or hearing arising from the death of . . . Clinton” The state agreed not to prosecute the capital felony murder charge and to recommend a sentence of forty-five years of incarceration, while allowing the defendant the right to argue for a lesser sentence.

The defendant subsequently filed multiple motions to withdraw his guilty plea between 1997 and 2002. The defendant refused to testify at Carpenter's trial when she was prosecuted for her role in Clinton's death. *Despres v. Commissioner of Correction*, 166 Conn. App. 572, 577, 142 A.3d 400, cert. denied, 323 Conn. 916, 149 A.3d 498 (2016). As a result, on April 22, 2002, the prosecutor notified the defendant that he had violated the terms of the plea agreement. On June 28, 2002, the defendant filed a motion to dismiss Fitzpatrick and to represent himself in anticipation of the upcoming sentencing hearing. At the bottom of the motion, the defendant wrote: “Can I please get an appearance form to file to take my case over? Also can you please send me the next court date for this motion” On July 2, 2002, Fitzpatrick filed a motion to withdraw.

On September 12, 2002, Fitzpatrick withdrew his motion, and the court, *Clifford, J.*, denied the defendant's motion to represent himself. During that hearing, Judge Clifford asked the defendant: "Are you asking to represent yourself at the sentencing hearing?" The defendant replied, "[y]es." The court did not canvass the defendant² regarding his invocation of the right of self-representation but, rather, stated: "I don't know if it really matters whether you represent yourself or [whether] you have an attorney because the attorney can address me and, you know, have me consider any information and so can you. So, it really doesn't make a difference." In ruling on the motion, the court stated: "I'm going to deny your request to have . . . Fitzpatrick . . . fired at this point and to represent yourself because basically at the time of sentencing, you can—as I said, you can indicate to me anything you want. It's almost as if you're representing yourself anyway because that's what a sentencing is."

During that same hearing, the defendant also raised with the court a separate issue regarding documents that he alleged Fitzpatrick had failed to turn over to him, including a statement given by Clein as part of Clein's plea agreement. In response, Fitzpatrick stated to the court that his law firm had given the defendant a copy of the relevant documents, which subsequently were lost. Fitzpatrick stated that he also gave the defendant a second, complete set of the documents. Fitzpatrick acknowledged, however, that he had not specifically handed over a copy of Clein's statement, and he agreed to do so.

Sometime after Judge Clifford had denied his motion for self-representation, the defendant hired Attorney Jon Schoenhorn to resurrect the plea agreement and to represent him at his sentencing hearing, which Schoenhorn did. See *Despres v. Commissioner of Correction*, supra, 166 Conn. App. 577–78. On December 4, 2003, Judge Clifford sentenced the defendant to forty-five years of incarceration, in part, because of the defendant's refusal to adhere to his plea agreement and to cooperate with the state during Carpenter's trial. See *id.*, 578.

On July 22, 2021, the defendant filed a motion to correct an illegal sentence.³ He argued in his motion that the sentence imposed by Judge Clifford was illegal under Practice Book § 43-22. Specifically, the defendant claimed that imposing the sentence after denying his motion to represent himself resulted in an illegal sentence. The defendant further argued that the sentence was illegal because of Fitzpatrick's alleged failure to provide the defendant with certain documents related to his defense. The state filed its objection to the defendant's motion to correct an illegal sentence on August 12, 2021, in which it argued that the court lacked jurisdiction to hear the defendant's motion because the

defendant's claims did not attack the sentencing proceeding itself but, rather, related to his frustrations with his attorney and the fact that he had not been permitted by the court to represent himself at the sentencing hearing. The state further argued that, even if the court determined that it did have jurisdiction, the motion should be denied because the defendant had not established that his rights were violated.

After hearing from both parties on May 4, 2022, the court, *Strackbein, J.*, subsequently issued a memorandum of decision. The court concluded that the defendant's claim did not attack the sentencing proceeding itself and, accordingly, dismissed the defendant's motion for lack of jurisdiction. In its memorandum of decision, the court agreed with the state's assertion that the defendant's claim "does not attack the sentencing proceeding, but rather his dissatisfaction with counsel and the trial court's refusal [to] allow him to proceed [as a self-represented defendant] at sentencing." The court, however, went on to address the merits of the claim raised and concluded that, if this court were to determine on appeal that there was jurisdiction, then the motion to correct should be denied on the merits because the defendant failed to establish that his underlying sentence was imposed in an illegal manner. This appeal followed.⁴

On appeal, the defendant claims that the court improperly dismissed his motion to correct an illegal sentence.⁵ Specifically, he argues that he raised a colorable claim under Practice Book § 43-22 and, therefore, dismissal of this claim for lack of jurisdiction was improper. We agree with the defendant that he raised a colorable claim under § 43-22 with respect to his argument that he was entitled to represent himself at sentencing. We disagree, however, with his argument that counsel's failure to provide him with copies of certain documents is an appropriate basis under § 43-22 for correcting an illegal sentence.

We begin by setting forth the relevant standard of review and legal principles. "The issue of whether a defendant's claim may be brought by way of a motion to correct an illegal sentence, pursuant to Practice Book § 43-22, involves a determination of the trial court's subject matter jurisdiction and, as such, presents a question of law over which our review is plenary." (Internal quotation marks omitted.) *State v. Turner*, 214 Conn. App. 584, 589, 280 A.3d 1278 (2022).

"Subject matter jurisdiction involves the authority of the court to adjudicate the type of controversy presented by the action before it." (Internal quotation marks omitted.) *State v. McCleese*, 333 Conn. 378, 386, 215 A.3d 1154 (2019). "A trial court generally has no authority to modify a sentence but retains limited subject matter jurisdiction to correct an illegal sentence or a sentence imposed in an illegal manner." *Id.* This

common-law rule was codified by Practice Book § 43-22. See *State v. Myers*, 343 Conn. 447, 459, 274 A.3d 100 (2022).

The issue of whether a trial court has subject matter jurisdiction to correct an illegal sentence rests upon “whether the defendant has raised a colorable claim within the scope of Practice Book § 43-22” (Internal quotation marks omitted.) *Id.* “[T]o raise a colorable claim within the scope of . . . § 43-22, the legal claim and factual allegations must demonstrate a possibility that the defendant’s claim challenges his or her sentence or sentencing proceedings, not the underlying conviction. The ultimate legal correctness of the claim is not relevant to our jurisdictional analysis.” *State v. Ward*, 341 Conn. 142, 153, 266 A.3d 807 (2021). Put another way, “where a defendant’s motion to correct plausibly [challenges] the defendant’s sentence, that claim is colorable, and the court has subject matter jurisdiction over that claim *even where the [claim has] no merit.*” (Emphasis in original; internal quotation marks omitted.) *State v. Turner*, *supra*, 214 Conn. App. 590.

Pursuant to Practice Book § 43-22, a court may correct an illegal sentence⁶ or a sentence imposed in an illegal manner. In the present case, the defendant claims that his sentence was imposed in an illegal manner. A sentence imposed in an illegal manner has “been defined as being within the relevant statutory limits but . . . imposed in a way [that] violates [a] defendant’s right . . . to be addressed personally at sentencing and to speak in mitigation of punishment . . . or his right to be sentenced by a judge relying on accurate information or considerations solely in the record, or his right that the government keep its plea agreement promises These definitions are not exhaustive, however, and the parameters of an invalid sentence will evolve . . . as additional rights and procedures affecting sentencing are subsequently recognized under state and federal law.” (Internal quotation marks omitted.) *State v. Anderson*, 187 Conn. App. 569, 583–84, 203 A.3d 683, cert. denied, 331 Conn. 922, 206 A.3d 764 (2019). Furthermore, the protection against imposing a sentence in an illegal manner “reflects the fundamental proposition that [t]he defendant has a legitimate interest in the character of the procedure [that] leads to the imposition of sentence even if he may have no right to object to a particular result of the sentencing process.” (Internal quotation marks omitted.) *State v. Belcher*, 342 Conn. 1, 12, 268 A.3d 616 (2022).

We will first address the portion of the defendant’s claim relating to the documents that Fitzpatrick allegedly failed to provide to the defendant. The defendant argues that this claim plausibly challenges the sentence itself. We are not persuaded.

Our Supreme Court has held that “the exclusive

forum for adjudicating ineffective assistance of counsel claims is by way of habeas proceedings. . . . There is no specific rule authorizing a defendant to bring his ineffective assistance of counsel claim by way of a motion to correct.” (Citations omitted; footnote omitted.) *State v. Parker*, 295 Conn. 825, 851–52, 992 A.2d 1103 (2010). In the present case, the defendant’s claim regarding Fitzpatrick’s failure to turn over certain documents is one of ineffective assistance of counsel, and, therefore, it does not raise a colorable claim for a motion to correct under Practice Book § 43-22. None of the defendant’s contentions about the exchange of documents between him and Fitzpatrick attacks the sentencing itself. This particular claim relates to the communication difficulties between the defendant and his attorney and does not challenge his sentence or the sentencing proceedings. Accordingly, we conclude that the court properly dismissed the defendant’s motion to correct an illegal sentence with respect to the claim that Fitzpatrick’s failure to provide the defendant with certain documents resulted in an illegally imposed sentence under § 43-22.

We next turn to the defendant’s assertion that the court improperly dismissed his motion to correct with respect to his claim that his sentence was imposed in an illegal manner because he was denied the right to represent himself at his sentencing hearing. The state concedes,⁷ and we agree, that the court had jurisdiction to decide this claim because “the legal claim and factual allegations . . . demonstrate a possibility that the defendant’s claim challenges his . . . sentence or sentencing proceedings” *State v. Ward*, *supra*, 341 Conn. 153.

The sixth amendment to the United States constitution provides in relevant part: “In all criminal prosecutions, the accused shall enjoy the right . . . to have the assistance of counsel for his defense.” U.S. Const., amend. VI. In *Faretta v. California*, 422 U.S. 806, 95 S. Ct. 2525, 45 L. Ed. 2d 562 (1975), the United States Supreme Court concluded that the sixth amendment to the United States constitution embodies a right to self-representation and that “a defendant in a state criminal trial has a constitutional right to proceed *without* counsel when he voluntarily and intelligently elects to do so.”⁸ (Emphasis in original.) *Id.*, 807; see also *State v. Braswell*, 318 Conn. 815, 827, 123 A.3d 835 (2015). Our Supreme Court “consistently has recognized the inviolability of the right of self-representation” (Citation omitted; internal quotation marks omitted.) *State v. Flanagan*, 293 Conn. 406, 418, 978 A.2d 64 (2009). “The right to represent oneself is not only exercisable when a defendant is dissatisfied with counsel. It also protects a defendant’s interest in autonomy and his right to put on his own defense, at *all* critical stages of the proceedings.” (Emphasis added.) *State v. Braswell*, *supra*, 834.

The United States Supreme Court has recognized that, “[e]ven though [a] defendant has no substantive right to a particular sentence within the range authorized by statute, the sentencing is a critical stage of the criminal proceeding[s] The defendant has a legitimate interest in the character of the procedure which leads to the imposition of sentence even if he may have no right to object to a particular result of the sentencing process.” (Citations omitted.) *Gardner v. Florida*, 430 U.S. 349, 358, 97 S. Ct. 1197, 51 L. Ed. 2d 393 (1977); see *Davis v. Commissioner of Correction*, 319 Conn. 548, 568, 126 A.3d 538 (2015), cert. denied sub nom. *Semple v. Davis*, 578 U.S. 941, 136 S. Ct. 1676, 194 L. Ed. 2d 801 (2016); see also *Copas v. Warden*, 30 Conn. App. 677, 682, 621 A.2d 1378 (recognizing sentencing is critical stage of criminal proceedings), cert. denied, 226 Conn. 901, 625 A.2d 1374 (1993). Because a sentencing hearing *is* a critical stage of the criminal proceedings, the defendant’s claim that the court impermissibly failed to allow him to represent himself at the sentencing hearing plausibly challenges the sentencing proceeding, rather than his underlying conviction. Under *Ward*, this meets the threshold for subject matter jurisdiction with respect to a motion to correct an illegal sentence. See *State v. Ward*, supra, 341 Conn. 153.

Accordingly, we conclude that the court erred in its determination that it lacked subject matter jurisdiction and, consequently, improperly dismissed the defendant’s motion to correct relating to the self-representation claim.⁹

We acknowledge that in *State v. Ebron*, 219 Conn. App. 228, 240, 295 A.3d 112, cert. denied, 347 Conn. 902, A.3d (2023), this court concluded that, although “the defendant set forth a colorable claim for purposes of establishing the court’s jurisdiction over his motion to correct, and although we typically remand cases for a consideration of their merits if we determine that they were improperly dismissed for a lack of subject matter jurisdiction, where a defendant’s claim fails as a matter of law, a remand for further consideration of the merits would serve no useful purpose.” (Internal quotation marks omitted.) This court, in *Ebron*, therefore, considered the merits of the motion on appeal and ultimately concluded that the defendant’s claim failed as a matter of law.¹⁰ *Id.*, 240–45. On the basis of the facts alleged by the defendant in connection with his motion to correct an illegal sentence, we do not reach the same conclusion in the present case. On remand, the trial court will be required to make factual determinations relating to the merits of the defendant’s claim that the sentencing court’s denial of his motion for self-representation resulted in a sentence imposed in an illegal manner under Practice Book § 43-22.

The judgment is reversed with respect to the defen-

dant's claim in his motion to correct relating to self-representation and the case is remanded for a hearing on the merits of that claim; the judgment is affirmed in all other respects.

In this opinion the other judges concurred.

¹ Practice Book § 43-22 provides: "The judicial authority may at any time correct an illegal sentence or other illegal disposition, or it may correct a sentence imposed in an illegal manner or any other disposition made in an illegal manner."

² "[W]hen a defendant clearly and unequivocally has invoked his right to self-representation after the trial has begun, the trial court must consider: (1) the defendant's reasons for the self-representation request; (2) the quality of the defendant's counsel; and (3) the defendant's prior proclivity to substitute counsel. If, after a thorough consideration of these factors, the trial court determines, in its discretion, that the balance weighs in favor of the defendant's interest in self-representation, the court must then proceed to canvass the defendant in accordance with Practice Book § 44-3 to ensure that the defendant's choice to [represent himself] has been made in a knowing and intelligent fashion." *State v. Flanagan*, 293 Conn. 406, 433, 978 A.2d 64 (2009).

Practice Book § 44-3 provides: "A defendant shall be permitted to waive the right to counsel and shall be permitted to represent himself or herself at any stage of the proceedings, either prior to or following the appointment of counsel. A waiver will be accepted only after the judicial authority makes a thorough inquiry and is satisfied that the defendant:

"(1) Has been clearly advised of the right to the assistance of counsel, including the right to the assignment of counsel when so entitled;

"(2) Possesses the intelligence and capacity to appreciate the consequences of the decision to represent oneself;

"(3) Comprehends the nature of the charges and proceedings, the range of permissible punishments, and any additional facts essential to a broad understanding of the case; and

"(4) Has been made aware of the dangers and disadvantages of self-representation."

³ This was the defendant's second motion to correct an illegal sentence. His first motion was filed in November, 2005, and was based on, inter alia, double jeopardy grounds. It was denied by the trial court, and this court affirmed that judgment in *State v. Despres*, 107 Conn. App. 164, 166-67, 944 A.2d 989, cert. denied, 288 Conn. 904, 953 A.2d 649 (2008).

⁴ The defendant also claims on appeal that (1) Judge Clifford erred when he did not recuse himself before the 2003 sentencing hearing, (2) the denial of his motion to represent himself violated his constitutional right to self-representation, and (3) the denial of his request to represent himself violated his right to a fair and impartial sentencing hearing. Because each of these claims goes to the merits of the defendant's motion and not the court's jurisdiction, we do not reach them and leave them for the trial court to address on remand.

⁵ The defendant claims that the court improperly dismissed his motion to correct an illegal sentence for failure to state a colorable claim and that the court incorrectly determined that his motion did not attack the sentencing itself, as opposed to the underlying conviction. Because these two issues are inextricably intertwined, we discuss them together.

⁶ "[A]n illegal sentence is essentially one [that] . . . exceeds the relevant statutory maximum limits, violates a defendant's right against double jeopardy, is ambiguous, or is internally contradictory. . . . In accordance with this summary, Connecticut courts have considered four categories of claims pursuant to [Practice Book] § 43-22. The first category has addressed whether the sentence was within the permissible range for the crimes charged. . . . The second category has considered violations of the prohibition against double jeopardy. . . . The third category has involved claims pertaining to the computation of the length of the sentence and the question of consecutive or concurrent prison time. . . . The fourth category has involved questions as to which sentencing statute was applicable." (Internal quotation marks omitted.) *State v. Myers*, supra, 343 Conn. 459-60.

⁷ As discussed previously in this opinion, the state argued in its objection to the defendant's motion to correct that the court lacked jurisdiction because the defendant's claims, including the claim concerning the denial of his motion to represent himself at the sentencing hearing, did not attack the sentencing proceeding itself. In its appellate brief and at oral argument

before this court, however, the state conceded this point, agreeing that “the trial court had jurisdiction to decide the defendant’s motion to correct an illegal sentence as it pertains to his right to self-representation at sentencing.”

⁸ “[T]he right to counsel and the right to self-representation present mutually exclusive alternatives. A criminal defendant has a constitutionally protected interest in each, but since the two rights cannot be exercised simultaneously, a defendant must choose between them.” (Internal quotation marks omitted.) *State v. Pires*, 310 Conn. 222, 230, 77 A.3d 87 (2013).

⁹ As previously noted in this opinion, after the court concluded that it did not have jurisdiction to address the motion to correct, it alternatively stated that, “[s]hould the Appellate Court determine that the Superior Court has jurisdiction to decide the motion on the merits, the court would then deny the motion for failing to establish that his underlying sentence was illegal.” However, it is well settled that “[a] court lacks discretion to consider the merits of a case over which it is without jurisdiction” (Internal quotation marks omitted.) *Ajadi v. Commissioner of Correction*, 280 Conn. 514, 533, 911 A.2d 712 (2006). Rather, “[w]henver a court finds that it has no jurisdiction, it must dismiss the case” (Internal quotation marks omitted.) *Id.* In other words, “[i]t is well established that a court is without power to render a judgment if it lacks jurisdiction and that everything done under the judicial process of courts not having jurisdiction is, ipso facto, void.” (Internal quotation marks omitted.) *American Tax Funding, LLC v. Design Land Developers of Newtown, Inc.*, 200 Conn. App. 837, 847, 240 A.3d 678 (2020). In the present case, because the court had determined, albeit improperly, that it did not have subject matter jurisdiction, it therefore should not have addressed the claim on the merits, and the court’s analysis and conclusion regarding the merits of the defendant’s arguments constitute dicta. See *Statewide Grievance Committee v. Rozbicki*, 211 Conn. 232, 246, 558 A.2d 986 (1989).

¹⁰ In *Ebron*, the issue presented to the court was whether the defendant’s sentence was illegal under the United States Supreme Court’s decision in *Miller v. Alabama*, 567 U.S. 460, 479, 132 S. Ct. 2455, 183 L. Ed. 2d 407 (2012), in which the court held that the prohibition on cruel and unusual punishments set forth in the eighth amendment to the United States constitution forbids the imposition of mandatory sentences for life imprisonment without the possibility of parole when the crime was committed by an offender under the age of eighteen. *State v. Ebron*, supra, 219 Conn. App. 241–42. In *Ebron*, the defendant argued that, because the court did not properly consider his youth as a mitigating factor, his sentencing proceeding violated the prohibition against cruel and unusual punishment and the right to due process under the state constitution. *Id.*, 240–41. This court determined that, because the defendant’s sentence was thirty-two years, with the possibility of parole after twenty-seven years, his claim fell outside the scope of *Miller* and, therefore, necessarily failed as a matter of law. *Id.*
