STATE OF CONNECTICUT *v.* ELVIN G. RIVERA
(AC 39816)

DiPentima, C. J., and Keller and Moll, Js.

Syllabus

Convicted of the crimes of breach of the peace in the second degree, criminal mischief in the third degree and threatening in the second degree, the defendant appealed to this court. The defendant's conviction stemmed from a dispute he had with C, a tow truck operator. C had observed the defendant's car at a condominium complex in an area marked as a fire lane and secured the car for towing. When the defendant exited a nearby garage, C informed the defendant that he was towing the defendant's car because it was parked in a fire lane. The defendant became agitated, moved toward C, who was standing near his tow truck, and struck the tow truck with a pipe. After C grabbed a can of pepper spray from his truck and sprayed the defendant in the face, the defendant dropped the pipe and pulled a knife out from his pocket. Immediately upon seeing the knife, C entered his tow truck, drove a safe distance away from the defendant and called the police, who later arrested the defendant. Thereafter, prior to trial, the state filed a motion in limine to preclude evidence of C's prior convictions and any allegations of criminal conduct against C. The defendant filed an objection, to which he attached copies of 2013 police reports relating to C's prior larceny convictions, which contained statements by C admitting that he had

stolen cell phones to exchange them for drugs. The defendant argued that he intended to inquire into those specific acts, as well as C's drug use, in order to impeach C's credibility and to support his defense theory that C, motivated by his desire to fuel a drug habit, was stealing, rather than towing, the defendant's car. The trial court granted in part the state's motion in limine, concluding, inter alia, that evidence of the specific acts underlying the larceny convictions would be inadmissible. Subsequently, the trial court denied the defendant's motion to permit inquiry into the specific acts underlying C's prior breach of the peace conviction, which concerned an incident in which C, following a motor vehicle accident, attempted to use pepper spray on the other motorist in self-defense. The defendant contended that, because C pleaded guilty to the breach of the peace charge, the specific acts underlying the breach of the peace conviction could be used to establish that C was engaging in a pattern of making false self-defense claims and to impeach C's credibility in the present case, where C had sprayed pepper spray into the defendant's face allegedly in self-defense. *Held*:

1. The trial court did not abuse its discretion in prohibiting the defendant from cross-examining C as to the specific acts underlying his larceny convictions and his breach of the peace conviction: the trial court determined reasonably that C's statements from the 2013 police reports relating to C's prior larceny convictions were too remote in time to have probative value as to the incident underlying the present case, which occurred in March, 2015, that even if they were probative, they would have confused the jury, and that C's statements were not probative of C having a motive to steal the defendant's car, namely, to support a drug habit, where there was no indication in the record that C was under the influence of substances at the time of the incident underlying the present case; moreover, the trial court determined reasonably that C's guilty plea to the breach of the peace charge did not impugn his statement in the police report regarding his use of pepper spray in self-defense, such that the specific acts underlying the breach of the peace conviction were not probative of C engaging in a pattern of making false self-defense claims, and that the altercation underlying C's breach of the peace conviction, which occurred more than two years before the incident underlying the present case, was too remote and bore minimal probative value on C's credibility.
2. The defendant could not prevail on his claim that the trial court erroneously denied his motion seeking a disclosure and an in camera review of medical, mental health, and drug and alcohol treatment records of C, thereby violating his constitutional rights to confrontation and to present a defense: the trial court had the discretion to deny the defendant's request to voir dire C with respect to his confidential records on the basis of its determination that C's records from approximately two years prior to the incident underlying the present case were too remote in time and not material, and the defendant's claim that the trial court erroneously concluded that he failed to make a sufficient threshold

showing to require the disclosure and in camera examination of C's confidential records was unavailing, as the police reports relating to C's prior larceny conviction established, at most, that approximately two years before the incident underlying the present case, C had a drug addiction and intended to receive substance abuse counseling and treatment, and the court also determined reasonably that C's alleged drug use and pursuit of treatment and counseling were too remote in time to the incident underlying the present case and not material.

3. The trial court properly declined to instruct the jury that defense of property constituted a justification defense to the charge of criminal mischief in the third degree; although the defendant claimed that, pursuant to statute (§ 53a-16), defense of property applies in any prosecution for an offense, defense of property is applicable only to crimes against persons, and, thus, it does not constitute a justification defense to criminal mischief in the third degree.

4. The defendant could not prevail on his claim that the state failed to meet its burden to disprove his defense of property justification defense beyond a reasonable doubt, which was based on his claim that the evidence adduced at trial demonstrated that he believed reasonably that C was stealing his car and that physical force was necessary to prevent the larceny; there was sufficient evidence produced at trial for the jury to determine reasonably that the defendant's alleged belief that C was stealing his car was unreasonable, as the jury reasonably could have credited C's testimony and found that C, in the course of his employment, was attempting to tow the defendant's car because it was parked illegally in a fire lane, and that the defendant was aware that his car was being towed legally for that reason.

5. The defendant's claim that the state failed to meet its burden to disprove his self-defense justification defense beyond a reasonable doubt was unavailing; although the defendant claimed that the evidence adduced at trial demonstrated that he believed reasonably that C was using or was about to use deadly or nondeadly force on him and that physical force was necessary to defend himself, the evidence was sufficient for the jury to determine reasonably that the defendant's actions caused C to believe reasonably that the defendant was about to use physical force upon him and, thus, that the defendant was the initial aggressor, and, thus, the state presented sufficient evidence to disprove the defendant's self-defense claim beyond a reasonable doubt.

Argued October 18, 2018—officially released February 19, 2019

Procedural History

Information charging the defendant with the crimes of breach of the peace in the second degree, criminal mischief in the third degree, and threatening in the second degree, brought to the Superior Court in the judicial district of Hartford, geographical area number

twelve, where the court, *Lobo*, *J.*, granted in part the state's motion to preclude certain evidence and denied the defendant's motion to disclose certain confidential records; thereafter, the matter was tried to the jury; verdict and judgment of guilty, from which the defendant appealed to this court. *Affirmed.*

Alice Osedach, assistant public defender, for the appellant (defendant).

James M. Ralls, assistant state's attorney, with whom, on the brief, were *Gail Hardy*, state's attorney, and *Courtney Chaplin*, former assistant state's attorney, for the appellee (state).

Opinion

MOLL, J. The defendant, Elvin G. Rivera, appeals from the judgment of conviction, rendered after a jury trial, of breach of the peace in the second degree in violation of General Statutes § 53a-181 (a) (1), criminal mischief in the third degree in violation of General Statutes § 53a-117 (a) (1), and threatening in the second degree in violation of General Statutes § 53a-62 (a) (1). On appeal, the defendant claims that (1) the trial court erroneously prohibited him from cross-examining the state's key witness, Stephen Chase, as to the specific acts underlying several misdemeanor convictions rendered against Chase, (2) the court erroneously denied his motion seeking a disclosure and an in camera review of Chase's medical, mental health, and drug and alcohol treatment records, (3) the court committed instructional error, and (4) the state failed to meet its burden to disprove his defense of property and self-defense justification defenses beyond a reasonable doubt.[1] We disagree and, accordingly, affirm the judgment of the trial court.

[1] In his principal appellant's brief and his reply brief, the defendant's claims that the state failed to disprove his defense of property and self-defense justification defenses beyond a reasonable doubt were presented in separate sections. For ease of discussion, we will address these claims together.

The following facts, which the jury reasonably could have found, and procedural history are relevant to our disposition of the defendant's claims. In March, 2015, Chase was employed as a tow truck operator. Chase's employer contracted with various property owners to tow vehicles that were parked illegally or otherwise without authorization on their properties. Pursuant to a contract executed by Chase's employer and Coachlight Condominiums, a condominium complex located in East Hartford, Chase was authorized to tow vehicles on the Coachlight Condominiums property that were, inter alia, parked in fire lanes and/or blocking tenants' garages.

On March 24, 2015, while patrolling the Coachlight Condominiums property in the course of his employment, Chase observed a silver car parked in an area marked as a fire lane.[2] To secure the car for towing, Chase attached the rear of the car to the boom of his tow truck and lifted the rear of the car off the ground. Soon thereafter, the defendant exited a nearby garage and angrily asked Chase why the car, which belonged to the defendant, was being towed. Chase replied that the defendant's car was parked in a fire lane. The defendant became agitated, telling Chase that "[y]ou're not f'ing towing my car . . . ." The defendant then approached his car, which was hitched to Chase's tow truck, and opened the driver's side door. Believing that the defendant would attempt to drive the car away, Chase operated his tow truck to lift the rear of the car higher off the ground. Chase then notified the defendant that he could pay $93.59 for the release of his car. The defendant returned to the garage wherefrom he had appeared and obtained a pipe approximately three or four feet in length. The defendant moved toward Chase, who was standing next to the driver's side door of his

[2] More specifically, the car was parked in front of a garage door, above which was a sign indicating that the area in which the car was parked was a fire lane.

tow truck, and struck the tow truck with the pipe. Thereafter, Chase, believing that the defendant intended to strike him with the pipe, stepped backward toward the tow truck, reached into the tow truck through the driver's side door, grabbed a can of pepper spray located in the center console, and sprayed the pepper spray into the defendant's face. The defendant became disoriented, dropped the pipe, and pulled a knife out from his pocket. Immediately upon seeing the knife, Chase entered his tow truck, drove a safe distance away from the defendant, and called the police to report the altercation.

The defendant was arrested on-site and charged with breach of the peace in the second degree in violation of § 53a-181 (a) (1),[3] criminal mischief in the third degree in violation of § 53a-117 (a) (1),[4] and threatening in the second degree in violation of § 53a-62 (a) (1).[5] In September, 2016, the defendant's case was tried to a jury. The state called Chase as its key witness during its case-in-chief. The jury found the defendant guilty on all three counts. The trial court, *Lobo*, *J.*, accepted the jury's verdict and sentenced the defendant to a total effective sentence of two years incarceration, execution suspended after fifteen months of incarceration, followed by two years of probation with special conditions. This appeal followed. Additional facts and procedural history will be set forth as necessary.

[3] General Statutes § 53a-181 (a) provides in relevant part: "A person is guilty of breach of the peace in the second degree when, with intent to cause inconvenience, annoyance or alarm, or recklessly creating a risk thereof, such person: (1) Engages in fighting or in violent, tumultuous or threatening behavior in a public place . . . ."

[4] General Statutes § 53a-117 (a) provides in relevant part: "A person is guilty of criminal mischief in the third degree when, having no reasonable ground to believe that such person has a right to do so, such person: (1) Intentionally or recklessly (A) damages tangible property of another . . . ."

[5] General Statutes § 53a-62 (a) provides in relevant part: "A person is guilty of threatening in the second degree when: (1) By physical threat, such person intentionally places or attempts to place another person in fear of imminent serious physical injury . . . ."

I

We first consider the defendant's claim that the trial court erroneously precluded him from cross-examining Chase as to the specific acts underlying several misdemeanor convictions rendered against Chase, thereby violating his constitutional rights to confrontation and to present a defense under the sixth amendment to the United States constitution.[6] Specifically, the defendant asserts that the court improperly prohibited him from inquiring into the specific acts underlying (1) convictions rendered against Chase on February 20, 2014, on three separate counts of larceny in the sixth degree in violation of General Statutes § 53a-125b[7] (2014 larceny convictions), and (2) a conviction rendered against Chase on January 17, 2013, on one count of breach of the peace in the second degree in violation of § 53a-181 (2013 breach of the peace conviction). We disagree.

We begin by setting forth the relevant standard of review and legal principles that govern our review of the defendant's claim. "The sixth amendment to the [United States] constitution guarantees the right of an accused in a criminal prosecution to confront the witnesses against him. . . . The primary interest secured by confrontation is the right to cross-examination . . . and an important function of cross-examination is the exposure of a witness' motivation in testifying. . . . Cross-examination to elicit facts tending to show motive, interest, bias and prejudice is a matter of right and may not be unduly restricted. . . .

[6] The defendant also claims a violation of his state constitutional rights pursuant to article first, § 8, of the Connecticut constitution. We deem the defendant's state constitutional claims abandoned because he has failed to provide an independent analysis under our state constitution. See *State* v. *Maye*, 70 Conn. App. 828, 831 n.1, 799 A.2d 1136 (2002).

[7] General Statutes § 53a-125b provides in pertinent part: "(a) A person is guilty of larceny in the sixth degree when he commits larceny as defined in section 53a-119 and the value of the property or service is five hundred dollars or less. . . ."

"Although it is within the trial court's discretion to determine the extent of cross-examination and the admissibility of evidence, the preclusion of sufficient inquiry into a particular matter tending to show motive, bias and interest may result in a violation of the constitutional requirements [of the confrontation clause] of the sixth amendment. . . . Further, the exclusion of defense evidence may deprive the defendant of his constitutional right to present a defense. . . .

"[T]he confrontation clause does not [however] suspend the rules of evidence to give the defendant the right to engage in unrestricted cross-examination. . . . Rather, [a] defendant is . . . bound by the rules of evidence in presenting a defense. . . . Although exclusionary rules of evidence cannot be applied mechanistically to deprive a defendant of his rights, the [federal] constitution does not require that a defendant be permitted to present every piece of evidence he wishes. . . . To the contrary, [t]he [c]onfrontation [c]lause guarantees only an opportunity for effective cross-examination, not cross-examination that is effective in whatever way, and to whatever extent, the defense might wish. . . .

"In analyzing the defendant's claims, we first review the trial court's evidentiary rulings. Our standard of review for evidentiary claims is well settled. . . . We review the trial court's decision to admit [or exclude] evidence, if premised on a correct view of the law . . . for an abuse of discretion. . . . The trial court has wide discretion to determine the relevancy of evidence and the scope of cross-examination. . . . In determining whether there has been an abuse of discretion, the ultimate issue is whether the court . . . reasonably [could have] conclude[d] as it did. . . . If, after reviewing the trial court's evidentiary rulings, we conclude that the trial court properly excluded the proffered evidence, then the defendant's constitutional

claims necessarily fail." (Citations omitted; internal quotation marks omitted.) *State* v. *Davis*, 298 Conn. 1, 8–11, 1 A.3d 76 (2010). Additionally, "[i]t bears emphasis that any limitation on the impeachment of a key government witness is subject to the most rigorous appellate review." (Internal quotation marks omitted.) *State* v. *Grant*, 89 Conn. App. 635, 645, 874 A.2d 330, cert. denied, 275 Conn. 903, 882 A.2d 678 (2005).

Pursuant to § 4-5 (a) of the Connecticut Code of Evidence, evidence of other crimes, wrongs, or acts of a person may not be admitted to prove the bad character, propensity, or criminal tendencies of that person, subject to certain exceptions set forth in § 4-5 (b) that are not applicable here. Pursuant to § 4-5 (c), however, evidence of other crimes, wrongs, or acts is admissible for other purposes, "such as to prove intent, identity, malice, motive, common plan or scheme, absence of mistake or accident, knowledge, a system of criminal activity, or an element of the crime, or to corroborate crucial prosecution testimony." "Admissibility of other crimes, wrongs or acts evidence is contingent on satisfying the relevancy standards and balancing test set forth in [Connecticut Code of Evidence §§] 4-1 and 4-3, respectively. For other crimes, wrongs or acts evidence to be admissible, the court must determine that the evidence is probative of one or more of the enumerated purposes for which it is offered and that its probative value outweighs its prejudicial effect." Conn. Code Evid. § 4-5 (c), commentary. "To determine whether evidence of prior misconduct falls within an exception to the general rule prohibiting its admission, we have adopted a two-pronged analysis. . . . First, the evidence must be relevant and material to at least one of the circumstances encompassed by the exceptions. Second, the probative value of such evidence must outweigh the prejudicial effect of the other crime evidence." (Internal quotation marks omitted.) *State* v. *Boscarino*, 86 Conn. App. 447, 458, 861 A.2d 579 (2004).

Pursuant to Connecticut Code of Evidence § 6-6 (b) (1), "[a] witness may be asked, in good faith, about specific instances of conduct of the witness, if probative of the witness' character for untruthfulness." "The right to cross-examine a witness concerning specific acts of misconduct is limited in three distinct ways. First, cross-examination may only extend to specific acts of misconduct other than a felony conviction if those acts bear a special significance upon the [issue] of veracity . . . . Second, [w]hether to permit cross-examination as to particular acts of misconduct . . . lies largely within the discretion of the trial court. . . . Third, extrinsic evidence of such acts is inadmissible." (Internal quotation marks omitted.) *State* v. *Martinez*, 171 Conn. App. 702, 735, 158 A.3d 373, cert. denied, 325 Conn. 925, 160 A.3d 1067 (2017).

A

The defendant first claims that the trial court erroneously precluded him from cross-examining Chase as to the specific acts underlying the 2014 larceny convictions. We are not persuaded.

The following additional facts and procedural history are relevant to our disposition of the defendant's claim. On September 14, 2016, prior to the start of the second day of jury selection, the defendant orally moved the court for an order requiring the state to disclose any police reports relating to the 2014 larceny convictions and the 2013 breach of the peace conviction. The court denied the defendant's motion as to the 2013 breach of the peace conviction but granted the motion as to the 2014 larceny convictions.

On September 16, 2016, the state filed a motion in limine to preclude evidence of Chase's convictions and any allegations of criminal conduct against Chase. On September 19, 2016, the defendant filed an objection to the motion in limine, to which he attached copies

of, inter alia, three police reports relating to the 2014 larceny convictions, one dated May 29, 2013, and two dated May 30, 2013 (2013 police reports). On September 20, 2016, the court heard argument on the motion in limine. In support of the motion, the state argued, inter alia, that evidence of the specific acts underlying the 2014 larceny convictions was not probative of Chase's veracity and would mislead the jury. The state also requested that, if the court were to deem evidence relating to the 2014 larceny convictions admissible, the court limit the admission of such evidence to the names and dates of the convictions, as well as the identity of the courts in which the convictions were rendered. In opposing the motion, the defendant stated that he sought to inquire into the specific acts underlying the 2014 larceny convictions rather than offer evidence of the convictions themselves. The defendant noted that the 2013 police reports contained statements by Chase admitting that he had stolen cell phones to exchange them for drugs. The defendant argued that he intended to inquire into those specific acts, as well as Chase's drug use, in order to impeach Chase's credibility and to support his defense theory that Chase, motivated by his desire to fuel a drug habit, was stealing, rather than towing, the defendant's car on March 24, 2015.

Following argument, the court granted in part and denied in part the state's motion in limine, ruling that evidence of the 2014 larceny convictions, the dates of the convictions, the identity of the courts in which the convictions were rendered, and the sentences imposed would be admissible, but that evidence of the specific acts underlying those convictions would be inadmissible. In prohibiting evidence of the specific acts underlying the 2014 larceny convictions, the court determined that Chase's statements in the 2013 police reports were too remote, not relevant, would only serve to confuse the jury, and would inject collateral issues into the trial.

The court also rejected the defendant's argument that the 2013 police reports demonstrated that Chase had a drug habit providing him with a motive to steal the defendant's car on March 24, 2015, stating that there were no allegations that Chase was under the influence of any substances at that time.

At trial, Chase testified that he had been convicted of three counts of larceny in the sixth degree in 2014. Chase did not testify as to the specific acts underlying those convictions. In addition, on cross-examination, Chase testified that he had not been under the influence of alcohol or illegal drugs on March 24, 2015, and that he had not been under the influence of illegal drugs during the seven days preceding March 24, 2015.

The defendant asserts that the 2013 police reports included statements by Chase admitting that he previously had stolen cell phones to exchange them for drugs. The defendant contends that, if elicited on cross-examination, that information would have undermined Chase's credibility and supported his defense theory that Chase, motivated by a drug habit, was stealing the defendant's car rather than towing it. In response, the state argues, inter alia, that the specific acts underlying the 2014 larceny convictions were too remote and did not demonstrate that Chase had a motive to steal the defendant's car. We agree with the state.

"It is generally held that larcenous acts tend to show a lack of veracity. . . . [L]arcenous crimes by their very nature indicate dishonesty or tendency to make false statement. . . . Moreover, [i]n common human experience acts of deceit, fraud, cheating, or stealing, for example, are universally regarded as conduct which reflects on a man's honesty and integrity. . . . It does not follow, however, that if the acts inquired about are indicative of a lack of veracity, the court must permit the cross-examination. Whether to permit it lies largely

within the court's discretion." (Citations omitted; internal quotation marks omitted.) *State* v. *Martin*, 201 Conn. 74, 87, 513 A.2d 116 (1986).

Here, the court determined reasonably that Chase's statements in the 2013 police reports were too remote in time to have probative value as to the underlying March 24, 2015 incident and, even if they were probative, they would have confused the jury. See, e.g., *State* v. *Morgan*, 70 Conn. App. 255, 274, 797 A.2d 616 (trial court free to determine that remoteness of specific acts of misconduct tended to outweigh probative value), cert. denied, 261 Conn. 919, 806 A.2d 1056 (2002). The court also determined reasonably that Chase's statements were not probative of Chase having a motive to steal the defendant's car, namely, to support a drug habit, where there was no indication in the record that Chase was under the influence of substances at the time of the underlying incident on March 24, 2015. Accordingly, we conclude that the court did not abuse its discretion in precluding the defendant from cross-examining Chase as to the specific acts underlying the 2014 larceny convictions.

B

The defendant next claims that the trial court erroneously precluded him from cross-examining Chase as to the specific acts underlying the 2013 breach of the peace conviction. We disagree.

The following additional facts and procedural history are relevant to our disposition of the defendant's claim. On September 20, 2016, after the court, in adjudicating the state's motion in limine, had precluded evidence as to the specific acts underlying the 2014 larceny convictions, the defendant requested permission to be heard on an oral motion to permit inquiry into the specific acts underlying the 2013 breach of the peace conviction. The following day, the court heard argument on such

motion. The defendant noted that a police report relating to the 2013 breach of the peace conviction that he had acquired, dated October 14, 2012 (2012 police report),[8] contained a statement by Chase indicating that, following a motor vehicle accident on October 14, 2012, involving Chase and another motorist, Chase attempted to use pepper spray on the motorist in self-defense. As a result of that incident, both Chase and the motorist were charged with breach of the peace in the second degree in violation of § 53a-181. Chase pleaded guilty to the breach of the peace charge, which, according to the defendant, demonstrated that Chase's statement in the 2012 police report, representing that he had used the pepper spray in self-defense, was false. The defendant contended that the specific acts underlying the 2013 breach of the peace conviction could be used to establish that Chase was engaging in a pattern of making false self-defense claims and to impeach Chase's credibility in the present case, where Chase had sprayed pepper spray into the defendant's face allegedly in self-defense. The state objected, arguing, inter alia, that the specific acts underlying the 2013 breach of the peace conviction were too remote, lacked probative value, and did not support the defendant's argument that Chase was engaging in a pattern of making false self-defense claims.

Following argument, the court concluded that it was "maintaining" its ruling that the 2013 breach of the peace conviction and the specific acts underlying that conviction were not probative of Chase's credibility and were not relevant.[9] The court determined that Chase's

[8] On September 14, 2016, the court denied the defendant's oral motion seeking a disclosure of any police reports relating to the 2013 breach of the peace conviction. Nevertheless, sometime thereafter, the defendant obtained a copy of the 2012 police report, which he attached to his objection to the state's motion in limine.

[9] On the basis of the record before us, prior to its September 21, 2016 ruling, it does not appear that the court determined that the 2013 breach of the peace conviction and the specific acts underlying that conviction

guilty plea to the breach of the peace charge did not amount to a concession that Chase's statement in the 2012 police report was false, and it noted that the October 14, 2012 altercation between Chase and the motorist occurred over two years prior to the underlying March 24, 2015 incident. Thus, the court determined that the 2013 breach of the peace conviction and the acts underlying it did not demonstrate that Chase was engaging in a pattern of making false self-defense claims, were too remote, had no probative value, and would inject collateral issues into the trial.

At trial, Chase testified that he had been convicted of one count of breach of the peace sometime around 2013. Chase did not testify as to the specific acts underlying that conviction.

The defendant claims that the 2012 police report reflected that Chase previously had admitted to pepper spraying another individual. He further contends that, if elicited on cross-examination, that information would have undermined Chase's credibility and supported the defendant's theory that Chase had sprayed pepper spray in the defendant's face while attempting to steal his car, rather than in self-defense.

We conclude that the court did not abuse its discretion in prohibiting the defendant from cross-examining Chase as to the specific acts underlying the 2013 breach

were not probative or relevant. On September 14, 2016, in denying the defendant's oral motion seeking a disclosure of any police reports relating to the 2013 breach of the peace conviction, the court rejected an argument raised by the defendant that any police reports relating to the 2013 breach of the peace conviction might contain admissible evidence supporting his defense theory that Chase was the initial aggressor in the underlying altercation, determining that § 4-4 (a) (2) of the Connecticut Code of Evidence allowed such evidence only in homicide or criminal assault cases. The court did not make any findings that the 2013 breach of the peace conviction and the specific acts underlying that conviction were not probative or relevant at that time.

of the peace conviction. The court determined reasonably that Chase's guilty plea to the breach of the peace charge did not impugn his statement in the 2012 police report regarding his use of pepper spray in self-defense, such that the specific acts underlying the 2013 breach of the peace conviction were not probative of Chase engaging in a pattern of making false self-defense claims. The court also determined reasonably that the October 14, 2012 altercation underlying Chase's breach of the peace conviction, which occurred more than two years before the underlying incident on March 24, 2015, was too remote and bore minimal probative value on Chase's credibility. See *State* v. *Morgan*, supra, 70 Conn. App. 274.

In sum, we conclude that the court did not abuse its discretion in prohibiting the defendant from cross-examining Chase as to the specific acts underlying the 2014 larceny convictions and the 2013 breach of the peace conviction. Consequently, the defendant's constitutional claims fail as well.

II

We next address the defendant's claim that the trial court erroneously denied his motion seeking a disclosure and an in camera review of medical, mental health, and drug and alcohol treatment records of Chase (Chase's records), thereby violating his constitutional rights to confrontation and to present a defense under the sixth amendment to the United States constitution.[10] Specifically, the defendant asserts (1) that the court improperly rejected his request to voir dire Chase as to Chase's records, which restricted his ability to make

[10] The defendant also claims a violation of his state constitutional rights pursuant to article first, § 8, of the Connecticut constitution. We deem the defendant's state constitutional claims abandoned because he has failed to provide an independent analysis of them under our state constitution. See *State* v. *Maye*, 70 Conn. App. 828, 831 n.1, 799 A.2d 1136 (2002).

the requisite threshold showing to require the disclosure and in camera inspection of Chase's records, or, in the alternative, (2) that the court improperly concluded that he failed to satisfy the requisite threshold showing. We disagree.

The following additional facts and procedural history are relevant to our disposition of the defendant's claims. On September 19, 2016, before the evidentiary portion of the trial had commenced, the defendant filed a motion requesting that the state disclose, or that the court subpoena, Chase's records, and that the court conduct an in camera inspection of such records, if they existed, to determine whether they were probative of Chase's credibility (motion for disclosure). In support of the motion, the defendant stated that one of the police reports relating to the 2014 larceny convictions, dated May 29, 2013 (May 29, 2013 police report), reflected that Chase had confessed to committing several larcenies in May, 2013, "in an effort to fuel a drug habit." Chase also informed the police that he was "starting a drug addiction program on Monday, June 3, 2013" as a "result" of one of his arrests. The defendant contended that, to the extent that they existed, Chase's records likely contained evidence that the defendant could use to impeach Chase's credibility.

On September 20, 2016, the court heard argument on the motion for disclosure. During argument, defense counsel requested an opportunity to voir dire Chase to determine whether Chase's records existed and whether they were material to Chase's credibility such that obtaining them for an in camera inspection by the court was warranted. Defense counsel argued that he was in a "vacuum," as he did not have access to any of Chase's records, but that the May 29, 2013 police report indicated that Chase apparently had undergone substance abuse treatment. Defense counsel further

argued that substance abuse affects an individual's ability to comprehend, know, and correctly relate the truth, such that Chase's records could contain evidence that was probative of Chase's credibility. The state objected, arguing that it did not possess confidential records of Chase or have knowledge of any substance abuse treatment that Chase had undergone. It further argued that because the defendant had not proffered any evidence suggesting that Chase was impaired at the time of the altercation with the defendant on March 24, 2015, the information sought by the defendant by way of his motion for disclosure was immaterial, prejudicial, and had no probative value. The state also argued that obtaining and reviewing any such confidential records would cause undue delay in the case.

Following argument, the court denied the motion for disclosure. After setting forth the relevant law governing access to confidential records, the court stated: "In listening to argument, [the] court is not persuaded that the defendant has met the initial threshold for the disclosure of the records at this point in time. There is, again—it has been represented, an allegation, that back in 2013, two years prior, that [Chase] had a drug problem, and that [Chase] was seeking treatment. Again, two years prior to the allegations as contained in the case that's presently before the court. Defense counsel also argued that we don't know that—we don't know what's in the records. It's true, none of us know what's in the records. But not knowing what's in the records doesn't allow for a fishing expedition [to] discover what could or potentially be in the records. The initial threshold has to be met. What's being offered as to . . . that initial threshold is the 2013 statement alleged to be made by [Chase]. That there was an issue back then, two years ago. Again, as to how that reflects or is associated with the present matter before the court, there is nothing that this court has heard regarding [Chase's]

ability to perceive or to recollect or narrate relevant events that occurred. There's no indication as to the allegations and, again, as it . . . pertained in the police report as to substance abuse. Based on the remoteness . . . and what the court has already put forth on the record, [the] court does not find that the threshold is met at this point in time, and the request is denied."

With regard to the defendant's request to voir dire Chase as to Chase's records, after initially reserving its decision, the court ruled as follows: "[T]he court had further reflection on [defense] counsel's request as to being able to voir dire [Chase] regarding his substance abuse and mental health records. Again, those are confidential records. Again, [the] court is denying that request to voir dire [Chase] as to the mental health and medical records, again, based on the court's earlier ruling that the initial proffer this court found did not meet the original threshold to bring it to a potential in camera review or consider putting it before witnesses to explore that matter further. Again . . . the statement made by [Chase] was back from in—from 2012 and 2013, two years prior to the matter that's before the court today, and would not be material to this case. And again, just opening up potential collateral issues, which this court is not going to get into."

The following exchange then occurred on the record between defense counsel and the court:

"[Defense Counsel]: Judge, I just want a clarification on the ruling on the motion for an in camera review.

"The Court: Mm-mmm.

"[Defense Counsel]: I believe Your Honor said I could not voir dire preliminarily on the medical records or the mental health, but you didn't mention drug.

"The Court: And substance abuse, as far as the records.

"[Defense Counsel]: Okay.

"The Court: And, again, as far as what attorneys wish to get into, not restricting cross-examination or questions asked of witnesses, but as of this point in time, [the] court hasn't heard anything that would—that would cause this court to order an unsealing of those records.

"[Defense Counsel]: Your Honor, at this point—at this point in that motion for the in camera review of the records—

"The Court: Mm-mmm.

"[Defense Counsel]: —we don't have the records. So the procedure—what I requested was to question [Chase] out of the presence of the jury about where he's treated for drugs and alcohol.

"The Court: Mm-mmm.

"[Defense Counsel]: And then if—and at that point if he states, you know, that he [was] treated at X, Y and Z, and at that point that's when the—Your Honor would determine whether the threshold has been met.

"The Court: And, again, from what's been presented to the court is that there was a statement made back in 2013 that [Chase] was seeking treatment. The court's not finding that relevant as to this case that's before the court today. That that information would not be material. That individual has a right to confidentiality regarding substance abuse and mental health records. That includes potentially if and when and where and whether he's ever treated that. That confidentiality covers all of that. So, at this point in time, the court is not finding, based on the proffer, a reason to have him testify as to anything as to what his treatment is or was at any point in time, if it occurred.

"[Defense Counsel]: And Your Honor has balanced that against [the defendant's] constitutional rights to cross-examine and impeach the witnesses. And we know that—

"The Court: Absolutely.

"[Defense Counsel]: —in the proffer that I made prior is, we know, in 2013 that [Chase] had a cocaine, severe cocaine habit. That he was fueled by a drug addiction to commit larcenies. And that we claim that that's completely material and relevant to the defense in this case.

"The Court: Yes. So noted."

A

The defendant first claims that the trial court erroneously rejected his request to voir dire Chase as to Chase's records, thereby restricting his ability to make the threshold showing warranting the procurement and in camera review of Chase's records. In response, the state argues, inter alia, that the court acted within its discretion to reject the defendant's request to voir dire Chase. We agree with the state.

"[O]ur Supreme Court has established that to compel an in camera review of confidential records, a defendant must make a preliminary showing that there is a reasonable ground to believe that failure to review the records likely would impair the defendant's right to confrontation. . . . To meet this burden, the defendant must do more than assert that the privileged records may contain information that would be useful for the purposes of impeaching a witness' credibility. . . . As explained by our Supreme Court: [T]he defendant's offer of proof should be specific and should set forth the issue in the case to which the [confidential] information sought will relate." (Internal quotation marks omitted.) *State* v. *Campanaro*, 146 Conn. App. 722, 733, 78 A.3d 267 (2013), cert. denied, 311 Conn. 902, 83 A.3d 604 (2014).

Our Supreme Court has "urged trial courts to permit the defendant a certain latitude in his attempt to make [the preliminary showing required to obtain an in camera inspection of confidential records] . . . [however],

in the context of [the defendant's] offer of proof to make that showing, our rules of evidence remain operative." (Citation omitted; internal quotation marks omitted.) *State* v. *Bruno*, 236 Conn. 514, 531, 673 A.2d 1117 (1996). A trial court retains the discretion to curtail inquiry that is not probative. Id., 531, 533. "While we are mindful that the defendant's task to lay a foundation as to the likely relevance of records to which he is not privy is not an easy one, we are also mindful of the witness' legitimate interest in maintaining, to the extent possible, the privacy of [his] confidential records." Id., 531–32.

Generally, a defendant is "afforded an opportunity to voir dire persons with knowledge of the contents of the [confidential] records sought" in creating a factual basis upon which the trial court might conclude that there is a reasonable ground to believe that the records would contain impeachment evidence such that a further inquiry is warranted. Id., 523. The court, however, had the discretion to deny the defendant's request to voir dire Chase with respect to Chase's records on the basis of its determinations that Chase's records were too remote in time to the underlying March 24, 2015 incident and not material. We conclude that the court did not abuse its discretion under these circumstances.

B

In the alternative, the defendant claims that the trial court erroneously concluded that he failed to make a sufficient threshold showing to require the disclosure and in camera examination of Chase's records. Specifically, the defendant contends that, notwithstanding the court's declining his request to voir dire Chase as to Chase's records, the May 29, 2013 police report satisfied the requisite threshold showing. In response, the state argues that the evidence submitted by the defendant was insufficient to meet the necessary threshold showing. We agree with the state.

"This court will review a trial court's denial of a defendant's request to conduct an in camera review of confidential records pursuant to our standard of review for evidentiary rulings. . . . Therefore, [w]e review a court's conclusion that a defendant has failed to make a threshold showing of entitlement to an in camera review of [confidential] records . . . under the abuse of discretion standard. . . . We must make every reasonable presumption in favor of the trial court's action. . . . The trial court's exercise of its discretion will be reversed only where the abuse of discretion is manifest or where injustice appears to have been done." (Internal quotation marks omitted.) *State* v. *Campanaro*, supra, 146 Conn. App. 732.

In the present case, the May 29, 2013 police report that the defendant submitted in support of his motion for disclosure established, at most, that Chase had a drug addiction in May, 2013, and intended to receive substance abuse counseling and treatment in June, 2013, nearly two years before the underlying March 24, 2015 incident. "However, we have never held that a history of alcohol or drug abuse or treatment automatically makes a witness fair game for disclosure of [confidential] records to a criminal defendant . . . ." (Citation omitted; internal quotation marks omitted.) *State* v. *Bruno*, supra, 236 Conn. 529. Further, the court determined reasonably that Chase's alleged drug use and pursuit of treatment and counseling were too remote in time to the underlying March 24, 2015 incident and not material. Accordingly, we conclude that the court did not abuse its discretion in denying the defendant's motion for disclosure.[11]

[11] Although the court denied the defendant's motion for disclosure, defense counsel asked Chase on cross-examination whether he was under the influence of alcohol or illegal drugs on March 24, 2015, and whether he was under the influence of illegal drugs in the seven days preceding March 24, 2015. Chase replied "[n]o" to those inquiries. Defense counsel did not ask Chase any other questions concerning his purported substance abuse. "Where the trial court allows significant cross-examination concerning a

III

We now turn to the defendant's claim that the trial court committed instructional error by failing to instruct the jury that defense of property constituted a justification defense to the charge of criminal mischief in the third degree. Specifically, relying on General Statutes § 53a-16, he contends that defense of property applies "in any prosecution for an offense," including criminal mischief in the third degree. (Internal quotation marks omitted.) In response, the state argues, inter alia, that defense of property is applicable only to crimes against persons and, thus, it does not constitute a justification defense to criminal mischief in the third degree. We agree with the state.

We begin by setting forth the relevant standard of review. Whether a justification defense applies to a particular crime is a question of law and, therefore, subject to plenary review. See *State* v. *Amado*, 254 Conn. 184, 197, 756 A.2d 274 (2000).

The following additional facts and procedural history are relevant to the defendant's claim. On September 22, 2016, the defendant filed a written request to charge in which he requested, inter alia, that the court instruct the jury that defense of property applied to all three of the crimes of which he was charged, including criminal mischief in the third degree. Following a charge conference, the court declined to give the charge requested by the defendant regarding defense of property. Instead, the court instructed the jury that defense of property

witness' veracity, it cannot be said that the constitutional right to confrontation is implicated. . . . Although a lack of knowledge about the credibility of a witness implicates the constitutional right of confrontation, [t]hat lack of knowledge can be ameliorated by an extensive and effective [cross-examination]." (Internal quotation marks omitted.) *State* v. *Blake*, 106 Conn. App. 345, 355 n.7, 942 A.2d 496, cert. denied, 287 Conn. 922, 951 A.2d 573 (2008).

applied only to the charges of breach of the peace in the second degree and threatening in the second degree.

"Due process requires that a defendant charged with a crime must be afforded the opportunity to establish a defense. . . . This fundamental constitutional right includes proper jury instructions on the elements of [the defense] so that the jury may ascertain whether the state has met its burden of proving beyond a reasonable doubt that the [crime charged] was not justified." (Internal quotation marks omitted.) *State* v. *Nathan J.*, 99 Conn. App. 713, 716, 915 A.2d 907 (2007), aff'd, 294 Conn. 243, 982 A.2d 1067 (2009). "A defendant must, however, assert a *recognized legal defense before such a charge will become obligatory*. . . . *State* v. *Rosado*, 178 Conn. 704, 707, 425 A.2d 108 (1979). Our Supreme Court has held that only when the evidence presented indicates the availability of one of the numerous statutory defenses, codified in the General Statutes, is the defendant entitled, as a matter of law, to a theory of defense charge." (Emphasis in original; internal quotation marks omitted.) *State* v. *Fiocchi*, 17 Conn. App. 326, 329, 553 A.2d 181, cert. denied, 210 Conn. 812, 556 A.2d 611 (1989).

Section 53a-16 provides: "In any prosecution for an offense, justification, as defined in sections 53a-17 to 53a-23, inclusive, shall be a defense." General Statutes § 53a-21 provides: "A person is justified in using reasonable physical force *upon another person* when and to the extent that he reasonably believes such to be necessary to prevent an attempt by such other person to commit larceny or criminal mischief involving property, or when and to the extent he reasonably believes such to be necessary to regain property which he reasonably believes to have been acquired by larceny within a reasonable time prior to the use of such force; but he may use deadly physical force under such circumstances

only in defense of person as prescribed in section 53a-19." (Emphasis added.)

This court's decision in *State* v. *Fiocchi*, supra, 17 Conn. App. 326, is instructive to our resolution of the defendant's claim. In *Fiocchi*, following a jury trial, the defendant was convicted of unlawful discharge of a firearm in violation of General Statutes (Rev. to 1985) § 53-203[12] for shooting and killing a neighbor's dog that had entered the defendant's property and had previously attacked his chickens. Id., 327–28. The trial court instructed the jury on the defense codified in General Statutes § 22-358; id., 329; which protects owners of any domestic animal or poultry from criminal and civil liability for killing any dog observed "pursuing or worrying any such domestic animal or poultry." General Statutes (Rev. to 1985) § 22-358 (a). On appeal from the judgment of conviction, the defendant claimed, inter alia, that the court erroneously failed to give the jury a "general justification" instruction. (Internal quotation marks omitted.) *State* v. *Fiocchi*, supra, 329. This court rejected that claim, determining that there was no general, noncodified justification defense recognized under Connecticut law. Id. This court further stated: "With respect to the defense of justification provided in our penal code pursuant to General Statutes §§ 53a-16 and 53a-19, which the defendant referred to in his request to charge, we conclude that those statutes do not apply to the use of force against animals. These statutes represent a codification of the common law; see Commission to Revise the Criminal Statutes, Penal Code Comments, Connecticut General Statutes, p. 219; and specifically refer to the use of force against 'persons.' 'Person' is

[12] General Statutes (Rev. to 1985) § 53-203 provides: "Any person who intentionally, negligently or carelessly discharges any firearm in such a manner as to be likely to cause bodily injury or death to persons or domestic animals, or the wanton destruction of property shall be fined not more than two hundred fifty dollars or imprisoned not more than three months or both."

defined under General Statutes [Rev. to 1985] § 53a-3 (1) as 'a *human being*, and, where appropriate, a public or private corporation, an unincorporated association, a partnership, a government or a governmental instrumentality.' . . . Based on a plain language reading of these statutes, it is evident that . . . §§ 53a-16 and 53a-19 apply *only* to the use of force against another *person* and not animals. Therefore, the trial court properly limited its instruction of the defense of justification to the specific statutory defense for killing a dog set forth in . . . § 22-358." (Emphasis in original; footnotes omitted.) *State* v. *Fiocchi*, supra, 329–30.

Although *Fiocchi* discussed the applicability of self-defense to a crime involving the use of force against a domestic animal, the rationale in *Fiocchi* is germane to the issue before us. The plain language of § 53a-21 mandates that a defendant must use "reasonable physical force *upon another person*" to invoke defense of property. (Emphasis added.) Accordingly, defense of property is inapplicable to crimes that involve the use of force against property, such as criminal mischief in the third degree; see General Statutes § 53a-117; and, thus, we conclude that the court correctly declined to instruct the jury that defense of property applied to the charge of criminal mischief in the third degree.[13]

[13] The defendant cites to *State* v. *Morgan*, 86 Conn. App. 196, 860 A.2d 1239 (2004), cert. denied, 273 Conn. 902, 868 A.2d 746 (2005), for the proposition that, pursuant to § 53a-16, a justification defense is a defense to all crimes charged. The defendant's reliance on *Morgan* is misplaced. In *Morgan*, this court held that the trial court improperly charged the jury on self-defense by failing to instruct the jury that it was obligated to find the defendant not guilty of two counts of attempt to commit assault in the first degree in violation of General Statutes §§ 53a-49 (a) (2) and 53a-59 (a) (1) and (2) if the jury determined that the defendant was justified in his use of force. Id., 205–206. Contrary to the assertion of the defendant in the present case, *Morgan* does not state that justification defenses apply to *all* crimes. See, e.g., *State* v. *Davis*, 261 Conn. 553, 573, 804 A.2d 781 (2002) (defendant not entitled to self-defense instruction when charged only with interfering with peace officer in violation of General Statutes § 53a-167a and assaulting peace officer in violation of General Statutes [Rev. to 1997] § 53a-167c); *State* v. *Amado*, supra, 254 Conn. 197–202 (defendant not entitled to self-defense

IV

Finally, we address the defendant's claims that the state failed to meet its burden to disprove his defense of property and self-defense justification defenses beyond a reasonable doubt. We disagree.

"On appeal, the standard for reviewing sufficiency claims in conjunction with a justification offered by the defense is the same standard used when examining claims of insufficiency of the evidence. . . . In reviewing a sufficiency of the evidence claim, we apply a two part test. First, we construe the evidence in the light most favorable to sustaining the verdict. Second, we determine whether upon the facts so construed and the inferences reasonably drawn therefrom the [jury] reasonably could have concluded that the cumulative force of the evidence established guilt beyond a reasonable doubt. . . . This court cannot substitute its own judgment for that of the jury if there is sufficient evidence to support the jury's verdict. . . . Moreover, we do not ask whether there is a reasonable view of the evidence that would support a reasonable hypothesis of innocence. We ask, instead, whether there is a reasonable view of the evidence that supports the jury's verdict of guilty. . . .

"The rules governing the respective burdens borne by the defendant and the state on the justification[s] of self-defense [and defense of property] are grounded in the fact that [u]nder our Penal Code, self-defense, as defined in . . . § 53a-19 (a) [and defense of property as defined in § 53a-21 are] . . . defense[s], rather than . . . affirmative defense[s]. See General Statutes § 53a-16. Whereas an affirmative defense requires the defendant to establish his claim by a preponderance of the

instruction when charged with felony murder in violation of General Statutes § 53a-54c). Further, unlike the present case, the defendant in *Morgan* was not charged with a crime involving the use of force against property. *State* v. *Morgan*, supra, 198.

evidence, a properly raised defense places the burden on the state to disprove the defendant's claim beyond a reasonable doubt. See General Statutes § 53a-12. Consequently, a defendant has no burden of persuasion for a claim of self-defense [or defense of property]; he has only a burden of production. That is, he merely is required to introduce sufficient evidence to warrant presenting his claim . . . to the jury. . . . Once the defendant has done so, it becomes the state's burden to disprove the defense beyond a reasonable doubt. . . .

"Whether the defense of the justified use of force, properly raised at trial, has been disproved by the state is a question of fact for the jury, to be determined from all the evidence in the case and the reasonable inferences drawn from that evidence. . . . As long as the evidence presented at trial was sufficient to allow the jury reasonably to conclude that the state had met its burden of persuasion, the verdict will be sustained." (Citations omitted; footnote omitted; internal quotation marks omitted.) *State* v. *Nicholson*, 155 Conn. App. 499, 505–506, 109 A.3d 1010, cert. denied, 316 Conn. 913, 111 A.3d 884 (2015).

We also note that "[i]t is the jury's right to accept some, none or all of the evidence presented. . . . Moreover, [e]vidence is not insufficient . . . because it is conflicting or inconsistent. [The jury] is free to juxtapose conflicting versions of events and determine which is more credible. . . . It is the [jury's] exclusive province to weigh the conflicting evidence and to determine the credibility of witnesses. . . . The [jury] can . . . decide what—all, none, or some—of a witness' testimony to accept or reject. . . . We do not sit as a [seventh] juror who may cast a vote against the verdict based upon our feeling that some doubt of guilt is shown by the cold printed record." (Internal quotation marks omitted.) *State* v. *Wortham*, 80 Conn. App. 635, 642, 836 A.2d 1231 (2003), cert. denied, 268 Conn. 901, 845 A.2d 406 (2004).

The following additional facts and procedural history are relevant to our disposition of the defendant's claims. During the state's case-in-chief, Chase testified that, on March 24, 2015, he had been employed by "A & M and Central" and that, pursuant to a contract executed by his employer and Coachlight Condominiums, he was authorized to tow vehicles parked illegally in restricted zones, such as fire lanes, on the Coachlight Condominiums property. Chase further testified that on March 24, 2015, he was attempting to tow the defendant's car from the Coachlight Condominiums property because he had observed it parked in a fire lane, which he identified on the basis of signs on the property designating the area in question as a fire lane. In addition, Chase testified that he informed the defendant that he was towing the defendant's car because it was parked in a fire lane, the defendant approached him and struck his tow truck with a pipe while he was standing nearby, he sprayed the defendant with the pepper spray because he believed that the defendant intended to strike him with the pipe and he "feared for [his] life," and the defendant pulled out a knife from his pocket after being sprayed with the pepper spray.

During his case-in-chief, the defendant elicited testimony from John Freitas, the vice president and director of a company named A & M Towing & Recovery, Inc. (A & M Towing). Freitas testified that A & M Towing did not have a towing services contract with Coachlight Condominiums on March 24, 2015, and that Chase had not been employed by A & M Towing on that date. Freitas also testified that a company named Central Automotive Transport (Central) had started managing A & M Towing's business operations beginning in May, 2014, and that he would not have known the identities of Central's employees who would have been driving A & M Towing's tow trucks. The defendant also elicited testimony from Gloria Stokes, the fire marshal for East

Hartford. Stokes testified that she had the authority to designate fire lanes in apartment complexes in East Hartford and that she had not designated the area on the Coachlight Condominiums property where the defendant's car had been parked on March 24, 2015, as a fire lane. Stokes further testified, however, that there were signs on the Coachlight Condominiums property indicating that the area in question was a fire lane. In addition, the court granted the defendant's request to admit into evidence an undated map indicating that the area where the defendant's car had been parked was not a fire lane.

At trial, the defendant asserted defense of property and self-defense as justification defenses.[14] With respect to his defense of property defense, the defendant's theory was that he believed that Chase was stealing his car and that force was necessary to prevent the larceny. With respect to his self-defense claim, the defendant's theory was that he was entitled to use force to defend himself after Chase had sprayed and incapacitated him with the pepper spray.

A

The defendant first claims that the state failed to meet its burden to disprove his defense of property justification defense beyond a reasonable doubt. Specifically, he asserts that the evidence adduced at trial demonstrates that he believed reasonably that Chase was stealing his car and that physical force was necessary to prevent the larceny. In response, the state argues, inter alia, that there was sufficient evidence produced at trial for the jury to determine reasonably that the defendant's alleged belief that Chase was stealing his car was unreasonable. We agree with the state.

Section 53a-21 provides in pertinent part that "[a] person is justified in using reasonable physical force

[14] The court instructed the jury that both of the justification defenses applied only to the charges of breach of the peace in the second degree and threatening in the second degree.

upon another person when and to the extent that he reasonably believes such to be necessary to prevent an attempt by such other person to commit larceny . . . .''

In the present case, if the jury credited Chase's testimony, which it was free to do, it reasonably could have found that Chase, in the course of his employment, was attempting to tow the defendant's car from the Coachlight Condominiums property because it was parked illegally in a fire lane and, further, that the defendant was aware that his car was being towed legally for that reason.[15] In turn, the jury reasonably could have determined that the defendant's alleged beliefs that Chase was committing a larceny and that physical force was necessary to prevent the larceny were unreasonable. Accordingly, construing the evidence in the light most favorable to sustaining the verdict, we conclude that the state met its burden to disprove the defendant's defense of property justification defense beyond a reasonable doubt.

B

The defendant next claims that the state failed to meet its burden to disprove his self-defense justification

[15] We note that the jury could have harmonized the testimonies of Freitas and Stokes with Chase's testimony. Chase testified that he was employed by "A & M and Central." Freitas testified that Chase was not employed by A & M Towing, but that Central had taken over A & M Towing's business operations in May, 2014, and that its employees, whose identities Freitas would not have known, were driving A & M Towing's tow trucks. The jury could have credited the testimonies of Chase and Freitas to determine reasonably that Chase was employed and authorized by a towing services company to tow illegally parked vehicles from the Coachlight Condominiums property on March 24, 2015. In addition, Chase testified that he observed signs on the Coachlight Condominiums property indicating that the location where the defendant's car had been parked on March 24, 2015, was a fire lane. Stokes' testimony confirmed that there were signs on the property marking the location in question as a fire lane, although she had not designated that area as a fire lane in her capacity as East Hartford's fire marshal. The jury could have credited the testimonies of Chase and Stokes to determine reasonably that the defendant's car was parked illegally in a fire lane on March 24, 2015.

defense beyond a reasonable doubt. Specifically, he asserts that the evidence adduced at trial demonstrates that he believed reasonably that Chase was using or about to use deadly or nondeadly force on him and that physical force was necessary to defend himself. He further contends that the evidence does not establish that he was the initial aggressor in the altercation with Chase. In response, the state argues, inter alia, that there was sufficient evidence produced at trial for the jury to determine reasonably that the defendant was the initial aggressor. We agree with the state.

Section 53a-19 (a) provides in relevant part that "a person is justified in using reasonable physical force upon another person to defend himself or a third person from what he reasonably believes to be the use or imminent use of physical force, and he may use such degree of force which he reasonably believes to be necessary for such purpose; except that deadly physical force may not be used unless the actor reasonably believes that such other person is (1) using or about to use deadly physical force, or (2) inflicting or about to inflict great bodily harm." Section 53a-19 (c) provides in relevant part that "[n]otwithstanding the provisions of subsection (a) of this section, a person is not justified in using physical force when . . . (2) he is the initial aggressor, except that his use of physical force upon another person under such circumstances is justifiable if he withdraws from the encounter and effectively communicates to such other person his intent to do so, but such other person notwithstanding continues or threatens the use of physical force . . . ."

"A defendant who acts as an initial aggressor is not entitled to the protection of the defense of self-defense. . . . The initial aggressor, however, is not necessarily the first person who uses physical force. . . . Section

53a-19 contemplates that a person who reasonably perceives a threat of physical force may respond with physical force without becoming the initial aggressor and forfeiting the defense of self-defense. . . . The initial aggressor is the person who first acts in such a manner that creates a reasonable belief in another person's mind that physical force is about to be used upon that other person." (Citations omitted.) *State* v. *Skelly*, 124 Conn. App. 161, 167–68, 3 A.3d 1064, cert. denied, 299 Conn. 909, 10 A.3d 526 (2010).

In crediting Chase's testimony, the jury reasonably could have found that Chase had sprayed the defendant with pepper spray, which led the defendant to pull out the knife from his pocket, only after the defendant had approached Chase with a pipe and, with Chase standing nearby, struck Chase's tow truck with the pipe. The evidence was sufficient for the jury to determine reasonably that the defendant's actions caused Chase to believe reasonably that the defendant was about to use physical force upon him and, thus, that the defendant was the initial aggressor. Accordingly, construing the evidence in the light most favorable to sustaining the verdict, we conclude that the state presented sufficient evidence to disprove the defendant's self-defense claim beyond a reasonable doubt.[16]

The judgment is affirmed.

In this opinion the other judges concurred.

[16] In his principal appellant's brief, the defendant also claims that, if the jury determined that the defendant had used deadly physical force, the state failed to prove that any of the statutory exceptions precluding the use of deadly physical force applied. See General Statutes § 53a-19 (b). Regardless of whether the jury found that the defendant used deadly or nondeadly physical force, the jury could have determined reasonably that the defendant was the initial aggressor and, therefore, concluded that the state had disproved the defendant's self-defense claim beyond a reasonable doubt.

STATE OF CONNECTICUT *v.* CALVIN BENNETT (AC 40443)

DiPentima, C. J., and Elgo and Harper, Js.

Syllabus

The defendant, who had been convicted by a three judge panel of the crimes of felony murder, home invasion and burglary in the first degree in connection with the shooting death of the victim, appealed to this court from the trial court's denial of his motion to correct an illegal sentence. On appeal, the defendant claimed that his sentence for both burglary in the first degree and home invasion violated his constitutional protection against double jeopardy because the home invasion was part of the same transaction as the burglary and his intent throughout the transaction was to carry out a larceny. *Held* that the defendant's conviction of burglary in the first degree and home invasion did not violate his constitutional protection against double jeopardy; although the defendant claimed that the robbery that gave rise to the home invasion was incidental to the completion of the larceny that gave rise to the burglary charge and, therefore, could be considered as part of an uninterrupted course of conduct in furtherance of the burglary, the acts were susceptible to separation into parts that supported a conviction of both burglary in the first degree and home invasion, as the burglary charge arose from the defendant's distinct and separate act of entering the victim's dwelling at night with the intent to commit a larceny, while the home invasion charge arose from the defendant's separate act of threatening the use of physical force against the victim's girlfriend after the defendant and an associate entered the home and were committing the larceny, and although the defendant's conduct constituted one transaction and the defendant may have had the intent to commit a larceny throughout the transaction, the defendant's intent was not a factor in determining whether the transaction was susceptible to separation into parts that supported a conviction of both crimes.

Argued October 25, 2018—officially released February 19, 2019

Procedural History

Substitute information charging the defendant with the crimes of aiding and abetting murder, felony murder, home invasion and burglary in the first degree, brought to the Superior Court in the judicial district of Waterbury and tried to a three judge court, *Cremins*, *Crawford* and *Schuman*, *Js.*; judgment of guilty, from which the defendant appealed to our Supreme Court,

which reversed the judgment in part and remanded the case for further proceedings; thereafter, the court, *Fasano*, *J.*, denied the defendant's motion to correct an illegal sentence, and the defendant appealed to this court. *Affirmed.*

W. Theodore Koch III, assigned counsel, for the appellant (defendant).

Linda Currie-Zeffiro, assistant state's attorney, with whom, on the brief, were *Maureen Platt*, state's attorney, and *John Davenport*, senior assistant state's attorney, for the appellee (state).

Opinion

HARPER, J. The defendant, Calvin Bennett, appeals from the judgment of the trial court denying his motion to correct an illegal sentence. On appeal, the defendant argues that the court improperly rejected his claim that his sentence for both burglary in the first degree in violation of General Statutes § 53a-101 (a) (3)[1] and home invasion in violation of General Statutes § 53a-100aa (a) (1)[2] violates his constitutional protection against double jeopardy. We affirm the judgment of the trial court.

Our Supreme Court, in its opinion addressing the defendant's direct appeal, recited the following procedural history and facts relevant to this appeal. "The defendant . . . was charged with aiding and abetting

[1] General Statutes § 53a-101 (a) provides in relevant part: "A person is guilty of burglary in the first degree when . . . (3) such person enters or remains unlawfully in a dwelling at night with intent to commit a crime therein."

[2] General Statutes § 53a-100aa (a) provides in relevant part: "A person is guilty of home invasion when such person enters or remains unlawfully in a dwelling, while a person other than a participant in the crime is actually present in such dwelling, with intent to commit a crime therein, and, in the course of committing the offense: (1) Acting either alone or with one or more persons, such person or another participant in the crime commits or attempts to commit a felony against the person of another person other than a participant in the crime who is actually present in such dwelling . . . ."

murder in violation of General Statutes §§ 53a-8 and 53a-54a, felony murder in violation of General Statutes § 53a-54c, home invasion in violation of General Statutes § 53a-100aa (a) (1), and burglary in the first degree in violation of General Statutes § 53a-101 (a) (3). The defendant elected a trial to a three judge court (panel). See General Statutes § 54-82. The panel, consisting of *Cremins*, *Crawford* and *Schuman*, *Js.*, rendered a unanimous verdict of guilty on all of the charges except aiding and abetting murder, on which a majority of the panel found the defendant guilty, and thereafter rendered judgment in accordance with the verdict and imposed a total effective sentence of sixty years imprisonment. . . .

"[The victim] James Caffrey lived in the second floor apartment of 323 Hill Street in Waterbury with his girlfriend Samantha Bright and one other roommate. James' mother, Emilia Caffrey, lived in the first floor apartment. In the late afternoon of Saturday, October 26, 2008 . . . Caffrey and Bright had five visitors, including Tamarius Maner, in their living room. Maner had a clear view of the bedroom from where he was seated in the living room. Maner purchased a small amount of marijuana from . . . Caffrey and paid him some money, which Caffrey put in the bedroom. Caffrey kept the marijuana in the bedroom. Caffrey remarked that he had saved $500 for a child that he was expecting with Bright.

"At about that time, Maner and the defendant lived next door to each in other in Bridgeport and had done drug business together. Maner contacted the defendant by cell phone during the evening of Saturday, October 26. Shortly after midnight on Sunday, October 27, Maner and the defendant drove from Bridgeport to Waterbury to go to James Caffrey's apartment. They were carrying loaded handguns.

"Just after 1 a.m., the doorbell to the second floor apartment at 323 Hill Street rang and Caffrey answered the door. A conversation of a few seconds with . . . Caffrey ensued. Maner then shot Caffrey in the face from a distance of one to three feet with a .45 caliber handgun. Caffrey fell in the hallway in a pool of blood and died from the gunshot wound to the head.

"Maner and the defendant walked past Caffrey and into the bedroom. Then the defendant put a gun to Bright's head and asked: 'Where is everything?' Bright understood the question to inquire about money and drugs. Bright referred them to the top dresser drawer. Maner opened it and threw its contents on the bedroom floor.

"At about that time, they heard the screams of Emilia Caffrey, who had heard the shot and discovered her son lying in the second floor hallway. The defendant told Bright to keep her head down and face the wall. Maner and the defendant then ran into the kitchen, which Emilia Caffrey had also entered to call 911. Maner, who was standing at the stove, fired one shot at [Emilia] Caffrey and missed. The defendant was standing at the window.

"Maner and the defendant then ran out of the kitchen, pushing [Emilia] Caffrey to the floor as they left. They returned to their car and arrived back in Bridgeport around 2 a.m.

"Police interviews of some of the Waterbury visitors to James Caffrey's apartment on the afternoon of October 26 led to the identity of Maner, who was also known in Bridgeport as T or Trigger. Further police investigation, including analysis of Maner's cell phone calls, brought police to an apartment in Bridgeport where they found the defendant. The defendant voluntarily returned to Waterbury with the police and told them that he had not left Bridgeport on the night in question.

When confronted with the fact that his cell phone records showed him in Waterbury during the time of the crimes, the defendant put his head down for a minute and then indicated that he had nothing more to say. A search, pursuant to a warrant, of his apartment in Bridgeport revealed a suitcase containing the defendant's clothes, a loaded .45 caliber pistol, and a sock containing sixty-one rounds of ammunition." (Internal quotation marks omitted.) *State* v. *Bennett*, 307 Conn. 758, 760–63, 59 A.3d 221 (2013). Our Supreme Court vacated the defendant's conviction of aiding and abetting murder and affirmed the judgment in all other aspects. Id., 777.

On November 16, 2015, the defendant filed a pro se motion to correct an illegal sentence pursuant to Practice Book § 43-22,[3] arguing that his sentence for both burglary in the first degree and home invasion violates his constitutional protection against double jeopardy. The defendant subsequently was appointed counsel, who filed a memorandum of law in support of the defendant's motion. After a hearing, the trial court orally denied the motion. This appeal followed.

We begin by setting forth the standard of review and relevant law. "Ordinarily, a claim that the trial court improperly denied a defendant's motion to correct an illegal sentence is reviewed pursuant to the abuse of discretion standard. . . . A double jeopardy claim, however, presents a question of law, over which our review is plenary." (Citations omitted; internal quotation marks omitted.) *State* v. *Baker*, 168 Conn. App. 19, 24, 145 A.3d 955, cert. denied, 323 Conn. 932, 150 A.3d 232 (2016).

"The double jeopardy clause of the fifth amendment to the United States constitution provides: [N]or shall

[3] Practice Book § 43-22 provides that "[t]he 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."

any person be subject for the same offense to be twice put in jeopardy of life or limb. The double jeopardy clause is applicable to the states through the due process clause of the fourteenth amendment. . . . This constitutional guarantee prohibits not only multiple trials for the same offense, but also multiple punishments for the same offense in a single trial. . . .

"Double jeopardy analysis in the context of a single trial is a two-step process. First, the charges must arise out of the same act or transaction. Second, it must be determined whether the charged crimes are the same offense. Multiple punishments are forbidden only if both conditions are met." (Internal quotation marks omitted.) *State* v. *Schovanec*, 326 Conn. 310, 325, 163 A.3d 581 (2017). If we determine that the charges do not arise from the same act or transaction, we do not need to proceed to the second step of the analysis. Id., 328.

"At step one, it is not uncommon that we look to the evidence at trial and to the state's theory of the case . . . in addition to the information against the defendant, as amplified by the bill of particulars. . . . If it is determined that the charges arise out of the same act or transaction, then the court proceeds to step two, where it must be determined whether the charged crimes are the same offense. . . . At this second step, we [t]raditionally . . . have applied the *Blockburger* test to determine whether two statutes criminalize the same offense, thus placing a defendant prosecuted under both statutes in double jeopardy: [W]here the same act or transaction constitutes a violation of two distinct statutory provisions, the test to be applied to determine whether there are two offenses or only one, is whether each provision requires proof of a fact which the other does not. . . . In applying the *Blockburger* test, we look only to the information and bill of particulars—as opposed to the evidence presented at trial—to determine what constitutes a lesser included offense of the offense charged." (Citations omitted; internal

quotation marks omitted.) *State* v. *Porter*, 328 Conn. 648, 662, 182 A.3d 625 (2018). This test is "a technical one and examines only the statutes, charging instruments, and bill of particulars as opposed to the evidence presented at trial." Id., 656.

In the present case, we begin our analysis by determining whether the conviction for burglary in the first degree and home invasion arose from the same act or transaction.[4] "The same transaction . . . may constitute separate and distinct crimes where it is susceptible of separation into parts, each of which constitutes a completed offense. . . . [T]he test is not whether the *criminal intent* is one and the same and inspiring the whole transaction, but whether *separate acts* have been committed with the requisite criminal intent and are such as are made punishable by the [statute]." (Emphasis added; internal quotation marks omitted.) *State* v. *Tweedy*, 219 Conn. 489, 497–98, 594 A.2d 906 (1991). When determining whether two charges arose from the same act or transaction, our Supreme Court has asked whether a jury reasonably could have found separate factual basis for each offense charged. *State* v. *Schovanec*, supra, 326 Conn. 329; see also *State* v. *Snook*, 210 Conn. 244, 265, 555 A.2d 390, cert. denied, 492 U.S. 924, 109 S. Ct. 3258, 106 L. Ed. 2d 603 (1989). Logically, it follows that we must ask whether the three judge panel reasonably could have found separate factual bases for the burglary and home invasion charges.

The defendant argues that the home invasion was part of the same transaction as the burglary and that his intent throughout the transaction was to carry out a larceny. We agree that the commission of the burglary did not cease until the defendant left the dwelling. See *White* v. *Commissioner of Correction*, 170 Conn. App.

[4] We note that the defendant did not seek a bill of particulars to aid in our analysis.

415, 434, 154 A.3d 1054 (2017) (burglary, once commenced, continues until all participants in burglary have left the premises). Nevertheless, although the defendant's conduct constituted one transaction and the defendant may have had the intent to commit a larceny throughout the transaction, the relevant inquiry does not focus on the defendant's intent. Rather, we must determine whether the transaction is susceptible to separation into parts that support a conviction of both burglary in the first degree and home invasion. We conclude that the acts are susceptible to separation into parts.

The information alleges that the defendant committed burglary in the first degree when he "entered and remained unlawfully in a dwelling at night with the intent to commit a crime therein, namely *a larceny*." (Emphasis added.) The information further alleges that the defendant committed home invasion when he "entered and remained unlawfully in a dwelling, while a person other than the participant in the crime [was] actually present in such dwelling, with the intent to commit a crime therein, here, a larceny, and, in the course of committing the offense, acting with one or more persons, such person or another participant in the crime commit[ted] . . . a felony, here, *a robbery* against the person of Samantha Bright, who was not a participant in the crime who was actually present in such dwelling." (Emphasis added.)

As the charges are presented in the information, the panel could have reasonably found a factual basis to support the burglary charge when the defendant unlawfully entered Caffrey's home at night with the intent of committing a larceny by stealing Caffrey's drugs and money. Additionally, the panel reasonably could have found a factual basis to support the home invasion charge when, subsequent to the unlawful entry, the defendant pointed a gun at Bright's head while asking

"where is everything?" The threatened use of physical force during the commission of the larceny gave rise to the felonious act of robbery and, therefore, completed the offense of home invasion.[5] In other words, the burglary charge arose from the distinct and separate act of *entering* the dwelling at night with the intent to commit a larceny, while the home invasion charge arose from the separate act of *threatening the use of physical force* against Bright after the defendant and Maner entered the home and were committing the larceny. See *State* v. *Meadows*, 185 Conn. App. 287, 295, 197 A.3d 464 (transaction giving rise to conviction of prohibited contact with victim and threatening and harassing victim in violation of standing criminal protective order constituted separate acts because conduct described in long form information was susceptible to separation into parts despite close proximity of acts), cert. granted, 330 Conn. 947, 196 A.3d 327 (2018); *State* v. *James E.*, 154 Conn. App. 795, 833-834, 112 A.3d 791 (2015) (two counts of assault of elderly person considered separate acts or transactions because conduct described in information was susceptible to separation into parts despite victim being shot twice in short period of time), aff'd, 327 Conn. 212, 173 A.3d 380 (2017).

In an attempt to support his argument, the defendant cites to *White* v. *Commissioner of Correction*, supra, 170 Conn. App. 433–34, seemingly for the proposition that when a burglary is in progress, actions taken after entry into a home may be considered as part of an uninterrupted course of conduct in furtherance of the burglary .[6] The relevant portion of our decision in *White*

[5] Robbery is defined in General Statutes § 53a-133, which provides in relevant part: "A person commits robbery when, in the *course of committing a larceny* he uses or threatens the immediate use of physical force upon another person for the purpose of . . . compelling the owner of such property or another person to deliver up the property or to engage in other conduct which aids in the commission of the larceny." (Emphasis added.)

[6] The defendant argues in his reply brief that one of the state's arguments in the present case is analogous to one of its arguments in *White*, in which

did not address a double jeopardy argument, but rather addressed, following our Supreme Court's decision in *State* v. *Salamon*, 287 Conn. 509, 949 A.2d 1092 (2008), whether a defendant's conduct that gave rise to a kidnapping conviction was incidental to the commission of a burglary.[7] Id., 433. We disagree, therefore, with the defendant's analogy.

Framed differently, the defendant essentially argues that the home invasion, specifically the robbery that gave rise to the home invasion, was incidental to the completion of the larceny that gave rise to the burglary charge. Our court rejected a similar claim in *State* v. *Gemmell*, 151 Conn. App. 590, 603–604, 94 A.3d 1253, cert. denied, 314 Conn. 915, 100 A.3d 405 (2014), in which the defendant argued that, according to *Salamon*, his conviction of home invasion was incidental to the charges of violation of a protective order or unlawful restraint. In rejecting the defendant's claim, the court noted that *Salamon* was applicable only to the state's kidnapping statutes, and not to other crimes. Id. We similarly reject the defendant's claim in the present case.

In conclusion, the burglary in the first degree and home invasion charges arose from a transaction that was susceptible to separation into parts. Accordingly, the defendant's conviction of both offenses did not vio-

it argued that the commission of the burglary was completed upon entry into the home and, therefore, any actions subsequent to the burglary were not incidental to the burglary. Although the state's brief in the present case does state that the burglary was completed upon entry into the dwelling, the state also acknowledged that the burglary continued as long as the defendant and Maner remained in the dwelling. By use of the word "completed," the state appears to mean that liability for burglary attached upon entry into the dwelling.

[7] In *Salamon*, our Supreme Court reexamined this state's kidnapping statutes in holding that a defendant could not be convicted of kidnapping if restraint of a victim was merely incidental in the commission of a separate offense. See *State* v. *Salamon*, supra, 287 Conn. 509.

late his constitutional protection against double jeopardy. Because we conclude that the charges arose from separate acts, we need not move to the second step of our double jeopardy analysis.

The judgment is affirmed.

In this opinion the other judges concurred.

DEVON SMITH *v.* COMMISSIONER OF CORRECTION (AC 40747)

Keller, Prescott and Pellegrino, Js.

Syllabus

The petitioner sought a writ of habeas corpus, claiming, inter alia, that he received ineffective assistance from his criminal trial counsel. After the habeas court granted the motion to dismiss the third count of the amended petition alleging actual innocence filed by the respondent Commissioner of Correction, the petitioner filed a withdrawal of the remaining counts of the habeas petition, which the habeas court accepted with prejudice. Subsequently, the habeas court granted the petition for certification to appeal, and the petitioner appealed to this court. *Held* that the petitioner could not prevail in his claim that the habeas court erred in accepting the withdrawal of his habeas petition only with prejudice; that court acted within its discretion in accepting the withdrawal with prejudice, as the petitioner had filed and withdrawn numerous prior habeas petitions, all of which he withdrew before trial, the petitioner was provided every opportunity to continue to litigate his prior habeas petitions and had a full opportunity to be heard, trial was continued on five occasions, four continuances of which were granted at the petitioner's request, the habeas court was willing to continue the case and offered the petitioner a second day of trial in the future so that he could attempt to locate a potential witness, the petitioner sought to withdraw his petition on the eve of trial, when exhibits had been marked, counsel were ready to proceed, and witnesses had been subpoenaed and were ready to testify, and the petitioner, who had been extensively canvassed by the habeas court, was fully aware of the potential consequences of withdrawal.

Argued November 13, 2018—officially released February 19, 2019

Procedural History

Amended petition for writ of habeas corpus, brought to the Superior Court in the judicial district of Tolland, where the court, *Sferrazza*, *J.*, granted the respondent's motion to dismiss as to the third count of the amended petition and rendered partial judgment thereon; thereafter, the petitioner filed a withdrawal of the remaining counts of the amended petition, which the court, *Prats*, *J.*, accepted with prejudice; subsequently, the court, *Prats*, *J.*, denied the petitioner's motion for reconsideration and granted the petition for certification to appeal, and the petitioner appealed to this court. *Affirmed.*

Justine F. Miller, assigned counsel, for the appellant (petitioner).

Michele C. Lukban, senior assistant state's attorney, with whom, on the brief, were *Gail P. Hardy*, state's attorney, and *Tamara Grosso*, assistant state's attorney, for the appellee (respondent).

Opinion

PELLEGRINO, J. The petitioner, Devon Smith, appeals from the judgment of the habeas court, *Prats*, *J.*, rendered when it granted the petitioner's motion to withdraw his petition for a writ of habeas corpus. The petitioner claims that the habeas court abused its discretion because it conditioned the petitioner's withdrawal of his petition to be with prejudice. We disagree and, accordingly, affirm the judgment of the habeas court.

The record reveals the following relevant facts and procedural history. In 1993, following a jury trial, the petitioner was found guilty of murder in violation of General Statutes § 53a-54a and sentenced to sixty years incarceration. *State* v. *Smith*, 46 Conn. App. 285, 298, 699 A.2d 250, cert. denied, 243 Conn. 930, 701 A.2d 662

(1997). This court affirmed the petitioner's conviction on direct appeal. Id.

In January, 2011, the petitioner, who was self-represented at the time, filed a habeas petition, which is the subject of this appeal. In the petition, the petitioner alleged, inter alia, that his criminal trial counsel, Kevin Randolph, provided ineffective assistance due to his failure to call a "number of witnesses."[1] The petitioner also represented that he had previously not filed a habeas petition.

On November 21, 2011, the habeas court, *Newson, J.*, granted the petitioner's motion for the appointment of counsel and appointed Dante Gallucci to represent the petitioner. Gallucci appeared before the habeas court on November 2, 2012, at which time he stated that it was his understanding that the petitioner had "filed a couple of [prior habeas petitions], but he withdrew them." Gallucci also stated: "[The petitioner] hasn't had any kind of substantive habeas on [the 1993] murder [conviction]. He's been involved in other habeas[es] with other cases." In response to Galluci's statements, the clerk of court identified several habeas petitions that the petitioner previously had filed.

On January 11, 2013, the petitioner appeared before the habeas court, *Solomon, J.*, by videoconference. During that conference, the court asked the petitioner whether he had previously filed habeas petitions and noted that court records indicated that he had filed seven prior habeas petitions. The petitioner then admitted to having filed other petitions involving his 1993 murder conviction but maintained that the issues in the current petition were different from those in the earlier petitions. Ultimately, in a filing dated September 10, 2013, the petitioner acknowledged previously having

[1] The petitioner also alleged a claim of actual innocence that was dismissed by the habeas court.

filed eight habeas actions, seven of which related to the petitioner's 1993 conviction.[2]

On April 3, 2013, the habeas court issued a scheduling order, in which it set the first day of trial for October 7, 2013. On September 13, 2013, less than a month before trial was scheduled to begin, the petitioner filed a motion requesting a continuance. The habeas court, *Newson*, *J.*, granted this motion on September 19, 2013. On September 17, 2013, Gallucci filed a motion to withdraw as the petitioner's counsel, which the habeas court, *Bright*, *J.*, granted on September 23, 2013. In October, 2013, Wade Luckett entered an appearance as the petitioner's counsel.

On June 6, 2014, the habeas court issued a new scheduling order, which postponed the start of trial until June 18, 2015. On January 2, 2015, the petitioner, through counsel, filed an amended habeas petition. On June 4, 2015, two weeks before trial, the petitioner again filed a motion to continue the trial date. In support of this motion, the petitioner identified four potential witnesses that he had yet to interview. The habeas court, *Oliver*, *J.*, granted the petitioner's motion on June 9, 2015, and subsequently rescheduled the trial for May 26, 2016.

On May 3, 2016, approximately three weeks before the trial was scheduled to begin, the petitioner filed a motion to amend his habeas petition because he had become aware that another witness, "Jesus Rodriguez, would have provided favorable, if not outright exculpatory, testimony on [the petitioner's] behalf . . . and was available to testify if he [were] called as a witness." The habeas court granted the petitioner's motion to amend and marked off the trial that had been scheduled to begin on May 26, 2016. The start of trial was then postponed to March 20, 2017. The petitioner filed a third amended habeas petition on March 8, 2017.

[2] The petitioner clarified that one of the petitions he had previously filed related to a different conviction.

On March 15, 2017, five days before trial was scheduled to begin, the petitioner again asked that trial be continued, this time to accommodate two of his witnesses. The habeas court granted this request and rescheduled trial for July 17, 2017. On July 7, 2017, the respondent, the Commissioner of Correction, submitted a witness list for the trial. On July 17, 2017, the petitioner submitted an exhibit, which was marked for identification.

Prior to the commencement of trial on July 17, 2017, Luckett informed the habeas court, *Prats*, *J.*, that he was not ready to proceed because the petitioner wanted to withdraw his petition. The habeas court canvassed the petitioner regarding his desire to withdraw and informed him that if he withdrew his petition, it would be with prejudice, meaning he would be unable to raise the same claims in a subsequent habeas petition. In response, the petitioner stated that he had made the decision to withdraw the pending petition freely and voluntarily.

The petitioner also stated that it was his understanding that he "could withdraw the habeas at any time prior to a hearing" without consequence. The court explained that the petitioner could withdraw his petition, but also stated: "[I]f you try to raise a new habeas in the future, there will be objection from the respondent in this case . . . we're on the eve of trial today. We have witnesses who have been subpoenaed for today. This case goes back six years . . . . [Present] [c]ounsel has been involved . . . since 2013. It's been scheduled for trial. There [have] been continuances.

"All of what has been done between now and then with a full opportunity to be heard. So just withdrawing it with the hope that later on you're going to file another [petition] with the same claims would not be appropriate. Do you understand? And it's going to meet objection, and if the court accepts your withdrawal today,

it would be with prejudice, meaning that it would bar you from raising these claims [in the future]."

Luckett acknowledged that exhibits had been marked and witnesses had been subpoenaed and were present. He argued, however, that the petitioner should be permitted to withdraw his petition without prejudice because evidence had not yet been presented and because the petitioner's claims in the petition at issue had never been fully litigated. Additionally, Luckett asserted that a withdrawal without prejudice was warranted because there were potential witnesses whom the petitioner had been unable to locate, including Rodriguez. Luckett argued that Rodriguez was expected to provide exculpatory testimony and that he had hired several investigators to find Rodriguez, but that they had been unable to do so.

The habeas court told the petitioner that if he started trial that day it would grant the petitioner another day of trial in the future, which would allow the petitioner to continue to search for Rodriguez and the other witnesses whom the petitioner had been unable to locate. The habeas court reiterated that if the petitioner withdrew his petition, it would be with prejudice. Luckett stated that he was ready to begin trial that day but that he would let the petitioner make the ultimate decision regarding withdrawal.

The habeas court again canvassed the petitioner, stating: "[I]f I grant the withdrawal, just for the record, I want to be very clear that the court is going to do it with prejudice, and that later on, if you try to raise the same basis, there's going to be a very strong objection, and you're possibly going to be barred from raising this claim again. You understand that?" The petitioner responded: "I'll take my chances. Rather [not] have a hearing today and lose with certainty." The petitioner subsequently signed a withdrawal form that contained

the notation, "withdrawal w[ith] prejudice accepted . . . after canvass on the record." Thereafter, the petitioner filed a motion to reconsider, which the habeas court denied on July 28, 2017. The petitioner then filed a petition for certification to appeal the decision, which the habeas court granted on July 28, 2017. This appeal followed.

On appeal, the petitioner claims that the habeas court abused its discretion by stating that it would permit him to withdraw his petition only if it was with prejudice to filing a later petition raising the same claims. Specifically, the petitioner claims that the circumstances of the present case are not similar to those in which a court may order that a petition be withdrawn with prejudice. The respondent argues that the habeas court did not abuse its discretion because "the matter had been pending since 2011; counsel had made diligent efforts to locate desired witnesses; trial had been continued at least three times . . . trial was scheduled to begin that day; subpoenaed witnesses were present . . . exhibits had been marked; [the] petitioner's counsel was ready to proceed; the habeas court informed the petitioner that if he proceeded with trial as scheduled, it would schedule a second trial day; and, a withdrawal with prejudice is entirely consistent with our habeas jurisprudence." We agree with the respondent.

"We begin by setting out the standards of review governing this appeal. The decision by a habeas court to condition a withdrawal of a habeas petition on that withdrawal being with prejudice is, when authorized, a decision left to that court's discretion." (Internal quotation marks omitted.) *Kendall* v. *Commissioner of Correction*, 162 Conn. App. 23, 28, 130 A.3d 268 (2015). "Discretion means a legal discretion, to be exercised in conformity with the spirit of the law and in a manner to subserve and not impede or defeat the ends of substantial justice. . . . Inherent in the concept of judicial

discretion is the idea of choice and a determination between competing considerations. . . . When reviewing claims under an abuse of discretion standard, the unquestioned rule is that great weight is due to the action of the trial court . . . . Under that standard, we must make every reasonable presumption in favor of upholding the trial court's ruling, and only upset it for a manifest abuse of discretion. . . . [Our] review of such rulings is limited to questions of whether the trial court correctly applied the law and reasonably could have reached the conclusion that it did." (Citation omitted; internal quotation marks omitted.) *Palumbo* v. *Barbardimos*, 163 Conn. App. 100, 110–11, 134 A.3d 696 (2016).

General Statutes § 52-80 provides in relevant part: "The plaintiff may withdraw any action . . . before the commencement of a hearing on the merits thereof. After the commencement of a hearing on an issue of fact in any such action, the plaintiff may withdraw such action . . . only by leave of court for cause shown." "The term with prejudice means [w]ith loss of all rights; in a way that finally disposes of a party's claim and bars any future action on that claim. . . . The disposition of withdrawal with prejudice exists within Connecticut jurisprudence. . . . Indeed, the disposition of withdrawal with prejudice is a logically compelling disposition in some circumstances. A plaintiff is generally empowered, though not without limitation, to withdraw a complaint before commencement of a hearing on the merits. . . . A plaintiff is not entitled to withdraw a complaint without consequence at such hearing. . . . The decision by a habeas court to condition a withdrawal of a habeas petition on that withdrawal being with prejudice is, when authorized, a decision left to that court's discretion." (Citations omitted; internal quotation marks omitted.) *Marra* v. *Commissioner of*

Correction, 174 Conn. App. 440, 454–55, 166 A.3d 678, cert. denied, 327 Conn. 955, 171 A.3d 456 (2017).

Moreover, "[h]abeas courts are given wide latitude in fashioning remedies." *Mozell* v. *Commissioner of Correction*, 147 Conn. App. 748, 760, 83 A.3d 1174, cert. denied, 311 Conn. 928, 86 A.3d 1057 (2014). "[H]abeas corpus has traditionally been regarded as governed by equitable principles. . . . Among them is the principle that a [petitioner's] conduct in relation to the matter at hand may disentitle him to the relief he seeks." (Internal quotation marks omitted.) *Negron* v. *Warden*, 180 Conn. 153, 166 n.6, 429 A.2d 841 (1980). "A [petitioner] should never be permitted to abuse [his] right to voluntarily withdraw an action. Such abuse may be found if, in executing [his] right of withdrawal, the [petitioner] unduly prejudices the right of an opposing party or the withdrawal interferes with the court's ability to control its docket or enforce its rulings." *Palumbo* v. *Barbadimos*, supra, 163 Conn. App. 115.

"Significantly . . . [this] court . . . [has] recognized that in certain circumstances, a withdrawal of a petition *prior* to the commencement of a hearing on the merits could be deemed to be with prejudice . . . ." (Emphasis in original.) *Marra* v. *Commissioner of Correction*, supra, 174 Conn. App. 456. This court concluded that such circumstances existed in *Marra* and *Mozell*.

In *Marra* v. *Commissioner of Correction*, supra, 174 Conn. App. 454, this court concluded that, under the circumstances of that case, the habeas court properly determined that the petitioner's habeas action could not be maintained because his withdrawal of a previous habeas action was with prejudice. The petitioner in *Marra* executed a withdrawal of his previous habeas action the day before trial was to begin. Id. The petitioner's case had been pending for two and one-half years,

during which time it was continued three times. Id. The previous habeas court stated that prejudice existed because the court "set aside the time [for the] trial . . . the clerk [of court] gave up her time . . . and even met with the attorneys and marked all the exhibits . . . so that [the court] [would be] ready to go . . . ." (Internal quotation marks omitted.) Id., 449. Moreover, the previous habeas court noted that the court and the respondent were ready for trial. Id., 447. This court also cited the fact that the petitioner "participated personally in the decision to withdraw the previous habeas matter the day before trial was to begin," in affirming that the petitioner's withdrawal of his previous habeas action was with prejudice. (Internal quotation marks omitted.) Id., 458.

Similarly, in *Mozell* v. *Commissioner*, supra, 147 Conn. App. 760, this court concluded that the habeas court acted within its discretion when it only allowed the petitioner to withdraw one of the counts in his habeas petition with prejudice. The petition at issue in *Mozell* was the petitioner's third, and by the time the petitioner sought to withdraw his petition on the day of trial, the action had been pending for approximately two and one-half years. Id., 750–51. The habeas court conditioned withdrawal of one of the petitioner's counts on being with prejudice because "[w]itnesses had been subpoenaed and were in court ready to proceed; [expenses] such as setting up videoconferencing for a witness in Nevada had been incurred; [and] evidence had begun, according to the respondent's counsel, in that some exhibits had already been admitted in full . . . ." (Footnote omitted.) Id., 760.

The petitioner argues that the present case is factually distinguishable from *Marra* and *Mozell*, and, therefore, that a withdrawal with prejudice was not appropriate under the circumstances. We are unpersuaded.

Like the petitioners in *Marra* and *Mozell*, the petitioner in the present case had filed and withdrawn numerous prior habeas petitions. Indeed, the petitioner in the present case had filed more petitions than the petitioners in *Marra* and *Mozell*, who filed two and three petitions, respectively. The petitioner in the present case filed at least seven petitions, all of which he withdrew before trial.

The petitioner attempts to distinguish the present case from *Marra* and *Mozell* by arguing that in those cases a final judgment had been rendered on other petitions filed by the petitioners, whereas, in the present case, none of the petitioner's prior habeas petitions had reached final judgment or even received a hearing on the merits. In the present case, final judgment was not reached on any of the petitioner's many habeas petitions because the petitioner chose to withdraw them. Despite his choice to withdraw the petitions, the petitioner was provided every opportunity to continue to litigate them and, therefore, had a full opportunity to be heard.

In this case, trial was continued on five occasions, more times than in *Marra* and *Mozell* combined. In *Marra*, trial was continued three times, and, in *Mozell*, trial was never continued. Four of the continuances in the present case were granted at the petitioner's request. Moreover, the habeas court was willing to continue the case in response to the petitioner's request to withdraw his petition. The court offered the petitioner a second day of trial in the future so that he could attempt to find Rodriguez.[3] The petitioner was afforded ample time to prepare his case.

As did the petitioners in *Marra* and *Mozell*, the petitioner sought to withdraw his petition on the eve of

[3] The petitioner argues that he had a good reason to withdraw his petition, namely, that he needed more time to locate Rodriguez. By the time the petitioner withdrew his petition, however, he had been attempting to locate Rodriguez with the assistance of counsel for approximately two years. In fact, the habeas court had already granted at least one continuance to allow the petitioner more time to find potential witnesses.

trial when the case was ready to proceed after efforts and resources had been expended in preparation for trial. Similarly, exhibits in the present case had been marked, counsel were ready to proceed, and witnesses had been subpoenaed and were ready to testify. Moreover, as in *Mozell* where expenses had been incurred in setting up videoconferencing for a witness in Nevada, in the present case, witnesses were subpoenaed and were present to testify.

Additionally, like the petitioner in *Marra*, the petitioner in the present case made the ultimate decision to withdraw the habeas matter on the day of trial and was fully aware of the potential consequences of withdrawal, as he had been extensively canvassed by the habeas court.

On the basis of the foregoing, we conclude that, under these circumstances, the court acted within its discretion in granting the petitioner's motion to withdraw with prejudice.

The judgment is affirmed.

In this opinion the other judges concurred.

CONNECTICUT COMMUNITY BANK, N.A. *v.* JAMES T. KIERNAN, JR., ET AL.
(AC 41378)

Lavine, Sheldon and Elgo, Js.

Syllabus

The plaintiff bank sought to foreclose a mortgage on certain real property owned by the defendant K. At the time that the plaintiff commenced its foreclosure action, K's property was encumbered by a first mortgage that subsequently was refinanced with another bank, M Co. After a dispute arose between the plaintiff and M Co. as to the priority of their mortgages, the parties agreed to sell the property and to escrow the sale proceeds pending a resolution of the dispute. The plaintiff then converted the foreclosure action to a claim for interpleader as against M Co. and a claim against K for damages pursuant to the language of

the mortgage note. After K was defaulted for failure to plead, the trial court granted the plaintiff's motion for summary judgment as against K. The plaintiff thereafter sought an award of $134,462.82 in attorney's fees as against K, which included attorney's fees it incurred in protecting the priority of its mortgage by prosecuting the interpleader claim. The trial court awarded the plaintiff $11,000 in attorney's fees, and the plaintiff appealed to this court. The plaintiff claimed that the trial court improperly excluded from its award any attorney's fees that it had incurred in protecting the priority of its mortgage as against M Co. *Held* that the trial court properly excluded from its award of attorney's fees against K any fees that the plaintiff incurred in asserting its priority claim as against M Co.; the plaintiff provided no legal or factual basis for extending certain language in its mortgage note, which permitted the recovery of attorney's fees incurred to enforce the plaintiff's rights in foreclosing its mortgage, to a separate claim asserting priority over M Co.'s lien, the mortgage note did not mention attorney's fees incurred in protecting a priority claim, and the plaintiff did not have a priority claim against any other person or entity at the time that it issued its mortgage, as K's property was encumbered by a first mortgage when the plaintiff issued its loan and the plaintiff's lien would have remained subordinate to the first mortgage if that first mortgage had not been refinanced in favor of M Co., and the plaintiff's claim that the trial court improperly applied *Total Recycling Services of Connecticut, Inc.* v. *Connecticut Oil Recycling Services, LLC* (308 Conn. 312) when it required the plaintiff to distinguish the fees it had incurred as against K from those it had incurred as against M Co., was not reviewable, as the plaintiff, at trial, did not in any meaningful way dispute the applicability of *Total Recycling Services of Connecticut, Inc.*, to its claims for fees against K.

Argued November 29, 2018—officially released February 19, 2019

Procedural History

Action to foreclose a mortgage on certain real property owned by the named defendant et al., brought to the Superior Court in the judicial district of Stamford-Norwalk, where the plaintiff filed an amended complaint and withdrew the action as against the defendant Elizabeth M. Kiernan et al.; thereafter, the named defendant was defaulted for failure to plead; subsequently, the court, *Povodator, J.*, granted the plaintiff's motion for summary judgment and granted in part the plaintiff's motion for attorney's fees, and the plaintiff appealed to this court. *Affirmed.*

Houston Putnam Lowry, with whom, on the brief, was *Dale M. Clayton*, for the appellant (plaintiff).

Opinion

SHELDON, J. The plaintiff, Connecticut Community Bank, N.A., doing business as the Greenwich Bank & Trust Company, appeals from the judgment of the trial court awarding what it claims to be an allegedly insufficient amount of attorney's fees after finding the defendant James T. Kiernan, Jr.,[1] liable pursuant to a mortgage note that he executed in favor of the plaintiff. The plaintiff claims on appeal that the trial court erred by excluding from its award any attorney's fees that it had incurred in protecting the priority of its mortgage as to a subsequent encumbrancer, M&T Bank, formerly known as Hudson City Savings Bank (M&T Bank), which it had brought into this action as a defendant on its claim of interpleader. We affirm the judgment of the trial court.

The following procedural history and undisputed facts are relevant to this appeal. On October 7, 2005, the defendant and his wife, Elizabeth M. Kiernan, executed a home equity line of credit agreement and disclosure statement (HELOC) in favor of the plaintiff in the original maximum principal amount of one million dollars. The HELOC was secured by an open-end mortgage deed encumbering certain real property located at 25 The Ridgeway in Greenwich. At the time the plaintiff issued the HELOC, the subject property, which had been owned by Elizabeth Kiernan since 1992, was encumbered by a mortgage in favor of Washington Mutual Bank, F.A. (Washington Mutual), in the principal amount of $2,500,000. The plaintiff's mortgage was recorded on the Greenwich land records on February 5, 2008.

In April, 2011, the Kiernans refinanced the mortgage on the subject property with M&T Bank. As a result,

[1] Although James T. Kiernan, Jr., is not the only defendant in this action, we refer to him as the defendant because the order at issue in this appeal was rendered against him.

Washington Mutual's mortgage was released and a new mortgage was recorded on the land records in favor of M&T Bank on the principal amount of $2,425,000 on May 3, 2011.

At some point in 2015, the Kiernans defaulted on the HELOC and, consequently, the plaintiff brought this action to foreclose its mortgage on the subject property. During the course of litigation, a dispute arose between the plaintiff and M&T Bank as to the priorities of their respective mortgages. By agreement of all parties, the property was sold and all proceeds from the sale were deposited in an escrow account pending resolution of the priority dispute between the plaintiff and M&T Bank.

On April 6, 2017, the plaintiff amended its complaint, converting its claim against the defendant from a mortgage foreclosure claim to a claim for interpleader and a claim on a note. The amended complaint thus contained two counts; the first stating a claim for interpleader as against M&T Bank and the second presenting a claim for damages on the note as against the defendant. The defendant did not respond to the amended complaint, and thus he was defaulted for failure to plead.

On April 12, 2017, the plaintiff filed a motion for summary judgment as to the defendant on the second count of the amended complaint. The defendant did not oppose the plaintiff's motion. On August 11, 2017, the court granted summary judgment on the note in favor of the plaintiff "in the principal amount of $999,140.89 plus interest in the amount of $68,515.40 ($54,515.40 as calculated through 4/7/17), plus 126 days (through 8/11/17) at $109.49, which comes to $13,795.74 (plus interest continuing to accrue at $109.49 per day)." The court also addressed the plaintiff's claim for attorney's fees as follows: "The plaintiff has indicated an intent to submit a claim for attorney's fees, as allowed

under the note. The court will entertain such a submission, subject to the presumptive obligation of a party claiming the right to attorney's fees to make an attempt to identify fees directly or closely related to the claim for which such fees are allowed, eliminating fees for matters unrelated to the claim, to the extent possible/practical. *Total Recycling Services of Connecticut, Inc.* v. *Connecticut Oil Recycling Services, LLC*, 308 Conn. 312, 63 A.3d 896 (2013) (*Total Recycling*). Thus, subject to the plaintiff's possible argument to the contrary, the plaintiff's fees incurred in connection with its dispute as to priority to the proceeds of the sale of the property, which, in turn, is a consequence of the attempted mortgage foreclosure, at least facially would seem unrelated to the 'pure' note based claim against this defendant. . . . Attorney's fees are to be determined after a claim with supporting documentation is submitted (allowing parties an opportunity to object or otherwise challenge the claim, thereafter)."

On May 5, 2017, the plaintiff filed an affidavit in support of its claim for attorney's fees against the defendant in the amount of $46,152 to recover for time spent by counsel on its claim against the defendant through May, 2017. On August 24, 2017, the plaintiff filed an updated motion for attorney's fees against the defendant in the amount of $134,462.82, seeking $102,084 in fees for its current counsel, $26,672.60 in fees for its prior counsel, and $5706.22 in costs. The plaintiff argued that it was entitled to the full amount of $134,462.82 pursuant to § 18 (c) (ii) of the note signed by the defendant, which provided: "We can enforce our rights in court. This includes, for example, foreclosing on the mortgage described in section 11 above. If we enforce our rights in court, you agree to pay our court costs and attorneys' fees, as allowed by law and as set by the court." Pursuant to the court's previous order to attempt to apportion the fees incurred against the defendant and those

incurred in pursuit of its priority claim, the plaintiff alleged that it had incurred attorney's fees in the amount of $41,484.50 as to the defendant directly. The plaintiff argued, however, that the defendant "is responsible for all attorney's fees pursuant to his contract (the note) with [the] plaintiff, including [the] plaintiff's attorney's fees regarding the priority dispute with [M&T Bank] (because such fees were incurred in connection with his loan). If [the] plaintiff had not made this loan, there would be no priority dispute with [M&T Bank]."[2]

The court heard argument on the plaintiff's motion for attorney's fees on October 10, 2017. At the hearing, counsel for the plaintiff reiterated his contention that his client was entitled to attorney's fees from the defendant not only for all fees it had incurred in obtaining the summary judgment against him on the note, but also for all fees it had incurred in protecting the priority of its mortgage by prosecuting its interpleader claim. The defendant objected to the plaintiff's argument that he was responsible for all fees incurred by the plaintiff in prosecuting its interpleader claim. He further argued that the amount of fees requested was excessive because he did not oppose the plaintiff's claim against him on the note and the claimed 108.5 hours expended in obtaining judgment against him on the note was unreasonable. He requested instead that the court award the plaintiff fees for four hours of work in the total amount of $1600. During rebuttal argument by the plaintiff, the court commented as follows: "[A] hundred hours strike me as somewhat extreme for a motion for summary judgment against a defaulting party." Apparently agreeing, counsel for the plaintiff replied, "It does,

[2] Notably, also on May 5, 2017, the plaintiff filed a motion for attorney's fees against M&T Bank for fees incurred to obtain the judgment of interpleader. Many of the claimed billable hours listed in the affidavit submitted by the plaintiff in support of its motion were identical to those contained in the affidavit that it submitted in support of its claim for fees against the defendant.

Your Honor." Counsel for the plaintiff then agreed with the court that one hundred hours did not seem to be a "defensible" claim, and conceded "that some of these entries, especially early on, relate to the M&T issues. I'm surprise[d] that they weren't stricken from here." The court offered the plaintiff an opportunity to file a revised affidavit, but the plaintiff declined the court's offer, noting: "I'm sure you're more than capable of reviewing what has been submitted and coming up with what you believe is a fair amount of time for the work—summary judgment—and . . . ." The court thereupon took the papers on the plaintiff's motion.

On January 30, 2018, the court issued an order granting the plaintiff attorney's fees in the total amount of $11,000.[3] The court explained that, pursuant to *Total*

[3] Specifically, the court ruled, inter alia: "Having obtained summary judgment as against this defendant, the plaintiff claims that it is entitled to $100,000 as reasonable attorney's fees. The defendant has objected to that claim, and the court heard argument on October 10, 2017. (As a point of reference, in [its ruling on the plaintiff's motion for summary judgment], the court had noted its obligation to apply [*Total Recycling*], supra, 308 Conn. 312, to the claim for attorney's fees, requiring the claimant to make an effort to allocate attorney's fees to claims for which such fees are collectable to the extent reasonably possible. The plaintiff has not challenged [the] applicability of that decision to this situation.) During the course of argument, the defendant accurately pointed out that he had never filed any pleadings, filed no objection to the motion for summary judgment, and while the motion for summary judgment was pending, when the plaintiff filed a motion for default for failure to plead, nothing was done that might prevent that motion from being granted. Somewhat simplistically, the defendant's position is that in connection with these proceedings, he has never actively disputed any claim made by the plaintiff, yet is being asked to pay more than $100,000 as 'reasonable' attorney's fees in connection with his liability under the note. The defendant also argued that an appropriate award would be in the area of $1600. Somewhat conceding that $100,000 might be unreasonable, during argument, the plaintiff suggested something substantially greater would be reasonable, doing a rough calculation suggesting in excess of twenty hours just for the motion for summary judgment. . . . Again, although arguably withdrawn by virtue of the oral argument discussed above, the plaintiff has claimed $102,084 in legal fees attributable to current counsel. The court has attempted to identify each/every billing entry making mention of summary judgment or some activity seemingly related to same (e.g., references to an affidavit of debt), and even if the court were to assume that the full amount of time for each such entry was solely related to the motion for summary judgment, the total would be less than $9500. (Entries

for April 5 [two entries], 11, 12 [two entries], 25, May 5, 10, 12, and 25, with the motion for summary judgment being submitted for adjudication on May 30, 2017.) Most if not all of the entries for those dates contain activities unrelated to summary judgment, and an especially extreme example is the entry for May 12, totaling $1080, where the only apparent connection to summary judgment was reclaiming the motion. (For clarity, the court is not suggesting that the plaintiff is claiming that the full 2.7 hours on May 12 were attributable to summary judgment, but rather is using this as an example of the extent to which the maximal calculation set forth earlier in the paragraph clearly exceeds any realistic allocation of time to the motion.) Additional time undoubtedly was spent with respect to the preparation of the request for admissions and the subsequent notice relating to the failure of the defendant to respond (deny) those requests. Additional time undoubtedly was spent with respect to the deposition, as reflected on submitted documentation. Again, however, to the extent that the primary strategy appears to have been summary judgment, the need for alternate avenues (e.g., the court recalls seeing somewhere, in a pleading, a reference to the admissions potentially being used in support of summary judgment—something that does not appear to have happened) becomes less pressing, such that the reasonableness of substantial fees for such alternate avenues is open to question. (Alternatively, they may be subject to 'discount' for that reason.) Even allowing for some amount of time attributable to 'getting up to speed' when the file was taken over, the claim against this defendant remained an uncontested claim for money owed on a note/loan (amounts advanced on a line of credit). Conversely, the court must recognize that substantial time and effort went into the initial foreclosure aspect of the proceeding—directed to a different defendant—which was transformed into an interpleader proceeding in turn necessitated by the issue currently being litigated quite actively relating to priority of liens. The court must draw a distinction between covering all bases as a matter of due diligence, and reasonableness in pursuing a claim in which there had been no identified or apparent indicia of resistance. Thus, while it may have been appropriate diligence to prepare and file a motion for summary judgment, while at the same time filing/serving requests for admissions directed to him, while at the same time preparing for and eventually taking his deposition, the question for the court is what is reasonable with respect to allowance of attorney's fees, given a contractual entitlement to such an award and the absence of any 'resistance' from this defendant. Under the circumstances, taking into account the need for litigation, the need to address claims against this defendant in the context of a claim against the mortgagor, initial uncertainty as to whether there would be active resistance/opposition to the motion for summary judgment or any other approach that might be taken, the relatively straightforward nature of the claim as advanced and presented via summary judgment, and given the magnitude of the debt (recognizing that the substantial amount in dispute would justify greater attention to detail), the court concludes that an appropriate award of reasonable attorney's fees, as against defendant James Kiernan under his contractual responsibility for reasonable attorney's fees related to collection efforts by current counsel, is $10,000. Added to the $1000 that the court has estimated to be reasonable fees for efforts of prior counsel, the aggregate reasonable attorney's fees attributable to collection efforts directed to defendant James Kiernan total $11,000."

Recycling, which it had previously referenced when granting the plaintiff's motion for summary judgment as against the defendant, it was limiting the plaintiff's award of attorney's fees to those incurred in prosecuting its claim against the defendant on the note, not those incurred in protecting the priority of its mortgage against M&T Bank on its interpleader claim. The court noted that the plaintiff had not objected to the application of *Total Recycling* to this case, and, in fact, that the plaintiff had withdrawn its claim for the full $102,084 when it argued its motion to the court. The court further noted that it had considered all of the plaintiff's claims for fees against the defendant, and noted that the defendant had not opposed any of the plaintiff's claims against him in its pursuit of judgment against him, and thus that summary judgment had been rendered against him on that claim upon his default. The court ultimately concluded that upon weighing the "straightforward nature of the claim as advanced" against the defendant and the "magnitude of the debt" claimed by the plaintiff, the defendant's "contractual responsibility for reasonable attorney's fees related to collection efforts by current counsel is $10,000." Therefore, upon determining that the plaintiff should also receive an additional $1000 in attorney's fees for the limited efforts of prior counsel, it awarded the plaintiff $11,000 in attorney's fees against the defendant under the note. This appeal followed.

The plaintiff claims that the trial court erred in excluding from its award of attorney's fees against the defendant the fees that it had incurred in protecting the priority of its mortgage. In support of that claim, the plaintiff argues that § 18 (c) (ii) of the note "is a very broad contractual attorney's fees provision. [The defendant] agreed to reimburse [the] plaintiff for its court costs and attorney's fees to enforce [the] plaintiff's rights. This not only includes [the] plaintiff's rights under the HELOC, but it also explicitly includes foreclosing the HELOC mortgage. This means the reimbursed attorney's fees will include not only the cost to

enforce the mortgage, but also [the] plaintiff's costs incurred to protect the HELOC mortgage's priority." The plaintiff has provided no legal or factual basis for extending the explicit language relating to foreclosing its mortgage to a separate claim against another party asserting priority over that other party's lien, nor are we aware of any. The HELOC does not mention fees incurred in "protecting" a priority claim; nor does any other provision of the HELOC entitle the plaintiff to such fees. In fact, the plaintiff did not have a priority claim against any other person or entity at the time that it issued the HELOC because the subject property was then encumbered by the first mortgage from Washington Mutual, so it is difficult to understand how the plaintiff reads into that contractual language the defendant's obligation to pay attorney's fees to protect a right that the plaintiff did not have when the parties signed the note. The plaintiff argued in its motion for attorney's fees, consistent with its position before this court, that, "If [the] plaintiff had not made this loan, there would be no priority dispute with [M&T Bank]." This argument overlooks the fact that the property by which its mortgage was secured had been encumbered by a first mortgage when it extended its loan to the defendant. In so arguing, the plaintiff ignores the fact that if the defendant had not refinanced the first mortgage to Washington Mutual in favor of M&T Bank, there also would be no priority dispute, for the plaintiff's lien would have remained subordinate to that of Washington Mutual.[4]

[4] We note that the priority dispute is still pending, and it is not clear from the record whether the priority claim that it seeks to have this defendant fund is valid, a subject upon which we express no opinion. Although it is not disputed that the plaintiff's HELOC mortgage was recorded prior to M&T Bank's mortgage, "[t]here is . . . an exception to the "first in time, first in right rule." The Restatement (Third), Property, Mortgages § 7.6 (1997), on the topic of subrogation, provides a thorough explanation of this complicated doctrine. The Restatement provides in relevant part: "(a) One who fully performs an obligation of another, secured by a mortgage, becomes by subrogation the owner of the obligation and the mortgage to the extent necessary to prevent unjust enrichment. Even though the performance would

The plaintiff also contends that the trial court "erred in applying or misapplying *Total Recycling* . . . to this case. [The] plaintiff made its objection known to the court." We disagree. In its decision granting the plaintiff's motion for summary judgment, the court announced its intention to rely on *Total Recycling*, in which our Supreme Court held that "a party is . . . entitled to a full recovery of reasonable attorney's fees if an apportionment is impracticable because the claims arise from a common factual nucleus and are intertwined." *Total Recycling*, supra, 308 Conn. 333. Pursuant to *Total Recycling*, the court instructed the plaintiff to attempt to distinguish the fees it had incurred against the defendant in enforcing its claim on the note from those incurred against M&T Bank in protecting the priority of its lien. Accordingly, when the plaintiff filed its motion for attorney's fees on August 24, 2017, it did not, in any meaningful way, dispute the applicability of *Total Recycling* to its claims for fees against the defendant; nor did it do so at oral argument on its motion for attorney's fees. We thus decline to review the plaintiff's claim that the court improperly applied *Total Recycling* to this case in ordering it to apportion its fees between those that it had incurred as to the

otherwise discharge the obligation and the mortgage, they are preserved and the mortgage retains its priority in the hands of the subrogee. . . ." Restatement (Third), supra, § 7.6.

"The holders of intervening interests can hardly complain about this result, for they are no worse off than before the senior obligation was discharged." Id., comment (a), p. 510.

Moreover, the plaintiff's claim of priority does not arise from any interference by the defendant with the plaintiff's enforcement of its rights under the note. As noted, the plaintiff chose to assert its priority over M&T Bank, a right that it did not have when it issued the HELOC to the defendant. That priority dispute is ongoing between the plaintiff and M&T Bank, and, should the plaintiff prevail in its priority claim, it may seek attorney's fees under General Statutes § 52-484, which it has properly requested in its interpleader complaint, and under which it has sought and received an award of attorney's fees for commencing the interpleader proceeding against the defendant.

defendant and those that it had incurred against M&T Bank in its priority claim.[5]

On the basis of the foregoing, we cannot conclude that the court erred by excluding from its award of attorney's fees against the defendant any attorney's fees that the plaintiff incurred in asserting its priority claim against M&T Bank.

The judgment is affirmed.

In this opinion the other judges concurred.

STATE OF CONNECTICUT *v.* DESHAWN TYSON (AC 40468)

Prescott, Bright and Harper, Js.

Syllabus

The defendant, who had been on probation in connection with his conviction of the crime of sexual assault in the first degree, appealed to this court from the judgment of the trial court revoking his probation and imposing a sentence of nine years of incarceration. He claimed that the trial court improperly admitted into evidence details of his prior criminal history and abused its discretion in revoking his probation and imposing the entire nine year period of incarceration remaining on his underlying sentence. *Held* that the trial court did not abuse its discretion in admitting into evidence details of the defendant's prior criminal history: it is well settled that probation proceedings are informal and that strict rules of evidence do not apply to such proceedings, and the factual details of the prior offenses committed by the defendant were plainly relevant to the court's discretionary determination of whether it should revoke the defendant's probation, impose a new sentence, or continue the defendant on probation; moreover, the trial court did not abuse its discretion in revoking the defendant's probation and imposing the remainder of the underlying sentence, that court having found that the defendant, while on probation, committed a sexual assault in the first degree, which was the same criminal behavior for which he was originally sentenced, and given the seriousness of the defendant's conduct and the risk he posed to the public, the court acted well within its discretion in concluding that the defendant was no longer amenable to probation and imposing the remainder of his original sentence.

Argued January 15–officially released February 19, 2019

[5] We note that any claim that it was impractical to so apportion those fees is belied by the fact that the plaintiff did, in fact, present to the trial court an affidavit apportioning them.

Procedural History

Substitute information charging the defendant with violation of probation, brought to the Superior Court in the judicial district of Ansonia-Milford and tried to the court, *Markle*, *J.*; judgment revoking the defendant's probation, from which the defendant appealed to this court. *Affirmed.*

Laila M.G. Haswell, senior assistant public defender, for the appellant (defendant).

Rita M. Shair, senior assistant state's attorney, with whom were *Kevin D. Lawlor*, state's attorney, and, on the brief, *Cornelius P. Kelly*, assistant state's attorney, for the appellee (state).

Opinion

PER CURIAM. The defendant, DeShawn Tyson, appeals from the judgment of the trial court revoking his probation and sentencing him to nine years of incarceration. See General Statutes § 53a-32. On appeal, the defendant claims that the trial court (1) improperly admitted into evidence details of his prior criminal history, and (2) abused its discretion in concluding that he was no longer amenable to probation and imposing the entire period of incarceration remaining on his underlying sentence. We disagree and, accordingly, affirm the judgment.

On January 24, 2006, the defendant pleaded guilty to sexual assault in the first degree in violation of General Statutes § 53a-70 (a) (1). The court subsequently sentenced him to eighteen years of incarceration, execution suspended after nine years, and ten years of probation. On March 1, 2013, the defendant was released from incarceration and began serving his probation.

On March 16, 2016, the defendant was arrested pursuant to a warrant charging him with violating his probation. Specifically, the state alleged that the defendant violated his probation by, among other things, committing a forcible sexual assault on May 6, 2014, on the victim at the Marriott Hotel in New Haven. Following a violation of probation hearing, the trial court found by a fair preponderance of the evidence that the defendant had committed a sexual assault in the first degree as alleged by the state and, thus, had violated one or more conditions of his probation. The court also concluded that the defendant posed a risk to the public and would not benefit from an additional period of probation. Accordingly, the court sentenced the defendant to the remaining nine years of incarceration imposed as part of his original sentence. This appeal followed.

The defendant's claims on appeal do not merit extensive discussion. With respect to his claim that the court improperly admitted evidence regarding the details of prior crimes he had committed, the defendant recognizes that "the Connecticut Code of Evidence does not apply to proceedings involving probation. Section 1-1 (d) (4) of the Connecticut Code of Evidence specifically provides: The Code, other than with respect to privileges, does not apply in proceedings such as, but not limited to the following . . . [p]roceedings involving probation. . . . Furthermore, [i]t is well settled that probation proceedings are informal and that strict rules of evidence do not apply to them." (Citation omitted; internal quotation marks omitted.) *State* v. *Tucker*, 179 Conn. App. 270, 276–77, 178 A.3d 1103, cert. denied, 328 Conn. 917, 180 A.3d 963 (2018). "The evidentiary standard for probation violation proceedings is broad. . . . [T]he court may . . . consider the types of information properly considered at an original sentencing

hearing because a revocation hearing is merely a reconvention of the original sentencing hearing." (Internal quotation marks omitted.) *State* v. *Megos*, 176 Conn. App. 133, 147, 170 A.3d 120 (2017). All that is necessary is that the information presented to the court is relevant and "has some minimal indicia of reliability." (Internal quotation marks omitted.) *State* v. *Shakir*, 130 Conn. App. 458, 464, 22 A.3d 1285, cert. denied, 302 Conn. 931, 28 A.3d 345 (2011). We review a trial court's rulings regarding the admissibility of evidence at a violation of probation hearing for an abuse of discretion. Id.

Here, the factual details regarding other offenses committed by the defendant were plainly relevant to the court's discretionary determination regarding whether it should revoke the defendant's probation, impose a new sentence, or continue the defendant on probation. Moreover, the evidence of the details of his other crimes was probative and had a minimal indicia of reliability because the defendant himself testified to the details during cross-examination by the state. Accordingly, we conclude that the court did not abuse its discretion by admitting this evidence.

The defendant's second claim is equally devoid of merit. After concluding that a defendant has violated his probation, the trial court is vested with broad discretion to determine whether the defendant should be continued on probation, or whether probation should be revoked and all or some of the original sentence be imposed. *State* v. *Faraday*, 268 Conn. 174, 185, 842 A.2d 567 (2004); *State* v. *Corringham*, 155 Conn. App. 830, 837–38, 110 A.3d 535 (2015). "In determining whether there has been an abuse of discretion, every reasonable presumption should be given in favor of the correctness of the court's ruling; reversal is required only where an abuse of discretion is manifest or where injustice appears to have been done." (Internal quotation marks omitted.) *State* v. *Tucker*, supra, 179 Conn. App. 284.

In the present case, the court found that the defendant, while on probation, committed a sexual assault in the first degree, the same criminal behavior for which he originally received a significant period of incarceration and a lengthy period of probation. Given the seriousness of the defendant's conduct and the risk he poses to the public, the trial court acted well within its broad discretion to sentence him to the remaining nine years of his original sentence.

The judgment is affirmed.

JEAN COLINET *v.* DAVID BROWN
(AC 40612)

DiPentima, C. J., and Sheldon and Prescott, Js.

Syllabus

The self-represented, incarcerated plaintiff brought this action against the defendant, a retired Department of Correction employee, claiming violations of his federal constitutional rights. After the plaintiff had been removed from his job in the prison's industries program because of security concerns, he was allowed back into the program four years later. Thereafter, he wrote two letters to the defendant seeking back pay for the time that he was removed from the prison industries program. The defendant perceived the letters to contain certain comments that were threatening in nature and, subsequently, requested that the plaintiff be removed from the industries program, and the prison warden agreed. The plaintiff claimed that his removal from his job in the industries program violated his fourteenth amendment rights to due process and to equal protection, and his first and fourteenth amendment right against retaliation. The trial court rejected the due process claim, concluding that the plaintiff had no property or liberty interest in any particular job while in prison. The court found that the plaintiff failed to prove his equal protection claim, and that he failed to prove that his first and fourteenth amendment right against retaliation was violated because the defendant had a legitimate interest in the safety and security of the industries program, which was achieved by removing the plaintiff from the situation. The court thereafter rendered judgment for the defendant. On appeal to this court, the plaintiff claimed that the trial court's conclusions constituted bias and an abuse of discretion. *Held* that after a careful review of the record, the briefs, the parties' arguments and the applicable law, this court found no merit to the plaintiff's claims on appeal.

Argued December 11, 2018—officially released February 19, 2019

Procedural History

Action to recover damages for the alleged deprivation of the plaintiff's federal constitutional rights, and for other relief, brought to the Superior Court in the judicial district of Tolland and tried to the court, *Cobb*, *J.*; judgment for the defendant, from which the plaintiff appealed to this court. *Affirmed.*

Jean Colinet, self-represented, the appellant (plaintiff).

Stephen R. Finucane, assistant attorney general, with whom were *Matthew B. Beizer*, assistant attorney general, and, on the brief, *George Jepsen*, former attorney general, for the appellee (defendant).

Opinion

PER CURIAM. In this action brought pursuant to 42 U.S.C. § 1983, the plaintiff, Jean Colinet, who is an inmate serving a sentence for murder, appeals from the judgment of the trial court rendered in favor of the defendant, David Brown, a retired former director of correctional enterprises for the Department of Correction (department). The plaintiff claims that the court erred in rejecting his claims that his fourteenth amendment rights to due process and equal protection, and his first and fourteenth amendment right against retaliation were violated. We affirm the judgment of the trial court.

The trial court set forth the following relevant facts and procedural history. "In 2011, the plaintiff was removed from his job in the industries program (laundry services) for security reasons. The plaintiff then accepted a post as a janitor, which paid a lower wage. A few years later, the decision to remove the plaintiff from the industries position was revisited, and he was allowed back into that program in 2015. The defendant was not involved in the 2011 decision. [The] plaintiff wrote to the defendant in January, 2015, and expressed

his disagreement with the 2011 decision to remove him from the industries position, and asked that he be paid 'back pay' or the difference in pay between his industries post and his janitorial post from 2011 to 2015. The defendant perceived certain comments in the plaintiff's letter as threatening, and the court agrees. An attorney for the [department] responded to the plaintiff's letter and explained that the plaintiff was not entitled to back pay. The plaintiff sent the defendant a second letter dated February, 2015, which the defendant again believed certain comments in the letter as threatening in nature, and again the court agrees. As a result of the two letters, and in particular because they contained perceived threatening comments, the defendant requested that the plaintiff be removed from the industries program for safety and security reasons. The defendant did not want the plaintiff punished, but only that he be removed from the situation—that is, the industries program. The warden agreed that the letters contained some content that was threatening and, [as] such, that security and safety interests in the prison were implicated. The warden also agreed that the plaintiff [should] be removed from the industries program in March, 2015.

"The plaintiff then brought this action alleging that [the] defendant . . . violated his constitutional rights by having him removed from his industries job after he wrote the two letters disagreeing with his removal from the position and seeking back pay. The plaintiff believes that the letters were not threatening."

The court rejected the plaintiff's due process claim on the ground that he "has no property or liberty interest in any particular job while in prison. *Santiago* v. *Commissioner of Correction*, 39 Conn. App. 674, 667 A.2d 304 (1995)." The court found that the plaintiff failed to prove his equal protection claim because he failed to

prove that he has been treated differently from a similarly situated group. The court also found that the plaintiff failed to prove that his first and fourteenth amendment right against retaliation was violated. The court found that the letters written by the plaintiff had "contained threatening references," and thus that "the defendant had a legitimate interest in the internal safety and security of the industries program within the prison, which was achieved by removing the plaintiff from the situation. The prison's legitimate interests take precedence over the plaintiff's right to complain over being removed from his prison job or not receiving back pay, particularly where he had no right to any particular prison job." This appeal followed.

The plaintiff challenges the judgment of the trial court on the grounds that its conclusions "constituted biasness and an abuse of discretion." We have carefully reviewed the record, the briefs submitted and arguments made by both parties, and the applicable law, and we find no merit to the plaintiff's claims on appeal.

The judgment is affirmed.