CASES ARGUED AND DETERMINED

IN THE

APPELLATE COURT

OF THE

STATE OF CONNECTICUT

STATE OF CONNECTICUT *v.* ERVIN B.*
(AC 41482)

Alvord, Prescott and DiPentima, Js.

Syllabus

Convicted of the crime of threatening in the second degree, the defendant appealed to this court. The defendant allegedly was involved in a domestic disturbance during which he stabbed his wife in the leg. Over the defendant's objection, the trial court admitted portions of his wife's hearsay statement to a police officer that the defendant "was gonna continue to hurt her more." Neither the defendant nor his wife testified at trial. The defendant claimed that the evidence was insufficient to support a finding that he made a physical threat to his wife, a necessary element of threatening in the second degree in violation of statute (§ 53a-62 (a) (1)). *Held* that the evidence was not sufficient to support the defendant's conviction of threatening in the second degree in violation of § 53a-62 (a) (1), there having been insufficient evidence to support the conclusion beyond a reasonable doubt that the defendant made a physical threat to his wife: the state presented no direct evidence to the jury that the defendant had threatened his wife, either through words or some nonverbal expression, with imminent future harm; moreover, the state's argument that the jury reasonably could have inferred a threat from other evidence was unavailing, as the fact that evidence existed from which the jury could have concluded that the defendant had recently assaulted his wife, without more, was insufficient to support an inference that he necessarily made a threat of future violence, his

* In accordance with our policy of protecting the privacy interest of the victims of domestic violence, we decline to identify the defendant, the victim, or others through whom the victim's identity may be ascertained. See General Statutes § 54-86e.

wife's statement that he "was gonna continue to hurt her more" did not connect her subjective fear of future harm to any particular act, expression or communication by the defendant, nor was there evidence that she complained of a threat, that other people heard threatening words or observed threatening behavior, or that the police inquired about a potential threat; furthermore, the jury was not permitted to speculate that a threat had been made solely on the basis of her assertion of fear, and, assuming the jury was permitted to consider the defendant's silence during his wife's statement as an evidentiary admission that he had stabbed her, this could not be viewed as an admission of a threat or have more effect than acknowledging her subjective fear.

Argued September 16—officially released December 22, 2020

Procedural History

Information charging the defendant with the crimes of assault in the first degree and threatening in the second degree, brought to the Superior Court in the judicial district of Fairfield, geographical area number two, and tried to the jury before *Kavanewsky, J.*; thereafter, the court denied the defendant's motion for a judgment of acquittal; verdict and judgment of guilty of threatening in the second degree, from which the defendant appealed to this court. *Reversed*; *judgment directed.*

Emily H. Wagner, assistant public defender, for the appellant (defendant).

Brett R. Aiello, deputy assistant state's attorney, with whom, on the brief, were *John C. Smriga*, state's attorney, and *Joseph J. Harry*, senior assistant state's attorney, for the appellee (state).

Opinion

PRESCOTT, J. The defendant, Ervin B., appeals from the judgment of conviction, rendered following a jury trial, of threatening in the second degree in violation of General Statutes § 53a-62 (a) (1). The defendant claims on appeal that the evidence was insufficient to prove beyond a reasonable doubt that he was guilty of threatening in the second degree. We agree with the defendant's insufficiency of the evidence claim and therefore

remand the case to the trial court with direction to render a judgment of acquittal.[1]

The following procedural history and evidence presented at trial is relevant to the defendant's insufficiency claim. The defendant is married to the complaining witness, Wanda. On February 13, 2016, at approximately 3:40 a.m., Officer Christopher Smith was dispatched to the defendant's and Wanda's apartment building in Bridgeport to respond to a report of a domestic disturbance. Smith met the defendant at the front door of the building, and he then accompanied Smith to apartment number eight. Smith found Wanda standing on the second floor landing outside of the apartment and bleeding from a stab wound to her right thigh. Wanda was upset and crying, and she appeared to be in pain. Smith quickly called for medical assistance and for the assistance of a Spanish speaking officer because Wanda speaks only Spanish.

Officer Ariel Martinez arrived at the apartment shortly thereafter and began to speak to Wanda in Spanish. Martinez asked Wanda what had happened. Wanda stated that she had come home from a night out and the defendant stabbed her.[2] She also stated that the

[1] The defendant also claims on appeal that the trial court (1) abused its discretion by admitting, pursuant to the excited utterance exception to the hearsay rule, a statement by the complaining witness, (2) violated his constitutional right to confrontation by admitting that statement, (3) improperly excluded a prior inconsistent statement of the complaining witness, and (4) violated his sixth amendment right to counsel by prohibiting defense counsel during closing argument from commenting on the fact that the state's complaining witness did not testify at trial. Because we agree with the defendant's insufficiency of the evidence claim and order a judgment of acquittal, it is unnecessary to reach the defendant's other claims on appeal.

[2] Although neither Smith nor Martinez testified directly regarding the manner in which Wanda identified the defendant as her assailant, they nonetheless testified that she had provided them with that information at the time they responded to the incident. Moreover, the jury heard Wanda's hearsay statement to Martinez that the defendant was "gonna continue to hurt her more." From that statement and the fact that the defendant was taken into custody following her identification, the jury could have inferred that Wanda accused the defendant by name.

defendant "was gonna continue to hurt her more." The defendant, who was standing nearby, did not respond to Wanda's accusation that he had stabbed her. At the end of this conversation, the defendant was arrested and transported to the Bridgeport police station. He subsequently was charged with assault in the first degree in violation of General Statutes § 53a-59 (a) (1) and threatening in the second degree in violation of § 53a-62 (a) (1).

Wanda was transported to a hospital for medical care. She received treatment for a serious laceration to her leg from a sharp object, and six staples were required to close the wound.[3]

Wanda did not testify at trial, and a portion of her hearsay statement to Martinez was admitted over the defendant's objection as an excited utterance. Following the conclusion of the state's case, the defendant made a motion for a judgment of acquittal on the ground that the evidence presented by the state was insufficient to prove beyond a reasonable doubt that the defendant had committed assault in the first degree or threatening in the second degree. The court denied the motion in its entirety.[4]

The jury subsequently found the defendant not guilty of assault in the first degree and guilty of threatening in the second degree. The court sentenced the defendant on the conviction of threatening in the second degree to one year of incarceration, suspended after four months, and two years of probation. This appeal followed.

The defendant claims on appeal that his conviction of threatening in the second degree must be reversed because the state failed to present sufficient evidence

[3] At trial, the court excluded statements attributed to Wanda in her medical records that identified the defendant as the person who stabbed her.

[4] The defendant did not testify at trial and presented no evidence during his case-in-chief.

to prove beyond a reasonable doubt each element of the crime. Specifically, the defendant argues that the hearsay statement of Wanda relied on by the state to establish the existence of a threat only conveyed Wanda's subjective belief that the defendant would harm her in the future, and not that any actual threat of harm was made by the defendant or that he intended to place Wanda in fear of imminent physical injury.[5] The state argues that the jury reasonably could have inferred that a threat was made, and advances three evidentiary bases in the record supporting such an inference: (1) the defendant stabbed Wanda; (2) Wanda stated that the defendant was going to "continue to hurt her more"; and (3) the defendant, who was present when Wanda made that statement and identified him as her assailant, offered no denial or explanation. We agree with the defendant that there was insufficient evidence of a threat.

"The standard of review we apply to a claim of insufficient evidence is well established. In reviewing the sufficiency of the evidence to support a criminal conviction 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 [finder of fact] reasonably could have concluded that the cumulative force of the evidence established guilt beyond a reasonable doubt. . . .

"We note that the jury must find every element proven beyond a reasonable doubt in order to find the defendant guilty of the charged offense, [but] each of the basic and inferred facts underlying those conclusions

[5] The defendant's brief is not a model of clarity in identifying which of the elements of threatening in the second degree he challenges in his insufficiency claim. Read as a whole, however, there is no doubt that the defendant's analysis argues that the state offered insufficient evidence of an actual threat, and the state responded to that argument in its brief and at oral argument before this court.

need not be proved beyond a reasonable doubt. . . . If it is reasonable and logical for the jury to conclude that a basic fact or an inferred fact is true, the jury is permitted to consider the fact proven and may consider it in combination with other proven facts in determining whether the cumulative effect of all the evidence proves the defendant guilty of all the elements of the crime charged beyond a reasonable doubt. . . .

"Because [t]he only kind of an inference recognized by the law is a reasonable one [however] . . . any such inference cannot be based on possibilities, surmise or conjecture. . . . It is axiomatic, therefore, that [a]ny [inference] drawn must be rational and founded upon the evidence. . . . [T]he line between permissible inference and impermissible speculation is not always easy to discern. When we infer, we derive a conclusion from proven facts because such considerations as experience, or history, or science have demonstrated that there is a likely correlation between those facts and the conclusion. If that correlation is sufficiently compelling, the inference is reasonable. But if the correlation between the facts and the conclusion is slight, or if a different conclusion is more closely correlated with the facts than the chosen conclusion, the inference is less reasonable. At some point, the link between the facts and the conclusion becomes so tenuous that we call it speculation. When that point is reached is, frankly, a matter of judgment. . . .

"Moreover, it does not diminish the probative force of the evidence that it consists, in whole or in part, of evidence that is circumstantial rather than direct. . . . It is not one fact, but the cumulative impact of a multitude of facts which establishes guilt in a case involving substantial circumstantial evidence. . . . In evaluating evidence, the [finder] of fact is not required to accept as dispositive those inferences that are consistent with the defendant's innocence. . . . The [finder of fact] may draw whatever inferences from the evidence or

facts established by the evidence it deems to be reasonable and logical. . . .

"[A]s we have often noted, proof beyond a reasonable doubt does not mean proof beyond all possible doubt . . . nor does proof beyond a reasonable doubt require acceptance of every hypothesis of innocence posed by the defendant that, had it been found credible by the [finder of fact], would have resulted in an acquittal. . . . On appeal, we do not ask whether there is a reasonable view of the evidence that would support a reasonable hypothesis of innocence. We ask, instead, whether there is a reasonable view of the evidence that supports the [finder of fact's] verdict of guilty. . . .

"Finally, [w]e . . . emphasize the weighty burden imposed on the state by the standard of proof beyond a reasonable doubt. Under bedrock principles of our criminal justice system, it is obviously not sufficient for the state to prove simply that it is more likely than not that the defendant [committed the offense], or even that the evidence is clear and convincing that he [committed the offense]. . . . Our Supreme Court has described the beyond a reasonable doubt standard as a subjective state of near certitude . . . ." (Citations omitted; internal quotation marks omitted.) *State* v. *Gray-Brown*, 188 Conn. App. 446, 464–66, 204 A.3d 1161, cert. denied, 331 Conn. 922, 205 A.3d 568 (2019).

Section 53a-62 provides in relevant part: "(a) A person is guilty of threatening in the second degree when: (1) By physical threat, such person intentionally places or attempts to place another person in fear of imminent serious physical injury . . . ." The state in its amended information dated October 11, 2017, charged the defendant with threatening in the second degree in violation of § 53a-62 (a) (1) in that, "by physical threat, [he] intentionally placed or attempted to place one [Wanda] in fear of imminent physical injury . . . ." Thus, the state

was obligated to prove beyond a reasonable doubt the following elements of this offense: (1) the defendant made a physical threat to Wanda, and (2) he specifically intended by his conduct to put Wanda in fear of imminent serious physical injury. See *State* v. *Ramirez*, 107 Conn. App. 51, 65, 943 A.2d 1138 (2008), aff'd, 292 Conn. 586, 973 A.2d 1251 (2009); see also *State* v. *Kantorowski*, 144 Conn. App. 477, 488, 72 A.3d 1228, cert. denied, 310 Conn. 924, 77 A.3d 141 (2013) (threatening in second degree is specific intent crime). The defendant challenges, inter alia, the sufficiency of the evidence as it relates to the first element, that is, whether the defendant through his conduct or words made a physical threat to Wanda.

Our Supreme Court has stated that "a threat, by definition, is an *expression* of an intent to cause some future harm." (Emphasis added.) *State* v. *Cook*, 287 Conn. 237, 257, 947 A.2d 307, cert. denied, 555 U.S. 970, 129 S. Ct. 464, 172 L. Ed. 2d 328 (2008). This is consistent with the dictionary definition of a threat as "[a] *communicated* intent to inflict harm or loss on another . . . ." (Emphasis added.) Black's Law Dictionary (11th Ed. 2019) p. 1783; see also Merriam-Webster's Collegiate Dictionary (11th Ed. 2003) p. 1302 (defining threat as "*expression of intention* to inflict evil, injury, or damage" (emphasis added)). In naming the offense at issue "threatening," the legislature used an active verb that describes the actions of the perpetrator. It follows, therefore, that a conviction for threatening requires proof of some action by the defendant, whether by word or gesture, that expresses or implies the future infliction of harm.

Our review of the record shows that the state presented no direct evidence to the jury that the defendant had threatened Wanda, either through words or some nonverbal expression, with imminent future harm. Wanda was not called to testify at trial, and, thus, the jury never heard from her directly whether the defendant had conveyed an overt or implied threat to her.

No other witness testified that they heard or observed the defendant, through word or deed, express an intent to hurt Wanda in the future. The state directs us to no such evidence in the record. Instead, as previously indicated, the state argues that the jury reasonably could have inferred from other evidence presented that the defendant made a threat, and it identifies three potential evidentiary sources as supporting such an inference.

First, the state argues that evidence was presented that the defendant had stabbed Wanda. The mere fact that evidence existed from which the jury could have concluded that the defendant recently had assaulted Wanda, however, is not probative of any intent to cause future harm and cannot, without more, be held sufficient to support an inference that he necessarily made a threat of additional violence in the future. If we were to agree with such a position, any assault or domestic altercation in which a victim later expressed to the police some fear of future harm by the perpetrator would, in the state's view, support not only a charge of threatening but ultimately a conviction, regardless of whether there was any independent evidence of a threat actually having been made. Such an obviously unjustifiable outcome demonstrates why drawing the inference that the state advances would depart from the realm of reasonable inferences that a jury permissibly may draw into pure speculation that cannot be a permissible basis for a criminal conviction.

Second, the state argues that the jury could have made a reasonable inference that the defendant had made a threat to Wanda on the basis of Martinez' trial testimony, in which he described what Wanda had told him during the investigation of the stabbing incident.[6]

[6] As indicated in footnote 1 of this opinion, the defendant challenges the propriety of the court's admission of the Wanda's statement under the excited utterance exception to the hearsay rule. In assessing the sufficiency of the evidence, however, we consider *all* evidence admitted at trial. See *State* v. *Chemlen*, 165 Conn. App. 791, 818, 140 A.3d 347 ("[c]laims of evidentiary

Specifically, the state directs us to the following colloquy between the prosecutor and Martinez:

"Q. [D]id you ask [Wanda], at the request of Officer Smith, what happened?

"A: Yes.

"Q. And what did—did she respond?

"A. Yes.

"Q. What did she say?

"A. She said, she came home from a night out into the apartment and she was stabbed.

"Q. Okay. And when she came home, she was stabbed. Did she say anything more?

"A: Yes. She said that *he was gonna continue to hurt her more*." (Emphasis added.)

According to the state, the jury reasonably could have inferred on the basis of Wanda's statement to Martinez that the defendant "was gonna continue to hurt her more," that the defendant had in fact threatened her with imminent physical injury.

In our view, Wanda's statement to Martinez could constitute evidence from which the jury reasonably could have inferred that the defendant previously had hurt her[7] and that she believed that he likely would hurt her again in the future. Nothing in her statement to Martinez, however, connected Wanda's subjective fear that the defendant would harm her again to any particular act, expression, or communication by the defendant from which the jury could have inferred the factual predicate for that fear. Nothing in the officers' testimony

insufficiency in criminal cases are always addressed independently of claims of evidentiary error" (internal quotation marks omitted)), cert. denied, 322 Conn. 908, 140 A.3d 977 (2016).

[7] Logically, the statement that Wanda believed he would "*continue* to hurt her *more*," if credited, reasonably implies that he had hurt her in the past.

suggested that Wanda had complained that the defendant had made a threat to her, that the officers or responding medical personnel had heard threatening words or observed threatening behavior, or even that the police had inquired about a potential threat. We do not find any such evidence from our review of the evidentiary record before us. Rather than resulting from any specific threat, Wanda's statement that the defendant "was gonna continue to hurt her more" reflected at most her fear that, because he previously had hurt her, he likely would do so again.

As demonstrated by our Supreme Court's recent decision in *State* v. *Rhodes*, 335 Conn. 226, A.3d (2020), the "line between permissible inference and impermissible speculation is not always easy to discern." (Internal quotation marks omitted.) Id., 238. "When we infer, we derive a conclusion *from proven facts* because such considerations as experience, or history, or science have demonstrated that there is a likely correlation between those facts and the conclusion. . . . [I]f the correlation between the facts and the conclusion is slight, or if a different conclusion is more closely correlated with the facts than the chosen conclusion, the inference is less reasonable. At some point, the link between the facts and the conclusion becomes so tenuous that we call it speculation." (Emphasis added; internal quotation marks omitted.) Id.

In the present case, there were no facts of any kind from which the jury could have inferred threatening words or conduct toward Wanda independent of the alleged assault. In other words, there were no facts from which the jury could have inferred that the defendant actively had engaged in threatening. No factual basis was offered to explain Wanda's general statement of fear that the defendant would hurt her again. In deciding whether the state had met its burden of proving beyond a reasonable doubt that a threat was made by the defendant, the jury was not permitted to guess at possibilities

or speculate that a threat was made solely on the basis of Wanda's assertion of her fear of the defendant.

Finally, the state claims that the jury reasonably could have drawn an inference of a threat from the fact that, when Wanda gave her statement to Martinez, the defendant was standing close enough to have overheard her statement, but he chose to remain silent, neither disputing Wanda's statement nor offering any explanation. The state cites to *State* v. *Leecan*, 198 Conn. 517, 504 A.2d 480, cert. denied, 476 U.S. 1184, 106 S. Ct. 2922, 91 L. Ed. 2d 550 (1986), for the proposition that "[w]hen a statement, accusatory in nature, made in the presence and hearing of an accused, is not denied or explained by him, it may be received into evidence as an admission on his part." (Internal quotation marks omitted.) Id., 522. The decision in *Leecan*, however, additionally states: "The circumstances, of course, must be such that a reply would naturally be called for even in the prearrest setting. . . . Although evidence of silence in the face of an accusation may be admissible under the ancient maxim that silence gives consent the inference of assent may be made only when no other explanation is consistent with silence." (Citation omitted; internal quotation marks omitted.) Id., 522–23.

In the present case, Martinez testified that the defendant was present and close enough to have overheard Wanda's statements to him. According to Martinez, the defendant made no denials regarding her statements, which included both Wanda's identification of the defendant as her attacker and her statement that the defendant "was gonna continue to hurt her more."[8] Even assuming the jury was permitted to consider the defendant's

[8] Although for purposes of this analysis we must assume the jury accepted the state's offer of the defendant's silence as an admission, it may have been reasonable for the defendant to have stayed silent in this situation because he was not being addressed by the police, he was not part of the conversation, and, had he interrupted to defend his innocence, it might have been perceived as aggressive or escalating an already de-escalated situation.

silence as an evidentiary admission that he was the person who stabbed Wanda, for the reasons previously discussed, it would have been unreasonable for the jury to infer solely from the fact that an assault had occurred that the defendant also made a physical threat of future harm to Wanda. Furthermore, Wanda's statement that the defendant would hurt her more contained no accusation that the defendant, either implicitly or expressly, had conveyed a threat of future harm. Accordingly, even assuming the defendant's silence was an admission, it only could have had the effect of acknowledging Wanda's subjective fear. It cannot be viewed as an admission of a threat. As we already have discussed, it would be nothing more than impermissible speculation to infer that Wanda's fear was the result of any specific threat by the defendant rather than simply the circumstances of the parties' relationship.

We conclude that there was insufficient evidence for the jury to have concluded beyond a reasonable doubt that the defendant made a physical threat to Wanda. Accordingly, his conviction of threatening in the second degree in violation of § 53a-62 (a) (1) cannot stand.

The judgment is reversed and the case is remanded with direction to render judgment of acquittal.

In this opinion the other judges concurred.

TOWN OF NEWTOWN *v.* SCOTT E. OSTROSKY ET AL.
(AC 42176)

Alvord, Suarez and Pellegrino, Js.

Syllabus

The defendant O appealed to this court, challenging the trial court's denial of his motion to reargue and for reconsideration of the trial court's judgment of foreclosure by sale. The plaintiff, the town of Newtown, had sought to foreclose a mortgage and filed a motion for default as to O for his failure to plead pursuant to the applicable rule of practice

(§ 10-18). The court clerk thereafter granted the motion. O claimed that the foreclosure judgment should be opened and vacated because, inter alia, the default entered by the clerk was invalid and could not serve as the basis for the foreclosure judgment. *Held* that the trial court properly denied the motion to reargue and for reconsideration; because the claim raised by O in this court essentially reiterated the claim he raised in the trial court, which thoroughly addressed his arguments, this court adopted the trial court's well reasoned memorandum of decision as a statement of the facts and applicable law.

Argued November 18—officially released December 22, 2020

Procedural History

Action to foreclose a mortgage on certain of the named defendant's real property, and for other relief, brought to the Superior Court in the judicial district of Danbury and transferred to the judicial district of Fairfield, where the named defendant was defaulted for failure to plead; thereafter, the court, *Hon. Alfred J. Jennings, Jr.*, judge trial referee, granted the plaintiff's motion for a judgment of strict foreclosure and rendered judgment of foreclosure by sale; subsequently, the court denied the named defendant's motion to reargue and for reconsideration, and the named defendant appealed to this court. *Affirmed.*

Robert M. Fleischer, for the appellant (named defendant).

Alexander Copp, with whom, on the brief, was *Jason A. Buchsbaum*, for the appellee (plaintiff).

Opinion

PER CURIAM. This is an appeal from a denial of a motion to reargue and for reconsideration filed by the defendant Scott E. Ostrosky[1] from the judgment of foreclosure by sale rendered by the trial court in favor

[1] The other defendants in this action are the town of Monroe, the Planning and Zoning Commission of the Town of Monroe, the Inland Wetlands Commission of the Town of Monroe, and Joseph Chapman, in his capacity as land use enforcement officer for the town of Monroe. Because they are not participating in this appeal, we refer to Ostrosky as the defendant.

of the plaintiff, the town of Newtown. On appeal, the defendant claims that the judgment should be opened and vacated because (1) the default that was entered by the court clerk was invalid and cannot serve as the basis for the foreclosure judgment and (2) the motion for a judgment of foreclosure was filed prematurely by the plaintiff. We affirm the judgment of the trial court.

The following facts and procedural history are relevant to the resolution of this appeal. The plaintiff instituted foreclosure proceedings against the defendant on October 17, 2016. On May 23, 2018, the plaintiff filed a motion for default for failure to plead, pursuant to Practice Book § 10-18. On June 6, 2018, the plaintiff filed a motion for a judgment of strict foreclosure, pursuant to Practice Book § 17-25 et seq. On June 7, 2018, the court clerk granted the plaintiff's motion for default for failure to plead. On June 18, 2018, the court rendered judgment of foreclosure by sale against the defendant, setting a sale date of December 8, 2018. On July 3, 2018, the defendant filed a motion to reargue and for reconsideration, claiming that the default entered by the court clerk was invalid and could not serve as the basis for the foreclosure judgment, and that the plaintiff's motion for judgment was filed prematurely. On September 13, 2018, the court denied the defendant's motion to reargue and for reconsideration.

The defendant appealed to this court from the denial of his motion to reargue and for reconsideration and challenged the trial court's judgment of foreclosure by sale. On appeal, he essentially reiterates the same claim that he raised in the trial court in support of his motion to reargue and for reconsideration, namely, that the default entered by the court clerk was invalid and could not serve as the basis for the foreclosure judgment and that the plaintiff's motion for judgment of strict foreclosure was filed prematurely.

We carefully have examined the record of the proceedings before the trial court, in addition to the parties' appellate briefs and oral arguments, and we conclude that the judgment of the trial court should be affirmed. Because the court, *Hon. Alfred J. Jennings, Jr.*, judge trial referee, thoroughly addressed the arguments raised in this appeal, we adopt its well reasoned decision denying the defendant's motion to reargue and for reconsideration as a statement of the facts and the applicable law with respect to the issues raised in this appeal. See *Newtown* v. *Ostrosky*, Superior Court, judicial district of Fairfield, Docket No. CV-16-6060962-S (September 13, 2018) (reprinted at 201 Conn. App. 16, A.3d). Any further discussion by this court would serve no useful purpose. See, e.g., *Woodruff* v. *Hemingway*, 297 Conn. 317, 321, 2 A.3d 857 (2010).

The judgment denying the motion to reargue and for reconsideration is affirmed and the case is remanded for the purpose of setting a new sale date.

APPENDIX

TOWN OF NEWTOWN *v.* SCOTT E. OSTROSKY ET AL.*

Superior Court, Judicial District of Fairfield
File No. CV-16-6060962-S

Memorandum filed September 13, 2018

Proceedings

Memorandum of decision on named defendant's motion to reargue and for reconsideration. *Motion denied.*

Joshua Pedreira, for the plaintiff.

Robert M. Fleischer, for the named defendant.

* Affirmed. *Newtown* v. *Ostrosky*, 201 Conn. App. 13, A.3d (2020).

Opinion

HON. ALFRED J. JENNINGS, JR., JUDGE TRIAL REFEREE. The defendant Scott E. Ostrosky moves to reargue and for reconsideration of the ruling by the court on June 18, 2018, granting the plaintiff's motion for a judgment of foreclosure and entering judgment of foreclosure by sale on June 18, with a sale date of December 8, 2018. Since both parties have briefed the issue thoroughly, the court will decide this motion as a motion for reconsideration.

The defendant argues, first, that the default for failure to plead entered against him by the clerk on June 7, 2018, in response to the plaintiff's motion for default for failure to plead, dated May 23, 2018 (No. 114), was invalid and cannot serve as the basis for judgment. The defendant's reasoning is that the motion for default for failure to plead was filed "pursuant to Connecticut Practice Book § 10-18," which provides: "Parties failing to plead according to the rules and orders of the judicial authority may be nonsuited or defaulted, as the case may be. (See General Statutes § 52-119 and annotations.)" The referenced statute, § 52-119, provides: "Parties failing to plead according to the rules and orders of the court may be nonsuited or defaulted, as the case may be." The May 23, 2018 motion for default alleges that "the return date was November 8, 2016, and, to date, no responsive pleading has been filed by the defendant Scott Ostrosky, although the time limit for such has passed." The time limit at issue, as stated in Practice Book § 10-8, for a foreclosure action such as this, is fifteen days after the return date. There is no claim by the defendant that he had filed a responsive pleading to the complaint within that fifteen day time frame or at any subsequent date. The defendant argues that a motion for default for failure to plead may also be brought under Practice Book § 17-32 (a), which specifically authorizes that the motion "shall be acted on by the clerk not less than seven days from the filing of

the motion, without placement on the short calendar." Since the clerk is specifically authorized to act on a motion for default filed pursuant to Practice Book § 17-32 (a), but there is no such specific authority stated in Practice Book § 10-18 for the clerk to act on a motion for default filed pursuant to that section, the defendant argues that it was improper and invalid for the clerk to have granted the motion for default filed against him brought pursuant to § 10-18. The argument fails because Practice Book § 10-18 (and § 52-119) provide simply that the party who has failed to plead within the time specified in the rules "may be nonsuited or defaulted, as the case may be." The authority to grant or to deny such nonsuit or default is not stated or limited in Practice Book § 10-18, but left to other provisions of law. But the language of Practice Book § 17-32 (a) granting authority of the clerk to act on motions for default for failure to plead is clearly and expressly stated as applying "[w]here a defendant is in default for failure to plead pursuant to Section 10-8 . . . ." This motion for default was filed pursuant to Practice Book § 10-18 on May 23, 2018, for failure to plead within the time limit of Practice Book § 10-8. The motion was granted by the clerk more than seven days later, on June 7, 2018. As the Appellate Court has stated in *Deutsche Bank National Trust Co.* v. *Bertrand*, 140 Conn. App. 646, 657, 59 A.3d 864, cert. dismissed, 309 Conn. 905, 68 A.3d 661 (2013): "When a defendant fails to advance timely the pleadings in accordance with Practice Book § 10-8, Practice Book § 17-32 sets forth a procedure by which the clerk of the court, without input from the judicial authority, may act on a motion for default filed by the plaintiff." There was nothing improper or invalid about the clerk entering default for failure to plead within the Practice Book § 10-8 limits on June 7, 2018.

The defendant argues, second, that the plaintiff's motion for judgment of strict foreclosure (No. 115), filed on June 6, 2018, and granted as a judgment of

foreclosure by sale on June 18, 2018, was filed prematurely in violation of the language of Practice Book § 17-32 (b), which states: "A claim for a hearing in damages or motion for judgment shall not be filed before the expiration of fifteen days from the date of notice of the issuance of the default under this subsection." In this case, the motion for judgment of strict foreclosure was filed on June 6, 2018, which was one day prior to the entry of default for failure to plead on June 7, 2018. The plaintiff asserts, and the court agrees, that the foregoing fifteen day limitation of Practice Book § 17-32 (b) is excused by Practice Book § 17-33 (b) in the case [of] a judgment entered in a foreclosure case such as this. Practice Book § 17-33 (b) provides: "Since the effect of a default is to preclude the defendant from making any further defense in the case so far as liability is concerned, the judicial authority, at or after the time that it renders the default, notwithstanding Section 17-32 (b), may also render judgment in foreclosure cases, in actions similar thereto and in summary process actions, provided the plaintiff has also made a motion for judgment and provided further that any necessary affidavits of debt or accounts or statements verified by oath, in proper form, are submitted to the judicial authority." In this case, a motion for judgment of strict foreclosure had been filed by the plaintiff on June 6, 2018. Before that motion was granted on June 18, 2018, the plaintiff had filed all the requisite affidavits, appraisal, and foreclosure worksheet in proper form. The defendant argues, however, that the fifteen day limitation of Practice Book § 17-32 (b) is not excused because the foregoing excusing provision of Practice Book § 17-33 (b) only applies "at or after the time it renders the default" and that the word "it" refers back to the judicial authority" so that, in this case, where the default had been granted by the clerk, who, he claims, is not a "judicial authority," the fifteen day limit was not excused. Practice Book § 1-1 (c) defines the term "judicial authority" as

"the Superior Court, any judge thereof, each judge trial referee when the Superior Court has referred a case to such trial referee pursuant to General Statutes § 52-434, and for purposes of the small claims rules only, any magistrate appointed by the chief court administrator pursuant to General Statutes § 51-193*l*." The definition does not specifically include a clerk of the court, but it does include "the Superior Court," which would include an order of an officer of the court, such as an assistant clerk acting on behalf of the Superior Court pursuant to a mandatory grant of authority under Practice Book § 17-32 (a) (motion for default for default for failure to plead within deadline of Practice Book § 10-8 "SHALL be acted on by the clerk" (emphasis added)).

The strict interpretation of Practice Book § 17-33 (b) urged by the defendant is inconsistent with the Supreme Court's holding that "[t]he design of the rules of practice is both to facilitate business and to advance justice; they will be interpreted liberally in any case where it shall be manifest that a strict adherence to them will work surprise or injustice." (Internal quotation marks omitted.) *Coppola* v. *Coppola*, 243 Conn. 657, 665, 707 A.2d 281 (1998). Since Practice Book § 17-32 (a) mandated that motions for default for failure to plead "shall be acted on by the clerk," under the defendant's narrow interpretation, no judgment of strict foreclosure following default for failure to plead could ever be filed until fifteen days had elapsed following the granting of default, despite the obvious intent of Practice Book § 17-33 (b) to "facilitate business" by permitting the simultaneous filing of a motion for default for failure to plead and a motion for judgment of strict foreclosure in foreclosure and similar cases. That interpretation virtually eliminates rule 17-33 (b) from ever taking effect in a failure to plead situation—which would definitely not "facilitate business." It is manifest to this court that the liberal interpretation treating an authorized order by the clerk as an order of "the Superior Court" and, therefore, an

order of "the judicial authority" for the purposes of Practice Book § 17-33 (b) is appropriate. There should be no surprise that a defendant who has appeared by counsel but has not filed a responsive pleading to the complaint eighteen months after the return date should be defaulted for failure to plead and subject to an immediate motion for judgment of foreclosure. The expressed reasoning of the Practice Book § 17-33 (b) exception to waiting fifteen days applies here: "Since the effect of a default is to preclude the defendant from making any further defense in the case so far as liability is concerned . . . ." See *Chase Manhattan Mortgage Corp.* v. *Burton*, 81 Conn. App. 662, 841 A.2d 248, cert. denied, 268 Conn. 919, 847 A.2d 313 (2004), where the plaintiff had simultaneously filed a motion for judgment and a motion for default for failure to plead. The clerk granted the motion for default on September 11, 2002, and the court rendered judgment on September 16, 2002. Id., 667. The Appellate Court held that, because the case was a foreclosure proceeding, Practice Book § 17-33 (b) applied and the court properly rendered judgment despite only five days elapsing after the default had entered.

For the foregoing reasons, the defendant's motion to reargue and for reconsideration is denied, and the plaintiff's objection thereto is sustained.

ERIC T. KELSEY *v.* COMMISSIONER OF CORRECTION
(AC 42932)

Prescott, Suarez and DiPentima, Js.

Syllabus

The petitioner, who had been convicted of various crimes, sought a second writ of habeas corpus, claiming, inter alia, ineffective assistance of criminal trial counsel and former habeas counsel. The habeas court, upon the request of the respondent, the Commissioner of Correction, issued an order to show cause why the petition should be permitted to

proceed in light of the fact that the petitioner had filed it outside of the two year time limit for successive petitions set forth in the applicable statute (§ 52-470 (d) (1)). The court conducted an evidentiary hearing and, thereafter, dismissed the petition pursuant to § 52-470 for lack of good cause for the delay in filing the successive petition. On the granting of certification, the petitioner appealed to this court. *Held* that the habeas court did not abuse its discretion in dismissing the habeas petition and properly determined that the petitioner failed to establish good cause for the delay in filing his untimely habeas petition; the petitioner failed to rebut successfully the presumption of unreasonable delay set forth in § 52-470, as he failed to demonstrate that something outside of his control or the control of habeas counsel caused or contributed to the delay, as the only evidence having been presented was the petitioner's testimony that he was allegedly unaware of the statutory deadline imposed by § 52-470 and was never made aware of it by his former habeas counsel, and that he did not always have access to a law library or similar legal resource while he was incarcerated and was in lockdown, evidence that was insufficient to persuade the court that he had rebutted the presumption of unreasonable delay, and the court properly took into consideration the lengthy delay, indicating that the second petition was filed nearly three years beyond the filing deadline, and properly concluded that, even if it accepted the petitioner's proffered excuses at face value, a mere assertion of ignorance of the law, without more, was insufficient, the court having properly noted that ignorance of the law, in and of itself, was not a legally justified excuse, and the record sufficiently demonstrated that the court properly weighed relevant factors in reaching its decision to dismiss the petition, and the petitioner failed to demonstrate that, under the circumstances, the court's determination was an abuse of discretion.

Argued September 22—officially released December 22, 2020

Procedural History

Petition for a writ of habeas corpus, brought to the Superior Court in the judicial district of Tolland, where the court, *Newson, J.*, rendered judgment dismissing the petition; thereafter, the court granted the petition for certification to appeal, and the petitioner appealed to this court. *Affirmed.*

Naomi T. Fetterman, for the appellant (petitioner).

Laurie N. Feldman, special deputy assistant state's attorney, with whom, on the brief, were *Brian W. Preleski*, state's attorney, and *Jo Anne Sulik*, supervisory assistant state's attorney, for the appellee (respondent).

Opinion

PRESCOTT, J. The present appeal provides us with an opportunity to delineate the "good cause" standard that a petitioner must satisfy to overcome the rebuttable presumption that a successive petition for a writ of habeas corpus filed outside of statutorily prescribed time limits is the result of unreasonable delay that warrants dismissal of the petition; see General Statutes § 52-470;[1] and to clarify the appellate standard of review applicable to a habeas court's determination of whether a petitioner has satisfied the good cause standard.

[1] General Statutes § 52-470 provides in relevant part: "(a) The court or judge hearing any habeas corpus shall proceed in a summary way to determine the facts and issues of the case, by hearing the testimony and arguments in the case, and shall inquire fully into the cause of imprisonment and thereupon dispose of the case as law and justice require.

* * *

"(d) In the case of a petition filed subsequent to a judgment on a prior petition challenging the same conviction, there shall be a rebuttable presumption that the filing of the subsequent petition has been delayed without good cause if such petition is filed after the later of the following: (1) Two years after the date on which the judgment in the prior petition is deemed to be a final judgment due to the conclusion of appellate review or the expiration of the time for seeking such review; (2) October 1, 2014; or (3) two years after the date on which the constitutional or statutory right asserted in the petition was initially recognized and made retroactive pursuant to a decision of the Supreme Court or Appellate Court of this state or the Supreme Court of the United States or by the enactment of any public or special act. For the purposes of this section, the withdrawal of a prior petition challenging the same conviction shall not constitute a judgment. The time periods set forth in this subsection shall not be tolled during the pendency of any other petition challenging the same conviction. Nothing in this subsection shall create or enlarge the right of the petitioner to file a subsequent petition under applicable law.

"(e) In a case in which the rebuttable presumption of delay . . . applies, the court, upon the request of the respondent, shall issue an order to show cause why the petition should be permitted to proceed. The petitioner or, if applicable, the petitioner's counsel, shall have a meaningful opportunity to investigate the basis for the delay and respond to the order. If, after such opportunity, the court finds that the petitioner has not demonstrated good cause for the delay, the court shall dismiss the petition. For the purposes of this subsection, good cause includes, but is not limited to, the discovery of new evidence which materially affects the merits of the case and which

The petitioner, Eric T. Kelsey, appeals from the judgment of the habeas court dismissing his successive petition for a writ of habeas corpus pursuant to § 52-470 (d) and (e). The petitioner claims on appeal that the habeas court improperly determined that his purported ignorance of the filing deadline set forth in § 52-470 (d) (1) and his lack of meaningful access to a law library during some portions of his term of incarceration were insufficient to demonstrate good cause to overcome the statutory presumption of unreasonable delay. We disagree and, accordingly, affirm the judgment of the habeas court.

The procedural background underlying this appeal is as follows. In December, 2003, a jury convicted the petitioner of conspiracy to commit robbery in the first degree in violation of General Statutes §§ 53a-48 (a) and 53a-134 (a) (3) and felony murder in violation of General Statutes § 53a-53c.[2] See *State* v. *Kelsey*, 93 Conn. App. 408, 889 A.2d 855, cert. denied, 277 Conn. 928, 895 A.2d 800 (2006). The court sentenced the petitioner to a total effective term of forty years of incarceration. This court affirmed the judgment of conviction on direct appeal, rejecting the petitioner's claims that the trial court improperly had admitted into evidence certain out-of-court statements and had denied his motion for a mistrial based on the state's failure to preserve and produce exculpatory evidence. Id., 410, 416. The Supreme Court denied certification to appeal this court's decision.

After exhausting his direct appeal, in August, 2007, the petitioner filed his first petition for a writ of habeas

could not have been discovered by the exercise of due diligence in time to meet the requirements of subsection . . . (d) of this section . . . ."

[2] The jury acquitted the petitioner of murder in violation of General Statutes § 53a-54a (a). See *State* v. *Kelsey*, 93 Conn. App. 408, 410 n.1, 889 A.2d 855, cert. denied, 277 Conn. 928, 895 A.2d 800 (2006). According to this court's recitation of the facts underlying the petitioner's conviction, the petitioner, during a robbery planned with several coconspirators, stabbed the victim with a knife. Id., 411. The victim later died during surgery. Id., 412.

corpus challenging his conviction.[3] Following a trial on the merits, the habeas court denied the petition. This court dismissed the petitioner's appeal from the judgment of the habeas court by memorandum decision; *Kelsey* v. *Commissioner of Correction*, 136 Conn. App. 904, 44 A.3d 224 (2012); and our Supreme Court thereafter denied him certification to appeal from the judgment of this court. *Kelsey* v. *Commissioner of Correction*, 305 Conn. 923, 47 A.3d 883 (2012).

Nearly five years later, on March 22, 2017, the petitioner filed the underlying second petition for a writ of habeas corpus that is the subject of the present appeal. The petitioner raised seven claims not raised in his earlier petition.[4] On May 9, 2017, the respondent, the Commissioner of Correction, filed a request with the habeas court pursuant to § 52-470 (e) for an order directing the petitioner to appear and show cause why his second petition should be permitted to proceed in light of the fact that the petitioner had filed it well outside the two year time limit for successive petitions set forth in § 52-470 (d) (1). See footnote 1 of this opinion. The habeas court, *Oliver*, *J.*, initially declined to rule on the respondent's request for an order to show cause, concluding that the request was premature and that the court lacked discretion to act on the respondent's request because the pleadings in the case were

[3] The petitioner, through court-appointed counsel, filed a one count amended petition in which he argued that his rights to due process and a fair trial had been violated because two coconspirators who testified against him at the criminal trial were offered consideration by the state in exchange for their testimony; that the state failed to disclose that it offered these witnesses consideration; that the witnesses lied when asked at trial if they were offered consideration by the state for their testimony, denying that they had received any consideration; and that the state failed to correct this false testimony.

[4] The petitioner filed the operative petition as a self-represented party. Although he later was appointed habeas counsel, counsel did not file an amended petition. In this second petition, the petitioner raised claims of ineffective assistance of criminal trial counsel and former habeas trial counsel, as well as claims directed at his coconspirator's testimony and other inculpatory evidence admitted at the criminal trial.

not yet closed.[5] See *Kelsey* v. *Commissioner of Correction*, 329 Conn. 711, 714, 189 A.3d 578 (2018).

After the habeas court denied the respondent's motion for reconsideration, the Chief Justice granted the respondent's request to file an interlocutory appeal from the order of the habeas court pursuant to General Statutes § 52-265a. The Supreme Court rejected the habeas court's reliance on § 52-470 (b) (1)[6] as its basis for not acting on the respondent's request for an order to show cause and concluded that "the habeas court's decision to take no action on the respondent's motion was predicated on its mistaken belief that it lacked discretion to act" and that "[i]t is well established that when a court has discretion, it is improper for the court to fail to exercise it."[7] Id., 726. The Supreme Court reversed the habeas court's decision and remanded the case to the habeas court for further proceedings consistent with its opinion. Id.

In accordance with the Supreme Court's remand order, the habeas court, *Newson*, *J.*, issued an order to show cause and conducted an evidentiary hearing. The only evidence presented at the hearing was the testimony of the petitioner. The respondent chose not to

[5] The court's order stated in relevant part: "No action will be taken pursuant to [§] 52-470 (b) (1) as the pleadings are not yet closed, thereby making the request premature. The respondent may reclaim the motion at the appropriate time. . . . Upon receipt of the certificate of closed pleadings, the court shall schedule a date to hear argument."

[6] General Statutes § 52-470 (b) (1) provides: "*After the close of all pleadings in a habeas corpus proceeding*, the court, upon the motion of any party or, on its own motion upon notice to the parties, shall determine whether there is *good cause for trial* for all or part of the petition." (Emphasis added.)

[7] The court reasoned that the motion for order to show cause filed by the respondent did not challenge whether there was good cause *to proceed to trial on the merits* with respect to all or part of the petition pursuant to § 52-470 (b), but, rather, only sought to have the court address the *timeliness* of the petition, irrespective of its merits, pursuant to subsection (e) of § 52-470, which, unlike subsection (b), did not contain any requirement that pleadings be closed before the court could consider the respondent's request. See *Kelsey* v. *Commissioner of Correction*, supra, 329 Conn. 720–23.

cross-examine the petitioner or to present any other evidence at the show cause hearing. The court also heard legal arguments from both sides.

Thereafter, on March 20, 2019, the habeas court issued a decision dismissing the petitioner's second habeas petition. In its decision, the habeas court first set forth the relevant provisions of § 52-470 and quoted this court's statement in *Langston* v. *Commissioner of Correction*, 185 Conn. App. 528, 532, 197 A.3d 1034 (2018), appeal dismissed, 335 Conn. 1, 225 A.3d 282 (2020), that good cause is "defined as a substantial reason amounting in law to a legal excuse for failing to perform an act required by law." The habeas court determined that the petitioner's proffered excuse failed to establish good cause under the statute, stating: "[T]he petitioner had until July 12, 2014, to file his next habeas petition challenging this conviction, but he did not file it until nearly three years beyond that date. The petitioner's claim for delay was that he was sometimes in and out of prison and did not always have access to law books and the law libraries at times when he was held in higher security facilities. He also attempts to offer the excuse that he was not aware of § 52-470. Neither of these is sufficient 'good cause' to excuse the petitioner's delay of nearly three years beyond the appropriate filing deadline for this matter." In support of its analysis, the habeas court, citing *State* v. *Surette*, 90 Conn. App. 177, 182, 876 A.2d 582 (2005), noted parenthetically that "ignorance of the law excuses no one." On the basis of its determination that the petitioner lacked good cause for the delay in filing the successive petition, the court dismissed the petition. The court subsequently granted certification to appeal, and this appeal followed.

The petitioner claims on appeal that the habeas court improperly determined that he failed to establish good cause for the delayed filing of his second petition for

a writ of habeas corpus. For the reasons that follow, we disagree.

I

A brief discussion of the governing statute, § 52-470, will aid in our discussion of the petitioner's claim. In *Kaddah* v. *Commissioner of Correction*, 324 Conn. 548, 153 A.3d 1233 (2017), our Supreme Court had its first opportunity to note the 2012 legislative amendments to § 52-470 that were made as part of "comprehensive habeas reform" and included, inter alia, the addition of subsections (d) and (e) that are at issue in the present appeal. Id., 566. Although the court did not discuss the specific subject of untimely petitions, the court recognized that the 2012 reforms to § 52-470 were "the product of collaboration and compromise by representatives from the various stakeholders in the habeas process" and were "intended to supplement that statute's efficacy in averting frivolous habeas petitions and appeals." Id., 567; see Public Acts 2012, No. 12-115, § 1.

Later, in *Kelsey* v. *Commissioner of Correction*, supra, 329 Conn. 715–24, our Supreme Court engaged in a more extensive discussion of § 52-470. The court first noted that subsection (a) was not altered substantively by the 2012 amendments and that "the legislature retained language that makes clear that the expeditious resolution of habeas petitions must be accomplished in a manner that does not curtail a petitioner's right to due process. In other words, the two principles of expediency and due process must be balanced in effectuating the legislative intent of the 2012 habeas reform." Id., 716–17. The court explained: "The 2012 amendments are significant . . . because they provide tools to effectuate the original purpose [of § 52-470] of ensuring expedient resolution of habeas cases. The 2012 habeas reform added two procedural mechanisms to

assist the habeas court in resolving the case in a summary way . . . . The amendments to § 52-470 set forth procedures by which the habeas court may dismiss meritless petitions and untimely ones. Specifically, § 52-470 (b) addresses the dismissal of meritless petitions, whereas § 52-470 (c), (d) and (e) provide mechanisms for dismissing untimely petitions." (Citations omitted; internal quotation marks omitted.) Id., 717. "[Section] 52-470 (b) provides the habeas court with a means—short of holding a trial on the merits—to screen out meritless petitions in a manner that allows the petitioner every opportunity to meet the required good cause showing . . . [whereas] § 52-470 (c), (d) and (e) together address whether the petitioner can establish good cause for a delay in filing a petition." Id., 718–19. In other words, these reforms represent the legislature's recognition that in order to resolve meritorious habeas petitions in an expeditious fashion, courts needed additional procedural tools to facilitate summary dispositions of habeas petitions that either failed to raise meritorious claims deserving a full trial or had been pursued in a dilatory manner.

Our Supreme Court recognized that "[a]s compared to the procedures available under § 52-470 (b) to demonstrate that good cause exists for trial, § 52-470 (e) provides significantly less detail regarding the procedures by which a petitioner may rebut the presumption that there was no good cause for a delay in filing the petition." Id., 721. "Nothing in subsection (e) expressly addresses whether the petitioner may present argument or evidence, or file exhibits, or whether and under what circumstances the court is required to hold a hearing, if the court should determine that doing so would assist it in making its determination. The only express procedural requirement is stated broadly. The court must provide the petitioner with a 'meaningful opportunity' both to investigate the basis for the delay and to respond

to the order to show cause. . . . The phrase 'meaningful opportunity' is not defined in the statute. That phrase typically refers, however, to the provision of an opportunity that comports with the requirements of due process." (Citations omitted.) Id., 722. "*The lack of specific statutory contours* as to the required 'meaningful opportunity' suggests that *the legislature intended for the court to exercise its discretion* in determining, considering the particular circumstances of the case, what procedures should be provided to the petitioner in order to provide him with a meaningful opportunity, consistent with the requirements of due process, to rebut the statutory presumption." (Emphasis added.) Id., 723.

The Supreme Court had no reason in *Kelsey* v. *Commissioner of Correction*, supra, 329 Conn. 711, to discuss in detail the parameters of the "good cause" standard because that issue was not before it. It noted only that § 52-470 (e) expressly recognizes that good cause for delay *may* include the "discovery of new evidence which materially affects the merits of the case and which could not have been discovered by the exercise of due diligence in time to meet the requirements of subsection (c) or (d) of this section."[8] (Emphasis omitted; internal quotation marks omitted.) Id., 723–24. The Supreme Court concluded that, "[i]n the absence of any language in [subsection (e)] cabining the discretion of the habeas court with respect to the timing of the issuance of an order to show cause for delay, we conclude that the legislature intended that the court exercise its discretion to do so when the court deems it appropriate given the circumstances of the case." Id., 724.

[8] The legislature chose not to define "good cause" beyond providing this sole example. Although "[w]e are not permitted to supply statutory language that the legislature may have chosen to omit"; (internal quotation marks omitted) *Kelsey* v. *Commissioner of Correction*, supra, 329 Conn. 721; we nevertheless are permitted, consistent with principles of statutory interpretation, to construe the meaning of the legislature's use of the term "good cause" in this context. See part III of this opinion.

We read our Supreme Court's discussion of § 52-470 as placing significant emphasis on the discretion that the legislature granted habeas courts to achieve the goals of habeas corpus reform, which included placing express, definitive time limitations on the filing of an initial petition that challenges the judgment of conviction; see General Statutes § 52-470 (c); and on any subsequent, successive petitions. See General Statutes § 52-470 (d). Rather than creating a rigid, unyielding time frame for the filing of petitions akin to that found in ordinary statutes of limitations, the legislature chose, instead, to create only a rebuttable presumption of undue delay, and to afford a petitioner an opportunity to avoid dismissal of an untimely petition by showing "good cause" for the delay. Consistent with our Supreme Court's analysis of the statute's "meaningful opportunity" provision and bearing in mind the goal of the statute to balance expediency and due process, we construe the absence of a detailed statutory definition of the good cause standard as an indication that the legislature intended the habeas court to exercise significant discretion in making determinations regarding "good cause."

II

Before we turn to a discussion of the appropriate standard of review applicable to a habeas court's good cause determination, some additional explication of the good cause standard itself is required.[9] No appellate

[9] We note that our Superior Courts have sometimes struggled to apply the good cause standard consistently, resulting in disparate results that are not easily reconciled. Compare, e.g., *Shuff* v. *Commissioner of Correction*, Superior Court, judicial district of Tolland, Docket No. CV-18-4009634-S (April 3, 2019) (holding habeas counsel's failure to advise petitioner of statutory time constraints sufficient to establish good cause for late filing), with *Greenfield* v. *Commissioner of Correction*, Superior Court, judicial district of Tolland, Docket No. CV-16-4008061-S (October 17, 2019) (holding that petitioner's claim of lack of knowledge of statutory time limits as result of habeas counsel's failure to advise him was insufficient to make showing of good cause needed to file untimely petition).

court has attempted to define with any degree of specificity the meaning of "good cause" in this context. Nevertheless, we do not start with an entirely blank canvas.

In *Langston* v. *Commissioner of Correction*, supra, 185 Conn. App. 528, as in the present case, this court considered a petitioner's appeal from a judgment of the habeas court dismissing, pursuant to § 52-470 (d), an untimely successive petition for lack of good cause.[10] The court in *Langston*, after taking note of the sole

[10] The petitioner in *Langston* argued before the habeas court and on appeal that there was good cause for the delay in the filing of the successive petition because an attorney who had represented him in conjunction with an earlier habeas petition allegedly had advised him to withdraw that timely filed petition and to file the successive petition in its place, purportedly without explaining to the petitioner the potential legal ramifications of such action. *Langston* v. *Commissioner of Correction*, supra, 185 Conn. App. 532. Because the petitioner did not call his former habeas counsel to testify at the show cause hearing, the habeas court concluded that there was "insufficient evidence to ascertain whether counsel had failed to apprise the petitioner of the time constraints governing his subsequent petition." Id., 533. This court stated that it could not conclude that the habeas court improperly dismissed the petition on that basis. Id.

This court also rejected the petitioner's legal argument that subsections (d) and (e) of § 52-470 were inapplicable because the sole purpose of those provisions was to curtail stale claims brought years after a final judgment was rendered in a prior habeas action. Id., 532–33. The petitioner argued that, although his latest petition technically was untimely, he nonetheless had been challenging his conviction continuously for nearly two decades and, thus, his latest petition was "not representative of the vexatious or frivolous claims that the 2012 reforms to § 52-470 were implemented to address." Id., 533. This court rejected the petitioner's proposed statutory construction, noting that the petitioner voluntarily had withdrawn his prior petition days before a hearing on a motion to dismiss it and on "the relative eve of trial." Id. This court explained that "[t]he fact that the petitioner has litigated previous habeas claims does not excuse or justify this tactic, nor does it explain his failure to refile this case before the [statutory] deadline." Id. At the conclusion of its analysis, this court stated: "We cannot conclude that this argument demonstrates good cause for this untimely petition." Id. To the extent that our conclusion could be misconstrued as having rendered de novo review as to whether the petitioner met his burden of establishing good cause, a standard of review that we reject in part III of this opinion, we clarify that we were rejecting, as a matter of law, the statutory construction argument advanced by the petitioner.

express example of good cause provided by the legislature in § 52-470 (e), stated that "[t]he parties also agree that good cause has been defined as a 'substantial reason amounting in law to a legal excuse for failing to perform an act required by law . . . [a] [l]egally sufficient ground or reason.' " Id., 532. The court appears to have accepted the parties' definition of "good cause" in resolving the appeal before it, but it never stated that it agreed with that definition, nor did it further elaborate on the definition.[11] In short, the *Langston* definition, while technically accurate, provides little guidance as to its application in the habeas context.

In attempting to synthesize a more fulsome definition of good cause as that term is used in § 52-470 (d) and (e), we are mindful that the statute itself provides some interpretive guidance. As we have indicated, the statute does not attempt to exhaustively define good cause. It does, however, provide one example, stating: "For the purposes of . . . [§ 52-470 (e)], good cause includes, *but is not limited to*, the discovery of new evidence which materially affects the merits of the case and which could not have been discovered by the exercise of due diligence in time to meet the requirements of subsection (c) or (d) of this section." (Emphasis added.) General Statutes § 52-470 (e). This example of good cause provides insight into the type of circumstances that the legislature intended would satisfy the good cause standard. By indicating that good cause for filing an untimely petition could be met by proffering new legally significant evidence that could not have been discovered with due diligence, the legislature signaled its intent that a good cause determination pursuant to § 52-470 (e) must emanate from a situation that lies

[11] The definition was taken from *Schoolhouse Corp.* v. *Wood*, 43 Conn. App. 586, 591, 684 A.2d 1191 (1996), cert. denied, 240 Conn. 913, 691 A.2d 1079 (1997), which was quoting a generalized definition of "good cause" found in Black's Law Dictionary (6th Ed. 1990), in the context of a discussion of a court's common-law, discretionary authority to grant an untimely motion to substitute a decedent's executor as a party defendant.

outside of the control of the petitioner or of habeas counsel, acting with reasonable diligence.

It is also helpful to seek interpretive guidance from similar instances in which our courts have applied a "good cause" standard in considering whether a party should be permitted to proceed on a late filing. The court in *Schoolhouse Corp.* v. *Wood*, 43 Conn. App. 586, 684 A.2d 1191 (1996), cert. denied, 240 Conn. 913, 691 A.2d 1079 (1997), which was cited by this court in *Langston*, noted that excuses that involved "[n]eglect, indifference, disregard of plainly applicable statutory authority and self-created hardship" would not comport with its definition of good cause. Id., 591–92. Our Supreme Court, in discussing whether to exercise its supervisory authority to consider an untimely filed appeal for "good cause shown" under our rules of practice; see Practice Book § 60-2 (5); similarly has indicated that good cause must involve exceptional circumstances beyond the control of the party seeking to be excused from the filing deadline. See *Connecticut Light & Power Co.* v. *Lighthouse Landings, Inc.*, 279 Conn. 90, 104, 900 A.2d 1242 (2006).

We conclude that to rebut successfully the presumption of unreasonable delay in § 52-470, a petitioner generally will be required to demonstrate that something outside of the control of the petitioner or habeas counsel caused or contributed to the delay. Although it is impossible to provide a comprehensive list of situations that could satisfy this good cause standard, a habeas court properly may elect to consider a number of factors in determining whether a petitioner has met his evidentiary burden of establishing good cause for filing an untimely petition. Based on the authorities we have discussed and the principles emanating from them, factors directly related to the good cause determination include, but are not limited to: (1) whether external forces outside the control of the petitioner had any bearing on

the delay; (2) whether and to what extent the petitioner or his counsel bears any personal responsibility for any excuse proffered for the untimely filing; (3) whether the reasons proffered by the petitioner in support of a finding of good cause are credible and are supported by evidence in the record; and (4) how long after the expiration of the filing deadline did the petitioner file the petition. No single factor necessarily will be dispositive, and the court should evaluate all relevant factors in light of the totality of the facts and circumstances presented.

III

We turn next to the standard of review applicable to the present appeal, which is a matter disputed by the parties. The petitioner argues that the habeas court's dismissal of his petition for lack of good cause is a legal conclusion that should be subject to plenary review. The petitioner further argues that whether he established good cause under § 52-470 presents an issue of statutory construction over which our review is likewise plenary. The respondent, on the other hand, notes that this court has provided "conflicting suggestions in prior cases" regarding the appropriate standard of review and asks that we "take this opportunity to clarify that the proper standard of review of the habeas court's finding of lack of good cause is abuse of discretion." We agree with the petitioner that, to the extent we must construe the meaning of "good cause," as that term is used in § 52-470, the issue involves principles of statutory interpretation over which our review is always plenary. See *Kelsey* v. *Commissioner of Correction*, supra, 329 Conn. 715–24. We also agree with the respondent, however, that a habeas court's determination of whether a petitioner has satisfied the good cause standard in a particular case requires a weighing of the various facts and circumstances offered to justify the delay, including an evaluation of the credibility of any

witness testimony. As such, the determination invokes the discretion of the habeas court and is reversible only for an abuse of that discretion.[12]

That an abuse of discretion standard of review should apply is consistent with other instances in which reviewing courts have applied that standard in reviewing a lower court's determination involving whether a party has established sufficient "good cause" to proceed on an untimely pleading. For example, in *State* v. *Ayala*, 324 Conn. 571, 585, 153 A.3d 588 (2017), our Supreme Court indicated that a trial court's decision whether to allow the state to amend a criminal information after a trial had commenced "for good cause shown" is reviewed for an abuse of discretion. Our Supreme Court has also applied an abuse of discretion standard of review when called on to consider this court's determination, pursuant to Practice Book § 60-2 (6), regarding whether a party has established good cause for its failure to file a timely appeal. See *Alliance Partners, Inc.* v. *Voltarc Technologies, Inc.*, 263 Conn. 204, 211, 820 A.2d 224 (2003) ("[w]e cannot conclude on the facts of this case that the Appellate Court abused its discretion in determining that the plaintiff's explanation for its late appeal did not constitute good cause"); see also *Georges* v. *OB-GYN Services, P.C.*, 335 Conn. 669, 689, 240 A.3d 249 (2020) (applying abuse of discretion standard in assessing "whether the defendants established the requisite 'good cause' under Practice Book §§ 60-2 (5) and 60-3"). Similar to the considerable discretion that this court exercises over whether to permit an untimely appeal to proceed, the legislature imparted the habeas court with procedural tools needed to manage its dockets, which included discretion to determine, on a case-by-case basis, whether a petitioner has established

[12] It is, of course, axiomatic that in applying the abuse of discretion standard, "[t]o the extent that factual findings are challenged, this court cannot disturb the underlying facts found by the habeas court unless they are clearly erroneous . . . ." (Internal quotation marks omitted.) *Carter* v. *Commis-*

"good cause" sufficient to permit an untimely petition to proceed.

We acknowledge that both this court and our Supreme Court have stated that "[t]he conclusions reached by the [habeas] court in its decision to dismiss [a] habeas petition are matters of law, subject to plenary review." *Foote* v. *Commissioner of Correction*, 170 Conn. App. 747, 753, 155 A.3d 823, cert. denied, 325 Conn. 902, 155 A.3d 1271 (2017); see also *Gilchrist* v. *Commissioner of Correction*, 334 Conn. 548, 553, 223 A.3d 368 (2020) ("[w]hether a habeas court properly dismissed a petition for a writ of habeas corpus presents a question of law over which our review is plenary"). Those cases, however, did not involve a review of a habeas court's dismissal of a petition following a show cause hearing under § 52-470 (e). Rather, that standard has been applied in appeals that challenged a habeas court's declining to issue a writ pursuant to Practice Book § 23-24, or dismissing a petition for lack of subject matter jurisdiction or other legal ground raised in a motion to dismiss pursuant to Practice Book § 23-29. These types of preliminary dismissals typically are made solely on the basis of the allegations contained in the pleadings, do not ordinarily involve the taking or weighing of evidence, and do not require the exercise of discretion by the habeas court in deciding whether good cause exists.[13]

sioner of Correction, 133 Conn. App. 387, 392, 35 A.3d 1088, cert. denied, 307 Conn. 901, 53 A.3d 217 (2012).

[13] The petitioner cites *Johnson* v. *Commissioner of Correction*, 285 Conn. 556, 566, 941 A.2d 248 (2008), for the proposition that our review should be plenary. *Johnson* also did not involve a challenge to a good cause determination made pursuant to § 52-470 but, instead, was an appeal following a trial on the merits of a habeas petition in which the habeas court had dismissed a portion of the petition on the basis of procedural default. As authority for the standard of review it imposed in *Johnson*, the court cited language from *In re Jonathan M.*, 255 Conn. 208, 217, 764 A.2d 739 (2001). In *In re Jonathan M.*, our Supreme Court reviewed the dismissal of a habeas petition that sought to collaterally attack a judgment terminating parental rights on the ground that the respondent received ineffective assistance of counsel. Because the question of whether a respondent in a termination of

In contrast, in evaluating whether a petitioner has established good cause to overcome the rebuttable presumption of unreasonable delay in filing a late petition under § 52-470, the habeas court does not make a strictly legal determination. Nor is the court simply finding facts. Rather, it is deciding, after weighing a variety of subordinate facts and legal arguments, whether a party has met a statutorily prescribed evidentiary threshold necessary to allow an untimely filed petition to proceed. This process is a classic exercise of discretionary authority, and, as such, we will overturn a habeas court's determination regarding good cause under § 52-470 only if it has abused the considerable discretion afforded to it under the statute.

"In reviewing a claim of abuse of discretion, we have stated that [d]iscretion means a legal discretion, to be exercised in conformity with the spirit of the law and in a manner to subserve and not to impede or defeat the ends of substantial justice. . . . In general, abuse of discretion exists when a court could have chosen different alternatives but has decided the matter so arbitrarily as to vitiate logic, or has decided it based on improper or irrelevant factors. . . . [Reversal is required only] [i]n those cases in which an abuse of discretion is manifest or where injustice appears to have been done . . . ." *D'Ascanio* v. *Toyota Industries Corp.*, 133 Conn. App. 420, 428, 35 A.3d 388 (2012), aff'd, 309 Conn. 663, 72 A.3d 1019 (2013).

IV

Having provided additional guidance on the meaning of good cause under the statute and clarifying our standard of review, we turn to our consideration of whether, under the circumstances of the present case, the court

parental rights case properly could assert a claim of ineffective assistance of counsel raised a pure question of law, the court's application of plenary review in that case is distinguishable from the decision under review in the present matter.

abused its discretion by determining that the petitioner failed to demonstrate good cause for his delay in filing the second habeas petition. The petitioner does not dispute that his second petition for a writ of habeas corpus challenged the same underlying conviction that he challenged in his first petition or that the second petition was not filed within two years after he had exhausted his appellate rights regarding the dismissal of his first petition. Further, he does not dispute that, pursuant to § 52-470 (d) (1), the untimely filing of the second petition created a rebuttable presumption that the untimely filing was the result of unreasonable delay or that he had the evidentiary burden to overcome that presumption. Rather, the petitioner's argument on appeal is that the habeas court improperly determined that he failed to satisfy this burden. The respondent counters that there is nothing in the record before us from which we could conclude that the habeas court abused its discretion in determining that the petitioner failed to meet his burden of establishing good cause for the delay, and, accordingly, the habeas court properly dismissed the untimely second petition. The respondent also argues that, due to the lack of any particular findings by the court assessing the credibility of the petitioner's testimony at the show cause hearing, we necessarily are limited in our review as to whether the habeas court was required to find good cause on this record as a matter of law. We conclude that the habeas court properly exercised its discretion in dismissing the petition.

The following additional facts and procedural history are relevant to our discussion of the petitioner's claim. The petitioner was the only witness who testified at the show cause hearing, and no other evidence was offered by the parties. According to his testimony, shortly after the Supreme Court in 2012 finally disposed of his appeal from the denial of his first petition, he received a letter from his appellate habeas counsel. That letter notified

him of the Supreme Court's decision regarding the first petition but did not inform him of any time limitation for filing a subsequent petition. Additionally, the petitioner testified about his access to legal resources, such as a law library, during his incarceration. According to the petitioner, beginning sometime in 2012, through the end of February, 2013, he was held in administrative segregation and had no access to a law library. He also testified that he had no access to a law library from February, 2013, through December, 2013, when he was in twenty-two hour a day lockdown. From December, 2013, onward, however, he testified that he was housed in the general prison population on a twenty hour a day lockdown and testified that, during that time, he had access to a law library or the equivalent. The petitioner asserted that, because of his lack of access to legal resources during segregation and lockdown and his former habeas counsel's failure to inform him of the time limitations of § 52-470, he was unaware of the deadline for filing his second habeas petition, and this lack of knowledge necessarily established "good cause" for any delay.

We are not persuaded that the petitioner's alleged lack of knowledge of the deadlines contained in § 52-470, even if deemed credible by the court, is sufficient to compel a conclusion that he had met his burden of demonstrating good cause for the delay. The habeas court properly concluded that a mere assertion of ignorance of the law, without more, is insufficient. The only evidence presented by the petitioner supporting his contention that he was unaware of § 52-470's filing deadline was his own testimony that he lacked personal knowledge of the deadline and that he was never informed of it by his former habeas counsel.

It is unclear whether the habeas court credited the petitioner's assertion. The court stated merely that the petitioner "*attempts to offer the excuse* that he was not

aware of § 52-470." (Emphasis added.) Certainly, the habeas court could have chosen not to credit the petitioner's assertion that he was unaware of the filing deadline in light of the fact that the petitioner had initiated both the former and present habeas actions himself, thereby suggesting some familiarity with habeas procedures. Additionally, the latest petition contained a handwritten attachment with legal citations that suggests that the petitioner was able to do some legal research and, with diligence, could have familiarized himself with the requirements of § 52-470. The petitioner's own testimony was that, for some portion of the time prior to the expiration of the two year limitation period, he was housed in the general prison population and had access to legal resources.

Regardless of whether the court credited the petitioner's claim of ignorance of § 52-470, it nevertheless went on to conclude that the petitioner's own ignorance of the law did not satisfy his burden to establish good cause for the untimely filing. This reasoning is legally sound. "The familiar legal maxims, that [everyone] is presumed to know the law, and that ignorance of the law excuses no one, are founded upon public policy and in necessity, and the [principle underlying] them is that one's acts must be considered as having been done with knowledge of the law, for otherwise its evasion would be facilitated and the courts burdened with collateral inquiries into the content of men's minds." *Atlas Realty Corp.* v. *House*, 123 Conn. 94, 101, 192 A. 564 (1937); see also *State* v. *Surette*, supra, 90 Conn. App. 182. We are also not persuaded that the petitioner overcame the presumption simply because he was not represented by counsel at the time he filed the petition. "Although we allow pro se litigants some latitude, the right of self-representation provides no attendant license not to comply with relevant rules *of procedural and substantive law*." (Emphasis added.) *Ajadi* v. *Commissioner of Correction*, 280 Conn. 514, 549, 911 A.2d 712 (2006).

Furthermore, the petitioner has failed to persuade us that there is any legal significance to the fact that former habeas counsel who represented him with respect to his first petition did not inform him about the statutory deadline for filing a successive petition. The petitioner fails to cite legal authority that imposes any such duty of disclosure on former habeas counsel, nor are we aware of any. Former habeas counsel was engaged to represent the petitioner with respect to the first petition and presumably, consistent with his or her professional obligation, would have endeavored to raise any and all nonfrivolous claims available to the petitioner in that petition.

Because our own habeas corpus standards have developed in tandem with federal habeas corpus jurisprudence; see, e.g., *Crawford* v. *Commissioner of Correction*, 294 Conn. 165, 181–82, 982 A.2d 620 (2009); Connecticut courts often have looked to federal habeas decisional law for guidance. Federal courts, in considering whether circumstances exist to warrant equitable tolling of the one year federal habeas corpus statute of limitations for persons incarcerated on state charges; see 28 U.S.C. § 2244 (d) (1) (2018); have held that a petitioner's ignorance of the limitation period or lack of legal experience generally is insufficient cause to excuse an untimely filed petition. See, e.g., *Waldron-Ramsey* v. *Pacholke*, 556 F.3d 1008, 1013 (9th Cir. 2009) (self-represented petitioner's deprivation of legal materials, confusion or ignorance of law are not circumstances warranting equitable tolling); *Delaney* v. *Matesanz*, 264 F.3d 7, 15 (1st Cir. 2001) (rejecting argument that District Court abused its discretion by not applying equitable tolling principles to save untimely petition filed by self-represented prisoner asserting ignorance of law, quoting *Fisher* v. *Johnson*, 174 F.3d 710, 714 (5th Cir. 1999), cert. denied, 531 U.S. 1164, 121 S. Ct. 1124, 148 L. Ed. 2d 991 (2001), for proposition that

"[i]gnorance of the law, even for an incarcerated pro se petitioner, generally does not excuse prompt filing"). Although the federal courts apply principles of equitable tolling, we can think of no valid reason why a different standard should apply to a petitioner's knowledge, or lack thereof, of the statutory filing requirements contained in § 52-470. To hold otherwise threatens to create an easily asserted excuse, difficult to disprove, and, if readily accepted, would threaten to undermine the reform that the legislature intended by enacting the statutory time limits.

In light of the deferential standard of review and the record before us, the petitioner has failed to demonstrate on appeal that the habeas court abused its discretion by dismissing his untimely successive petition. The habeas court provided the petitioner with an evidentiary hearing at which he could have presented evidence to satisfy his burden of establishing good cause for the untimely petition. Ultimately, the habeas court concluded that the petitioner failed to provide sufficient evidence to persuade it that he had rebutted the presumption of unreasonable delay. In so concluding, the court properly took into consideration the lengthy delay, indicating that the second petition was filed nearly three years beyond the filing deadline. The court acknowledged the excuses offered by the petitioner for the delay, including that he allegedly was unaware of § 52-470 and that he did not always have access to a law library or similar legal resource while incarcerated. The court made no express findings as to whether it found the petitioner credible, but appeared to conclude that, even if it accepted the petitioner's proffered excuses at face value, they were insufficient in the court's assessment to overcome the statutory presumption of unreasonable delay imposed by the legislature. The court properly noted that ignorance of the law is not, in and of itself, a legally justified excuse. We are satisfied from

our review of the record that the habeas court properly weighed relevant factors in reaching its decision to dismiss the petition, and the petitioner simply has failed to demonstrate that, under the circumstances, the habeas court's determination amounted to an abuse of discretion.

The judgment is affirmed.

In this opinion the other judges concurred.