IN RE D'ANDRE T. ET AL.*
(AC 43883)

Prescott, Suarez and DiPentima, Js.

Syllabus

The respondent mother appealed to this court from the judgments of the trial court terminating her parental rights as to her two minor children and denying her motion to transfer guardianship of them to her sister, B. The trial court determined that, pursuant to statute (§ 17a-112 (j) (3) (B) (i)), the respondent had failed to achieve such a degree of personal

* In accordance with the spirit and intent of General Statutes § 46b-142 (b) and Practice Book §79a-12, the names of the parties involved in this appeal are not disclosed. The records and papers of this case shall be open for inspection only to persons having a proper interest therein and upon order of the Appellate Court.

rehabilitation as would encourage the belief that within a reasonable time she could assume a responsible position in the children's lives. The court also found that it was not in the children's best interests to transfer guardianship of them to B, as B was not a suitable guardian in light of her having allowed one of the children to be in the respondent's care in contravention of directives by the Department of Children and Families. On appeal, the mother claimed that the trial court denied her a fundamentally fair proceeding by treating her motion to transfer guardianship with less regard than the petitions to terminate her parental rights. She further claimed that this court should exercise its supervisory authority over the administration of justice to require the Superior Court to make certain written findings in all cases in which a court is considering a transfer of guardianship motion and a petition to terminate parental rights concurrently. *Held*:

1. This court had jurisdiction over the respondent mother's appeal, which presented an actual, justiciable controversy, notwithstanding the assertion by the petitioner, the Commissioner of Children and Families, that the appeal should be dismissed because the mother's request for a new procedural rule was not tethered to any actual controversy and she did not claim that the trial court erred in its decisions on the termination petitions or the motion to transfer guardianship; in light of the mother's contention that the trial court's failure to rule on her motion to transfer guardianship prior to ruling on the termination of parental rights petitions created an appearance that the court's default preference was to terminate her parental rights, the requirements of justiciability were satisfied, as there was an actual live controversy as to whether the court properly handled the motion to transfer guardianship, the parties' interests were adverse, and this court was capable of adjudicating whether the trial court properly considered the mother's motion, which could result in practical relief to her.

2. This court declined to exercise its supervisory authority over the administration of justice to adopt the respondent mother's proposed procedural rule, which implicated a policy consideration best addressed by the legislature, as the mother's proposed rule would not create a new procedural rule but would ask this court to rewrite the statutory (§ 46b-129 (j) (3)) scheme controlling transfer of guardianship motions when the legislature is better suited to gather and to assess the facts necessary to make that policy determination; the failure to adopt the mother's proposed rule did not implicate the fairness of the proceeding and would not enhance public confidence in the integrity of the judicial system, as there was no evidence of pervasive, significant problems or conduct that threatened the sound administration of justice, and, under the existing statutory (§ 17a-112 (k) (4)) scheme, the trial court, having been obligated to make certain written findings concerning guardians when considering a petition for the termination of parental rights, made such

written findings on the motion to transfer guardianship and explained why it did not believe that B was a suitable guardian.

Argued October 5—officially released November 17, 2020**

Procedural History

Petitions by the Commissioner of Children and Families to terminate the parental rights of the respondents as to certain of their minor children, brought to the Superior Court in the judicial district of Hartford and transferred to the judicial district of Middlesex, Child Protection Session at Middletown, where the matter was tried to the court, *Hon. Barbara M. Quinn*, judge trial referee; thereafter, the court denied the respondent mother's motion to transfer guardianship; judgments terminating the respondents' parental rights, from which the respondent mother appealed to this court. *Affirmed.*

Albert J. Oneto IV, assigned counsel, for the appellant (respondent mother).

Evan O'Roark, assistant attorney general, with whom, on the brief, were *William Tong*, attorney general, and *Benjamin Zivyon*, assistant attorney general, for the appellee (petitioner).

Opinion

DiPENTIMA, J. The respondent mother, Debralee B.,[1] appeals from the judgments of the trial court terminating her parental rights as to her two minor children on the ground that she failed to achieve a sufficient degree of personal rehabilitation pursuant to General Statutes § 17a-112 (j) (3) (B) (i). On appeal, the respondent does not challenge the underlying factual findings of the trial

** November 17, 2020, the date that this decision was released as a slip opinion, is the operative date for all substantive and procedural purposes.

[1] Because only the respondent mother has appealed from the judgments terminating her parental rights; see footnote 3 of this opinion; our references in this opinion to the respondent are to the mother.

court but claims that the court denied her a fundamentally fair proceeding by treating her motion to transfer guardianship to her sister, Carmen B., with less regard than the petitions to terminate her parental rights. The respondent urges us to use our supervisory authority over the administration of justice to reverse the judgments terminating her parental rights and denying her motion to transfer guardianship, to award her a new trial, and to obligate the trial court to apply a new procedural rule that would require the Superior Court to make certain written findings in all cases in which a court is considering a transfer of guardianship motion and a petition to terminate parental rights concurrently. We decline to exercise our supervisory authority, and, accordingly, affirm the judgments of the trial court.

The following facts, as found by the trial court, and procedural history are relevant to this appeal. The respondent has two minor children, D'Andre T. and D'Ziah D. The Department of Children and Families (department) first became involved with the respondent in October, 2015, after receiving a report that she was fighting with D'Andre's father on the street and that D'Andre had been left at home alone. The department substantiated the report and referred the respondent for ongoing services. Following additional incidents in April, 2016, the petitioner, the Commissioner of Children and Families, initiated neglect proceedings. D'Andre was removed from the respondent's care pursuant to an order of temporary custody on June 24, 2016, and was placed with his maternal aunt, Carmen B., on June 26, 2016. D'Andre continued to reside with Carmen B., and, on September, 27, 2016, he was adjudicated neglected and committed to the care and custody of the petitioner.

While the case involving D'Andre was pending, the respondent gave birth to D'Ziah. When D'Ziah was born,

both the respondent and D'Ziah tested positive for phencyclidine (PCP). The petitioner filed a petition of neglect and a motion for an order of temporary custody on October 21, 2016. D'Ziah was removed from the respondent's care at the hospital, and she was placed in the care of a family friend. She was adjudicated neglected on July 31, 2017, and committed to the care and custody of the petitioner. D'Andre later was placed with his sister in the same household after Carmen B. violated the department's requirements for his care by allowing the respondent to have two unsupervised visits with D'Andre. At one of those visits, the police became involved.

The court ordered specific steps with which the respondent was required to comply for reunification with D'Andre and D'Ziah. The respondent complied with these specific steps only sporadically and repeatedly failed to use the services the department offered to her. She also continued to use PCP. Although she participated in visits with her children supervised by the department, the visits did not go well. The respondent often behaved inappropriately, and D'Ziah had to be taken to a hospital after the respondent handled her too roughly during one visit.

On February 8, 2018, the petitioner filed petitions to terminate the respondent's parental rights with respect to both children on the ground that the respondent had failed to achieve a sufficient degree of personal rehabilitation that would encourage the belief that, within a reasonable time, she could assume a responsible position in the lives of her children. The court consolidated the petitions with a motion to transfer guardianship to Carmen B., which the respondent filed on November 30, 2017, prior to the filing of the petitions to terminate her parental rights.[2]

[2] The respondent's motion to transfer guardianship to Carmen B. was the last of three motions to transfer guardianship that she had filed prior to the filing of the petitions to terminate her parental rights. It appears that the respondent filed her first motion to transfer guardianship on June 5, 2017,

A trial was held on four nonconsecutive days in April, May, and November, 2019. On December 3, 2019, the court, in a thorough memorandum of decision, granted the termination petitions as to the respondent.[3] The court found, by clear and convincing evidence, that the respondent had "not made sufficient progress for a long enough period of time to assume that she is stable, had adequately addressed her mental health difficulties, including through the use of medication and is free of PCP permanently. There is no evidence of such changes in her behavior and outlook to support the claim that she could reasonably safely care for her children, now or in the future." Accordingly, the court found that the petitioner had proven that the respondent had failed to achieve a sufficient degree of personal rehabilitation pursuant to § 17a-112 (j) (3) (B) (i).

In the dispositional phase of the proceedings, the court made detailed findings on the seven criteria set out in § 17a-112 (k) as to the best interests of the children.[4] On the basis of these findings, the court concluded that terminating the respondent's parental rights

but it is unclear from the record to whom she was seeking to transfer guardianship and if the court ever ruled on her motion. The respondent filed her second motion to transfer guardianship on August 22, 2017, in which she sought to transfer guardianship to a family friend, Quetcy R. On October 26, 2017, the court, *Dyer*, *J.*, denied the motion on the ground that it was not in the children's best interests to transfer guardianship to Quetcy R. Thereafter, the respondent filed the motion to transfer guardianship to Carmen B. on November 30, 2017.

[3] The court also granted the petitions as to the fathers of D'Andre and D'Ziah. The court granted the petition as to D'Ziah's father on the basis of his consent to the termination of his parental rights. The court granted the petition as to D'Andre's father on the grounds of abandonment and failure to have an ongoing parent-child relationship with D'Andre. Neither father has appealed.

[4] General Statutes § 17a-112 (k) sets out the following factors: "Except in the case where termination of parental rights is based on consent, in determining whether to terminate parental rights under this section, the court shall consider and shall make written findings regarding: (1) The timeliness, nature and extent of services offered, provided and made available to the parent and the child by an agency to facilitate the reunion of

with respect to D'Andre and D'Ziah was in their best interests. The court also addressed the respondent's motion to transfer guardianship. The court determined that Carmen B. was not a suitable guardian for the respondent's children, citing her past conduct in allowing D'Andre to be in the respondent's care in contravention of the department's directives. The court also found that it was not in the best interests of the children to transfer guardianship to Carmen B. and, therefore, denied the respondent's motion to transfer guardianship. This appeal followed.

On appeal, the respondent does not argue that the court's factual findings were erroneous, nor does she claim that the court failed to comply with its statutory obligations to make findings on the seven criteria enumerated in § 17a-112 (k). Instead, the respondent contends that the court should have ruled on her motion to transfer guardianship prior to ruling on the petitions to terminate her parental rights and that the court

the child with the parent; (2) whether the [department] has made reasonable efforts to reunite the family pursuant to the federal Adoption and Safe Families Act of 1997, as amended from time to time; (3) the terms of any applicable court order entered into and agreed upon by any individual or agency and the parent, and the extent to which all parties have fulfilled their obligations under such order; (4) the feelings and emotional ties of the child with respect to the child's parents, any guardian of such child's person and any person who has exercised physical care, custody or control of the child for at least one year and with whom the child has developed significant emotional ties; (5) the age of the child; (6) the efforts the parent has made to adjust such parent's circumstances, conduct, or conditions to make it in the best interest of the child to return such child home in the foreseeable future, including, but not limited to, (A) the extent to which the parent has maintained contact with the child as part of an effort to reunite the child with the parent, provided the court may give weight to incidental visitations, communications or contributions, and (B) the maintenance of regular contact or communication with the guardian or other custodian of the child; and (7) the extent to which a parent has been prevented from maintaining a meaningful relationship with the child by the unreasonable act or conduct of the other parent of the child, or the unreasonable act of any other person or by the economic circumstances of the parent."

treated her motion with inadequate consideration. The respondent urges us to use our supervisory authority to reverse the judgments terminating her parental rights and to adopt a new procedural rule, to be applied on remand, requiring the Superior Court to make certain written findings in all cases in which the court is considering a transfer of guardianship motion and a petition to terminate parental rights concurrently. Specifically, pursuant to the respondent's proposed procedural rule, a trial court, when considering whether a guardian is " 'suitable and worthy,' " would be required to articulate written findings as to whether the guardian has the ability "[1] to show love and affection for the child, [2] to protect the child's health, education, and welfare, [3] to provide the child with food, clothing, medical care, and a domicile, and [4] to oversee the child's social and religious guidance." The court would then need to make detailed written findings addressing whether the transfer of guardianship is in the child's best interest. For this determination, the respondent proposes that the court should consider whether "[1] the placement will foster the child's sustained growth, development, well-being, and stability of environment, [2] the child would benefit from ongoing contact with a parent or the parent's extended family, to include the family's history, tradition, and culture, [3] there is any potential detriment to the child by terminating parental rights, and [4] the placement is outweighed by the benefit to the child of being placed in a stable adoptive home if the termination petition is granted."[5] The respondent claims that adopting such a procedural rule would guide

[5] The respondent derived her proposed "suitable and worthy" factors from *In re Isaiah J.*, 52 Conn. Supp. 485, 72 A.3d 446 (2011), aff'd, 141 Conn. App. 474, 62 A.3d 635, cert. denied, 308 Conn. 936, 66 A.3d 498, cert. denied sub nom. *Katherine D.* v. *Katz*, 571 U.S. 937, 134 S. Ct. 359, 187 L. Ed. 2d 249 (2013), and her proposed best interest of the child factors from *In re Dependency of A.C.*, 123 Wn. App. 244, 98 P.3d 89 (2004).

the trial court "in deciding matters that involve conflicting permanency options for children in foster care,[6] one by transfer of guardianship to a relative, and the other by termination of parental rights and adoption, where the court would be required to demonstrate through written findings that it has considered all relevant probative criteria bearing upon the transfer of guardianship as a less restrictive means of permanency . . . ." (Footnote added.) According to the respondent, such a rule is desirable because it would "assure the litigants and the public that the judiciary's default preference is not to terminate parental rights but to promote legislative policies favoring the placement of children in foster care with relatives."

In response, the petitioner argues that we should dismiss the respondent's appeal because her request for a new procedural rule is not connected to any actual controversy in that she is not challenging the termination of her parental rights. The petitioner further contends that, to the extent that we decide to review the respondent's claim, we should decline to exercise our supervisory authority because there are no exceptional circumstances in the present case warranting the use of such powers. We disagree with the petitioner's claim that the appeal should be dismissed but agree that we should not exercise our supervisory authority.

I

We first turn to the issue of whether we have jurisdiction over the respondent's appeal. The petitioner contends that we should dismiss her appeal because the

[6] Pursuant to General Statutes § 45a-604 (8), "permanent guardianship" is defined as "a guardianship . . . that is intended to endure until the minor reaches the age of majority without termination of the parental rights of the minor child's parents . . . ." It thus appears that guardianship can be a permanency option for children in foster care. We note that the respondent, however, did not move to have Carmen B. named as the permanent guardian of her children in her motion for transfer of guardianship. Instead, it appears that the respondent was seeking to transfer guardianship to Carmen B. on a temporary basis.

respondent's request for a new procedural rule is not tethered to any actual controversy. In the petitioner's view, the respondent does not claim that the trial court erred in making its decision either on the termination of parental rights petitions or on the motion to transfer guardianship. Consequently, the petitioner claims that the respondent is asking this court to issue an advisory opinion. We do not agree.

We begin by setting forth our standard of review. "Because courts are established to resolve actual controversies, before a claimed controversy is entitled to a resolution on the merits it must be justiciable. . . . Justiciability requires (1) that there be an actual controversy between or among the parties to the dispute . . . (2) that the interests of the parties be adverse . . . (3) that the matter in controversy be capable of being adjudicated by judicial power . . . and (4) that the determination of the controversy will result in practical relief to the complainant. . . . A case is considered moot if [the trial] court cannot grant the appellant any practical relief through its disposition of the merits . . . ." (Internal quotation marks omitted.) *In re Egypt E.*, 322 Conn. 231, 241, 140 A.3d 210 (2016). "Under such circumstances, the court would merely be rendering an advisory opinion, instead of adjudicating an actual, justiciable controversy." (Internal quotation marks omitted.) *St. Juste* v. *Commissioner of Correction*, 328 Conn. 198, 208, 177 A.3d 1144 (2018).

The respondent's claims on appeal demonstrate that there is an actual, justiciable controversy. Here, the respondent contends that the court erred in its handling of her motion to transfer guardianship to Carmen B. Specifically, she argues that the court should have ruled on her motion prior to ruling on the termination of parental rights petitions. She contends that the court's failure to do so denied her a fundamentally fair proceeding by creating an appearance that its default preference

was to terminate her parental rights. She further claims that the court's memorandum of decision, which disposed of her motion to transfer guardianship in eleven sentences, reflects that it treated her motion with less consideration than the termination of parental rights petitions. Moreover, due to these perceived errors, the respondent asks this court to reverse the judgments of the trial court, to award her a new trial, and to obligate the trial court to apply her proposed procedural rule.

In light of the respondent's claims of error and request for relief, we conclude that the respondent's appeal presents an actual, justiciable controversy. We conclude that the justiciability requirements have been satisfied because (1) there is an actual live controversy between the respondent and the petitioner as to whether the trial court properly handled the respondent's motion to transfer guardianship, (2) the parties' interests are adverse, with the respondent asserting that the court should have ruled on her motion to transfer guardianship first and the petitioner asserting that the court's consideration of her motion was proper, (3) this court is capable of adjudicating whether the court properly considered the respondent's motion, and (4) our determination of whether the court properly handled her motion could result in practical relief to the respondent if we were to conclude that the court erred and we adopt her proposed procedural rule. See *In re Egypt E.*, supra, 322 Conn. 241.

We are unpersuaded by the petitioner's argument to the contrary. Although our Supreme Court declined to exercise its supervisory authority in the cases that the petitioner cites, the court declined to do so, not because it concluded that it did not have jurisdiction over the appeal, but because it determined that the exercise of its supervisory authority was unnecessary. See, e.g., *State* v. *Weatherspoon*, 332 Conn. 531, 553, 212 A.3d 208 (2019) (declining to establish rule when no such

injustice occurred in case); *State* v. *Castillo*, 329 Conn. 311, 337, 186 A.3d 672 (2018) (declining to exercise supervisory authority when facts of defendant's case did not give rise to purported issue and defendant failed to demonstrate that issue was pervasive problem). Accordingly, we have jurisdiction over the respondent's appeal.

II

We now turn to the issue of whether we should exercise our supervisory authority to adopt the new procedural rule proposed by the respondent. Because we conclude that the proposed procedural rule implicates policy considerations better considered by the legislature, we decline to do so.

"Supervisory authority is an extraordinary remedy that should be used sparingly . . . . Although [a]ppellate courts possess an inherent supervisory authority over the administration of justice . . . [that] authority . . . is not a form of free-floating justice, untethered to legal principle . . . . Our supervisory powers are not a last bastion of hope for every untenable appeal. They are an extraordinary remedy to be invoked only when circumstances are such that the issue at hand, while not rising to the level of a constitutional violation, is nonetheless of utmost seriousness, not only for the integrity of a particular trial but also for the perceived fairness of the judicial system as a whole . . . . Constitutional, statutory and procedural limitations are generally adequate to protect the rights of the [litigant] and the integrity of the judicial system. Our supervisory powers are invoked only in the rare circumstance [in which] these traditional protections are inadequate to ensure the fair and just administration of the courts. . . . Overall, the integrity of the judicial system serves as a unifying principle behind the seemingly disparate use of our supervisory powers. . . . Thus, we are more

likely to invoke our supervisory powers when there is a pervasive and significant problem . . . or when the conduct or violation at issue is offensive to the sound administration of justice . . . ." (Internal quotation marks omitted.) *DeChellis* v. *DeChellis*, 190 Conn. App. 853, 870–71, 213 A.3d 1, cert. denied, 333 Conn. 913, 215 A.3d 1210 (2019).

We decline the respondent's invitation to exercise our supervisory authority in the present case. Matters pertaining to child protection, including the termination of parental rights, are heavily regulated by statute, and our legislature has crafted specific requirements that courts must comply with when determining, for example, whether to terminate parental rights. Pursuant to § 17a-112 (k), a court hearing a petition for the termination of parental rights is required to make specific written findings on seven criteria. The legislature, however, has not enacted a similar requirement for courts deciding a motion for transfer of guardianship. Transfer of guardianship motions are adjudicated pursuant to subsection (j) of General Statutes § 46b-129. *In re Avirex R.*, 151 Conn. App. 820, 833, 96 A.3d 662 (2014). Section § 46b-129 (j) (3) provides in relevant part that, "[i]f the court determines that the commitment should be revoked and the child's or youth's legal guardianship or permanent legal guardianship should vest in someone other than the respondent parent, parents or former guardian, or if parental rights are terminated at any time, there shall be a rebuttable presumption that an award of legal guardianship or permanent legal guardianship . . . shall be in the best interests of the child or youth and that such caregiver is a suitable and worthy person to assume legal guardianship or permanent legal guardianship . . . ."

As indicated by the clear language of § 46b-129 (j) (3), the court is not required to make specific findings on certain enumerated criteria when ruling on a motion

for transfer of guardianship. The rule that the respondent is asking us to adopt, which specifies eight criteria on which trial courts would be required to make written findings, would not be creating a new procedural rule, but, rather, would be asking us to rewrite the statutory scheme controlling transfer of guardianship motions. "It is not a proper function of this [court] to rewrite statutes." *State* v. *Lee*, 30 Conn. App. 470, 484, 620 A.2d 1303 (1993), aff'd, 229 Conn. 60, 640 A.2d 553 (1994). The legislature is better suited to gather and to assess the facts necessary to make this policy determination, and we defer to that branch of our government. See *State* v. *Moore*, 334 Conn. 275, 278–79, 221 A.3d 40 (2019) (noting reluctance to exercise supervisory authority when legislature already had acted in area of respondent's proposed procedural rule); *State* v. *Lockhart*, 298 Conn. 537, 577, 4 A.3d 1176 (2010) (deferring to legislature and declining to exercise supervisory power).

The procedural rule that the court adopted in *In re Yasiel R.*, 317 Conn. 773, 120 A.3d 1188 (2015), the main case on which the respondent relies in arguing that we should exercise our supervisory authority, is distinguishable from the rule that the respondent asks us to adopt here. In *In re Yasiel R.*, our Supreme Court invoked its supervisory authority to adopt a procedural rule requiring a brief canvass of all parents immediately before a parental rights termination trial. Id., 794. During the canvass, respondents would be advised, in part, of the nature and legal effect of a termination of parental rights proceeding, their ability to confront and to cross-examine witnesses, their right to representation by counsel, and their right to present evidence opposing the allegations. Id., 795. In adopting this procedural rule, our Supreme Court noted that the lack of such a canvass may give the appearance of unfairness "insofar as it may indicate a lack of concern over a parent's rights and understanding of the consequences of the

proceeding." Id., 794. Our Supreme Court concluded that "public confidence in the integrity of the judicial system would be enhanced by a rule requiring a brief canvass of all parents immediately before a parental rights termination trial so as to ensure that the parents understand the trial process, their rights during the trial and the potential consequences." Id. The court also stated that courts frequently canvass parties in other circumstances, such as when a criminal defendant waives his or her right to a jury trial and when a criminal defendant wishes to represent himself or herself, and that a canvass would neither materially delay the termination proceeding nor unduly burden the state. Id., 795–96. Accordingly, our Supreme Court concluded that imposing the canvass rule was an appropriate exercise of its supervisory authority. Id., 796.

The considerations that led the court in *In re Yasiel R.* to invoke its supervisory authority are not present here. Unlike the proposed rule presently before us, the procedural rule from *In re Yasiel R.* did not require the court, in effect, to rewrite a statutory scheme. The procedural rule that the court adopted there "merely constitute[d] an advisement to [respondents] of [their] rights regarding the trial" and did not effect a change in the substantive law of child protection. Id., 795. In the present case, the failure to adopt the respondent's proposed procedural rule also does not risk creating the appearance of unfairness. The proposed rule does not implicate the fairness of the proceeding itself, and would not enhance public confidence in the integrity of the judicial system by ensuring that parties to a termination and guardianship proceeding understand the trial process, their rights during trial, and the potential consequences. Moreover, under the existing statutory scheme, the trial court is obligated to make certain written findings concerning guardians when considering a petition for the termination of parental rights.

Specifically, the court is required to make written findings on the feelings and emotional ties of the child with respect to his or her parents and guardians. See General Statutes § 17a-112 (k) (4). It thus cannot be said that the respondent's proposed rule is necessary to ensure that courts properly and fairly consider transfer of guardianship motions raised concurrently with a petition for the termination of parental rights. Indeed, the trial court here made written findings on the respondent's motion and explained why it did not believe that Carmen B. was a suitable guardian. In light of these considerations, *In re Yasiel R.* is distinguishable. This simply is not the occasion to invoke the extraordinary remedy of our supervisory authority where the proposed procedural rule implicates a policy consideration best addressed by the legislature and there is no evidence of pervasive, significant problems[7] or conduct that threatens the sound administration of justice. Accordingly, we decline to exercise our supervisory authority to adopt the respondent's proposed procedural rule.

The judgments are affirmed.

In this opinion the other judges concurred.

JOHN DOE *v.* STEPHEN FLANIGAN ET AL.
(AC 42567)

Elgo, Bright and Moll, Js.*

Syllabus

The plaintiff sought to recover damages from, inter alia, the defendant city of Waterbury for injuries that he suffered when F, a former police officer employed by the city, allegedly pushed the plaintiff to the ground and

[7] The respondent has conceded that the number of cases to which the rule would apply is likely to be " 'extremely small.' "

* The listing of judges reflects their seniority status on this court as of the date of oral argument.

handcuffed him, and a third party, C, assaulted the plaintiff by placing a sex toy against his buttocks. The plaintiff's operative complaint alleged, inter alia, that the city was liable pursuant to statute (§ 52-557n) for the damages he sustained as a result of F's negligence. The court rendered partial summary judgment in favor of the city, concluding that there were no genuine issues of material fact as to whether F had engaged in wilful, rather than negligent misconduct, and that the identifiable victim subject to imminent harm exception to governmental immunity did not apply to the plaintiff's allegation that F failed to protect him from C's sexual assault. Subsequently, the plaintiff withdrew his remaining claims and appealed to this court. *Held*:

1. The trial court erred in granting the city's motion for summary judgment as to the plaintiff's claim that F negligently pushed him to the ground and handcuffed him: the plaintiff proffered sufficient evidence to demonstrate the existence of genuine issues of material fact with respect to whether F's conduct was wilful or negligent, as a reasonable jury could have concluded that the plaintiff was willingly handcuffed by F and was not, as the court concluded, an unwilling participant, there was an issue as to whether F was demonstrating the professional use of handcuffs on the plaintiff, and there was evidence in the record that F had shown a pattern of poor judgment while acting in his duties as a police officer, and the fact that F's use of handcuffs was in violation of the city's policy did not make his conduct per se wilful; moreover, the city's claim that this court should affirm the trial court's judgment on the alternative ground that F was not acting within the scope of his employment when he pushed the plaintiff to the ground and handcuffed him was unavailing, as there was evidence in the record that F was acting within his period of employment, the location of the assault was within F's normal jurisdiction, F frequently visited this location both while on and off duty and, at the time of the assault, F was on his way to an activity related to his role as a police officer in which he often demonstrated the use of handcuffs and he was dressed in full police uniform issued by the city, including his duty belt with his handcuffs and weapons.
2. The trial court erred in rendering summary judgment in favor of the city on the basis that there was no genuine issue of material fact as to whether it was apparent to F that the plaintiff was an identifiable victim subject to imminent harm, as the city never raised this defense in its motion; the city argued only that F's conduct was wilful and outside the scope of his employment and, thus, the plaintiff never had the opportunity or reason to make the argument that this exception to discretionary act immunity applied.

Argued June 19—officially released November 24, 2020

Procedural History

Action to recover damages for, inter alia, the named defendant's alleged negligence, and for other relief,

brought to the Superior Court in the judicial district of Waterbury, where the plaintiff filed an amended complaint; thereafter, the plaintiff filed a second amended complaint; subsequently, the court, *Shah*, *J.*, granted in part the motion for summary judgment filed by the defendant city of Waterbury and rendered judgment thereon; thereafter, the plaintiff withdrew his remaining claims and appealed to this court. *Reversed; further proceedings*.

Christopher DeMarco, for the appellant (plaintiff).

Daniel J. Foster, corporation counsel, for the appellee (defendant city of Waterbury).

Opinion

BRIGHT, J. This appeal arises out of an incident in which a third party, Charles Fullenwiley, assaulted the plaintiff, John Doe,[1] by placing a sex toy against his buttocks after the named defendant, Stephen Flanigan, at the time a police officer employed by the defendant city of Waterbury, allegedly pushed the plaintiff to the ground and handcuffed him.[2] The plaintiff appeals from the summary judgment rendered by the trial court in favor of the defendant on the fourth count of the plaintiff's second amended complaint, which alleged that, pursuant to General Statutes § 52-557n, the defendant was liable to the plaintiff for the injuries he sustained arising out of Flanigan's negligent conduct.[3] The fourth

[1] We note that the present action was commenced on behalf of John Doe, a minor child, by and through his parent, Jane Doe, as next friend. Thereafter, when John Doe reached the age of majority, he amended the complaint to delete the allegation that the claims were brought by his parent in a representative capacity. All references herein to the plaintiff are to John Doe.

[2] Flanigan is not a party to this appeal. Therefore, we refer to the city of Waterbury as the defendant throughout this opinion.

[3] In his four count second amended complaint, the plaintiff brought three counts against Flanigan, alleging that Flanigan (1) falsely arrested the plaintiff, (2) participated in the sexual assault of the plaintiff, and (3) was negligent in his interaction with the plaintiff. The plaintiff subsequently settled all of his claims against Flanigan.

count of the plaintiff's complaint incorporated the allegations of the third count, which alleged that Flanigan acted negligently when he (1) pushed the plaintiff to the ground and handcuffed him, (2) failed to protect the plaintiff from Fullenwiley's assault, and (3) failed to report Fullenwiley's assault. On appeal, the plaintiff claims that the court erred in concluding that there were no genuine issues of material fact as to whether (1) Flanigan engaged in wilful, rather than negligent, misconduct when he pushed the plaintiff to the ground and handcuffed him, and (2) the identifiable victim subject to imminent harm exception to governmental immunity did not apply to the plaintiff's allegation that Flanigan failed to protect the plaintiff from being sexually assaulted by Fullenwiley.[4] Additionally, the defendant argues that we can affirm the judgment of the trial court on the alternative ground that Flanigan was not acting within the scope of his employment, and, therefore, the defendant could not be liable.

As to the first issue raised by the plaintiff, we conclude that there are genuine issues of material fact as to whether Flanigan's conduct was wilful or negligent. We also reject the defendant's claimed alternative ground for affirmance because there are genuine issues of material fact as to whether Flanigan, in fact, was acting within the scope of his employment when he pushed the plaintiff to the ground and handcuffed him. As to the second issue raised by the plaintiff, we conclude that the court improperly rendered summary judgment on a ground not argued before it. Consequently, we reverse the judgment of the trial court.

The following facts, viewed in the light most favorable to the plaintiff, and procedural history are relevant

[4] The trial court denied the defendant's motion for summary judgment as to the plaintiff's failure to report allegation. Subsequently, the plaintiff withdrew that part of his negligence claim against the defendant.

to our resolution of the plaintiff's claims. At all times relevant to this appeal, the plaintiff was a minor under sixteen years of age, and Flanigan was employed by the defendant as a police officer. Flanigan took part in the Police Explorers, a program run by the Waterbury Police Department in which young people between the ages of fourteen and twenty-one would meet at the Waterbury Police Department on a monthly basis in order to learn more about becoming police officers. As part of the program, Flanigan frequently handcuffed juveniles as a way to demonstrate the use of handcuffs.

Beginning in July, 2005, the plaintiff worked with Fullenwiley at his place of business, an electronics store in Waterbury called World Technology. Flanigan, who had been friends with Fullenwiley since 2003, frequently visited the store to "hang out," often doing so while on duty. While at the store, Flanigan would "horse around" with the young people there, among whom were Fullenwiley's son and the plaintiff. In addition to horseplay, Flanigan, on more than one occasion, would handcuff young people at the store "because they wanted to see what it was like."

In the spring of 2006, Flanigan stopped at World Technology on his way to the Police Explorers. The plaintiff, while at World Technology, asked Flanigan to demonstrate the use of his handcuffs. Flanigan pushed the plaintiff to the ground and handcuffed him. While the plaintiff was restrained on the ground, Fullenwiley kneeled on his back and pushed a sex toy against his buttocks. Flanigan watched this incident unfold and took photographs of Fullenwiley and the plaintiff. In October, 2009, the plaintiff commenced the underlying action against Flanigan and the defendant for the injuries that he sustained arising out of this incident.

On January 22, 2015, the plaintiff filed the operative four count complaint (second amended complaint)

against Flanigan and the defendant. In the first and second counts, the plaintiff alleged that Flanigan falsely arrested the plaintiff and participated in a sexual assault against him. In the third count, the plaintiff alleged that Flanigan was negligent in pushing the plaintiff to the ground and handcuffing him, failing to protect the plaintiff from a sexual assault, and failing to report the sexual assault. Counts one through three subsequently were settled as against Flanigan himself, leaving only the fourth count of the complaint, which was brought against the defendant. In the fourth count, which incorporated by reference paragraphs 1 through 13 of the third count, the plaintiff alleged that, pursuant to § 52-557n, the defendant was liable to the plaintiff for the carelessness and negligence of Flanigan. The specific allegations of negligence in the third count at issue are as follows:

"6. . . . Flanigan would occasionally engage in 'horseplay' with minors at World Technology and would demonstrate the use of handcuffs to the minors present at World Technology.

"7. In the spring of 2006, while the plaintiff was at World Technology . . . Flanigan, in an attempt to demonstrate the use of handcuffs, pushed the plaintiff to the ground and put his handcuffs on the plaintiff.

"8. While the plaintiff lay on his stomach, and without . . . Flanigan knowing what was about to happen . . . Fullenwiley kneeled on the plaintiff's back and placed a [sex toy] against the plaintiff's buttocks.

"9. . . . Fullenwiley was ultimately arrested and convicted for various criminal offenses, among them the above-described incident.

"10. When . . . Flanigan observed Fullenwiley place a [sex toy] against the plaintiff's buttocks, he knew or should have known that . . . Fullenwiley's conduct

was illegal and that as a police officer, he had a duty to protect the minor plaintiff from such conduct, yet he failed to take any law enforcement action whatsoever.

"11. As a police officer . . . Flanigan was mandated to report incidents of child sexual abuse to the Department of Children and Families, thus making such a report nondiscretionary, yet he failed to make such a report.

"12. . . . Flanigan was negligent in that he failed to act in accordance with the scope of his duties as a police officer so as to protect the minor plaintiff from such conduct and to prevent such conduct from occurring.

"13. As a direct and proximate result of . . . Flanigan's negligence the plaintiff sustained physical injury, extreme emotional distress, fear and apprehension. From all of the aforesaid injuries the plaintiff has suffered and will suffer psychological pain and mental anguish, all of which are, or are likely to be, permanent in nature."[5]

On May 19, 2015, the defendant responded with an answer and nine special defenses. On November 22, 2016, the defendant filed a motion for summary judgment.[6] In addressing the motion for summary judgment,

[5] In the third count, the plaintiff also incorporated paragraphs 1 through 5 of the first count, which stated as follows:

"1. At all times relevant hereto the plaintiff was a child under the age of [sixteen] years of age.

"2. At all relevant times . . . Flanigan was employed by the defendant . . . as a police officer.

"3. At all relevant times the plaintiff was on probation from Juvenile Court.

"4. Beginning in the winter of 2006 the plaintiff would assist . . . Fullenwiley at his place of business known as World Technology located at 81 Bank Street, in the city of Waterbury, Connecticut.

"5. . . . Flanigan was a frequent visitor at . . . Fullenwiley's place of business, both while on and off duty as a Waterbury police officer."

[6] The motion filed on November 22, 2016 was subsequently sealed by the court, and the defendant filed a redacted motion for summary judgment with an accompanying memorandum on July 6, 2017.

the court treated the allegation of negligence against the defendant as setting forth three distinct claims. The court summarized the allegations as follows: "The plaintiff alleges that the [defendant] is liable for (A) Flanigan's affirmative acts of pushing the plaintiff to the ground and handcuffing him; (B) Flanigan's failure to protect the plaintiff from an assault by Fullenwiley; and (C) Flanigan's failure to make a mandatory report of child abuse."

In its memorandum in support of its motion for summary judgment, the defendant set forth the same argument as to all three bases for liability, namely, that Flanigan engaged in misconduct that was both wilful and outside of the scope of his official duties as a police officer. In support of its argument, the defendant stated: "The pleadings together with the sworn statements and testimony of the plaintiff clearly establish undisputed facts which can only lead to the conclusion that . . . Flanigan was not acting within the scope of his employment or official duties and that he had committed acts or omissions constituting wilful misconduct." The defendant argued that "[u]nder no scenario set forth by the plaintiff in an attempt to replead his case, can the plaintiff avoid the undisputed facts which the plaintiff himself asserts, that Flanigan pushed him to the ground, handcuffed him, participated in and photographed the incident where Fullenwiley placed a [sex toy] against the [plaintiff's] buttocks. There is no circumstance under which these activities of . . . Flanigan could be found to be within the scope of his employment or official duties. Additionally there can be no dispute that Flanigan's actions as testified to by the plaintiff were acts which constituted wilful misconduct." To the extent that Flanigan's actions constituted wilful misconduct beyond the scope of his employment, the defendant maintained that it could not be vicariously liable for such conduct under § 52-557n.

On February 27, 2017, the plaintiff filed a memorandum in opposition to the defendant's motion for summary judgment. In his memorandum, the plaintiff argued that the defendant failed to establish the absence of any genuine issue of material fact as to whether Flanigan had acted negligently, stressing that a reasonable fact finder could find that Flanigan had acted negligently, not wilfully. Specifically, the plaintiff stated: "It appears, based on statements he made, that Flanigan was not aware of the [defendant's] prohibition on the use of handcuffs for such purposes. Thus, a genuine issue exists as to whether Flanigan was negligent when he demonstrated the use of handcuffs on juveniles at World Technolog[y]. . . . The jury may determine that Flanigan had no idea what Fullenwiley was about to do after the plaintiff was placed on the ground and handcuffed. Flanigan may have negligently believed that he was simply demonstrating a restraint procedure, as he stated in his deposition and in police reports. After Fullenwiley held the [sex toy] to the plaintiff's buttocks, Flanigan had an absolute duty to arrest Fullenwiley, report the incident to his superiors, and alert [the Department of Children and Families]. It is for the trier of fact to determine whether his failure to do so was negligent or not." The plaintiff argued further that there exists a genuine issue of material fact as to whether Flanigan's actions—in demonstrating the use of handcuffs on the plaintiff—could be considered within the scope of his official duties as a police officer. The plaintiff argued that "[t]he plaintiff does not allege in the fourth count that Flanigan restrained the plaintiff so that Fullenwiley could sexually assault him; the allegation is that Flanigan negligently engaged in conduct without knowing what Fullenwiley was about to do. Thus, Flanigan's actions may still be considered within the scope of his employment if he thought, even mistakenly, that he was demonstrating the use of handcuffs."

On July 18, 2017, the court issued its memorandum of decision granting in part and denying in part the defendant's motion for summary judgment. The court addressed each of the three allegations of negligence in turn. As to the first allegation of negligence, that Flanigan was negligent in pushing the plaintiff to the ground and handcuffing him, the court found that the plaintiff had made a "colorable argument that a genuine issue of material fact exists as to whether Flanigan was acting in the scope of his employment or official duties at the time he pushed the plaintiff to the ground and placed him in handcuffs";[7] however, the court ultimately declined to reach that issue, finding instead that "[t]he only conclusion that can be reached . . . is that Flanigan's acts of pushing the plaintiff to the ground and unlawfully restraining him constitute[d] wilful misconduct. . . . Indeed, the plaintiff's allegation that Flanigan was demonstrating the use of handcuffs coupled with the evidence indicating that the plaintiff was not a willing participant in the demonstration buttress this determination. Moreover, the [defendant] submitted evidence that Flanigan's use of handcuffs in the manner alleged was in violation of the [defendant's] policies. . . . Accordingly, summary judgment is granted in favor of the [defendant] as to liability for Flanigan's acts of pushing the plaintiff to the ground and placing him in handcuffs."

With respect to the second allegation of negligence, that Flanigan had a duty as a police officer to protect the plaintiff from Fullenwiley's actions, the court did not consider whether Flanigan was acting in the scope of his employment or whether his actions were wilful, instead disposing of the claim on governmental immunity grounds, an argument that was not advanced by

[7] The court noted that "[t]he evidence submitted indicates that Flanigan was wearing his city issued police uniform and duty belt, which included his handcuffs (and presumably his weapon), and that he stopped into World Technology on his way to volunteer for the Police Explorers program."

the defendant. The court noted: "A police officer's actions in carrying out [his or her typical duties] are discretionary and typically afforded governmental immunity. See *Smart* v. *Corbitt*, 126 Conn. App. 788, 800, 14 A.3d 368, cert. denied, 301 Conn. 907, 19 A.3d 177 (2011). . . . However, governmental immunity does not apply when 'the circumstances make it apparent to [a] public officer that his or her failure to act would be likely to subject an identifiable person to imminent harm. . . . ' *Merritt* v. *Bethel Police Dept.*, 120 Conn. App. 806, 812, 993 A.2d 1006 (2010)." (Citation omitted.) Applying these principles, the court determined that this exception to governmental immunity did not apply. In reaching that determination, the court stated that, "[b]ased on the evidence submitted, there is no genuine issue of material fact that Flanigan knew that the plaintiff was at risk of imminent harm or that Flanigan's nonresponse to the imminent danger would likely subject the plaintiff to that harm. The plaintiff's complaint alleges that Fullenwiley acted 'without . . . Flanigan knowing what was about to happen' . . . and there is no evidence in the record from which a reasonable jury could determine that it was apparent to Flanigan that Fullenwiley would place a [sex toy] against the plaintiff's buttocks. . . . Thus, summary judgment is granted in favor of the [defendant] as to liability for Flanigan's failure to act to protect the plaintiff." (Citations omitted.)

As to the third allegation of negligence, whether Flanigan had a mandatory duty to report Fullenwiley's sexual assault of the plaintiff to the Department of Children and Families, the court determined that the defendant failed to satisfy its burden of proving that no genuine issue of material fact existed. Consequently, the court denied the defendant's motion for summary judgment as to its liability for Flanigan's failure to report. As we stated in footnote 4 of this opinion, however, the plain-

tiff subsequently withdrew his claim against the defendant as to its liability arising out of Flanigan's failure to report.[8] Accordingly, we do not consider this claim, but we do note for the purposes of this appeal that in addressing this issue the court found that "the [defendant] has failed to show that no genuine issue of material fact remains as to whether Flanigan was acting in the scope of his employment at the time he witnessed the plaintiff's abuse." The court specifically noted that "the evidence submitted indicates that Flanigan stopped at World Technology while on his way to volunteer with the Police Explorers; World Technology was within Flanigan's normal jurisdiction; Flanigan often stopped at World Technology, while both on and off duty; and, at the time of the abuse, Flanigan was dressed in full police uniform with his duty belt, which included his handcuffs (and presumably his weapon)—all of which were issued by the [defendant]." This appeal followed. Additional facts will be set forth as necessary.

Initially, we set forth our standard of review. "The standard of review of a trial court's decision granting summary judgment is well established. Practice Book § 17-49 provides that summary judgment shall be rendered forthwith if the pleadings, affidavits and any other proof submitted show that there is no genuine issue as to any material fact and that the moving party is entitled to judgment as a matter of law. In deciding a motion for summary judgment, the trial court must view the evidence in the light most favorable to the nonmoving party. . . . The courts are in entire agreement that the

[8] At oral argument before this court, both parties acknowledged that they had previously agreed that, after settling with Flanigan, the plaintiff also would withdraw his remaining claim against the city alleging a failure to report, and, instead, proceed solely on the two claims alleging negligence in handcuffing the plaintiff and a failure to protect the plaintiff from the assault. Accordingly, the parties agree that the subject of this appeal was not rendered moot by the plaintiff's withdrawal of part of the fourth count.

moving party . . . has the burden of showing the absence of any genuine issue as to all the material facts . . . . When documents submitted in support of a motion for summary judgment fail to establish that there is no genuine issue of material fact, the nonmoving party has no obligation to submit documents establishing the existence of such an issue. . . . Once the moving party has met its burden, however, the [nonmoving] party must present evidence that demonstrates the existence of some disputed factual issue. . . . Our review of the trial court's decision to grant the defendant's motion for summary judgment is plenary. . . . On appeal, we must determine whether the legal conclusions reached by the trial court are legally and logically correct and whether they find support in the facts set out in the memorandum of decision of the trial court." (Citations omitted; internal quotation marks omitted.) *Lucenti* v. *Laviero*, 327 Conn. 764, 772–73, 176 A.3d 1 (2018).

I

A

On appeal, the plaintiff first claims that the court erred in rendering summary judgment in favor of the defendant as to his claim that Flanigan negligently pushed the plaintiff to the ground and handcuffed him because there is a genuine issue of material fact as to whether Flanigan engaged in negligent or wilful misconduct. We agree with the plaintiff.

The following additional facts are relevant to our resolution of the plaintiff's claim. In support of his memorandum in opposition to the defendant's motion for summary judgment, the plaintiff submitted the transcript of Flanigan's March 5, 2013 deposition. At his deposition, Flanigan testified about his participation in the Police Explorers. Flanigan testified that he had handcuffed juveniles who were not under arrest

"numerous times with the Police Explorers" as a way to demonstrate the use of handcuffs. When asked if he had ever handcuffed a juvenile who was not under arrest outside of the Police Explorers program, Flanigan testified that he could recall two instances: one time with Fullenwiley's son and another time with the plaintiff. With respect to the plaintiff, Flanigan testified that he handcuffed him for a period of "about ten seconds" because "he asked me to."

Flanigan, in a statement given to the police on July 13, 2009, signed under penalty of perjury, stated that the incident with the plaintiff occurred when he was on his way to a Police Explorers meeting.[9] Flanigan averred further that, while at the store, "[t]he kids began to look at my duty belt and wanted to play with my handcuffs. I remember that . . . [the plaintiff was] among the kids that were there. I asked [Fullenwiley] if I could handcuff the boys as part of a demonstration. I handcuffed . . . [the plaintiff] and then uncuffed [him] right away after putting the cuffs on. I did not think it was a big deal because that was what I was going to teach the Explorers that night."

In addition to Flanigan's deposition testimony and police statement, the plaintiff also relied on Fullenwiley's written statement to the Waterbury Police Department, dated March 31, 2010. In his statement, Fullenwiley averred that Flanigan would horse around with the young people at his store, "but it was always in fun. No one was trying to hurt anyone." Fullenwiley averred further that the plaintiff "was always misbehaving. One day I was playing around with [the plaintiff] wrestling with him. [The plaintiff] is a big kid, like 230–240 pounds so when he was down on the floor, I kneeled down on

[9] This statement is at odds with Flanigan's testimony at his deposition that he resigned from the Police Explorers in 2005 due to scheduling conflicts. This would have been before the incident with the plaintiff. Such conflicts in recollection are for the finder of fact to resolve.

him. . . . There was a bunch of other people there too that day that saw what was going on. . . . While [the plaintiff] was on the ground, [he] got handcuffed. I think it was [Flanigan] that handcuffed [the plaintiff] with his handcuffs because he was on duty. He didn't do it to be malicious, we were all just playing around. Someone, I think it was [V] took my digital camera out and started taking pictures of us horsing around. I remember that three pictures were taken. I put them on my computer . . . for us all to look at. Two of the pictures had [Flanigan] in the background, standing by the doorway. [Flanigan] saw those pictures and told me to delete them because it looked bad and he could get in trouble. The third picture was of [the plaintiff] on the ground and you could see the handcuffs. I saved that picture and joked with [the plaintiff] that we were going to show all the girls at [school] how we got him on the floor. I've only seen [Flanigan] use his metal handcuffs that one time on [the plaintiff]. . . . The only other thing that I could remember [Flanigan] doing in my store while he was working was that sometimes he took out his Taser. . . . A few times when . . . [the plaintiff] misbehaved, [Flanigan] took his Taser out and took the cartridge off the end of it. Then he turned it on so you could see the electricity flash. [Flanigan] went near the boys with it to scare them, but he never touched anyone with it or used it on the boys. It probably wasn't appropriate for [Flanigan] to do that, but he was only doing it in fun."

Additionally, the plaintiff attached to his memorandum a copy of Flanigan's performance appraisal from the Waterbury department of human resources, dated November 29, 2004, and a copy of an interdepartmental memorandum, dated November 6, 2005, critiquing certain aspects of Flanigan's performance. In his performance appraisal, Flanigan's supervisor indicated that Flanigan has "on occasion exercise[d] poor judgment."

Similarly, in Captain A. Gallo's interdepartmental memorandum regarding Flanigan's performance, Gallo averred that Flanigan "has shown a pattern of being insensitive to citizens that he interacts with and at times has used poor judgment when his discretion is needed."

The following legal principles are relevant to our resolution of the plaintiff's claim. "The general rule is that governments and their agents are immune from liability for acts conducted in performance of their official duties. The common-law doctrine of governmental immunity has been statutorily enacted and is now largely codified in . . . § 52-557n. . . . Section 52-557n provides in relevant part: (a) (1) Except as otherwise provided by law, a political subdivision of the state shall be liable for damages to person or property caused by: (A) The negligent acts or omissions of such political subdivision or any employee, officer or agent thereof acting within the scope of his employment or official duties . . . (2) Except as otherwise provided by law, a political subdivision of the state shall not be liable for damages to person or property caused by: (A) Acts or omissions of any employee, officer or agent which constitute criminal conduct, fraud, actual malice or wilful misconduct . . . ." (Citation omitted; internal quotation marks omitted.) *Martin* v. *Westport*, 108 Conn. App. 710, 729, 950 A.2d 19 (2008).

"Whether a party's conduct is wilful is a question of fact. See *Bauer* v. *Waste Management of Connecticut, Inc.*, 239 Conn. 515, 527, 686 A.2d 481 (1996) ([w]hat constitutes wilfulness is a question of fact). The term has many and varied definitions, with the applicable definition often turn[ing] on the specific facts of the case and the context in which it is used. *Doe* v. *Marselle*, 236 Conn. 845, 851, 675 A.2d 835 (1996); *Screws* v. *United States*, 325 U.S. 91, 101, 65 S. Ct. 1031, 89 L. Ed. 1495 (1945). As we previously have observed, Black's Law Dictionary (6th Ed. 1990) demonstrates the varied

ways that wilful has been defined ranging from voluntary; knowingly; deliberate . . . [i]ntending the result which actually comes to pass; designed; intentional; purposeful; not accidental or involuntary to [p]remeditated; malicious; done with evil intent, or with a bad motive or purpose, or with indifference to the natural consequences.

"Additionally, we have defined the term differently depending on the context. See, e.g., *Dubay* v. *Irish*, 207 Conn. 518, 533, 542 A.2d 711 (1988) (wilful misconduct requires design to injure); *DeMilo* v. *West Haven*, 189 Conn. 671, 678–79, 458 A.2d 362 (1983) (wilful destruction of bridge means intentional destruction of bridge and intent to cause injury); *State* v. *Gotsch*, 23 Conn. Supp. 395, 398–99, 184 A.2d 56 (1962) (wilful commonly means intentional, as opposed to accidental, but in penal statute it means with evil intent); *Guest* v. *Administrator*, 22 Conn. Supp. 458, 459, 174 A.2d 545 (1961) (wilful breach of rule means deliberate violation done purposely with knowledge as opposed to result of thoughtlessness or inadvertence). *Doe* v. *Marselle*, supra, 236 Conn. 851–52 n.8. The term wilful also has been described as including not only the mere exercise of the will in failing to comply with the statute [in question], but also an intention to do an act that he knows, or ought to know, is wrongful or forbidden by law . . . . Ballentine's Law Dictionary (3d Ed. 1969).

"Correspondingly, the term wilful has been used to describe conduct deemed highly unreasonable or indicative of bad faith. See *CFM of Connecticut, Inc.* v. *Chowdhury*, 239 Conn. 375, 395, 685 A.2d 1108 (1996) ([t]o determine whether the bad faith exception applies, the court must assess whether there has been substantive bad faith as exhibited by, for example, a party's . . . wilful violations of court orders . . .), overruled in part on other grounds by *State* v. *Salmon*, 250 Conn. 147, 154–55, 735 A.2d 333 (1999); *ACMAT Corp.* v.

Greater New York Mutual Ins. Co., 282 Conn. 576, 591–92 n.13, 923 A.2d 697 (2007) (same); *Matthiessen* v. *Vanech*, 266 Conn. 822, 833, 836 A.2d 394 (2003) (While we have attempted to draw definitional distinctions between the terms wilful, wanton or reckless, in practice the three terms have been treated as meaning the same thing. The result is that [wilful], wanton, or reckless conduct tends to take on the aspect of highly unreasonable conduct, involving an extreme departure from ordinary care, in a situation where a high degree of danger is apparent." (Internal quotation marks omitted.) *Saunders* v. *Firtel*, 293 Conn. 515, 530–32, 978 A.2d 487 (2009); see *Dubay* v. *Irish*, supra, 207 Conn. 533 n.8 ("[w]ilful misconduct is intentional misconduct, and wanton misconduct is reckless misconduct, which is the equivalent of wilful misconduct" (internal quotation marks omitted)).

In reaching its conclusion that Flanigan's conduct of pushing the plaintiff to the ground and handcuffing him was wilful, the court stated that "Flanigan acted with a deliberate or reckless disregard for the plaintiff's safety and the consequences of his action." With respect to the parties' evidence, submitted in support of, or in opposition to the defendant's motion for summary judgment, the court reasoned that the plaintiff's unwillingness to participate in Flanigan's handcuffing demonstration buttressed its determination that Flanigan engaged in wilful misconduct.

Similarly, the defendant relies on the fact that Flanigan pushed the plaintiff to the ground just prior to handcuffing him as conclusive evidence that Flanigan's conduct exceeded mere negligence. The defendant states that "[a]ny such argument [that Flanigan's act of pushing the plaintiff to the ground constituted mere negligence] would defy common sense, because any reasonable person in Flanigan's position would have

known that the plaintiff was not a willing participant in what the plaintiff now calls a mere demonstration."[10]

The court and the defendant both ignored the import of the evidence proffered by the plaintiff in his opposition to the defendant's motion for summary judgment. Flanigan testified at his deposition that the plaintiff asked to be handcuffed. Similarly, Flanigan averred in his sworn police statement that, on the date in question, the plaintiff looked at his duty belt and "wanted to play with my handcuffs." On the basis of this evidence, a jury reasonably could conclude that the plaintiff was a willing participant in Flanigan's handcuffing demonstration.

Moreover, the plaintiff produced additional evidence that raises a genuine issue of material fact as to whether Flanigan's conduct was negligent or wilful. Specifically, in his statement to the police, Flanigan averred that he "did not think it was a big deal" to demonstrate the use of handcuffs on the plaintiff "because that was what I was going to teach the Explorers that night." To the extent that Flanigan, in fact, was demonstrating the professional use of handcuffs on the plaintiff, a jury reasonably could infer from Flanigan's conduct that he was not acting wilfully, as that term has been used throughout our case law. See *Saunders* v. *Firtel*, supra,

[10] We note that, on appeal, the defendant has not argued, as it did before the trial court, that the plaintiff's allegation that Flanigan photographed him operates as an admission to support its special defense that Flanigan engaged in wilful misconduct. Moreover, although the plaintiff in his principal appellate brief alludes to evidence that Flanigan "may" have taken a picture of a handcuffed juvenile, and similarly alleged, in his opposition to summary judgment before the trial court, that Flanigan photographed him, the plaintiff also relied on statements made by both Fullenwiley and Flanigan to demonstrate that the question of whether Flanigan photographed him remained a disputed issue of fact. Thus, even if we agreed that purported evidence of Flanigan photographing the plaintiff would support the defendant's claim of wilful misconduct, the issue is not properly before us, and, as a disputed fact, remains one for the trier of fact to resolve.

293 Conn. 530–32; see also *Daley* v. *Kashmanian*, 193 Conn. App. 171, 179, 219 A.3d 499 (2019) ("The state of mind amounting to recklessness may be inferred from conduct. But, in order to infer it, there must be something more than a failure to exercise a reasonable degree of watchfulness to avoid danger to others or to take reasonable precautions to avoid injury to them." (Internal quotation marks omitted.)), cert. granted, 335 Conn. 939, 237 A.3d 1 (2020), and cert. denied, 335 Conn. 940, 237 A.3d 1 (2020). Indeed, such an inference is supported by Fullenwiley's statement that, when Flanigan handcuffed the plaintiff, "[h]e didn't do it to be malicious, we were all just playing around."

Furthermore, Flanigan's supervisor indicated that Flanigan "has shown a pattern of being insensitive to citizens that he interacts with and at times has used poor judgment when his discretion is needed." Indeed, Flanigan's poor judgment had been on display in other instances, namely, his use of his Taser to scare the plaintiff and others. On the basis of this evidence, *viewed in the light most favorable to the plaintiff*, a jury reasonably could conclude that Flanigan's conduct, although inappropriate, was merely a lapse in judgment that was more akin to negligent horseplay than wilful misconduct, particularly in light of the evidence that comparable physical contact at World Technology "was always in fun."

Finally, the court's reliance on Flanigan's violation of the defendant's departmental policy as evidence that he engaged in wilful misconduct is misplaced. The mere fact that Flanigan's use of handcuffs "was in violation of the [defendant's] policies" does not make his conduct per se wilful. Whether a party engaged in wilful, wanton or reckless conduct cannot be determined simply by ascertaining whether an actor violated a policy, but, rather, it requires a determination of the actor's state of mind when violating the policy. See *Begley* v. *Kohl &*

Madden Printing Ink Co., 157 Conn. 445, 450–51, 254 A.2d 907 (1969) ("Recklessness is a state of consciousness with reference to the consequences of one's acts. . . . It requires a conscious choice of a course of action either with knowledge of the serious danger to others involved in it or with knowledge of facts which would disclose this danger to any reasonable man, and the actor must recognize that his conduct involves a risk substantially greater . . . than that which is necessary to make his conduct negligent." (Citation omitted; internal quotation marks omitted.)). As noted, Flanigan "has shown a pattern of being insensitive to citizens that he interacts with and at times has used poor judgment when his discretion is needed." This evidence raises a genuine issue as to whether Flanigan's conduct was negligent or wilful.

B

The defendant argues in the alternative that we should affirm the judgment of the trial court on the ground that Flanigan was not acting within the scope of his employment when he pushed the plaintiff to the ground and handcuffed him. We are not persuaded.

Section 52-557n (a) provides that a local government will not be liable for the negligent acts or omissions of an employee unless the employee was "acting within the scope of his employment or official duties." In determining whether an employee has acted within the scope of employment, "courts look to whether the employee's conduct: (1) occurs primarily within the employer's authorized time and space limits; (2) is of the type that the employee is employed to perform; and (3) is motivated, at least in part, by a purpose to serve the employer. . . . Ordinarily, it is a question of fact as to whether a wilful tort of the servant has occurred within the scope of the servant's employment . . . [b]ut there are occasional cases [in which] a servant's digression

from [or adherence to] duty is so clear-cut that the disposition of the case becomes a matter of law." (Citation omitted; internal quotation marks omitted.) *Harp* v. *King*, 266 Conn. 747, 782–83, 835 A.2d 953 (2003). More specifically, we have held that a police officer's actions "occurred in the course of duties if [the actions] took place (1) within the period of employment, (2) at a place where the employee could reasonably be, and (3) while the employee is reasonably fulfilling the duties of employment or doing something incidental to it." *Crotty* v. *Naugatuck*, 25 Conn. App. 599, 603–604, 595 A.2d 928 (1991).

The trial court, in determining that there was a genuine issue of material fact as to whether Flanigan was acting within the scope of his employment at the time he witnessed the plaintiff being sexually assaulted, relied on the following facts: "In the present case, the evidence submitted indicates that Flanigan stopped at World Technology while on his way to volunteer with the Police Explorers; World Technology was within Flanigan's normal jurisdiction; Flanigan often stopped at World Technology, while both on and off duty; and, at the time of the abuse Flanigan was dressed in full police uniform with his duty belt, which included his handcuffs (and presumably his weapon)—all of which were issued by the city." These factors similarly lead us to conclude that there is a genuine issue of material fact as to whether Flanigan was acting within the scope of his employment when he pushed the plaintiff to the ground and handcuffed him. Flanigan was acting "within [his] period of employment," "at a place where [he] could reasonably be," and a jury reasonably could find that he was "fulfilling the duties of employment or doing something incidental to it" when he demonstrated the use of handcuffs on his way to a program where he often demonstrated the use of handcuffs. See *Crotty* v. *Naugatuck*, supra, 25 Conn. App. 603–604.

Accordingly, we conclude that the court erred in granting the defendant's motion for summary judgment as to the first allegation of negligence because the plaintiff proffered sufficient evidence to demonstrate the existence of a genuine issue of material fact with respect to whether Flanigan engaged in wilful misconduct or negligent misconduct when he pushed the plaintiff to the ground and handcuffed him, as well as whether Flanigan was acting within the scope of his employment at that time.

II

We turn next to the plaintiff's duty to protect claim and the court's conclusion that there was no genuine issue of material fact as to whether it was apparent to Flanigan that the plaintiff was an identifiable victim subject to imminent harm. Notably, in reaching its conclusion that the identifiable victim subject to imminent harm exception to governmental immunity did not apply, the court considered, and answered, a dispositive question of law that the defendant did not raise in its motion for summary judgment. Consequently, we conclude that the court erred in rendering summary judgment in favor of the defendant on the basis of a defense that was never raised in the defendant's motion.

"[T]he court's function is generally limited to adjudicating the issues *raised by the parties* on the proof they have presented and applying appropriate procedural sanctions on motion of a party. . . . The parties may, under our rules of practice, challenge the legal sufficiency of a claim at two points prior to the commencement of trial. First, a party may challenge the legal sufficiency of an adverse party's claim by filing a motion to strike. . . . Second, a party may move for summary judgment and request the trial court to render judgment in its favor if there is no genuine issue of fact and the moving party is entitled to judgment as a matter of law.

. . . In both instances, the rules of practice require a party to file a written motion to trigger the trial court's determination of a dispositive question of law. *The rules of practice do not provide the trial court with authority to determine dispositive questions of law in the absence of such a motion*." (Citations omitted; emphasis altered; internal quotation marks omitted.) *Greene* v. *Keating*, 156 Conn. App. 854, 860–61, 115 A.3d 512 (2015). "[A] trial court lacks authority to render summary judgment on grounds not raised or briefed by the parties that do not involve the court's subject matter jurisdiction." *Bombero* v. *Bombero*, 160 Conn. App. 118, 131, 125 A.3d 229 (2015).

In response to the plaintiff's allegation that the defendant was liable for Flanigan's failure to protect him from Fullenwiley's unlawful conduct, the defendant, in its motion for summary judgment, argued only that Flanigan's conduct was wilful and outside of the scope of his employment.[11] Specifically, the defendant stated: "The pleadings together with the sworn statements and testimony of the plaintiff clearly establish undisputed facts which can only lead to the conclusion that . . . Flanigan was not acting within the scope of his employment or official duties and that he had committed acts or omissions constituting wilful misconduct. As a result, no liability exists on the part of the defendant . . . pursuant to § 52-557n for Flanigan's actions."

The trial court did not address these arguments, or the plaintiff's responses to them, as they related to the plaintiff's claim that Flanigan negligently failed to protect the plaintiff from Fullenwiley's assault. Instead, the court considered only whether the plaintiff had established an exception to discretionary act immunity under § 52-557n, noting that "[a] police officer's actions

[11] Although the defendant raised in its seventh special defense its alternative claim that it was entitled to immunity for the discretionary acts of Flanigan, it failed to raise and argue this claim in its motion for summary judgment.

in carrying out [his duty to protect] are discretionary and typically afforded governmental immunity." The court then correctly stated that "governmental immunity does not apply when the circumstances make it apparent to [a] public officer that his or her failure to act would be likely to subject an identifiable person to imminent harm," before concluding that "there is no evidence in the record from which a reasonable jury could determine that it was apparent to Flanigan that Fullenwiley would place a [sex toy] against the plaintiff's buttocks." (Internal quotation marks omitted.) The plaintiff hardly can be faulted for failing to present evidence to address an argument that the defendant never made. Again, in its motion for summary judgment, the defendant argued only that it was insulated from liability for Flanigan's conduct under § 52-557n because the conduct at issue was wilful and outside of the scope of his official duties. The defendant never argued that it was shielded from liability because Flanigan's conduct was discretionary. Consequently, the plaintiff never had the opportunity or reason to make the counterargument that the exception to discretionary act immunity applies to the circumstances here. The court, thus, improperly rendered summary judgment in favor of the defendant on a ground that neither party raised.

The judgment is reversed and the case is remanded with direction to deny the defendant's motion for summary judgment and for further proceedings.

In this opinion the other judges concurred.

STATE OF CONNECTICUT *v.* JOSHUA PARKER
(AC 43344)

Bright, C. J., and Prescott and Alexander, Js.

Syllabus

The defendant appealed from the judgment of the trial court revoking his probation for his failure to pay restitution. The defendant had previously

pleaded guilty to various offenses, including burglary and larceny, and was sentenced to probation. As a condition of his probation, the court ordered the defendant to make restitution in the amount of more than $18,000. Thereafter, he was charged with additional offenses and for violating certain terms of his probation, not involving the payment of restitution, to which he pleaded guilty. The trial court continued the defendant's probation. In the months that followed, the defendant paid a total of $850 in restitution. The state thereafter charged the defendant with violation of probation for failure to pay restitution. The trial court revoked the defendant's probation, having determined, on the basis of the defendant's prior statements made to the court at his first probation revocation hearing, that the defendant had the ability and the willingness to pay, and would make sufficient efforts to pay, but had failed to do so. On appeal, the defendant claimed, inter alia, that the trial court erred in revoking his probation without first finding that his failure to pay the restitution was wilful. *Held* that the trial court erred in revoking the defendant's probation for failure to make restitution payments, as that court did not apply the correct legal standard and erred in making an implicit finding of wilfulness: as a prerequisite to incarceration for the failure to pay restitution, the trial court was required to make explicit findings on the record that a defendant had the ability to pay and, if so, whether the failure to pay was wilful, and, if not, whether the defendant made sufficient bona fide efforts legally to acquire the resources to pay; even if the trial court interpreted the defendant's statements made one and one-half years earlier at the first probation revocation hearing as an admission that he had the ability to pay, the court was still required to inquire into the reasons for the defendant's failure to pay and whether he failed to make good faith efforts to acquire legally the resources to pay, the evidence did not logically support the conclusion that the defendant had the ability to pay restitution during his probationary period because there was no evidence that he had any source of income or other assets that could be applied toward restitution, the court did not take into consideration the actual efforts the defendant made to acquire the resources to pay during the probation period, instead, improperly basing its conclusion that the defendant violated probation on the mere fact that he expressed an intention to make sufficient efforts, and, accordingly, the court failed to make the necessary finding that the defendant's failure to pay was wilful.

Argued September 8—officially released November 24, 2020

Procedural History

Substitute information charging the defendant with two counts of violation of probation, brought to the Superior Court in the judicial district of Windham, geographical area number eleven, and tried to the court,

Chaplin, *J.*; judgment revoking the defendant's probation, from which the defendant appealed to this court. *Reversed*; *further proceedings*.

John L. Cordani, assigned counsel, with whom, on the brief, was *Jenna M. Scoville*, for the appellant (defendant).

Laurie N. Feldman, deputy assistant state's attorney, with whom, on the brief, were *Anne F. Mahoney*, state's attorney, and *Andrew J. Slitt*, assistant state's attorney, for the appellee (state).

Opinion

PRESCOTT, J. The defendant, Joshua Parker, appeals from the judgment of the trial court revoking his probation pursuant to General Statutes § 53a-32 and sentencing him to thirty months of incarceration. On appeal, the defendant claims that (1) the court improperly revoked his probation for failure to pay restitution without first making a finding that such failure to pay was wilful, as constitutionally required pursuant to *Bearden* v. *Georgia*, 461 U.S. 660, 103 S. Ct. 2064, 76 L. Ed. 2d 221 (1983), and (2) the state introduced insufficient evidence to prove that the defendant wilfully refused to pay restitution. We agree that the court did not make the constitutionally requisite finding that the defendant's failure to pay restitution was wilful and, accordingly, we reverse the judgment of the trial court and remand the case for a new probation revocation hearing.

The following facts and procedural history are relevant to our resolution of this appeal. On November 25, 2015, the defendant, pursuant to a plea agreement, pleaded guilty under the *Alford* doctrine[1] to burglary in the third degree in violation of General Statutes § 53a-103, larceny in the third degree in violation of General

[1] See *North Carolina* v. *Alford*, 400 U.S. 25, 37, 91 S. Ct. 160, 27 L. Ed. 2d 162 (1970).

Statutes § 53a-124, attempt to commit burglary in the third degree in violation of General Statutes §§ 53a-103 and 53a-49, and failure to appear in the first degree in violation of General Statutes § 53a-172. The trial court, *J. Fischer*, *J.*, canvassed the defendant and found that there was a factual basis for the guilty pleas and that they were knowingly and voluntarily made with the assistance of competent counsel. The trial court later sentenced the defendant, consistent with the plea agreement, to three years of incarceration on each docket[2], execution suspended, with two years of probation, to run concurrently. As a condition of probation, the court ordered the defendant to make restitution for verifiable out of pocket losses in both dockets. The amount of restitution was determined by the Office of Adult Probation to be $18,734.43.

In October, 2017, the defendant was charged with violation of probation pursuant to § 53a-32 after he was arrested for additional offenses. At the defendant's probation revocation hearing on January 18, 2018, he admitted to violating the terms of his probation and pleaded guilty to forgery in the second degree in violation of General Statutes § 53a-139 and to reckless driving in violation of General Statutes § 14-222.[3] As of the date of the hearing, the defendant had not made any payments toward the $18,734.43 in restitution that he owed. The basis for the violation of probation, however, was the new arrest and the new convictions. The defendant was represented by a public defender at this hearing and at every prior court proceeding related to this appeal.

[2] There were two separate dockets in this case, both in the judicial district of Windham. The first docket, Docket No. CR-14-0152726-S, included the charges of burglary in the third degree and larceny in the third degree. The second docket, Docket No. CR-14-0152727-S, included the charges of attempt to commit burglary in the third degree and failure to appear in the first degree.

[3] The guilty plea to forgery in the second degree was made pursuant to the *Alford* doctrine.

Pursuant to a plea agreement, the court, *Newson*, *J.*, continued the defendant on probation, accepted his guilty pleas on the new offenses, and sentenced him to an additional five years of incarceration, execution suspended, with three years of probation for the forgery charge. The court ordered two special conditions of probation: (1) the defendant was not to operate any motor vehicle unless and until his operating privileges are validly reinstated by the Department of Motor Vehicles; and (2) the defendant must be either employed or making reasonable efforts to find full-time employment during the period of probation, unless he was involved in some sort of full-time educational or treatment program.[4] Additionally, the court stated that, "as to the probations that were continued, all of those conditions remain in full force and effect."

Between February 15 and May 18, 2018, the defendant paid a total of $850 in restitution, leaving a remaining balance of $17,884.43. On January 2, 2019, the state charged the defendant with two counts of violation of probation for failure to pay restitution.[5] The defendant denied the charges. A second probation revocation hearing was held on May 30, 2019. During the evidentiary phase of the hearing, the state called one witness, Probation Officer Amy Gile.

Officer Gile testified that she had been supervising the defendant's probation since approximately January or February, 2018. For the entirety of this time, the defendant was not employed. In addition to restitution, the defendant's other financial obligations included court-ordered child support for his daughter. The defendant spoke to Officer Gile many times about seeking employment. He told Officer Gile about a few positions

[4] The court did not order restitution with respect to the forgery or to the reckless driving conviction.

[5] Specifically, the state alleged that the defendant violated his probation in that he "has not made a restitution payment since May 18, 2018."

that he was considering applying for, but she was unaware if he ever did so. Officer Gile never asked the defendant to show her any completed job applications. The defendant told Officer Gile that he was unable to find employment, and that he had to provide childcare for his daughter, which prevented him from working.

Officer Gile also testified that the defendant was placed in, and later "discharged . . . successfully" from, an alternative in the community program (AIC program) that assists people with a criminal record in finding a job. Specifically, the program helps participants build a resume, provides them with a list of employers that will hire people with a criminal record, and offers various online curricula. Officer Gile received monthly reports from the AIC program that indicated that the defendant's participation in the program was satisfactory.

Officer Gile further testified that she did not believe the defendant made bona fide efforts to acquire the resources to pay restitution. When asked, however, how she would make a determination as to whether someone she was supervising had attempted to find employment, she responded, "[w]e'd put 'em in the AIC program for employment services." The defendant did not call any witnesses. The court, *Chaplin*, *J.*, found that the defendant had violated a condition of his probation by not making sufficient payments toward his restitution obligation, revoked the defendant's probation, and sentenced him to serve thirty months of incarceration.

In the court's oral ruling, which later was signed as its memorandum of decision, the court explained that the basis for its finding of a violation of probation was a colloquy between the court and the defendant at the defendant's first probation revocation hearing on January 18, 2018.[6] Specifically, the court stated that "as a

[6] The relevant portion of that exchange is as follows:

"The Court: . . . [A]nything you want to say before the court imposes sentence?

point, the court is now just reiterating the basis for the court's understanding in making its decision rather than allowing . . . another opportunity for additional closing arguments. Noting that upon reviewing the exhibits provided to the court of the transcripts specifically, the court does find on the January 18th date of 2018, there was a violation of probation admission entered by [the defendant]. On that date, a new probation period began which is the probation for which we're before the court today. Considering that probationary period beginning that date, there's a conversation between the court at that time and [the defendant] . . . . Specifically . . . [the defendant] makes comments about the ability to extend the probation and that would afford him the opportunity to pay the $18,000, noting his difficulty paying that over a period of one year, and he indicated that he could actually pay that now that he had two years. . . .

"[The Defendant]: Yeah. That I just appreciate the opportunity to, you know, extend my probation; it will help me pay the eighteen thousand 'cuz it was a pretty penny to pay over one year, two years and it was impossible. So now I can actually pay it, so—

"The Court: He didn't pay anything?

"[The Prosecutor]: Not as of October of—not as of the first eleven months of his probation.

"The Court: Okay. Well . . . I'll put it to you this way: I don't get involved and I don't know the facts and circumstances of the case and I imagine there was something worthwhile by . . . the state's bothering to put you back on probation. But, there's a difference between it being difficult to pay back your obligation and doing nothing. Nothing's what you did. People get sent to prison for doing nothing when it comes to paying back their restitution obligations. So [it] appears you need to take this entire thing a little more seriously and start making some dent in your obligation because you need to understand that if you come back again, regardless of what the lawyers do, the court does not have to take their deal, if it doesn't want to. Do you understand that?

"[The Defendant]: Oh, I understand, yes.

"The Court: My two cents would be [for] you [to] go to prison today for not paying anything and picking up new charges like this. So take the opportunity. I don't—take you at your word you take it seriously; but you know the old saying, actions speak a lot louder than words."

"Judge Newson . . . then made comments to [the defendant] indicating that the difference between an impossibility to pay and difficulty paying are two different issues and that the result of not paying on the new period of probation after [the defendant] indicated he would be able to pay and he would be making sufficient efforts to pay. Indicating that he had the ability to pay and . . . had the willingness to pay demonstrates to . . . this court, that there was an understanding, based on [the defendant's] comments, that he had the ability to pay and would make sufficient efforts to achieve that and make those payments as required by the conditions of the probation that were discussed with him at that time, and he was thankful for having more time from that . . . probation to pay . . . the amount owed. Based upon that, the court finds . . . by the fair preponderance of the evidence that [the defendant] was, one, aware of the condition of probation of paying the restitution, at that time aware of the amount of probation required to be paid, and at this point, he has engaged in conduct that does not satisfy that condition and, in fact, he has violated that condition of probation in not making payments and that he has . . . made payments that total $850; however, that is not sufficient. The court finds that he is in violation of the probation as to each file."

Judge Chaplin later granted the defendant's application for waiver of appellate fees and appointment of appellate counsel based on a finding that the defendant was indigent. This appeal followed.

In *Bearden* v. *Georgia*, supra, 461 U.S. 662, the United States Supreme Court recognized that it is impermissible to imprison a defendant who is on probation, solely because of his lack of financial resources. To do so "would deprive the probationer of his conditional freedom simply because, through no fault of his own, he

cannot pay the fine. Such a deprivation would be contrary to the fundamental fairness required by the [f]ourteenth [a]mendment [to the United States constitution]." Id., 672–73. This case asks us to decide whether the trial court improperly revoked the defendant's probation for failure to pay restitution without first making a finding that such failure to pay was wilful, as is constitutionally required pursuant to *Bearden*.[7] Specifically, the defendant argues that the court did not make a finding that he wilfully refused to pay restitution because the court (1) stated that "the state need only establish that . . . the probationer knew the condition and engaged in conduct that violated the condition," (2) based its finding that the defendant violated his probation on statements made by the defendant at his January 18, 2018 probation revocation hearing, which statements are immaterial to the issue of whether he violated his probation during the new probation period that began after that hearing, (3) never mentioned wilfulness in the context of discussing the defendant's January 18, 2018 statements, nor made any connection between those statements and its finding that the defendant wilfully refused to pay restitution in May, 2019, and (4) subsequently found the defendant indigent in connection with this appeal.

The state concedes that the trial court did not make an explicit finding of wilfulness, but contends that the court made an implicit finding, which is constitutionally sufficient. In support of that contention, the state points

[7] The defendant asserts that his claims are preserved because, during the revocation hearing, defense counsel brought to the trial court's attention the fact that it must find that the defendant wilfully refused to pay restitution before revoking his probation. Alternatively, the defendant argues that because his claims are constitutional in nature, they are reviewable under *State* v. *Golding*, 213 Conn. 233, 239–40, 567 A.2d 823 (1989), as modified by *In re Yasiel R.*, 317 Conn. 773, 781, 120 A.3d 1188 (2015). We conclude that the claims are preserved and the state does not argue otherwise.

to the fact that (1) the parties told the court that wilfulness was the contested issue, (2) the court expressed understanding that the defendant was claiming that his failure to pay was not wilful, and (3) the defendant did not file a motion for articulation in the absence of which this court must presume that the trial court acted properly. In reply, the defendant maintains that the trial court did not make an implicit finding of wilfulness and, even if it did, an express finding is required to satisfy the defendant's fourteenth amendment rights to due process and equal protection.[8] We agree with the defendant that the court did not make a finding of wilfulness and, therefore, the judgment is set aside and the case is remanded for further proceedings. In addition, we hold that an explicit finding of wilfulness is required.

As a preliminary matter, we set forth principles of law pertaining to the revocation of probation for failure to pay restitution. "[R]evocation of probation hearings, pursuant to § 53a-32, are comprised of two distinct phases, each with a distinct purpose. . . . In the evidentiary phase, [a] factual determination by a trial court as to whether a probationer has violated a condition of probation must first be made." (Citations omitted; internal quotation marks omitted.) *State* v. *Preston*, 286

[8] As the court acknowledged in *Bearden*, "due process and equal protection principles converge in the [c]ourt's analysis" in cases involving indigents in the criminal justice system. *Bearden* v. *Georgia*, supra, 461 U.S. 665. Specifically, in the context of a defendant whose probation has been revoked for failure to pay restitution, the court explained "[t]here is no doubt that the [s]tate has treated the petitioner differently from a person who did not fail to pay the imposed fine and therefore did not violate probation. To determine whether this differential treatment violates the [e]qual [p]rotection [c]lause, one must determine whether, and under what circumstances, a defendant's indigent status may be considered in the decision whether to revoke probation. This is substantially similar to asking directly the due process question of whether and when it is fundamentally unfair or arbitrary for the [s]tate to revoke probation when an indigent is unable to pay the fine." Id., 665–66.

Conn. 367, 375–76, 944 A.2d 276 (2008). "The state must establish a violation of probation by a fair preponderance of the evidence. . . . That is to say, the evidence must induce a reasonable belief that it is more probable than not that the defendant has violated a condition of his or her probation." (Internal quotation marks omitted.) *State* v. *Durant*, 94 Conn. App. 219, 224, 892 A.2d 302 (2006), aff'd, 281 Conn. 548, 916 A.2d 2 (2007).

"In the dispositional phase, [i]f a violation is found, a court must next determine whether probation should be revoked because the beneficial aspects of probation are no longer being served. . . . [The two phases] are governed by two different standards of review. . . . In making its factual determination [during the evidentiary phase], the trial court is entitled to draw reasonable and logical inferences from the evidence. . . . Our review is limited to whether such a finding was clearly erroneous. . . . The standard of review of the trial court's decision at the [dispositional] phase . . . is whether the trial court exercised its discretion properly by reinstating the original sentence and ordering incarceration." (Citations omitted; internal quotation marks omitted.) *State* v. *Preston*, supra, 286 Conn. 375–77.

In *Bearden* v. *Georgia*, supra, 461 U.S. 672, the United States Supreme Court held that the fourteenth amendment to the United States constitution requires that "in revocation proceedings for failure to pay a fine or restitution, a sentencing court must inquire into the reasons for the failure to pay. If the probationer [wilfully] refused to pay or failed to make sufficient bona fide efforts legally to acquire the resources to pay, the court may revoke probation and sentence the defendant to imprisonment . . . . If the probationer could not pay despite sufficient bona fide efforts to acquire the resources to do so, the court must consider alternate measures of punishment other than imprisonment. Only if alternate measures are not adequate to meet the

[s]tate's interests in punishment and deterrence may the court imprison a probationer who has made sufficient bona fide efforts to pay." In other words, "absent *evidence and findings* that the defendant was somehow responsible for the failure [to pay]" it is unconstitutional to revoke probation. (Emphasis added.) Id., 665.

As our Supreme Court has recognized in a related context, "[t]he impact of indigency on a criminal defendant's liability to pay a fine is codified" in our rules of practice. (Internal quotation marks omitted.) *Molinas* v. *Commissioner of Correction*, 231 Conn. 514, 520, 652 A.2d 481 (1994). Specifically, Practice Book § 43-17 provides that "[n]o person shall be incarcerated as a result of failure to pay a fine unless the judicial authority first inquires as to the person's ability to pay the fine." In addition, Practice Book § 43-18 provides that "[t]he judicial authority may, upon a finding that the defendant is able to pay the fine and that the nonpayment is wilful, order the defendant incarcerated for nonpayment of the fine." Thus, in Connecticut, it has been acknowledged judicially, both in cases and through our adopted rules of practice, that a finding that a defendant had the ability to pay and wilfully failed to do so is a prerequisite to incarceration for the failure to pay a fine.

I

The defendant first claims that the trial court failed to make the requisite finding, pursuant to *Bearden*, that the defendant's failure to pay restitution was wilful. The state argues that the trial court made this finding implicitly, and that on appeal this court must presume that the trial court applied the correct legal standard. This issue presents a question of law and, therefore, it is subject to plenary review. See *Sosin* v. *Sosin*, 300 Conn. 205, 217, 14 A.3d 307 (2011) ("The interpretation of a trial court's judgment presents a question of law over which our review is plenary. . . . Effect must be

given to that which is clearly implied as well as to that which is expressed." (Citations omitted; internal quotation marks omitted.)); see also *Jones* v. *State*, 328 Conn. 84, 106–107, 177 A.3d 534 (2018) (whether trial court correctly applied legal standard raises question of law subject to plenary review). Accordingly, we must decide whether the trial court's "conclusions are legally and logically correct and find support in the facts that appear in the record." *Missionary Society of Connecticut* v. *Board of Pardons & Paroles*, 278 Conn. 197, 201, 896 A.2d 809 (2006). "[I]t is well settled that, in the absence of a contrary indication, we must presume that the court applied the correct legal standard." *State* v. *Petersen*, 196 Conn. App. 646, 668, 230 A.3d 696, cert. denied, 335 Conn. 921, 230 A.3d 696 (2020); see also *State* v. *Cecil J.*, 291 Conn. 813, 827 n.12, 970 A.2d 710 (2009) ("in [the] absence of contrary evidence, we presume that the trial court . . . undertook the proper analysis of the law and the facts" (internal quotation marks omitted)).

In the present case, the trial court explicitly stated that the basis for its determination that the defendant had violated a condition of probation by failing to pay restitution was the defendant's statement on January 18, 2018, that the continuation of extension of his probation "will help me pay the [restitution] . . . . So now I can actually pay it." See footnote 6 of this opinion. The trial court explained that this amounted to an "[indication] that he could actually pay." The court then reiterated that the defendant had indicated that he "would be able to pay and he would be making sufficient efforts to pay" and, further, such indication that "he had the ability to pay and . . . had the willingness to pay *demonstrates* to the court . . . that he had the ability to pay and would make sufficient efforts to achieve that and make those payments . . . ." (Emphasis added.)

The court's reasoning in this regard implies that it did not correctly apply the legal standard. Specifically, the trial court cannot make the constitutionally requisite finding that the defendant was at fault for the failure to pay restitution unless it determines that the defendant, *at the time he failed to make the required payments*, either had the ability to pay and wilfully chose not to, or, that the defendant did not have the ability to pay and "failed to make sufficient bona fide efforts legally to acquire the resources to pay." *Bearden* v. *Georgia*, supra, 461 U.S. 672; see *State* v. *Pieger*, 240 Conn. 639, 653 n.7, 692 A.2d 1273 (1997) ("it is well settled that the defendant's probation could not be revoked based upon his nonpayment . . . unless the trial court first determined that he was able to pay the money *and* that his nonpayment was wilful" (emphasis added)).

Here, the trial court concluded that the defendant had the ability to pay based on the defendant's statement on the first day of his probationary period, which, in context, is best understood as an expression of an intention to pay going forward, rather than an admission that he had the actual ability to pay. In fact, it can reasonably be inferred that the defendant's January 18, 2018 statement that he had the ability to pay $18,000 in restitution at that time was aspirational because, at that hearing, he was still represented by a public defender, reflecting his indigent status. See *Moscone* v. *Manson*, 185 Conn. 124, 131 n.3, 440 A.2d 848 (1981) ("[a]lthough the record does not expressly indicate the petitioner's indigency, we can infer that fact from his continued legal representation by public defenders").

Nevertheless, even if the defendant's statement could be taken as an admission that, on January 18, 2018, he had sufficient financial resources to make restitution payments, the court was still required to "inquire into the reasons for the [defendant's] failure to pay" more than the $850 that he paid in the months that fol-

lowed. *Bearden* v. *Georgia*, supra, 461 U.S. 672. Whether the defendant had the actual ability to pay or had failed to make good faith efforts to acquire legally the resources to pay throughout the duration of the probation period is an indispensable aspect of this inquiry. There could have been many intervening events that impacted the defendant's ability to pay or his efforts to acquire legally the resources to pay, and *Bearden* mandates that the court take into consideration any such events. Moreover, the fact that, when "reiterating the basis for the court's understanding in making its decision," the court pointed only to the defendant's stated ability to pay, which was made nearly one and one-half years prior, indicates that the trial court did not apply the requisite legal standard. Relying on the defendant's earlier statement at the beginning of his probationary period that he can actually pay cannot substitute for an inquiry at the time the state seeks to revoke his probation into whether he had the means to pay or had failed to make sufficient bona fide efforts legally to acquire the resources to pay.

Here, the evidence does not logically support the conclusion that the defendant had the ability to pay restitution during his probationary period because there is no evidence that he had any source of income. He was not employed since at least January or February, 2018. There was no evidence that he had other assets that could be applied toward restitution. In addition, his expenses included court-ordered child support for his daughter and his own basic needs.[9]

[9] We note that the state generally bears the burden of establishing a violation of probation by a fair preponderance of the evidence. See *State* v. *Davis*, 229 Conn. 285, 295, 641 A.2d 370 (1994). When the alleged probation violation is the failure to pay restitution, however, there is no clear Connecticut authority with regard to whether the state bears the burden of proving that the defendant wilfully failed to pay, or whether the defendant has the burden of raising and proving inability to pay as a defense. *Bearden*, itself, simply states that in revocation proceedings, the court "must inquire into the reasons for the failure to pay." *Bearden* v. *Georgia*, supra, 461 U.S. 672.

Furthermore, to the extent that the court's memorandum of decision can be read as finding that the defendant "failed to make sufficient bona fide efforts legally to acquire the resources to pay"; *Bearden* v. *Georgia*, supra, 461 U.S. 472; the evidence did not logically support such a conclusion.[10] Because the court's references to "sufficient efforts" in its decision are framed in terms of future conduct (i.e., "[the defendant] indicated . . . he would be making sufficient efforts to pay" and "that he . . . would make sufficient efforts to achieve that and make those payments as required by the conditions of probation"), the court's logic suffered from the same defect as it did with regard to the defendant's ability to pay. That is, the court did not take into consideration the actual efforts the defendant made to acquire legally the resources to pay during the probation period. Rather, it based its conclusion that the defendant violated probation on the mere fact that he expressed an intention to make sufficient efforts and erroneously inferred that, because he ultimately did not pay more than $850, he must not have honored that intention. That is not the constitutionally requisite inquiry under *Bearden*.

Furthermore, the evidence in the record of what the defendant actually did during the probationary period

We conclude that the burden is properly on the state to demonstrate that the defendant had the ability to pay and wilfully refused to do so or failed to make sufficient bona fide efforts legally to acquire the resources to pay, for several reasons. First, the state has the ultimate burden of proving a violation. The term violation denotes unlawful conduct, and if the defendant's failure to pay restitution is not wilful, it cannot be considered unlawful conduct because the state cannot punish a person solely on the basis of his poverty. See id.. Additionally, the state should bear the burden of proving wilfulness because probation revocation proceedings, although civil in nature, implicate the defendant's liberty interest.

[10] We note, however, that even if the defendant had the ability to pay restitution, a determination would still need to be made regarding whether his failure to pay was wilful. In other words, ability to pay is a necessary prerequisite to a finding of wilfulness, but it is not, in itself, sufficient to conclude that the failure to pay was wilful.

indicates that he made efforts to acquire legally the resources to pay. Specifically, he was placed in the AIC program to help him find employment, his participation was reported to be satisfactory, and he was ultimately "discharged successfully" from the program. He also told Officer Gile about a few positions for which he was considering applying. Whether those efforts could be deemed "sufficient" and "bona fide" is a factual determination for the trial court to make. We are not persuaded, however, based on our interpretation of the trial court's memorandum of decision, that the court actually made that determination. Accordingly, it did not apply the correct legal standard.

Our conclusion is further supported by the court's statement that, "in fact, [the defendant] has violated that condition of probation *in not making payments* and that he has made one payment or has made payments that total $850; however, that is not sufficient." (Emphasis added.) This suggests that the court's focus was on the fact that the defendant did not pay, not on whether he had the ability to pay and wilfully refused to do so, or did not have the ability to pay and failed to make sufficient bona fide efforts legally to acquire the resources to pay. See *Bearden* v. *Georgia*, supra, 461 U.S. 672.

Our decision in *State* v. *Martinik*, 1 Conn. App. 70, 467 A.2d 1247 (1983), likewise supports a conclusion that the court did not make the necessary finding that the defendant's failure to pay was wilful. In that case, just as here, the trial court revoked the defendant's probation for failure to make restitution payments. See id., 71. Specifically, the trial court stated that revocation was appropriate "because of the defendant's complete lack of cooperation with his probation officer in making the restitution payments." (Internal quotation marks omitted.) Id. This court, applying *Bearden*, held that the trial court did not make an appropriate finding

regarding wilfulness or review alternative punishments and, accordingly, set aside the judgment and remanded the case for further proceedings. Id., 72. As the defendant points out, despite the fact that the trial court in *Martinik* was silent on the issue of wilfulness, this court did not presume that the court applied the correct legal standard and made an implicit finding of wilfulness. It concluded, as we do here, that the court did not make the requisite finding.

Because we conclude that the trial court's judgment should be set aside for failure to make a finding of wilfulness, it is not necessary to reach the defendant's second claim that the state introduced insufficient evidence to prove that the defendant wilfully refused to pay restitution.[11]

II

Even if we were to conclude that the court made an implicit finding that the defendant's failure to pay restitution was wilful, we next consider whether a trial court in Connecticut is required to make an *explicit* finding on the record that a defendant's failure to pay restitution is wilful, before revoking probation. Neither the United States Supreme Court nor our Supreme Court explicitly has addressed this issue. The principles

[11] Unlike in the criminal context, where we would ordinarily address a claim of insufficiency of the evidence as a preliminary matter because double jeopardy principles dictate that "if we were to rule that the evidence was insufficient, the defendant would be entitled to an acquittal rather than a new trial" (internal quotation marks omitted); *State* v. *Gray*, 200 Conn. 523, 535–56, 512 A.2d 217, cert. denied, 497 U.S. 940, 107 S. Ct. 423, 93 L. Ed. 2d 373 (1986); it is unnecessary to do so here because those same concerns do not apply in the probation revocation proceeding context. See *State* v. *Davis*, 229 Conn. 285, 295, 641 A.2d 370 (1994) ("Although a [probation] revocation proceeding must comport with the requirements of due process, it is not a criminal proceeding. . . . It therefore does not require all of the procedural components associated with an adversary criminal proceeding." (Citations omitted; internal quotation marks omitted.)).

articulated in these cases, however, lead us to the conclusion that an explicit finding is required to satisfy the defendant's fourteenth amendment rights.[12]

As our Supreme Court acknowledged in *State* v. *Hill*, 256 Conn. 412, 421, 773 A.2d 931 (2001), the holding in *Bearden* "was grounded on the court's sensitivity to the treatment of indigents in the criminal justice system and its recognition of the due process and equal protection concerns that the indigence of a defendant raises." Moreover, probation itself, "once granted, is a constitutionally protected interest. The due process clause of the fourteenth amendment to the United States constitution requires that certain minimum procedural safeguards be observed in the process of revoking the conditional liberty created by probation. . . . This is so because the loss of liberty entailed is a serious deprivation requiring that the [probationer] be accorded due process." (Citations omitted; internal quotation marks omitted.) *State* v. *Davis*, 229 Conn. 285, 294, 641 A.2d 370 (1994).

The United States Supreme Court has recognized that, among the minimum procedural safeguards that must be observed in a proceeding to revoke probation, is the requirement of "a written statement by the [fact finders] as to the evidence relied on and the reasons for revoking [probation or] parole." (Internal quotation marks omitted.) *Gagnon* v. *Scarpelli*, 411 U.S. 778, 786, 93 S. Ct. 1756, 36 L. Ed. 2d 656 (1973), citing *Morrissey* v. *Brewer*, 408 U.S. 471, 489, 92 S. Ct. 2593, 33 L. Ed.

[12] We reach this issue because it is germane to the controversy and provides an independently sufficient basis to reverse the trial court's decision. See *Cruz* v. *Montanez*, 294 Conn. 357, 377, 984 A.2d 705 (2009) ("[I]t is not dictum . . . when a court . . . intentionally takes up, discusses and decides a question germane to, though not necessarily decisive of, the controversy. . . . Rather, such action constitutes an act of the court [that] it will thereafter recognize as a binding decision." (Internal quotation marks omitted.)).

2d 484 (1972).[13] "The written statement required by *Gagnon* and *Morrissey* helps to insure accurate [fact-finding] with respect to any alleged violation and provides an adequate basis for review to determine if the decision rests on permissible grounds supported by the evidence." *Black* v. *Romano*, 471 U.S. 606, 613–14, 150 S. Ct. 2254, 85 L. Ed. 2d 636 (1985).

Moreover, in *Turner* v. *Rogers*, 564 U.S. 431, 444–45, 131 S. Ct. 2507, 180 L. Ed. 2d 452 (2011), the United States Supreme Court addressed the issue of whether the due process clause grants an indigent defendant a right to state appointed counsel at a civil contempt proceeding, which may lead to his or her incarceration. Id., 441. The court explained that, in such cases, like in probation revocation proceedings for failure to pay restitution, "the critical question likely at issue . . . [concerns] the defendant's ability to pay." Id., 446. In its analysis, the court considered "the distinct factors that . . . [it] has previously found useful in deciding what specific safeguards the [c]onstitution's [d]ue [p]rocess [c]lause requires in order to make a proceeding fundamentally fair." (Internal quotation marks omitted.) Id., 444, citing *Mathews* v. *Eldridge*, 424 U.S. 319, 335, 96 S. Ct. 893, 47 L. Ed. 2d 18 (1976). Those factors are: "(1) the nature of the private interest that will be affected, (2) the comparative risk of an erroneous deprivation of that interest with and without additional or substitute procedural safeguards, and (3) the nature and magnitude of any countervailing interest in not providing additional or substitute procedural requirement[s]." (Internal quotation marks omitted.) *Turner* v. *Rogers*, supra, 444–45.

The private interest at issue in *Turner* was the same as it is here: "an indigent defendant's loss of personal

[13] In *Gagnon* v. *Scarpelli*, supra, 411 U.S. 782, the court held that the due process requirements established for parole revocation proceedings were also applicable to probation revocation proceedings.

liberty through imprisonment." Id., 445. The court reasoned that "[t]he interest in securing . . . freedom from bodily restraint, lies at the core of the liberty protected by the [d]ue [p]rocess [c]lause. . . . And we have made clear that its threatened loss through legal proceedings demands due process protection. . . . Given the importance of the interest at stake, it is obviously important to ensure accurate [decision-making] in respect to the key ability to pay question." (Citations omitted; internal quotation marks omitted.) Id. The court then proceeded to identify procedural safeguards that "can significantly reduce the risk of an erroneous deprivation of liberty," one of which is "an express finding by the court that the defendant has the ability to pay." Id., 447–48.

In light of the constitutional significance of the interests at stake when a trial court considers revoking probation for the failure to pay restitution, it is imperative that the court engages in the requisite inquiry into the reasons for the failure to pay, and makes accurate "findings" regarding whether the defendant was "somehow responsible for the failure." *Bearden* v. *Georgia*, supra, 461 U.S. 665. If these findings are not made on the record, it is more difficult to review on appeal the soundness of the court's decision, as the present case illustrates. Both the probationer and the state have an interest in assuring that the probationer is not unjustifiably deprived of his liberty. See *Black* v. *Romano*, supra, 471 U.S. 621 (Marshall, J., concurring) ("[I]n choosing probation, the [s]tate expresses a conclusion that its interests will be met by allowing an individual the freedom to prove that he can rehabilitate himself and live according to the norms required by life in a community. *Bearden* then recognizes that, once this decision is made, both the [s]tate and the probationer have an interest in assuring that the probationer is not deprived of this opportunity without reason."); see also *Gagnon*

v. *Scarpelli*, supra, 411 U.S. 785–86 ("[b]oth the probationer . . . and the [s]tate have interests in the accurate finding of fact and the informed use of discretion—the probationer . . . to insure that his liberty is not unjustifiably taken away and the [s]tate to make certain that it is neither unnecessarily interrupting a successful effort at rehabilitation nor imprudently prejudicing the safety of the community"). We therefore hold that the trial court is required to make explicit findings on the record as to whether the probationer had the ability to pay and, if so, whether the failure to pay was wilful, and, if not, whether the probationer made sufficient bona fide efforts legally to acquire the resources to pay.

This holding is consistent with appellate courts in other states that have persuasively held that, in probation revocation proceedings for the failure to pay restitution, trial courts are required to make explicit findings regarding whether the defendant was able to pay restitution and whether the failure to pay was wilful. See *Del Valle* v. *State*, 80 So. 3d 999, 1011 (Fla. 2011) ("To comply with the rules set forth in *Bearden* and *Stephens* [v. *State*, 630 So. 2d 1090 (Fla. 1994)], trial courts must inquire into a probationer's ability to pay *and* make an explicit finding of [wilfulness] . . . . We emphasize that the probationer's ability to pay is an element of [wilfulness] in the context of determining whether there is a [wilful] violation for failure to pay a monetary obligation as a condition of probation." (Emphasis in original.)); *Commonwealth* v. *Marshall*, 345 S.W.3d 822, 824 (Ky. 2011) ("We . . . reconfirm the principle of due process that the trial court must make clear findings on the record specifying the evidence relied upon and the reasons for revoking probation. This requirement specifically includes findings about whether the defendant made sufficient bona fide efforts to make payments."); *State* v. *Parsons*, 717 P.2d 99, 102–103 (N.M.

App. 1986) ("Was the trial court required to adopt findings of fact or indicate in the record its determination of whether defendant had the ability to pay sums ordered and whether defendant's failure to pay was [wilful]? We answer the question in the affirmative."). But see *United States* v. *Mitchell*, 317 Fed. Appx. 963, 965 (11th Cir. 2009) ("[A]lthough the district court did not explicitly state that [the defendant's] behavior was [wilful], it did find that [the defendant] made a mockery of supervised release. The record thus reveals that the district court implicitly found [the defendant's] failure to pay to be [wilful] and that [the defendant] did not make a bona fide effort to acquire resources to pay the fee."); *State* v. *Brady*, 300 P.3d 778, 780 (Utah App. 2013) ("These comments by the trial court illustrate its implicit finding of [wilfulness]. [The probationer] argues that an explicit finding is mandatory. We disagree.").

The judgment is reversed and the case is remanded for a new probation revocation hearing.

In this opinion the other judges concurred.

STATE OF CONNECTICUT *v.* RICKIE LAMONT KNOX
(AC 41168)
(AC 41644)

Alvord, Alexander and Harper, Js.

Syllabus

Convicted, after a jury trial, of the crime of criminal possession of a firearm in connection with the shooting death of the victim, and with being a persistent serious felony offender, the defendant appealed to this court. The victim and some friends argued outside a cafe with another group that included the defendant. At some point, the defendant withdrew a handgun. The victim appeared to reach for a gun in his waistband and the defendant shot the victim, who fell to the ground injured. The victim discharged his gun while on the ground. The defendant then fled the

scene with his gun. The victim later died as a result of his injuries. Approximately one month after the incident, the defendant was arrested and was briefly interviewed by a detective, B, before invoking his right to counsel, ending the interview. The next day, the defendant informed another officer that he wanted to speak with B. During this second interview, B informed the defendant of his *Miranda* rights (384 U.S. 436). The defendant expressly stated that he understood and waived these rights. During the course of the second interview, the defendant admitted to being outside the cafe at the time of the shooting. Certain statements made by the defendant during his second interview with B were admitted into evidence. After a jury trial, the defendant was found guilty of criminal possession of a firearm and tampering with physical evidence and with being a persistent serious felony offender. Thereafter, the trial court granted the defendant's motion for judgment of acquittal as to the charge of tampering with physical evidence, and the state, on the granting of permission, appealed to this court. *Held*:

1. The trial court properly granted the defendant's motion for a judgment of acquittal with respect to the charge of tampering with physical evidence, as no reasonable trier of fact could have found the defendant guilty; the state presented insufficient evidence that the defendant intended to impair the availability of his gun in a subsequent criminal investigation, there having been no evidence regarding the defendant's intent, apart from the evidence that, after shooting the victim, the defendant left the scene with the gun; moreover, the state's claim that it could rely on the defendant's prior felony conviction to support a finding that the defendant had removed the gun from the scene to avoid a charge of criminal possession of a firearm and, therefore, tampered with physical evidence, was unavailing, as evidence of that conviction had been admitted by stipulation only for the limited purpose of establishing an element of the crime of criminal possession of a firearm.

2. The defendant could not prevail on his claim that his statements made to the police during the second interview should have been excluded because he made an ambiguous request for counsel that required the police to stop the interview and clarify this request pursuant to *State* v. *Purcell* (331 Conn. 318); the defendant's explanation to B that he had changed his mind about speaking with the police because a lawyer had not come to see him after the first interview and he felt "left for dead," would not have caused a reasonable officer to construe that explanation as an ambiguous request for counsel as that statement did not contain any of the conditional or hedging terms that have been deemed ambiguous or equivocal invocations of that right, and the defendant made no clear and unequivocal request for an attorney; moreover, the conclusion that the defendant's explanation was not a request for counsel was supported by the circumstances of the two interviews, including, at outset of the second interview, the defendant's indication that he did not want to be recorded, his expressed concern for his safety, and

his reluctance to identify certain individuals involved in other criminal activity, and, at the first interview, the defendant, who B knew to have been involved in previous criminal matters, had unambiguously invoked his right to counsel, which resulted in the termination of that interview.

3. The trial court did not abuse its discretion in making its evidentiary ruling regarding the admission of certain portions of B's interview with the defendant: the court's decision to admit only that portion of the interview in which the defendant identified himself in a photograph taken from a surveillance video on the night of the shooting and to not admit the portion the defendant sought to introduce in which he identified another man in the photograph as the shooter did not violate the applicable rule (§ 1-5) of the Connecticut Code of Evidence because the evidence the defendant sought to introduce did not change or alter the fact that he identified himself as present at the scene and would not demonstrate that the portion of the interview that was introduced had been taken out of context; moreover, the defendant failed to establish that the court's evidentiary rulings violated his constitutional rights to due process and to present a complete defense.

Argued September 9—officially released November 24, 2020

Procedural History

Two part substitute information charging the defendant, in the first part, with the crimes of murder, criminal possession of a firearm, and tampering with physical evidence and, in the second part, with being a persistent serious felony offender, brought to the Superior Court in the judicial district of Waterbury, and tried to the jury before *Alander*, *J.*; verdict of guilty of criminal possession of a firearm, tampering with physical evidence, and with being a persistent serious felony offender; thereafter, the court granted the defendant's motion for a judgment of acquittal as to the charge of tampering with physical evidence; subsequently, the court, *Alander*, *J.*, rendered judgment of guilty of criminal possession of a firearm and enhanced the defendant's sentence for being a persistent serious felony offender, from which the state, on the granting of permission, and the defendant filed separate appeals to this court. *Affirmed.*

James M. Ralls, assistant state's attorney, with whom, on the brief, were *Maureen Platt*, state's attorney, and *Terence Mariani* and *Elena Palermo*, senior assistant state's attorneys, for the appellant in Docket No. AC 41168 (state).

James M. Ralls, assistant state's attorney, with whom, on the brief, were *Maureen Platt*, state's attorney, and *Terence Mariani*, senior assistant state's attorney, for the appellee in Docket No. AC 41644 (state).

Erica A. Barber, assigned counsel, for the appellant in Docket No. AC 41644 and the appellee in Docket No. AC 41168 (defendant).

Opinion

ALEXANDER, J. This case involves two separate appeals. First, in the appeal in Docket No. AC 41168, the state appeals from the decision of the trial court granting the motion for judgment of acquittal filed by the defendant, Rickie Lamont Knox, with respect to the charge of tampering with physical evidence in violation of General Statutes § 53a-155. The state contends that sufficient evidence existed to support this conviction. Second, in the appeal in Docket No. AC 41644, the defendant appeals from the judgment of conviction, rendered after a jury trial, of criminal possession of a firearm in violation of General Statutes § 53a-217. The defendant contends that his postarrest statements to the police had been obtained following a violation of the prophylactic rule created by our Supreme Court in *State* v. *Purcell*, 331 Conn. 318, 203 A.3d 542 (2019), and, therefore, should have been excluded from evidence. The defendant also argues that the court abused its discretion and violated his constitutional rights by admitting into evidence certain inculpatory portions of his police interview while excluding related contextual portions. We affirm the judgment of the trial court.

The following facts, as the jury reasonably could have found, and procedural history are necessary for the resolution of these appeals. On October 17, 2015, Isaiah James spent the day socializing with the decedent, Anthony Crespo, at the decedent's apartment. At some point that night, two other individuals, Ismail Abdus-Sabur and Timothy Minnifield, joined James and the decedent. After consuming all of the alcohol at the decedent's apartment, the group walked to the Barley Corn Cafe (cafe) around 1 a.m. on October 18, 2015. James and the decedent attempted to enter the cafe while the other two men, who were under the age of twenty-one, waited outside. After being denied entry into the cafe, James "bumped" into another man standing outside, and a brief verbal disagreement ensued. James then walked over to Abdus-Sabur and Minnifield. An individual, who the state argued was the defendant, then placed his hand, positioned to resemble a gun, to James' head, and cautioned him to "[w]atch [his] ass . . . ."

After being threatened, James spoke with the decedent. James turned around and realized that there was "a group of guys around [them]." The decedent began to argue with this group. The defendant, standing directly in front of the decedent, drew a handgun from his waistband. The decedent appeared to reach for a gun in his waistband. The defendant shot the decedent, who fell to the ground, injured.[1] The decedent discharged his gun while on the ground. The defendant then fled the scene.

Edward Bergin, the owner of the cafe, came outside and was directed to the decedent, who remained on the ground. Bergin overheard the decedent ask Edwin Melendez to retrieve the decedent's gun from under a

[1] During the autopsy, a single nine millimeter bullet was removed from the decedent's back.

nearby parked motor vehicle. Melendez looked under the motor vehicle, grabbed the decedent's gun and placed it in his vehicle. Bergin relayed this information regarding the relocating of the decedent's gun to Brian Brunelli, a Waterbury police officer who had been dispatched to the cafe.

Brunelli observed a small hole in the center of the decedent's chest. The decedent's gun was recovered from Melendez' vehicle. While on the ground outside of the cafe, the decedent informed Brunelli that he could neither breathe nor feel his legs. Medical personnel transported the decedent to the hospital, where he died soon thereafter.[2]

Joe Rainone, a Waterbury police lieutenant, processed the crime scene where the police recovered three firearm cartridges: a fired nine millimeter cartridge, an unfired .45 caliber cartridge, and a fired .45 caliber cartridge, which later testing revealed had been discharged from the decedent's gun.[3] On the basis of the evidence at the crime scene, the police concluded that two different guns had been used in the shooting outside of the cafe, and that the decedent had fired one shot during the altercation.

After an investigation, the police arrested the defendant approximately one month later. Recorded police interviews with the defendant occurred on November 20 and 21, 2015. At the start of the trial, the state filed an information charging the defendant with murder in violation of General Statutes § 53a-54, criminal possession of a firearm in violation of § 53a-217, carrying a pistol without a permit in violation of General Statutes

[2] James Gill, the forensic pathologist who performed the October 19, 2015 autopsy of the decedent, testified that the cause of death was a gunshot wound to the trunk of the torso. Gill further opined that the decedent would have been able to fire his gun after sustaining this gunshot wound.

[3] Rainone explained to the jury that a cartridge is often called a "live round" and consists of the canister, gun powder and the bullet.

§ 29-35 and tampering with physical evidence in violation of § 53a-155. At the conclusion of the trial, the state withdrew the charge of carrying a pistol without a permit and filed a new long form information charging the defendant with the crimes of murder, criminal possession of a firearm and tampering with physical evidence. The jury returned not guilty verdicts on the murder charge and certain lesser included offenses,[4] and a guilty verdict on the criminal possession of a firearm and tampering with physical evidence charges.

Following the jury's verdict, the court granted the defendant's motion for a judgment of acquittal with respect to the charge of tampering with physical evidence. The court concluded that the state had failed to present sufficient evidence that the defendant had removed his gun from the crime scene with the intent to hinder a criminal investigation. The court then proceeded to the state's part B information and the jury found the defendant guilty of being a persistent serious felony offender. See General Statutes § 53a-40 (c). On February 9, 2018, the court imposed a total effective sentence of twenty years incarceration. These appeals followed.

I

In the appeal in Docket No. AC 41168, the state claims that the court improperly granted the defendant's motion for judgment of acquittal with respect to the charge of tampering with physical evidence. Specifically, the state contends that it had produced sufficient evidence that the defendant had removed his gun from the crime

[4] The court charged the jury on the lesser included offenses of manslaughter in the first degree with a firearm in violation of General Statutes § 53a-55a, manslaughter in the second degree with a firearm in violation of General Statutes § 53a-56a and criminally negligent homicide in violation of General Statutes § 53a-58.

scene with the intent to impair its availability in a criminal investigation by a law enforcement agency. We disagree.

The state charged the defendant with tampering with physical evidence in violation of § 53a-155 (a) (1) by fleeing from the crime scene with his gun.[5] On October 2, 2017, the defendant filed a motion seeking, in part, to dismiss the tampering charge. On October 17, 2017, the court heard arguments on this motion. The court denied that portion of the defendant's motion to dismiss "in essence" but noted that the defendant could raise arguments relating to the tampering with physical evidence charge at a later time.

Before the conclusion of the state's case, the parties stipulated that the defendant had been convicted of a felony prior to the events of October 18, 2015. As a result of this stipulation, the court instructed the jury[6] that the evidence of the prior conviction had been admitted for the limited purpose of establishing one of the elements of criminal possession of a firearm[7] and

[5] The operative information charged the defendant as follows: "AND FURTHER THAT THE SAID [defendant] did commit the crime of TAMPERING WITH PHYSICAL EVIDENCE in violation of . . . § 53a-155 (a) (1) in that on or about October 18, 2015, at approximately 1:13 a.m., at or near [the cafe], that said [defendant] did, believing that a criminal investigation conducted by a law enforcement agency was about to be instituted, remove a thing with purpose to impair its availability in such criminal investigation; to wit [the defendant] fled the scene of the shooting with the gun he used to kill [the decedent]."

[6] Specifically, the court instructed the jury as follows: "Ladies and gentleman, I'll be giving full instructions as of the close of evidence, but as you just heard, the state has offered evidence that the defendant has been previously convicted of a felony. That evidence is not being admitted to show that the defendant has bad character or propensity to commit crimes. It's been admitted for a limited purpose only, that limited purpose is to establish an element of the crime of criminal possession of a firearm. And you're to use it for that purpose only. And I'll be providing you with additional instructions later in my charge to you."

[7] General Statutes § 53a-217 (a) provides in relevant part: "A person is guilty of criminal possession of a firearm . . . when such person possesses a firearm . . . and (1) had been convicted of a felony committed prior to,

was not to be used for any other purpose. The court subsequently reiterated the limited purpose of the evidence of the defendant's prior felony conviction during its final instructions to the jury.[8]

On October 31, 2017, after the conclusion of the evidentiary phase of the trial, the defendant filed a motion for judgment of acquittal. See Practice Book § 42-40. The defendant asserted that the state had failed to produce evidence that he "altered, destroyed, concealed or removed a firearm with the purpose to impair its availability in a criminal investigation or official proceeding." During oral argument on the defendant's motion, the prosecutor noted that the requisite intent for tampering with physical evidence could be inferred from both the defendant's flight from the scene and the fact that, given his prior felony conviction, the defendant knew that possession of a firearm constituted evidence of criminal possession of a firearm. After hearing from the parties, the court reserved judgment on the motion until after the jury verdict. See Practice Book § 42-42.[9]

on or after October 1, 2013 . . . ." See generally *State* v. *Harris*, 183 Conn. App. 865, 871 n.9, 193 A.3d 1223, cert. denied, 330 Conn. 918, 193 A.3d 1213 (2018).

[8] The court instructed the jury as follows: "You will recall that some testimony and evidence were admitted during the course of this trial for a limited purpose only. Any testimony or evidence which I identified as being received for a limited purpose, you will consider only as it relates to the limited issue for which it was allowed. You shall not consider such testimony and evidence in finding any other facts or as to any other issue.

* * *

"Any evidence in this case that the defendant has previously been convicted of a felony has been admitted for a limited purpose, that purpose being to establish the second essential element of this offense. *The evidence may not be used for any other purpose*." (Emphasis added.)

[9] Practice Book § 42-42 provides that "[i]f the motion [for judgment of acquittal] is made at the close of all the evidence in a jury case, the judicial authority may reserve decision on the motion, submit the case to the jury, and decide the motion either before the jury returns a verdict or after it returns a verdict of guilty or after it is discharged without having returned a verdict."

On November 6, 2017, the jury found the defendant guilty of criminal possession of a firearm and tampering with physical evidence. After excusing the jury, the court heard further argument from the parties regarding the defendant's motion for judgment of acquittal. At the outset, the court questioned whether the state had met its burden with respect to the tampering with physical evidence charge. The court inquired whether, under these facts, where there had been a "shootout and a valid claim of self-defense [and] where [the state had claimed that the defendant] had a duty to retreat," the defendant's flight from the scene with his gun was sufficient for the jury to find that he had intended to impair the criminal investigation. The prosecutor responded that the jury could have found that the defendant had a dual intent in that he wanted to flee the scene and prevent the police from gaining possession of his firearm.

The court then rendered its oral decision on the motion for judgment of acquittal. "My view is [that] the only evidence from which a jury could infer an intent to remove the gun to impair a criminal investigation is his flight from the scene. Under the circumstances of this case, where there was inarguably a shootout, where the [decedent] fired his weapon, and the defendant fled the scene claiming self-defense and the state argued a duty to retreat, looking at all those circumstances, I conclude a jury could not reasonably find that the state has proven beyond a reasonable doubt that he took the gun with him to impair its availability in a subsequent criminal investigation. So for those reasons, I'm going to grant the motion for judgment of acquittal."

Two days later, the state filed a motion for permission to appeal the granting of the defendant's judgment for motion of acquittal. See General Statutes § 54-96; Practice Book § 61-6 (b).[10] The court granted the state's

[10] General Statutes § 54-96 provides: "Appeals from the ruling and decisions of the Superior Court, upon all questions of law arising on the trial

motion for permission to appeal on November 28, 2017. See generally *State* v. *Richard P.*, 179 Conn. App. 676, 678 n.1, 181 A.3d 107 (trial court granted state permission to appeal), cert. denied, 328 Conn. 924, 181 A.3d 567 (2018); *State* v. *Brundage*, 148 Conn. App. 550, 552, 87 A.3d 582 (2014) (same), aff'd, 320 Conn. 740, 135 A.3d 697 (2016).

We begin with the relevant legal principles and our standard of review. A motion for a judgment of acquittal must be granted if the evidence would not reasonably permit a finding of guilt. *State* v. *Nival*, 42 Conn. App. 307, 308, 678 A.2d 1008 (1996); see also *State* v. *Greene*, 186 Conn. App. 534, 549, 200 A.3d 213 (2018). In ruling on such a motion, "the trial court must determine whether a rational trier of fact could find the crime proven beyond a reasonable doubt." *State* v. *Nival*, supra, 309.

In the present case, the court concluded that the state had failed to prove, beyond a reasonable doubt, that the defendant removed the gun from the crime scene with the intent to impair its availability in a subsequent criminal investigation. "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 [trier of fact] reasonably could have concluded that the cumulative force of the evidence established guilt beyond a reasonable doubt. . . . In evaluating evidence, the trier of fact is not required to accept as dispositive those inferences that

of criminal cases, may be taken by the state, with the permission of the presiding judge, to the Supreme Court or to the Appellate Court, in the same manner and to the same effect as if made by the accused."

Practice Book § 61-6 (b) provides in relevant part: "The state, with permission of the presiding judge of the trial court and as provided by law, may appeal from a final judgment."

are consistent with the defendant's innocence. . . . The trier may draw whatever inferences from the evidence or facts established by the evidence it deems to be reasonable and logical. . . .

"The trial court should not set a verdict aside where there was some evidence upon which the jury could reasonably have based its verdict . . . . A jury can rely on both circumstantial and direct evidence when making its verdict. There is no legal distinction between direct and circumstantial evidence so far as probative force is concerned. . . . Because direct evidence of the accused's state of mind is rarely available . . . intent is often inferred from conduct . . . and from the cumulative effect of the circumstantial evidence and the rational inferences drawn therefrom." (Citations omitted; internal quotation marks omitted.) *State* v. *Mark*, 170 Conn. App. 241, 249–51, 154 A.3d 564, cert. denied, 324 Conn. 927, 155 A.3d 1269 (2017); see also *State* v. *Greene*, supra, 186 Conn. App. 549–50.

We now turn to the statutory language of the crime of tampering with physical evidence. See, e.g., *State* v. *Pommer*, 110 Conn. App. 608, 613, 955 A.2d 637 (review of any claim that evidence was insufficient to prove violation of criminal statute necessarily includes consideration of skeletal requirement of necessary elements that charged statute requires to be proved), cert. denied, 289 Conn. 951, 961 A.2d 418 (2008). Section 53a-155 (a) provides in relevant part: "A person is guilty of tampering with or fabricating physical evidence if, believing that a criminal investigation conducted by a law enforcement agency or an official proceeding is pending, or about to be instituted, such person: (1) Alters, destroys, conceals or removes any record, document or thing with purpose to impair its verity or availability in such criminal investigation or official proceeding . . . ."[11] Our Supreme Court has set forth the

[11] Effective October 1, 2015, "[§] 53a-155 was amended . . . to add that one may be guilty of tampering during a criminal investigation or when a

elements of this crime. "The state . . . must establish that the defendant (1) believed that an official proceeding [or criminal investigation] was pending or about to be instituted, (2) discarded the evidence at issue, and (3) *acted with the intent to prevent the use of the evidence at an official proceeding* [*or criminal investigation*]." (Emphasis added.) *State* v. *Jordan*, 314 Conn. 354, 377, 102 A.3d 1 (2014); see also *State* v. *Mark*, supra, 170 Conn. App. 251.

On appeal, the state argues that the evidence was sufficient to prove that the defendant removed the gun from the crime scene with the intent to impair its availability in the subsequent police investigation. It further contends that the jury could have inferred that the defendant, cognizant of his prior felony conviction, removed the gun for the purpose of avoiding the charge of criminal possession of a firearm. The defendant counters that his prior felony conviction had been admitted into evidence for the limited purpose of establishing an element of the crime of criminal possession of a firearm and could not be used for any other purpose. We agree with the defendant.

A brief review of the relevant case law will facilitate our analysis. In *State* v. *Foreshaw*, 214 Conn. 540, 542–43, 572 A.2d 1006 (1990), the defendant shot and killed the victim and then fled in her car. The police arrested the defendant a short time later and found a bullet on the floor of her vehicle. Id., 543. The defendant stated that she had thrown her gun out of the car window, and efforts to retrieve it proved to be unsuccessful. Id. At her criminal trial, the defendant admitted that she had discarded the gun while driving away from the site of the shooting "so that she would not be caught with

criminal proceeding is about to commence." *State* v. *Stephenson*, 187 Conn. App. 20, 33 n.9, 201 A.3d 427, cert. granted on other grounds, 331 Conn. 914, 204 A.3d 702 (2019); see also *State* v. *Mark*, supra, 170 Conn. App. 243 n.2.

it." Id. The jury found her guilty of murder, carrying a pistol without a permit, and tampering with physical evidence. Id., 541.

On appeal, the defendant challenged the sufficiency of the evidence with respect to the tampering with physical evidence charge. Id., 549. Although the defendant in *Foreshaw* did not focus on whether she had discarded the gun with the intent to make it unavailable for the subsequent official proceeding; see id., 550–51; our Supreme Court noted that she had testified to discarding the gun "so that she would not be caught with it." Id., 550. Thus, in *Foreshaw*, the defendant's own words provided evidence of her intent with respect to the unavailability of the gun in the subsequent proceeding.

In *State* v. *Jordan*, supra, 314 Conn. 354, our Supreme Court clarified certain aspects of its decision in *Foreshaw*. In *Jordan*, a witness observed an individual pull "aggressively" on the locked door of a closed bank while wearing a jacket, ski mask and gloves. Id., 358–59. After hearing the witness' report on his radio, a nearby police officer observed a likely suspect and called out to him. Id., 359. The suspect took off running. Id. During the ensuing chase, the suspect removed and discarded several items of clothing, including his jacket, sweatshirt, mask and gloves. Id., 359–60. The police eventually located and arrested the defendant, who was charged with various criminal offenses. Id., 360–63. The defendant was convicted of attempt to commit robbery in the third degree, conspiracy to commit robbery in the third degree and tampering with physical evidence. Id., 358.

On appeal, the defendant claimed that the evidence was insufficient to support his conviction of tampering with physical evidence. Id., 376. In addressing the defendant's contention that *Foreshaw* had been decided

incorrectly, our Supreme Court observed that § 53a-155 applies to some, but not all, attempts to discard evidence that occur during a police investigation. Id., 382.[12] Furthermore, it noted that "it is not the existence of an investigation that is key but, rather, whether the defendant believes an official proceeding is pending or probable. . . . This analysis ensures that the focus of the inquiry is on the culpability of the actor, rather than on external factors wholly unrelated to [the actor's] purpose of subverting the administration of justice." (Internal quotation marks omitted.) Id., 383.

In *Jordan*, our Supreme Court determined that the jury could not reasonably have concluded that, at the time the defendant discarded the evidence, he believed that an official proceeding against him was probable. Id., 385. "Instead, the only reasonable inference from the facts . . . is that the defendant discarded his clothing to prevent its use in an investigation in order to escape detection and avoid being arrested by the pursuing police officer. There is no evidence that when the defendant discarded the clothing he believed that the police officer had any information, other than the clothing, linking him to the attempted bank robbery." Id., 388–89.

Unlike in *Jordan*, here, the removal of evidence for the purpose of impairing its availability in a criminal investigation by law enforcement falls within the ambit of § 53a-155. See note 12 of this opinion. Nevertheless, the state failed to produce any evidence that, at the time the defendant departed the crime scene, he removed the gun with the intent to impair its availability in a subsequent criminal investigation. Cf. *State* v. *Mark*, supra, 170 Conn. App. 254 (witness testified that defendant was nervous and had wanted to return to crime

[12] Our Supreme Court's decision in *State* v. *Jordan*, supra, 314 Conn. 354, was released on November 4, 2014, approximately eleven months before § 53a-155 was amended to include criminal investigations.

scene to dispose of rock used to kill victim). The evidence indicates that the defendant shot the decedent, who fell to the ground and returned fire. The defendant then left the scene. There is no additional evidence that, when he left the scene of the shooting, the defendant took the gun with the intent to prevent its use in the subsequent police investigation.

The state argues that, in addition to his flight from the scene of the shooting, the jury could have relied on the defendant's prior felony conviction to satisfy the element that he had removed the gun with the intent to impair its availability in an investigation by law enforcement. The state maintains that the evidence of the defendant's flight, combined with his prior felony conviction, supported a finding that the defendant had removed the gun from the scene to avoid a charge of criminal possession of a firearm, and therefore tampered with physical evidence.

The state's argument, however, overlooks the limited purpose for which the defendant's prior felony conviction had been admitted into evidence. The parties and the court addressed the admissibility of the defendant's prior felony conviction. The court indicated that it would provide the jury with "a cautionary instruction . . . that the felony conviction *is only to be used for that count* [*of criminal possession of a firearm*] *and for no other*. It's not to be used to infer bad character or criminal propensity on the part of the defendant." (Emphasis added.) When the parties' stipulation regarding the defendant's prior felony conviction was admitted into evidence and read to the jury, the court limited its use to the charge of criminal possession of a firearm. The court repeated that limitation during its charge to the jury. At no point did the state object to the limited purpose for which the evidence of the defendant's prior felony conviction could be used.

"Evidence which is offered and admitted for a limited purpose only, and the facts found from such evidence, cannot be used for another and totally different purpose. *O'Hara* v. *Hartford Oil Heating Co.*, 106 Conn. 468, 473, 138 A. 438 (1927)." (Internal quotation marks omitted.) *Access Agency, Inc.* v. *Second Consolidated Blimpie Connecticut Realty, Inc.*, 174 Conn. App. 218, 229, 165 A.3d 174 (2017); see also *Damick* v. *Planning & Zoning Commission*, 158 Conn. 78, 80–81, 256 A.2d 428 (1969) (when court used evidence and testimony for purposes beyond limited ones for which it had permitted admission into evidence, such misuse was impermissible); see generally Conn. Code Evid. § 1-4. Given the state's agreement to use the defendant's prior felony conviction only for a limited purpose, we reject its efforts to now apply that evidence to the tampering with physical evidence charge.[13] We conclude, therefore, that

[13] In its reply brief, the state relies on *State* v. *Gradzik*, 193 Conn. 35, 475 A.2d 269 (1984). In that case, the defendant had been convicted of burglary in the third degree and, on appeal, challenged the sufficiency of the evidence that he entered the building. Id., 36. At the close of the state's evidence, he moved for a judgment of acquittal on the basis that the state had failed to prove that the defendant entered the cellar door of the building. Id., 37. The court denied the defendant's motion. Id. In its charge, the court instructed that in order to find the defendant guilty, the jury had to find that the defendant had entered the cellar. Id., 37–38.

On appeal, the defendant claimed that the court's charge had "narrowed the issue to entry into the cellar [and because] proof of the defendant's presence in the hatchway is not sufficient for conviction," his conviction could not stand. Id., 38. Our Supreme Court first noted that, contrary to the trial court's instructions to the jury, the defendant's presence in the hatchway was sufficient for a conviction of burglary in the third degree. Id. It then explained: "The trial court cannot by its instruction change the nature of the crime charged in the information. . . . The substituted information charged the defendant with burglary in the third degree which could have been proved by the defendant's unlawful entry into the hatchway. Though the instruction incorrectly limited the proof necessary for a conviction, on review of a sufficiency of the evidence claim this court looks to see if the evidence supports the verdict on the crime charged. As discussed earlier, we hold that it does." (Citation omitted.) Id., 38–39.

We conclude that *State* v. *Gradzik*, supra, 193 Conn. 35, is distinguishable from the present case. In *Gradzik*, our Supreme Court concluded that the trial court's erroneous instruction could not limit the elements of the crime

the state presented insufficient evidence regarding the defendant's intent when he departed from the scene of the shooting. The evidence regarding his prior felony conviction could not be used to establish the element of intent in the tampering with physical evidence charge. For these reasons, we conclude that no reasonable trier of fact could have found the defendant guilty of this charge, and the trial court properly granted the defendant's motion for judgment of acquittal as to the charge of tampering with physical evidence.

II

In the appeal in Docket No. AC 41644, the defendant claims that his statements to the police had been obtained after a violation of the prophylactic rule established by our Supreme Court in *State* v. *Purcell*, supra, 331 Conn. 318, and, therefore, the court should have excluded his statements from evidence. The defendant also contends that the court abused its discretion and violated his constitutional rights by admitting into evidence certain inculpatory portions of his police interview and excluding related contextual portions. The state counters, inter alia, that the defendant did not make an ambiguous request for counsel during his interview with the police and, therefore, the *Purcell* rule did not apply. Additionally, the state maintains that the court did not abuse its discretion or violate the defendant's constitutional rights with respect to its rulings regarding the admissibility of portions of the defendant's police interview. We agree with the state.

On November 20, 2015, approximately one month after the shooting, the police took the defendant into

of burglary in the third degree so as to require the state to prove entry into the cellar. The evidence of the defendant's entry into the hatchway was sufficient to support his conviction, despite that improper instruction by the court. In the present case, the agreement of the parties limited the use the defendant's prior felony conviction and the court instructed the jury accordingly. The state's reliance on *Gradzik*, therefore, is misplaced.

custody pursuant to an arrest warrant. The defendant was arrested in New Haven and then transported to Waterbury. During a brief custodial interview in the detective bureau, the defendant unambiguously asserted his right to have a lawyer present, and Stephen Brownell, a Waterbury police detective, ended the interview.

The defendant remained in custody overnight at the Waterbury police station. The next day, he informed Ricardo Viera, a Waterbury police officer, that he wanted to speak with Brownell. The defendant's affirmative request was relayed to Brownell, who returned to the police station to speak with the defendant on November 21, 2015. During this second interview, Brownell informed the defendant of his *Miranda* rights.[14] The defendant expressly stated that he understood and waived these rights. During the course of this second interview, the defendant admitted to being outside the cafe at the time of the shooting.

On October 2, 2017, the defendant filed a motion to suppress the statements he made to law enforcement officers. The defendant claimed that these statements were made (1) without a valid waiver of his state and federal rights against self-incrimination, (2) involuntarily, in violation of state and federal rights to due process and (3) in violation of his right to counsel. The defendant filed a memorandum of law in support of the motion to suppress approximately two weeks later.

On October 17, 2017, the court held a hearing on the defendant's motion to suppress. For purposes of the hearing, the state conceded that the defendant was in custody and subject to interrogation. The parties also agreed to focus on the November 21, 2015 interview. The court indicated that it had watched the video recordings of both interviews. After hearing from the

[14] *Miranda* v. *Arizona*, 384 U.S. 436, 478–79, 86 S. Ct. 1602, 16 L. Ed. 2d 694 (1966).

state's witnesses, the court orally denied the defendant's motion to suppress.

The court found that the defendant had asserted his right to have counsel present during the first interview,[15] at which time Brownell terminated the interrogation.[16] The next day, the defendant affirmatively requested to speak to Brownell, which led to the second interview. The court expressly found that, during the second interview, the defendant was informed of, understood and waived his *Miranda* rights. The court noted that, during the second interview, the defendant had expressed dissatisfaction that a lawyer had not come to see him following the conclusion of the first interview. The court, relying on *Edwards* v. *Arizona*, 451 U.S. 477, 101 S. Ct. 1880, 68 L. Ed. 2d 378 (1981), concluded that the defendant had initiated further communication with the police,[17] and then had knowingly, intelligently and voluntarily waived his *Miranda* rights. Accordingly, it denied the defendant's motion to suppress.

[15] In *Miranda* v. *Arizona*, supra, 384 U.S. 469–73, the United States Supreme Court held that "a suspect subject to custodial interrogation has the right to consult with an attorney and to have counsel present during questioning, and that the police must explain this right to him before questioning begins." (Internal quotation marks omitted.) *State* v. *Purcell*, supra, 331 Conn. 330; see also *State* v. *Anonymous*, 240 Conn. 708, 720–21, 694 A.2d 766 (1997) (right of accused to have attorney present during custodial interrogation constitutes prophylactic rule to protect constitutional rights).

[16] In *Smith* v. *Illinois*, 469 U.S. 91, 98, 105 S. Ct. 490, 83 L. Ed. 2d 488 (1984), the United States Supreme Court acknowledged the "bright-line rule that *all* questioning must cease after an accused requests counsel." (Emphasis in original; internal quotation marks omitted.) See also *State* v. *Purcell*, supra, 331 Conn. 331; *State* v. *Rollins*, 245 Conn. 700, 704–706, 714 A.2d 1217 (1998); see generally annot., 83 A.L.R. 4th 454 § 2 [a] (1991).

[17] "We further hold that an accused . . . having expressed his desire to deal with the police only through counsel, is not subject to further interrogation by the authorities until counsel has been made available to him, *unless the accused himself initiates further communication, exchanges, or conversations with the police.*" (Emphasis added.) *Edwards* v. *Arizona*, supra, 451 U.S. 484–85; see also *State* v. *Hafford*, 252 Conn. 274, 290, 746 A.2d 150 (after suspect requests counsel, further conversations between police and suspect do not violate *Miranda* if initiated by suspect), cert. denied, 531

On the last day of the state's case, the prosecutor, outside the presence of the jury, sought to have portions of the video recording of the defendant's second interview admitted into evidence. Defense counsel, who had not been provided with advance notice of the specific excerpts the state sought to have admitted, noted that he likely would ask that certain additional portions also be admitted into evidence to provide the jury with context. After viewing the state's proffer, defense counsel offered several video clips for admission into evidence. The court admitted only the excerpt of the interview offered by the state, in which the defendant admitted to being present outside of the cafe on the night of the shooting.

A

The defendant first claims that his statements to the police during his second interview violated the prophylactic rule set forth by our Supreme Court in *State* v. *Purcell*, supra, 331 Conn. 318, and, therefore, the court should have excluded the statements from evidence. The defendant argues that he made an equivocal or ambiguous request for counsel at the beginning of the second interview and therefore the police should have confined any further questioning to narrow inquiries designed to clarify the defendant's desire for counsel, as required by *Purcell*. The state counters that the defendant's remarks did not constitute an ambiguous request for counsel, and, therefore, the police's subsequent questioning was not limited to a clarification of the desire for counsel, and that any error was harmless beyond a reasonable doubt. After a careful review of the record and our Supreme Court's decision in *Purcell*, we conclude that the defendant's comment did not amount to an equivocal or ambiguous request for counsel, and, therefore, the defendant's claim fails.

U.S. 855, 121 S. Ct. 136, 148 L. Ed. 2d 89 (2000); *State* v. *Mercer*, 208 Conn. 52, 67–68, 544 A.2d 611 (1988) (same).

The following additional facts are necessary for our analysis. Brownell first interviewed the defendant on November 20, 2015. This interview occurred after the defendant's arrest and transportation from New Haven to Waterbury. At the outset, Brownell informed the defendant that, before discussing the incident that had led to his arrest, the defendant had to be made aware of, and waive, certain rights.[18] The defendant stated that he was willing to talk to Brownell, but requested that he be permitted to telephone his father. After further conversation, Brownell again attempted to provide the defendant with his *Miranda* rights. After reading some of the *Miranda* rights aloud, the defendant again requested to make a telephone call. The defendant repeated that he was willing to speak with Brownell and added that he wanted a lawyer present.[19] Brownell asked if the defendant would prefer to have a lawyer and the defendant responded: "I'd rather have a lawyer present." At this point, Brownell ceased the interrogation of the defendant.

The next day, the defendant reinitiated communication with the police by affirmatively requesting to speak with Brownell, whom he described as the detective "controlling the case." After returning to the police station, Brownell commenced the second interview by attempting to obtain the defendant's waiver of his *Miranda* rights. The defendant repeatedly expressed his concerns about being recorded and for his safety.

After about fifteen minutes, the following colloquy occurred:

[18] For example, Brownell stated: "But if we wanna talk about the incident, if you wanna know why you're here, the things that happened, what I know, what people have been saying about you, at the bare minimum you have to understand these rights, you gotta read them out loud, and say that you understand them and you wanna speak with me."

[19] Specifically, the defendant stated: "Yes, I do [want to speak with Brownell], but I want to make a phone call, and my father and—and my girl, have her bring a lawyer—can I speak with you with a lawyer?"

"[Brownell]: Who did you, who did you reach out earlier to . . . say that you wanted to speak with me again? Did you reach out to somebody?

"[The Defendant]: Ye—couple of people.

"[Brownell]: Who was it? Officers downstairs?

"[The Defendant]: Mhhm.

"[Brownell]: Were they wearing like blue uniforms, like uniformed officers wear? Was that down in the cell block? You just—what did you say to them, that you wanted to speak with who?

"[The Defendant]: The controlling officer, that's all.

"[Brownell]: What's that?

"[The Defendant]: The controlling officer.

"[Brownell]: One of the controlling officers? Did you ask to speak with detectives from yesterday? Anything like that?

"[The Defendant]: Yeah, I said controlling the case.

"[Brownell]: Controlling the case?

"[The Defendant]: Cuz I just want to know like—it ain't—

"[Brownell]: Okay. *So you reached out to them correct? Is that fair to say, that you said you wanted to come back up here and speak with us? Okay. What changed your mind from yesterday when you said you didn't want to speak with us? Did you have some time to think about things?*

"[The Defendant]: *When the lawyer ain't come see me—*

"[Brownell]: No?

"[The Defendant]: *The lawyer ain't come see me, so now I feel like I'm being left for dead, like—*

"[Brownell]: *Shitty feeling*.

"[The Defendant]: Especially when I ain't—ain't nothing going—besides somebody probably saying something—I did something—like that's . . . ." (Emphasis added.)

After the defendant explained why he had changed his mind, Brownell made efforts to read to the defendant his *Miranda* rights. He also explained the various ways in which they could discuss the incident, as well as the parameters of such a discussion. After several attempts, Brownell read the defendant his rights. The defendant verbally acknowledged that he understood them and waived these rights. Brownell then proceeded to interview the defendant about the shooting at the cafe. Subsequently, in denying the defendant's motion to suppress, the court found that he had knowingly, intelligently and voluntarily waived his rights during the second interview.[20]

On appeal, the defendant contends that his response to Brownell's inquiry as to why he had changed his mind about speaking with the police constituted an equivocal or ambiguous request for counsel to be present at the second interview. At the time of the motion to suppress, and for purposes of the defendant's federal constitutional rights, this issue was controlled by *Davis* v. *United States*, 512 U.S. 452, 114 S. Ct. 2350, 129 L. Ed. 2d 362 (1994). In that case, the United States Supreme Court noted the rule that requires the police to cease questioning a suspect after counsel has been requested until either a lawyer is actually present or the suspect

[20] During the hearing on the defendant's motion to suppress, defense counsel argued that the police had a legal obligation "to explain to [the defendant] the fact he need not sit here feeling like he's left for dead, that arrangement can, in fact, be made to secure an attorney here and now. And not just this nebulous, you know, this if you can't one will be provided to you, but explaining. A guy who has expressed, doesn't have one, wants one and is feeling left for dead—and frustrated . . . ."

reinitiates the conversation with law enforcement. Id., 458; see also *State* v. *Purcell*, supra, 331 Conn. 331. "The applicability of the rigid prophylactic rule . . . requires courts to determine whether the accused *actually invoked* his right to counsel. . . . [I]f a suspect makes a reference to an attorney that is ambiguous or equivocal in that a reasonable officer in light of the circumstances would have understood only that the suspect *might* be invoking the right to counsel, our precedents do not require the cessation of the questioning." (Citations omitted; emphasis in original; internal quotation marks omitted.) *Davis* v. *United States*, supra, 458–59. Stated differently, "the suspect must unambiguously request counsel. . . . Although a suspect need not speak with the discrimination of an Oxford don . . . he must articulate his desire to have counsel present sufficiently clearly that a reasonable police officer in the circumstances would understand the statement to be a request for an attorney." (Citations omitted; internal quotation marks omitted.) Id., 459.

During the pendency of the defendant's appeal, however, our Supreme Court issued its decision in *State* v. *Purcell*, supra, 331 Conn. 318. In that case, the defendant made the following statements during a custodial interrogation: "See, if my lawyer was here . . . then . . . we could talk. That's, you know, that's it. . . . I'm supposed to have my lawyer here. You know that." (Internal quotation marks omitted.) Id., 334. On appeal, our Supreme Court concluded that these statements "were not the type of expression necessary under *Davis* to require interrogation to cease" as they did not constitute an unambiguous request for counsel. Id., 341.

The court then considered whether article first, § 8, of the Connecticut constitution required the police to stop and clarify an ambiguous or equivocal request for the presence of counsel. Id. Specifically, the court described the issue as "whether to adopt an additional

layer of prophylaxis to prevent a significant risk of deprivation of those vital constitutional rights protected under *Miranda*." Id., 342. Our Supreme Court observed that it had "endorsed the stop and clarify rule and followed it for more than a decade prior to *Davis*. See *State* v. *Anderson*, 209 Conn. 622, 627–28, 553 A.2d 589 (1989); *State* v. *Barrett*, [205 Conn. 437, 448, 534 A.2d 219 (1987)]; *State* v. *Acquin*, [187 Conn. 647, 674–75, 448 A.2d 163 (1982), cert. denied, 463 U.S. 1229, 103 S. Ct. 3570, 77 L. Ed. 2d 1411 (1983)]." *State* v. *Purcell*, supra, 331 Conn. 347. Ultimately, the court concluded that the standard set forth in *Davis* failed to safeguard adequately the right to counsel during a custodial interrogation under our state constitution. Id., 361–62. "We therefore hold that, consistent with our precedent and the majority rule that governed prior to *Davis*, our state constitution requires that, *if a suspect makes an equivocal statement that arguably can be construed as a request for counsel, interrogation must cease except for narrow questions designed to clarify the earlier statement and the suspect's desire for counsel. . . .* Interrogators confronted with such a situation alternatively may inform the defendant that they understand his statement(s) to mean that he does not wish to speak with them without counsel present and that they will terminate the interrogation. In either case, if the defendant thereafter clearly and unequivocally expresses a desire to continue without counsel present, the interrogation may resume." (Citation omitted; emphasis added; internal quotation marks omitted.) Id., 362. As a corollary to this rule, however, if the suspect makes statements that cannot be construed as a request for counsel, then the interrogation may continue, subject to any other applicable constitutional limitations.

The trial in the present case predated our Supreme Court's decision in *Purcell*. Nevertheless, the parties agree, and we concur, that because this appeal was

pending when *Purcell* was released on March 29, 2019, the new rule set forth therein applies to this matter. See *State* v. *Dickson*, 322 Conn. 410, 450, 141 A.3d 810 (2016) (new constitutional rules of criminal procedure must be applied in future trials and cases pending on direct review), cert. denied, U.S. , 137 S. Ct. 2263, 198 L. Ed. 2d 713 (2017); *Morrison* v. *Sentence Review Division*, 84 Conn. App. 345, 351 n.6, 853 A.2d 638 (same), cert. denied, 272 Conn. 908, 863 A.2d 701 (2004).

The dispositive question, therefore, is whether the exchange between the defendant and Brownell constituted an ambiguous or equivocal request so as to trigger the requirement of *Purcell* that any further questioning was limited to clarifying whether the defendant, in fact, wanted to have an attorney present.

We are mindful that "[i]nvocation [of the right to counsel] and waiver [of said right] are entirely different inquiries . . . ." (Internal quotation marks omitted.) *State* v. *Rollins*, 245 Conn. 700, 704, 714 A.2d 1217 (1998); see also *State* v. *Barrett*, supra, 205 Conn. 440–41 (noting analysis comprised of whether defendant had in fact invoked right to counsel and whether he had waived right to counsel). In *Davis* v. *United States*, supra, 512 U.S. 459, the United States Supreme Court identified the test for an ambiguous or equivocal invocation of the right to counsel as whether the defendant's reference to an attorney would lead a reasonable officer, under the circumstances, to understand that the defendant might be requesting counsel. See also *State* v. *Purcell*, supra, 331 Conn. 333 (noting test from majority opinion in *Davis*). Indeed, in considering the facts of *Purcell* under the federal constitution, our Supreme Court specifically recognized that a reasonable police officer could have interpreted the defendant's statements as the invocation of the right to counsel, but that his statements were reasonably amenable to a different

interpretation. Id., 339–40. We therefore will consider whether, under the circumstances, a reasonable officer could have interpreted the defendant's exchange with Brownell during the second interview as an invocation of the right to counsel. See id., 333–39; see also *State* v. *Anonymous*, 240 Conn. 708, 722–23, 694 A.2d 766 (1997).

After the defendant had reinitiated communication with the police, Brownell conducted the second interview. Brownell informed the defendant that they had to "go over" his rights. The defendant indicated that he did not want to be recorded, and he wanted to regain his freedom. The two men also addressed the defendant's concern for his safety and his reluctance to identify certain individuals.[21] After further discussion, the defendant stated that he had changed his mind about speaking to Brownell because a lawyer had not come to see him and that he had felt "left for dead . . . ." Brownell responded with "[s]hitty feeling." After further discussion, the defendant was read his rights, which he acknowledged and waived.

After a careful consideration of the facts and circumstances, we conclude that the defendant's explanation as to why he had changed his mind about speaking with Brownell did not constitute an ambiguous or equivocal request for counsel. Our Supreme Court has observed "that not every reference to an attorney during custodial

[21] During the argument on the motion to suppress, the court noted: "I, having viewed the videotape, I agree with [the prosecutor] that the hemming and hawing was not about [the defendant's] concern about whether he was waiving his rights, it's whether it was being recorded, whether someone else would find out what he was saying to the police because he had some desire to give information about other criminal activity he was aware of and he didn't want those people to know that he was talking to the police, that it was not in any way an uncertainty in his mind as to whether he wanted to talk to the police, but whether there would be a record of what he said, you know, written or recorded record of what he said to the police and I so find."

interrogation is an invocation of the right to counsel." *State* v. *Shifflett*, 199 Conn. 718, 737, 508 A.2d 748 (1986); see also *State* v. *Wilson*, 199 Conn. 417, 443, 513 A.2d 620 (1986) (fleeting reference to attorney, considered in context, may not amount to invocation of right to counsel depending on circumstances), overruled in part on other grounds by *State* v. *McCoy*, 331 Conn. 561, 586–87, 206 A.3d 725 (2019). Here, the defendant explained to Brownell that he changed his mind and agreed to speak with him about the shooting because "the lawyer ain't come see me . . . ." A statement made by a suspect in a custodial interrogation, even containing the word "attorney" or "lawyer," need not necessarily fall within the sphere of a request, clear or ambiguous, for counsel. Indisputably, the statement at issue did not constitute an "affirmative statement of present intent," which has been held to constitute a clear, unequivocal invocation of the right to counsel. *State* v. *Purcell*, supra, 331 Conn. 334–35. More importantly, it did not contain one or more conditional or hedging terms relating to the desire to have counsel present, which have been deemed ambiguous or equivocal invocations of that right. Id., 335–36.

Our conclusion that the defendant's explanation for speaking to the police would not cause a reasonable officer to construe it as an ambiguous request for counsel is supported by the circumstances of the two interviews. At the outset of the second interview, the defendant indicated that he did not want to be recorded and was worried about his safety. The defendant expressed his reluctance to provide names of individuals to Brownell and inquired as to whether other law enforcement agencieshad been involved in this matter. Those agitations caused him to interrupt Brownell's efforts to read the defendant his *Miranda* rights. Prior to his explanation for changing his mind, which occurred approximately fifteen minutes into the second interview, the defendant

said nothing that could remotely be construed as a request for counsel. Further, the defendant, who Brownell knew to have been involved in previous criminal matters, unambiguously had invoked his right to counsel the previous day which resulted in the termination of the first interview. Given the circumstances and the language used by the defendant during his second exchange with Brownell explaining his reason for choosing to speak about the shooting, there was nothing that would have alerted a reasonable officer that the defendant was requesting counsel. Accordingly, we conclude that his *Purcell* claim must fail.

B

The defendant next claims that the court abused its discretion and violated his constitutional rights by admitting into evidence certain inculpatory portions of his statement while excluding related contextual portions. Specifically, he argues that "the court permitted the prosecution to create a misleading impression for the jury by allowing the state to introduce inculpatory portions of the defendant's statements while omitting portions wherein he denied involvement in the shooting incident." The defendant further claims to have suffered both evidentiary and constitutional harm and therefore is entitled to a new trial. We are not persuaded by the defendant's claims.

The following additional facts are necessary for the resolution of these claims. On October 27, 2017, the prosecutor informed the court of his intention to offer portions of the defendant's recorded interview with Brownell for admission into evidence. The first portion contained Brownell showing the defendant a photograph from the surveillance video taken outside of the cafe on the night of the shooting and the defendant identifying himself in the photograph. The state also sought to have this photograph admitted into evidence.

Defense counsel objected to the state's proffer and argued that additional portions of the recording should be admitted into evidence. These portions included the defendant's identification of the shooter as a man dressed in all white clothing.

The court noted that defense counsel sought to have these additional portions of the defendant's interview with Brownell admitted into evidence pursuant to § 1-5 of the Connecticut Code of Evidence.[22] Defense counsel explained that the defendant's acknowledgment of his presence outside of the cafe at time of the shooting would be taken out of context by the jury if his identification of the shooter as the man dressed in all white clothing also was not admitted into evidence. The court noted that the defendant's "motivation as to why he's putting himself at the scene is not necessary to understand [the fact that he has identified himself as being present] at the scene."[23] Defense counsel conceded that, in the portion of the video that the state sought to have admitted into evidence, the defendant had identified himself in the photograph taken at the scene on the night of the shooting. After hearing further argument, the court declined to admit into evidence the additional portions of the recorded interview of the defendant by Brownell.

The court informed the parties that it would admit into evidence a twenty-three second portion of the defendant's recorded interview with Brownell. During this excerpt, identified as exhibit 62A, Brownell showed the defendant a photograph and asked if he was depicted

[22] Section 1-5 (b) of the Connecticut Code of Evidence provides: "When a statement is introduced by a party, another party may introduce any other part of the statement, whether or not otherwise admissible, that the court determines, considering the context of the first part of the statement, ought in fairness to be considered with it."

[23] The court also indicated that defense counsel was attempting to minimize the effect of the defendant's self-identification.

in that photograph. The defendant examined the photograph and responded in the affirmative. Brownell then inquired whether the defendant was "next to the dude in white?" The defendant again responded in the affirmative.

Brownell testified that he had interviewed the defendant for approximately three hours on November 21, 2015. He further stated that this interview had been audio and video recorded. The court admitted into evidence the short clip of the police interview conducted by Brownell, identified as exhibit 62A, and it was played for the jury. The court also admitted into evidence the photograph that Brownell showed to the defendant during the second interrogation.

Following the jury verdict, the defendant filed a motion for a new trial on November 13, 2017. Therein, the defendant again claimed that the admission of exhibit 62A was misleading and prejudicial. The court denied the defendant's motion for a new trial.

On appeal, the defendant claims both evidentiary and constitutional error with respect to the court's ruling regarding exhibit 62A. With respect to the former claim, the defendant contends that the court abused its discretion in admitting exhibit 62A and in excluding the portions of the police interview in which he identified the shooter as the man dressed in all white in violation of § 1-5 of the Connecticut Code of Evidence.

Before addressing the specifics of this claim, we set forth our standard of review. "To the extent a trial court's [ruling regarding] admission of evidence is based on an interpretation of the [Connecticut] Code of Evidence, our standard of review is plenary. For example, whether a challenged statement properly may be classified as hearsay and whether a hearsay exception properly is identified are legal questions demanding plenary review. They require determinations about which reasonable

minds may not differ; there is no judgment call by the trial court . . . . We review the trial court's decision to admit evidence, if premised on a correct view of the law, however, for an abuse of discretion." (Internal quotation marks omitted.) *State* v. *Norman P.*, 169 Conn. App. 616, 628, 151 A.3d 877 (2016), aff'd, 329 Conn. 440, 186 A.3d 1143 (2018); see also *State* v. *Rivera*, Conn. , , A.3d (2020).

In the present case, the issue is whether the court properly admitted and excluded the various portions of the police interview pursuant to § 1-5 of the Connecticut Code of Evidence and therefore we apply the abuse of discretion standard of review. Pursuant to that standard, "[t]he trial court's ruling on evidentiary matters will be overturned only upon a showing of a clear abuse of the court's discretion. . . . We will make every reasonable presumption in favor of upholding the trial court's ruling . . . and . . . upset it [only] for a manifest abuse of discretion." (Internal quotation marks omitted.) *State* v. *Brett B.*, 186 Conn. App. 563, 600, 200 A.3d 706 (2018), cert. denied, 330 Conn. 961, 199 A.3d 560 (2019); see also *State* v. *Garcia*, 299 Conn. 39, 56–57, 7 A.3d 355 (2010).

Section 1-5 (b) of the Connecticut Code of Evidence "applies to statements, and its purpose is to ensure that statements placed in evidence are not taken out of context. . . . This purpose also demarcates the rule's boundaries; a party seeking to introduce selected statements under the rule must show that those statements are, in fact, relevant to, and within the context of, an opponent's offer and, therefore, are part of a single conversation. . . . *State* v. *Castonguay*, 218 Conn. 486, 497, 590 A.2d 901 (1991). . . . [This] rule logically extends to written and recorded statements. Thus, like subsection (a), subsection (b)'s use of the word statement includes oral, written and recorded statements. In addition, because the other part of the statement is

introduced under subsection (b) for the purpose of putting the first part into context, the other part need not be independently admissible. Conn. Code Evid. § 1-5, commentary, subsection (b) . . . .'' (Internal quotation marks omitted.) *Cousins* v. *Nelson*, 87 Conn. App. 611, 617–18, 866 A.2d 620 (2005); see generally C. Tait & E. Prescott, Connecticut Evidence (5th Ed. 2014) § 1.28.2, pp. 89–90.

In *State* v. *Norman P.*, supra, 329 Conn. 459, our Supreme Court defined the term ''context'' as ''[t]he weaving together of words in language . . . [t]he part or parts of a written or spoken passage preceding or following a particular word or group of words and so intimately associated with them as *to throw light upon their meaning* . . . .'' (Emphasis in original; internal quotation marks omitted.) It also set forth the following analytical pathway to determine whether a statement had been taken out of context so as to require the admission into evidence of the relevant additional sections. ''In accordance with these principles, when a portion of a statement introduced by a party has been taken out of context such that it distorts the meaning of the entire statement and could mislead the jury, § 1-5 (b) of the Connecticut Code of Evidence requires that the relevant remainder be admitted . . . . We have relied on a useful inquiry in determining whether § 1-5 (b) requires the admission of a remainder of a statement: does the remainder 'alter the context' of the already introduced portion of the statement? *State* v. *Castonguay*, [supra, 218 Conn. 497]. The nature of the question suggests a practical approach to applying § 1-5 (b): identify which portions of the statement were initially introduced into evidence, set forth the argument of the party proffering the remainder as to how the partial introduction distorts the meaning of the whole, then juxtapose that initial offering with the remainder. If the addition of the remainder would alter

the meaning of the initial offering—or, in other words, would demonstrate that the initial portion was taken out of context—then § 1-5 (b) requires that the remainder be admitted into evidence. This court followed precisely this approach in [*State* v. *Jackson*, 257 Conn. 198, 214, 777 A.2d 591 (2001)], in which the court first considered which portions of the statement had been admitted, identified the defendant's argument as to why the remainder was necessary to provide context, then juxtaposed the initial offering with the remainder of the statement and concluded that the original portions had not distorted the meaning of the entire statement." *State* v. *Norman P.*, supra, 329 Conn. 460.

Applying this analysis to the facts of the present case, we conclude that the court did not abuse its discretion with respect to its evidentiary rulings. Here, the court determined that in exhibit 62A the defendant identified himself in the photograph during his interview with Brownell. The additional information that the defendant sought to have introduced into evidence included the defendant's identification of the man in all white as the shooter. The evidence proffered did not change or alter the fact that the defendant had made this self-identification that placed him at the scene of the shooting. Stated differently, the defendant's identification of the individual in white clothing was not so intimately associated so as to "throw light" on the fact that the defendant identified himself in the photograph of the outside of the cafe on the night of the shooting. See *State* v. *Norman P.*, supra, 329 Conn. 459. The defendant's evidentiary claims, therefore, must fail.

The defendant also alludes to claims of constitutional error regarding the court's admission of exhibit 62A and its exclusion of the evidence proffered by the defendant. Specifically, he asserts that the court's rulings amounted to violations of due process and the right to present a complete defense. After a careful review of

the defendant's brief, we conclude that he has failed to establish violations of his constitutional rights. Having determined that the court properly admitted exhibit 62A into evidence and that § 1-5 of the Connecticut Code of Evidence did not require the admission of the evidence offered by the defendant regarding his identification of the man dressed in white as the shooter, the defendant's declarations of constitutional error do not persuade us that constitutional violations occurred.

The judgment is affirmed.

In this opinion the other judges concurred.

COMMISSIONER OF LABOR *v.* WALNUT TIRE SHOP, LLC, ET AL.
(AC 42986)

Lavine, Elgo and Alexander, Js.

Syllabus

The plaintiff sought to collect, inter alia, unpaid wages on behalf of two employees of the defendant W Co. A state marshal served two copies of the summons and complaint on the defendant B, W Co.'s president, in both his individual capacity and as president of W Co. Following the defendants' failure to respond to the plaintiff's pleadings, the trial court granted the plaintiff's motion for default and rendered judgment in favor of the plaintiff. Thereafter, the defendants filed a motion to open the default judgment pursuant to the applicable statute (§ 52-212), claiming that they had been deprived of actual notice of the proceedings by the plaintiff's failure to serve the summons and complaint on W Co. The court denied the defendants' motion to open, and the defendants appealed to this court. *Held* that the trial court did not abuse its discretion in denying the defendants' motion to open, as the defendants failed to comply with the requirements of § 52-212 in that the motion was not verified under oath by either the defendants or their attorney; furthermore, the defendants' claim that they lacked actual notice of the plaintiff's action because the summons listed a nonparty individual as W Co.'s registered agent for service was unavailing, the record having unequivocally indicated that both defendants were properly served with legal process by service in hand to B.

Submitted on briefs September 17—officially released November 24, 2020

Procedural History

Action to collect, inter alia, unpaid wages, and for other relief, brought to the Superior Court in the judicial district of Hartford, where the defendants were defaulted for failure to appear; thereafter, the court, *Gordon*, *J.*, rendered judgment in favor of the plaintiff; subsequently, the court, *Sheridan*, *J.*, denied the defendants' motion to open the judgment, and the defendants appealed to this court. *Affirmed.*

Ramiro Alcazar filed a brief for the appellants (defendants).

Maria C. Rodriguez and *Philip M. Schulz*, assistant attorneys general, and *William Tong*, attorney general, filed a brief for the appellee (plaintiff).

PER CURIAM. The defendants, Walnut Tire Shop, LLC (company), and Ramon Balbuena, appeal from the judgment of the trial court denying their motion to open a default judgment rendered in favor of the plaintiff, the Commissioner of Labor. On appeal, the defendants claim that the court abused its discretion in denying that motion because they lacked actual notice of the plaintiff's action. We disagree and, accordingly, affirm the judgment of the trial court.

It is undisputed that, at all relevant times, Balbuena was the owner and president of the company.[1] On November 11, 2018, the plaintiff commenced an action against the defendants on behalf of two employees to recover unpaid wages pursuant to General Statutes § 31-72[2] and civil penalties pursuant to General Statutes

[1] In the complaint, the plaintiff alleged that Balbuena was the owner and principal of the company. Moreover, in opposing the defendants' motion to open, the plaintiff submitted, as an exhibit, a business inquiry conducted with the Secretary of the State's commercial recording division, which lists Balbuena as the "president" of the company.

[2] General Statutes § 31-72 provides in relevant part: "When any employer fails to pay an employee wages in accordance with the provisions of sections 31-71a to 31-71i, inclusive, or fails to compensate an employee in accordance with section 31-76k . . . such employee . . . shall recover, in a civil action,

§ 31-69a. On that date, a state marshal served two copies of the summons and complaint on Balbuena in both his individual capacity and as president of the company.[3]

When the defendants did not appear or otherwise respond to that pleading, the plaintiff filed a motion for default, which the court granted. The plaintiff then filed a motion for a default judgment that was accompanied by a sworn affidavit of debt. The court granted that motion on March 15, 2019, and rendered judgment in favor of the plaintiff in the amount of $24,136.35.[4] The plaintiff provided notice of that judgment to the defendants in accordance with Practice Book § 17-22.

On April 24, 2019, the defendants filed a motion to open the default judgment pursuant to General Statutes § 52-212.[5] In that motion, they alleged that the plaintiff

(1) twice the full amount of such wages, with costs and such reasonable attorney's fees as may be allowed by the court, or (2) if the employer establishes that the employer had a good faith belief that the underpayment of wages was in compliance with law, the full amount of such wages or compensation, with costs and such reasonable attorney's fees as may be allowed by the court. . . . The Labor Commissioner may collect the full amount of any such unpaid wages . . . as well as interest calculated in accordance with the provisions of section 31-265 from the date the wages or payment should have been received, had payment been made in a timely manner. In addition, the Labor Commissioner may bring any legal action necessary to recover twice the full amount of unpaid wages . . . and the employer shall be required to pay the costs and such reasonable attorney's fees as may be allowed by the court. The commissioner shall distribute any wages . . . collected pursuant to this section to the appropriate person."

[3] In the return of service, the marshal attested in relevant part: "Then and there by virtue hereof and at the special direction of the plaintiff's attorney, I made due and legal service upon the within named defendants: *Walnut Tire Shop, LLC* by leaving with and within the hands of *Ramon Balbuena, President* and *Ramon Balbuena* by leaving with and within the hands at *153 Walnut Street, Waterbury, Connecticut*, two true and attested copies of the within, summons-civil, complaint and amount in demand with my endorsement thereon." (Emphasis in original.)

[4] The court awarded the plaintiff $17,145.60 in unpaid wages, $6900 in civil penalties, and $90.65 in costs.

[5] General Statutes § 52-212 provides in relevant part: "(a) Any judgment rendered or decree passed upon a default or nonsuit in the Superior Court may be set aside, within four months following the date on which it was

had failed to serve the summons and complaint on the company, thereby depriving the defendants of "actual notice of those proceedings . . . ." The plaintiff filed an objection, and the court thereafter denied the defendants' motion to open. From that judgment, the defendants now appeal.

It is well established that "[a] motion to open and vacate a judgment . . . is addressed to the [trial] court's discretion, and the action of the trial court will not be disturbed on appeal unless it acted unreasonably and in clear abuse of its discretion. . . . In determining whether the trial court abused its discretion, this court must make every reasonable presumption in favor of its action. . . . The manner in which [this] discretion is exercised will not be disturbed so long as the court could reasonably conclude as it did." (Citations omitted; internal quotation marks omitted.) *Walton* v. *New Hartford*, 223 Conn. 155, 169–70, 612 A.2d 1153 (1992); see also *Purtill* v. *Cook*, 197 Conn. App. 22, 26, 231 A.3d 245 (2020) ("[o]ur review of a ruling on a motion to open a default judgment is governed by the abuse of discretion standard").

On appeal, the defendants contend that the court abused its discretion in denying their motion to open because they lacked actual notice of the plaintiff's action. For two distinct reasons, the defendants' claim

rendered or passed, and the case reinstated on the docket, on such terms in respect to costs as the court deems reasonable, upon the complaint or written motion of any party or person prejudiced thereby, showing reasonable cause, or that a good cause of action or defense in whole or in part existed at the time of the rendition of the judgment or the passage of the decree, and that the plaintiff or defendant was prevented by mistake, accident or other reasonable cause from prosecuting the action or making the defense. . . .

"(c) The complaint or written motion shall be verified by the oath of the complainant or his attorney, shall state in general terms the nature of the claim or defense and shall particularly set forth the reason why the plaintiff or defendant failed to appear. . . ."

is unavailing. First, as a procedural matter, they have failed to comply with the mandate of § 52-212 (c) and Practice Book § 17-43, which require motions to open default judgments pursuant to § 52-212 to "be verified by the oath of the complainant or [its] attorney . . . ." The motion to open in the present case was not verified under oath by either the defendants or their attorney. On that basis alone, the trial court was entitled to deny the defendants' motion. See *Lawton* v. *Weiner*, 91 Conn. App. 698, 712, 882 A.2d 151 (2005) (court did not abuse its discretion in denying defendants' motion to open because it was "not sworn to"); *Water Pollution Control Authority* v. *OTP Realty, LLC*, 76 Conn. App. 711, 713, 822 A.2d 257 ("[i]t is not an abuse of discretion for a court to deny a motion to open that does not set forth facts, upon oath, to demonstrate that a defendant has been prevented by mistake, accident or other reasonable cause from making a defense"), cert. denied, 264 Conn. 920, 828 A.2d 619 (2003).

Second, as a substantive matter, the defendants' claim that they lacked actual notice of the plaintiff's action is belied by the uncontroverted fact that the marshal served copies of the summons and complaint on Balbuena in both his individual capacity and as president of the company.[6] In so doing, the marshal properly served legal process on the company pursuant to General Statutes § 52-57 (c).[7]

[6] In their appellate brief, the defendants concede that "[t]he summons and complaint were served in hand on [Balbuena] individually and as president of [the company]."

[7] General Statutes § 52-57 (c) provides in relevant part: "In actions against a private corporation, service of process shall be made either upon *the president*, the vice president, an assistant vice president, the secretary, the assistant secretary, the treasurer, the assistant treasurer, the cashier, the assistant cashier, the teller or the assistant teller or its general or managing agent or manager or upon any director resident in this state, or the person in charge of the business of the corporation or upon any person who is at the time of service in charge of the office of the corporation in the town in which its principal office or place of business is located. . . ." (Emphasis added.)

The defendants nonetheless argue that, because the summons listed Ramiro Alcazar as the registered agent for service for the company, the service conducted on its president on November 11, 2018, was invalid. They offer no legal authority to support that assertion. To the contrary, this court has held that "there is no exclusive means for service on a limited liability company. Although General Statutes § 34-105 (a) provides that process 'may be served upon the limited liability company's statutory agent for service,' subsection (e) of § 34-105 expressly states that '[n]othing contained in this section shall limit or affect the right to serve any process, notice or demand required or permitted by law to be served upon a limited liability company in any other manner permitted by law.' " *Little* v. *Mackeyboy Auto, LLC*, 142 Conn. App. 14, 20, 62 A.3d 1164 (2013). For that reason, this court held that service of process conducted on an officer specified in § 52-57 (c) properly conferred notice of the plaintiff's action on the defendant limited liability company, even when its registered agent was not served. Id. That precedent compels a similar conclusion in the present case.

The record before us unequivocally indicates that both defendants were served with legal process on November 11, 2018. The court, therefore, did not abuse its discretion in denying the defendants' motion to open.

The judgment is affirmed.