STATE OF CONNECTICUT *v.* JAQUAN WADE (AC 44898)

Elgo, Suarez and Clark, Js.

Syllabus

The defendant, who had been convicted of conspiracy to commit murder, appealed to this court from the judgment of the trial court revoking his probation and sentencing him to thirteen years of imprisonment. The defendant had signed a form that contained conditions of probation that required, inter alia, that he not violate any criminal laws of this state. Thereafter, the defendant's probation officer received information that the defendant was a suspect in a home invasion. In the warrant application for the defendant's arrest, a police officer indicated that the defendant had been positively identified in a photographic array by R, a complaining witness to the home invasion. Prior to the probation revocation hearing, the defendant filed three motions with the court, seeking to suppress evidence of the photographic array identification as well as any testimony related to R's statements surrounding his identification of the defendant throughout the course of the investigation into the home invasion. The defendant specifically asked the court to engage in the balancing test referenced in *State* v. *Crespo* (190 Conn. App. 639), weighing the defendant's interest in confronting R against the state's reasons for not producing R and the reliability of the proffered hearsay, and to preclude testimony from any witness regarding R's identification of the defendant if the state did not present R as a witness. The state later located and offered to produce R, but he indicated that, if he were called to testify, he would invoke his fifth amendment right against self-incrimination and, thus, the court found that he was unavailable to testify. After the court's determination that R was unavailable, defense counsel argued that *Crespo* no longer applied and that the defendant's right to due process would be violated by the court's consideration of unreliable hearsay and a total inability to confront R. The court denied the defendant's motions and engaged in an evaluation of the reliability of the exhibits and subsequent testimony, finding them to be sufficiently reliable. The court found that the defendant had violated the terms of his probation. *Held*:

1. This court declined to consider the merits of the defendant's claim that the trial court violated his due process right to confrontation under the fourteenth amendment when it failed to apply the balancing test referenced in *Crespo*, the defendant having abandoned that claim: although the defendant maintained his objection to the admission of R's identification evidence based on a due process right to confrontation, defense counsel acknowledged during the probation revocation hearing that, because R ultimately was unavailable due to his invocation of his

right to remain silent, the "whole issue" was "reliability," as R had consumed both marijuana and alcohol on the night of the home invasion; moreover, the record reflected that defense counsel changed tactics after R invoked his fifth amendment rights, disclaimed his initial request that the court apply the *Crespo* balancing test and stated that "circumstances have changed."

2. The trial court did not abuse its discretion in admitting certain hearsay evidence relating to R's identification of the defendant; the court engaged in sufficient review and evaluation of the hearsay evidence to conclude that that evidence was relevant, reliable and probative, including that, R, in audiovisual recordings, identified the defendant with a high degree of confidence and did not significantly vary in his explanation of what happened or how he knew it was the defendant, that R's identification was corroborated by other evidence, that R's descriptions to the police of the home invasion included a number of statements against penal interest, and that a video recording of the double-blind photographic array identification revealed nothing unduly suggestive about the procedure.

Argued March 8—officially released October 3, 2023

Procedural History

Substitute information charging the defendant with violation of probation, brought to the Superior Court in the judicial district of Fairfield, geographical area number two, and tried to the court, *Hernandez*, *J.*; judgment revoking the defendant's probation, from which the defendant appealed to this court. *Affirmed.*

Erica A. Barber, assistant public defender, for the appellant (defendant).

Meryl R. Gersz, deputy assistant state's attorney, with whom, on the brief, were *Joseph T. Corradino*, state's attorney, and *Joseph J. Harry*, senior assistant state's attorney, for the appellee (state).

Opinion

ELGO, J. The defendant, Jaquan Wade, appeals from the judgment of the trial court revoking his probation

and imposing a sentence of thirteen years of incarceration.[1] On appeal, the defendant argues that the due process clause of the fourteenth amendment to the federal constitution prohibited the admission of a witness' out-of-court statements at his probation revocation hearing because the witness was not present and available for cross-examination. The defendant claims that the court improperly failed to implement the balancing test referenced in *State* v. *Crespo*, 190 Conn. App. 639, 647, 211 A.3d 1027 (2019), when it admitted the witness' out-of-court statements relating to the identification of the defendant in order to establish that the defendant violated the condition of his probation that he not violate any criminal laws. The defendant thus contends that, without this improper hearsay evidence, the evidence was insufficient to support the court's finding that he violated that condition.[2] We affirm the judgment of the trial court.

[1] The court found that the defendant violated three conditions of probation: (1) he left the state without proper approval, (2) he failed to submit to substance abuse evaluation and counseling and, (3) to the extent that the defendant was involved in the home invasion discussed subsequently in this opinion, he violated the probation condition that he not violate any criminal law of the United States, this state, or any other state or territory. On appeal, the defendant does not challenge the court's findings that he was in violation of probation for leaving the state and failing to submit to substance abuse evaluation and counseling. The defendant only appeals the court's judgment with respect to the alleged criminal law violation.

[2] On appeal, the defendant specifically argues that the court relied on the defendant's alleged participation in the home invasion and that this finding "substantially contributed to the severity of the trial court's sentence in the dispositional phase . . . ." Because the defendant challenges only one of the court's findings for the violation of probation in making this argument, we note this court's recent decision in *State* v. *Eric L.*, 218 Conn. App. 302, 317–18 n.13, 291 A.3d 621, cert. granted, 346 Conn. 927, 291 A.3d 1041 (2023), in which we acknowledged that, "in order to obtain review of the merits of a claim that the trial court improperly found [the defendant] to be in violation of his probation in a particular way, [it is not necessary to] always successfully challenge on appeal each and every ground on which the court found him to be in violation. If a defendant adequately briefs a claim that a court's alleged error in finding one particular ground during the adjudicatory phase materially affected the severity of the sentence it imposed during the

The following facts and procedural history are relevant to the resolution of this appeal. The defendant was serving a term of probation pursuant to a sentence imposed in 2013 following his conviction for conspiracy to commit murder in violation of General Statutes §§ 53a-48 and 53a-54a (a). The defendant was sentenced to a total effective sentence of twenty years of incarceration, execution suspended after seven years, followed by five years of probation. In 2018, the defendant was released from the custody of the Department of Correction, signed a conditions of probation form,[3] and began serving his probation on February 23, 2018.

On May 14, 2019, the defendant's probation officer received information that the defendant was a suspect in a home invasion in Stratford in violation of the condition of probation that he not violate any criminal laws. On June 17, 2019, the court issued an arrest warrant for the defendant for violation of probation pursuant to General Statutes § 53a-32.[4] The defendant was arrested pursuant to that warrant on July 2, 2019.[5]

dispositional phase, the court should review the claim because the alleged error may 'have had some bearing on [the] disposition the court ordered and, if the court ordered the defendant to serve some portion of his suspended sentence as to that disposition, what that sentence would be.' "

[3] The court-imposed conditions of probation included, inter alia, that the defendant (1) "not violate any criminal law of the United States, this state or any other state or territory," (2) "not leave the [s]tate of Connecticut without permission from the [p]robation [o]fficer," and (3) "[s]ubmit to any medical and/or psychological examination, urinalysis, alcohol and/or drug testing, and/or counseling sessions required by the [c]ourt or the [p]robation [o]fficer."

[4] General Statutes § 53a-32 provides in relevant part: "(a) At any time during the period of probation or conditional discharge, the court or any judge thereof may issue a warrant for the arrest of a defendant for violation of any of the conditions of probation or conditional discharge, or may issue a notice to appear to answer to a charge of such violation, which notice shall be personally served upon the defendant. . . ."

[5] The defendant's arrest warrant application stated that "[the defendant] was a suspect in a home invasion that took place at approximately 3 a.m. in Stratford. . . . [Stratford Police Detective Jason Delauri] later notified this affiant [the defendant's probation officer] that [the defendant] was positively identified by the victim of the home invasion in a lineup and that

A probation revocation hearing was held over the course of two days in May, 2021. The state presented seven witnesses, including the defendant's probation officer, two eyewitnesses to the Stratford home invasion, and the detective who investigated the defendant's alleged involvement in the home invasion.

At the outset of the hearing, the defendant filed three motions with the court: (1) a motion to suppress identification testimony in connection with the home invasion; (2) a motion in limine to preclude testimony about the identification; and (3) a motion regarding his right to confront the home invasion complaining witness, Lawrence Rainey, at the violation of probation hearing. Through these motions, the defendant sought to suppress evidence of a photographic array identification by Rainey and Rainey's statements surrounding his identification of the defendant throughout the course of the investigation. In the motion concerning his right to confrontation, the defendant specifically asked the court to engage in the balancing test referenced in *State* v. *Crespo*, supra, 190 Conn. App. 647, and to preclude any testimony from any witness regarding Rainey's identification of the defendant if the state did not present Rainey as a witness. The state filed an omnibus response to the defendant's motions, arguing that the Connecticut Code of Evidence does not apply to probation revocation hearings and that the defendant has no absolute right to confront witnesses in such proceedings. In the absence of an objection from the parties, the court opted to consider the evidence that was the subject of the pending motions during the course of the violation of probation hearing because the parties agreed that the same evidence would be the subject of the revocation hearing and the defendant's motions.

a warrant will be submitted at a later date." The warrant application also indicated that the defendant left Connecticut in violation of the terms of his probation and failed to submit to substance abuse evaluation and treatment as required under the conditions of his probation.

During the revocation hearing, the testimony included evidence of the defendant's alleged involvement in the home invasion that occurred in Stratford on May 13, 2019. The court heard testimony from two eyewitnesses to the incident: Eric Rodriguez and Rebecca Thompson. At the time of the incident, Rodriguez, Rainey, and a man named Angel were living in the home. According to Rodriguez, Rainey sold marijuana from the home and made several sales a day. Rodriguez and Thompson testified that, on the evening of May 12, 2019, the three men and Thompson were hanging out with several friends in the home, all drinking alcohol and smoking marijuana.[6] In the early morning hours of May 13, 2019, the only people remaining in the residence were Rodriguez and Thompson, who were on the couch in the living room, while Rainey was upstairs and Angel was upstairs asleep. At approximately 2 a.m., three men in masks and dark clothing entered the home unannounced. One man had a gun and two of the men held knives. The men with the knives ran upstairs where they encountered Rainey. Downstairs, the third man approached Rodriguez and Thompson with a gun and ordered them onto the ground. Rodriguez fought with the man for the gun and a scuffle occurred between the two that led into the kitchen. Once in the kitchen, the man dropped the gun, grabbed a knife, and attempted to stab Rodriguez. Rodriguez rushed toward the man and grabbed the blade of the knife and the man's wrist. The man pulled away and the knife cut Rodriguez' hand, resulting in serious injuries that required fifty-five stitches and at least one corrective surgery. The man then forced Rodriguez to his knees and held the knife to his throat. The intruder ordered Rodriguez and Thompson to lie on the ground in the kitchen and empty

[6] Rodriguez testified that he consumed seven or eight alcoholic drinks throughout the evening and the group smoked several grams of marijuana. Rodriguez also testified that he observed Rainey consume two beers in addition to smoking marijuana.

their pockets, from which the intruder took Rodriguez' car keys and both of their cell phones. The altercation lasted approximately ten minutes and, shortly thereafter, all three men fled the home.

Rodriguez further testified that his friend, Rashaun Richards, previously asked Rodriguez to assist him with robbing Rainey. Additional investigation by the police department revealed that Richards' mother, who was also the defendant's stepmother, owned a vehicle that was at the home at the time of the incident and was used as the getaway car. Further, without objection from the defense, Detective Jason Delauri, the investigating officer for the home invasion, testified that Richards sent Facebook Messenger text messages to the defendant around the time of the incident, which indicated to Detective Delauri that Richards was acting "as a lookout" and appeared to warn the defendant when a car pulled up on the street. Richards was later arrested in connection with the home invasion. Over the defendant's objection,[7] Rodriguez also testified that, after the incident, Rainey told him that he had a hunch that an individual named Pharaoh Eaton and his friend committed the crime because Eaton and the friend came to the home to purchase marijuana from Rainey the day before and, during the home invasion, the men seemed to know where to go and the location of everything they intended to steal. The defendant's probation officer testified that the defendant told him that he needed money in order to travel to Texas and, in fact, the defendant was scheduled to leave for Texas on May 14, 2019, the day after the home invasion.

[7] Defense counsel argued that any testimony by Rodriguez as to what Rainey told him about who committed the home invasion would constitute hearsay and would violate the defendant's due process right to confrontation. The court overruled the objection, finding that Rainey's prior statements were relevant and highly probative to show that Rainey identified the intruder prior to the photographic array identification.

Detective Delauri also testified during the first day of the probation revocation hearing. At the time of Detective Delauri's testimony, the state was unable to locate Rainey and did not intend to call him as a witness. As a result, facts pertaining to Rainey's identification of the defendant primarily came from the testimony of Detective Delauri, who had interviewed Rainey. During Detective Delauri's testimony, the state sought to admit into evidence several exhibits relating to Rainey's identification of the defendant. The state offered (1) exhibit 4, the video recording of the police station interview between Detective Delauri and Rainey; (2) exhibit 5, the video recording of Rainey's identification of the defendant which occurred by means of a photographic array administered by Detective Todd Moore and presented to Rainey; and (3) exhibit 7, the photographic array presented to Rainey. Subject to the defendant's objections as to those exhibits and any related testimony, Detective Delauri was provisionally allowed to testify that, during his initial interview at police headquarters, Rainey indicated that, although he did not know the man's name at the time, he was able to identify one of the two suspects because he had contact with him one or two days prior to the incident when Eaton visited the home to purchase marijuana. Detective Delauri also testified that Rainey indicated that he was able to see the person's face through the mask in order to recognize the individual and, at one point, Rainey identified a person with the nickname "Quan" as the person who accompanied Eaton to purchase marijuana on the day prior to the home invasion. On the basis of this information, Detective Delauri interviewed Rainey again, accompanied by Detective Moore, to conduct a photographic array to identify suspects for the home invasion. In a double-blind procedure,[8] Detective Moore

[8] "To qualify as double-blind, a photographic array must be administered by an uninterested party without knowledge of which photograph represents the suspect." *State* v. *Marquez*, 291 Conn. 122, 132, 967 A.2d 56, cert. denied, 558 U.S. 895, 130 S. Ct. 237, 175 L. Ed. 2d 163 (2009).

showed Rainey a photographic array for identification, which contained the defendant's photograph. At that time, Rainey identified the defendant as the man involved in the home invasion.

In objecting to the entry of the proffered exhibits, as well as the state's questions and Detective Delauri's testimony regarding Rainey's identification of the defendant, the defendant asserted grounds of hearsay and a violation of his due process right to confrontation. In response, the court reserved ruling with respect to the admissibility of the evidence in order to review the audiovisual exhibits before the second day of the hearing.

At the close of evidence on the first day of the hearing, the court also heard arguments from the defense and the state regarding the defendant's motions. At that time, defense counsel specifically mentioned that, in his motion regarding the defendant's right to confrontation, he asked the court to engage in the balancing test referenced in *State* v. *Crespo*, supra, 190 Conn. App. 647. The defendant also directed the court's attention to § 53a-32 (c),[9] which enumerates a right to confrontation via cross-examination in violation of probation hearings. In acknowledging the balancing test, the court specifically asked the state what steps it took to locate the witness given that it was required to balance the defendant's confrontation right against the state's stated reason for not producing him. After the state indicated that it would need additional time to subpoena

[9] General Statutes § 53a-32 (c) provides in relevant part that, "[u]pon notification by the probation officer of the arrest of the defendant or upon an arrest by warrant as herein provided, the court shall cause the defendant to be brought before it without unnecessary delay for a hearing on the violation charges. At such hearing the defendant . . . shall be advised by the court that such defendant has the right to retain counsel and, if indigent, shall be entitled to the services of the public defender, and shall have the right to cross-examine witnesses and to present evidence in such defendant's own behalf. . . ."

the witnesses relevant to the court's inquiry, the matter was subsequently continued for additional testimony on that issue.

On the second day of the hearing, the state offered to produce Rainey, who, after speaking with a special public defender, indicated that he intended to invoke his fifth amendment right against self-incrimination.[10] The court thus found that Rainey was unavailable to testify. After making this finding, the court heard from counsel on the defendant's motions. During argument, defense counsel argued that, "[a]t the time that [the] motions were filed and at the time of the first day of the hearing the circumstances were such that the state had been unable to identify, locate and speak with Mr. Rainey. Obviously, the circumstances have now changed. As we first addressed this morning the state did speak with Mr. Rainey. Counsel was appointed as the court indicated, and Mr. Rainey has decided to assert his fifth amendment privilege against self-incrimination. . . . [T]he due process clause to the federal constitution is controlling here. The right of an accused in a criminal trial . . . is in essence the right to a fair opportunity to defend against the state's accusations, the right to confront and cross-examine witnesses have long been recognized as essential to due process. And that's what our argument is here.

"That . . . change in circumstance, the invocation of the fifth amendment right, has completely undermined [the defendant's] ability to engage in a meaningful cross-examination or confrontation with the critical witness in this circumstance. And, as such, the consideration

[10] At the suggestion of defense counsel, Rainey was appointed a special public defender who, after speaking with Rainey, informed the court that, in light of his admission to distributing marijuana during his interview after the incident, Rainey would invoke his fifth amendment protections if called as a witness in the violation of probation hearing.

of that evidence would amount to a violation of due process. . . .

"Our argument is simply that the evaluation of the confrontation rights here under the due process clause after doing so allow[ed] the state to benefit from that evidence to [the defendant's] detriment in that he could not confront the critical witness in this . . . case and not addressing the issue of probation at this time would violate his due process rights."

In response, the state asserted that the applicable evidentiary principles differ in a probation revocation hearing, specifically with regard to the defendant's right to confrontation. In support of its position, the state argued that the exhibits and testimony presented during the hearing were reliable and corroborated by the evidence and testimony from the two eyewitnesses. The state also argued that the court is required to make a finding of good cause only when the state does not call a witness. Thus, the state argued that, because Rainey was unavailable to both the state and defense counsel in the present case, the court is left only with a "balancing test between what [the court determines] as reliable and probative."

In his rebuttal argument, defense counsel responded that, with regard to the motion to suppress, "the whole issue there is reliability." The defendant then argued that the court should find the exhibits and any testimony stemming from those exhibits and Rainey's identification of the defendant to be unreliable. Specifically, defense counsel argued the following to the court:

"The state . . . referenced a balancing test from *Crespo*. And again, Your Honor, I think the circumstances have changed a bit. *Crespo* governs when the state . . . does not call a witness. And, up until Thursday at the conclusion of the hearing, the state had indicated it could not find Mr. Rainey, did not speak to Mr.

Rainey. . . . The difference is . . . not that they're just not calling him as a witness, it's that he's now unavailable. . . . Effectively cross-examination, confrontation is denied there wholly and completely. . . . The court's analysis is, I believe, governed by the due process clause of the federal constitution, which ensures minimum safeguards in connection with a hearing such as this one, a violation of probation hearing.

"And the minimum—a part of those minimum safeguards, as I mentioned enumerated in our statute but also in case law, are that there is at least a minimum right to confront evidence against you, cross-examine witnesses. And I understand the circumstances of a violation of probation hearing are different than that of a trial, we have established that. But, at a minimum, the consideration of this evidence which is ultimately the question, the consideration of this evidence, the identification procedure which, again, [its] reliability has been called into question." Defense counsel then stated that these factors combined—the unreliability of the evidence and the total inability to confront the complaining witness—weigh in the defendant's favor as to whether his due process rights would be violated.

Following these arguments, the court denied the defendant's motions. In so ruling, the court stated that "[t]he violation of probation proceeding is not a criminal proceeding, it's a hybrid proceeding. And the protections which are typically afforded to defendants in a criminal trial, while similar in a violation of probation hearing, are not the same. As I stated earlier, the court can consider information which is relevant and reliable." The court then engaged in an evaluation of the reliability of the exhibits and subsequent testimony, finding them to be sufficiently reliable. Specifically, the court found, inter alia, that (1) Rainey's identification of the defendant in the photographic array was consistent with his prior statements regarding identification and

not unduly suggestive, (2) the corroborating facts and testimony from other witnesses supported reliability, and (3) Rainey's own statements against penal interest with respect to his selling marijuana further heightened the reliability and credibility of the hearsay evidence. The court thereafter found, by a fair preponderance of the evidence, that the defendant had violated the terms of his probation. It therefore revoked the defendant's probation and sentenced him to the remaining thirteen years of imprisonment that had been suspended.[11] This appeal followed.

I

On appeal, the defendant claims that the court violated his due process right to confrontation under the fourteenth amendment when it improperly failed to apply the balancing test referenced in *State* v. *Crespo*, supra, 190 Conn. App. 647, and allowed hearsay evidence and testimony concerning Rainey's identification of the defendant. In arguing that the court was required to conduct the balancing test during the probation revocation hearing, the defendant specifically refers to this court's precedent that, when the state declines to call a witness to testify, "[t]he exercise of the right to confront adverse witnesses in a probation revocation proceeding is not absolute, but rather entails a balancing inquiry conducted by the court, in which the court 'must balance the defendant's interest in cross-examination against the state's good cause for denying the right to cross-examine. . . . In considering whether the court had good cause for not allowing confrontation or that the interest of justice [did] not require the witness to appear . . . the court should balance, on the one hand,

[11] The record reflects that the defendant objected to the court's findings that (1) the beneficial purposes of probation were no longer being served by the defendant's probation and (2) the defendant has not met the terms of his probation on the basis of the testimony of his supervising probation officers.

[1] the defendant's interest in confronting the declarant, against, on the other hand, [2] the government's reasons for not producing the witness and [3] the reliability of the proffered hearsay.' " Id. The state argues in response that the defendant abandoned his claim that due process requires that the court employ the balancing test referenced in *Crespo*. We agree with the state.

We begin by setting forth the principles relevant to probation revocation proceedings. "Our Supreme Court has explained that probation is a penal alternative to incarceration, and its purpose is to provide a period of grace in order to aid in the rehabilitation of the individual. . . . It also noted that persons on probation do not enjoy absolute liberty but rather 'conditional liberty properly dependent on observance of special [probation] restrictions. . . . These restrictions are meant to assure that the probation serves [as] a period of genuine rehabilitation and that the community is not harmed by the probationer's being at large.' . . . This conditional liberty, however, is a privilege that once granted, constitutes a constitutionally protected interest. . . . The due process clause of the fourteenth amendment mandates certain minimum procedural safeguards before that conditional liberty interest may be revoked." (Citations omitted.) *State* v. *Polanco*, 165 Conn. App. 563, 570, 140 A.3d 230, cert. denied, 322 Conn. 906, 139 A.3d 708 (2016).

With respect to those minimum procedural safeguards, "[i]t is well established that the defendant is entitled to limited due process rights in a probation revocation proceeding. Probation revocation proceedings fall within the protections guaranteed by the due process clause of the fourteenth amendment to the federal constitution. . . . The revocation proceeding must comport with the basic requirements of due process because termination of that privilege results in a loss of liberty. . . . [T]he minimum due process

requirements for revocation of [probation] include written notice of the claimed [probation] violation, disclosure to the [probationer] of the evidence against him, the opportunity to be heard in person and to present witnesses and documentary evidence, the right to confront and cross-examine adverse witnesses in most instances, a neutral hearing body, and a written statement as to the evidence for and reasons for [probation] violation. . . . Despite that panoply of requirements, a probation revocation hearing does not require all of the procedural components associated with an adversarial criminal proceeding." (Internal quotation marks omitted.) *State* v. *Tucker*, 179 Conn. App. 270, 279–80, 178 A.3d 1103, cert. denied, 328 Conn. 917, 180 A.3d 963 (2018).

Specifically, with regard to the right to confrontation, "[i]n *State* v. *Shakir*, 130 Conn. App. 458, 467, 22 A.3d 1285, cert. denied, 302 Conn. 931, 28 A.3d 345 (2011), we noted that the due process safeguards are codified in Federal Rule of Criminal Procedure 32.1 and include 'an opportunity to . . . question any adverse witness *unless the court determines that the interest of justice does not require the witness to appear* . . . .' We further explained that the court must balance the defendant's interest in cross-examination against the state's good cause for denying the right to cross-examine. Id. Specifically, we cited to case law from the United States Court of Appeals for the Second Circuit and stated: 'In considering whether the court had good cause for not allowing confrontation or that the interest of justice [did] not require the witness to appear . . . the court should balance, on the one hand, the defendant's interest in confronting the declarant, against, on the other hand, the government's reasons for not producing the witness and the reliability of the proffered hearsay.' " (Emphasis added.) *State* v. *Polanco*, supra, 165 Conn. App. 570–71.

On the basis of our review of the record in this case, it is evident that the defendant effectively abandoned his claim that the balancing test referenced in *Crespo* was applicable. Although the defendant maintained his objection based on a due process right to confrontation, he clearly abandoned the balancing test, acknowledging that, because Rainey was now unavailable due to his invocation of his right to remain silent, "the whole issue . . . is reliability." We reiterate that, during the second day of the revocation hearing, defense counsel repeatedly acknowledged that Rainey's unavailability was a "change in circumstance" and asked the court to consider only the reliability of the proffered evidence and whether admitting such evidence would violate the defendant's federal due process rights. Arguing that "the whole issue . . . is reliability," the defendant contended that Rainey's proffered identification evidence was unreliable in light of his marijuana and alcohol consumption. Moreover, defense counsel further disclaimed his initial request that the court apply the balancing test and acknowledged that the test is no longer applicable when, in response to the state's argument, he stated that "[t]he state had referenced a balancing test from *Crespo*. And again, Your Honor, I think the circumstances have changed a bit. *Crespo* governs when the state . . . does not call a witness. . . . The difference is . . . not that they're just not calling him as a witness, it's that he's now unavailable. . . . Effectively cross-examination, confrontation is denied there wholly and completely. . . . The court's analysis is I believe governed by the due process clause of the federal constitution which ensures minimum safeguards in connection with a hearing such as this one, a violation of probation hearing." Thus, the record clearly reflects that defense counsel changed tactics once Rainey invoked his fifth amendment rights and focused solely on whether the evidence regarding his identification of

the defendant was reliable.[12] Because we agree with the state that the defendant abandoned this claim, we decline to consider the merits of his claim on appeal.

II

In light of our resolution of the claim raised in part I of this opinion, we briefly address the defendant's ancillary challenge to the court's determination that the hearsay evidence was reliable. Here, we note that "[t]he evidentiary standard for probation violation proceedings is broad. . . . [T]he court may . . . consider the types of information properly considered at an original sentencing hearing because a revocation hearing is merely a reconvention of the original sentencing hearing. . . . The court may, therefore, consider hearsay information, evidence of crimes for which the defendant was indicted but neither tried nor convicted, evidence of crimes for which the defendant was acquitted, and evidence of indictments or informations that were dismissed." (Internal quotation marks omitted.) *State* v. *Megos*, 176 Conn. App. 133, 147, 170 A.3d 120 (2017). Moreover, hearsay evidence presented during a probation revocation hearing may be considered sufficiently

[12] We also note that, after his appeal was filed, the defendant filed a motion for articulation, arguing that, although "[i]t is not appropriate . . . for the trial court judge to use the articulation process to change or alter its decision," the trial court's decision was "not clear because, although the defendant identified the balancing test for determining good cause as controlling the court's inquiry, the court did not make any express findings on that issue." In denying the motion, the trial court recounted in its memorandum of decision the procedural history relevant to the motion to suppress, noting that, due to "developments which were not anticipated in the original motion to suppress, the court made a finding that Rainey was not available. . . . Significantly, while reframing his argument in support of suppression, defense counsel did not argue in support of applying the *Crespo* balancing test. . . . In short, counsel abandoned the very standard which he now seeks to have this court articulate." (Citations omitted.) We agree with the trial court's characterization of the record at trial, and we reject as trial by ambuscade this transparent attempt to resuscitate for appeal an issue that the record clearly demonstrates was abandoned.

reliable when it is supported by corroborating evidence. See *State* v. *Maietta*, 320 Conn. 678, 691, 134 A.3d 572 (2016).

Here, the court found that Rainey identified the defendant "with a high degree of confidence. That [identification] was consistent with his other statements, and he did not vary in any significant way in his explanation of what happened and how it was that he was able to identify the defendant. So [the court finds] . . . his audiovisual recordings to be extremely reliable.

"[The audiovisual recordings] are further corroborated by the testimony from the detective about the phone traffic in essence advising the defendant about what was going on during the course of the home invasion. . . .[13] [H]is various statements are consistent with the court testimony of Eric Rodriguez and Rebecca Thompson. Now, admittedly, they experienced different events, but to the extent that there's overlap they are consistent and remain consistent, which adds to the reliability of Mr. Rainey's statements.

"In addition, Mr. Rainey, during his description of what happened, made a number of statements against penal interest, admitting that he was involved in the distribution of marijuana which, in the court's view, further heightens the reliability and credibility of the statements which he gave. The video recording of the identification procedure which was employed reveals . . . that Detective Moore complied with the requirements of performing a photo[graphic] array and . . .

[13] We note that the court referenced evidence of statements made by Richards, the driver of the getaway car on the night of the home invasion. Specifically, the court recalled evidence that Richards was communicating with the defendant during the home invasion through Facebook Messenger and that he warned the defendant of a car approaching the home during the home invasion. We also reiterate that the evidence showed that the getaway car was owned by Richards' mother, who was the defendant's stepmother.

there was nothing unduly suggestive—there was nothing suggestive at all quite frankly about the identification procedure that was used." (Footnote added.)

We note that "our standard of review is that [the trial court's evidentiary] rulings will be overturned on appeal only where there was an abuse of discretion and a showing by the defendant of substantial prejudice or injustice. . . . In reviewing claims that the trial court abused its discretion, great weight is given to the trial court's decision and every reasonable presumption is given in favor of its correctness. . . . We will reverse the trial court's ruling only if it could not reasonably conclude as it did." (Internal quotation marks omitted.) *State* v. *Megos*, supra, 176 Conn. App. 147. The record clearly reflects that the court engaged in sufficient review and evaluation of the hearsay evidence, including the corroborating evidence, to conclude that the evidence was relevant, reliable and probative. Therefore, we conclude the court did not abuse its discretion in admitting the hearsay evidence in question.

The judgment is affirmed.

In this opinion the other judges concurred.

COMMISSIONER OF TRANSPORTATION *v.* ACP, LLC, ET AL.
(AC 45523)

Prescott, Elgo and Clark, Js.

Syllabus

The plaintiff Commissioner of Transportation appealed to this court from the judgment of the trial court awarding certain damages to the defendant property owner for the taking by eminent domain of a portion of its real property by the commissioner. The defendant had appealed to the trial court, pursuant to statute (§ 13a-76), challenging the assessment of damages for the partial taking filed by the commissioner. The commissioner deemed the partial taking necessary for the widening of Route 1 in Norwalk onto the defendant's property. The partial taking consisted

of a rectangular piece of land along the frontage of the defendant's property, approximately 100 feet in length, with a temporary easement to, inter alia, construct a sidewalk and driveway, to install a temporary sedimentation control system, and to install pavement markings. The commissioner assessed total damages of $72,500 for the partial taking, which the defendant claimed was wholly and totally inadequate to provide just compensation. While the application for a reassessment of damages was pending in the trial court, construction commenced, during which all utilities on the property were relocated, five parking spaces were rendered unusuable, and construction vehicles, including a crane, a dump truck, and a cement mixer, were occasionally parked on the property. The construction affected ingress and egress to and from the property by employees and occupants of the buildings on the property, which included a veterinary hospital. A veterinarian with an ownership interest in the defendant testified that the police and construction workers had to be advised to move their vehicles to allow clients onto the property, and that customers complained about the disruption caused by the construction. During the evidentiary hearing on the application for reassessment, both parties presented testimony from expert real estate appraisers. The defendant's expert witness, G, a professional real estate appraiser, testified that it was his opinion that the defendant was entitled to temporary severance damages in the amount of $51,000 because it would have been more difficult to rent the commercial space located in the buildings on the property during the period of construction, and, consequently, the $51,000 represented a 10 percent decrease to the fair market rental value of the commercial space during the 2.8 years of construction. G testified that he based that amount on the negative impact of the construction on the entrance to the property, and, more specifically, the impeded access to tenants and occupants of the buildings on the property, as well as the noise, dust, and disruption to the property caused by construction, and the loss of five parking spaces. G averred that his methodology was founded on the measure of temporary loss of market rental value and not on any contract leases during the time period and that he reviewed and analyzed the rent of seventeen similar properties within Norwalk. When asked by the trial court as to how G determined that the construction caused a 10 percent diminution in the market rental value, G testified that it represented his subjective judgment as to the degree of loss, and his judgment was not a product of quantitative analysis, but rather predicated on his many years of doing appraisals and analyzing properties of this type, and an accumulation of factors. In contrast to G's testimony, the commissioner's expert witness opined that the defendant was not entitled to any temporary severance damages because there was no damage to the remainder of the property as a result of the taking, that the property received the benefit of a new driveway, and that noise and dust were not part of severance damages because those factors were general impacts to all

property owners along the affected area of Route 1, and not just to the defendant's property. He also characterized G's opinion on temporary severance damages as utilizing an arbitrary number that had no basis in fact. The trial court found in favor the defendant, crediting G's opinion, and reassessed the total value from the partial taking to include temporary severance damages in the amount of $51,000, for a total amount of $138,500, and awarded additional costs, fees, and interest. The trial court also rejected the arguments advanced by the commissioner's counsel as to why G's estimate as to temporary severance damages was flawed. On the commissioner's appeal to this court, *held* that the trial court's severance damages award was not clearly erroneous because it was the function of the trial court, as the sole arbiter of credibility, to determine whether G's opinion was arbitrary and speculative as the commissioner claimed, and to assign whatever weight it deemed appropriate to that opinion, and the commissioner failed to provide, and this court was not aware of, any authority in which this court reversed a trial court's condemnation award that was made on the basis of an expert's opinion on the ground that such an opinion was the product of the expert's subjective views; moreover, if the commissioner believed that G's opinion was too arbitrary or speculative to have supported an award of temporary severance damages, the proper method to have precluded the trial court's reliance on G's opinion was to challenge the admissibility of that opinion on those grounds by way of a pretrial motion in limine or an objection at the evidentiary hearing, which the commissioner failed to do, rather, the commissioner's counsel stipulated that G was an expert appraiser and did not object to the introduction of his report into evidence or to his testimony with respect to temporary severance damages; furthermore, the trial court carefully considered the commissioner's contention that G's opinion was arbitrary and speculative, having posed its own questions to the witnesses, including inquiries as to how G arrived at his 10 percent estimate, and G was subject to adept cross-examination by the commissioner's counsel, who thoroughly questioned him as to the factual basis for his decision that noise and dust affected the market rental value of the property, and the methodology, if any, that he used to arrive at his 10 percent estimate, and, although the commissioner, on appeal, disagreed with the trial court's credibility assessment, this court could not reverse the trial court's judgment on that basis.

Argued May 24—officially released October 3, 2023

Procedural History

Appeal from the award of damages to the named defendant on its application for a reassessment of damages from the notice of compensation and assessment of damages filed by the plaintiff for the partial taking

by condemnation of certain of the named defendant's real property, and for other relief, brought to the Superior Court in the judicial district of Stamford-Norwalk and tried to the court, *Hon. Charles T. Lee*, judge trial referee; judgment for the named defendant, from which the plaintiff appealed to this court. *Affirmed.*

Andrew Mark Ammirati, assistant attorney general, with whom were *Raul Antonio Rodriguez*, assistant attorney general, and, on the brief, *William Tong*, attorney general, for the appellant (plaintiff).

Frank W. Murphy, for the appellee (named defendant).

Opinion

CLARK, J. The plaintiff, the Commissioner of Transportation (commissioner), appeals from the judgment of the trial court awarding damages to the defendant ACP, LLC,[1] for the taking by eminent domain of a portion of its real property by the commissioner. On appeal, the commissioner claims that the court improperly relied on the expert opinion of the defendant's appraiser to award the defendant temporary severance damages because that expert opinion was arbitrary and speculative. We affirm the judgment of the trial court.

The following undisputed facts and procedural history are relevant to this appeal. The defendant owns real property located at 322 Westport Avenue, also known as U.S. Route 1, in Norwalk (property). The property consists of a 30,382 square foot parcel of land improved with a one-story building and a two-story building. The

[1] The commissioner, in his notice of condemnation and assessment of damages, named four other defendants: U.S. Small Business Administration, Fairfield County Bank, Ridgefield Bank Mortgage Corporation, and Strawberry Hill Animal Hospital, LLC. ACP, LLC, and Strawberry Hill Animal Hospital, LLC, were the only defendants that appeared before the trial court. All references to the defendant in this opinion are to ACP, LLC, because it is the only defendant that has participated in this appeal.

one-story building is 4059 square feet and was occupied by a high-end printing franchise between December, 2017, and September, 2019. The two-story building is 6654 square feet and at all relevant times was occupied by a veterinary hospital for cats, named "A Cat's Place," which is an entity related in ownership to the defendant. The property has 102 feet of frontage on Route 1, which is one of the most heavily developed retail corridors in Fairfield County. Vehicular access to the property was by way of a thirty-eight foot curb cut leading across a tapering concrete apron to a driveway that provided access to a parking lot with thirty-five parking spaces.

On December 1, 2017, the commissioner, pursuant to General Statutes § 13a-73 (b),[2] filed a notice of condemnation and assessment of damages for the taking of a narrow strip of land along the entire frontage of the property (partial taking). The commissioner deemed the partial taking necessary to improve the intersection of Route 1 and Strawberry Hill Avenue, which required the widening of Route 1 onto the property. The partial taking was a rectangular area amounting to 1231 square feet, approximately 100 feet in length and varying between ten and fourteen feet in width, together with a temporary easement to construct a driveway and sidewalk, to install a temporary sedimentation control system, and to install pavement markings. The commissioner assessed damages of $72,500 for the partial taking. On January 18, 2018, the defendant, pursuant to General Statutes § 13a-76, filed an appeal and application for reassessment of damages, claiming that the damages assessed by the commissioner for the partial taking were "wholly and totally inadequate to provide just compensation."

[2] Section 13a-73 (b) was the subject of a technical amendment in 2018; see Public Acts 2018, No. 18-62, § 1; however, that amendment has no bearing on the merits of this appeal. In the interest of simplicity, we refer to the current revision of the statute.

During the pendency of the present action, construction on the property to widen Route 1 occurred at various times between 2018 and 2022. The construction consisted of, inter alia, the regrading and shortening of the driveway on the property, the repositioning of Route 1 and the sidewalk closer to the buildings on the property, the installation of a new sidewalk, as well as the relocation of all utilities—such as gas, water, electric, sewer, and telephone—from their current location next to Route 1 into the partial taking area. The water and gas lines were relocated twice. The area of construction was more than 2000 square feet and rendered five of the parking spaces on the property unusable. The reconstruction of the driveway spanned April, 2020, to August, 2022. Because the roadway and the sidewalk were moved closer to the building, it became necessary to remove and replace a streetside garden and a sign on the property. Construction vehicles, including a crane, a dump truck, and a cement mixer, were occasionally parked on the driveway to the property. Consequently, a portion of the driveway was periodically closed off with yellow tape, and the entrance to the property was sometimes blocked entirely. Although the veterinary hospital located in the two-story building was not forced to close due to the interference, it was without water for one day while the main was being relocated. The printing business located in the one-story building quit its lease in September, 2019.

On September 22, 2021, the court held an evidentiary hearing with respect to the reassessment of damages for the partial taking of the property. The defendant called two witnesses: Edward Kurose, a veterinarian with an ownership interest in the defendant, and Michael Gold, a real estate appraiser retained by the defendant. The commissioner called two of his employees as witnesses: Christina Smith, the supervising property agent for the Route 1 construction project, and

John Kerr, an expert real estate appraiser. The parties cumulatively introduced many exhibits into evidence, generally consisting of pictures of the property before, during, and after the construction; surveys and maps of the property and the partial taking; letters and correspondence from the Department of Transportation (department); and the reports of the competing appraisers.

At the hearing, Kurose testified about the disruption that the construction caused to his veterinary hospital located in the two-story building on the property. Kurose explained that the construction was erratic, that there was no clear pattern as to when work was being done, and that his customers regularly complained of the disruption caused by the construction. He averred that the construction affected the ingress and egress by the employees and customers of the businesses to and from the property and, as a result, he was required to advise the police or construction workers to move their vehicles to allow his clients entry onto the property. Smith testified that, although she had not been to the property, she had reviewed the relevant maps and reports with respect to the construction. She briefly testified regarding the scope of construction completed at the property, the partial taking, and the temporary easement.

The testimony of the parties' competing expert appraisers did not markedly differ in their estimation of the value of the condemnation of the fee interest. The commissioner's appraiser, Kerr, assessed the value of the partial taking of the fee interest as $80,000. The defendant's appraiser, Gold, valued the partial taking of the fee interest as $87,500. Nevertheless, the testimony of the expert appraisers diverged with respect to the defendant's entitlement, if at all, to temporary severance damages, which represented the impermanent

diminution in value of the remaining property that was caused by the partial taking.

Gold estimated that the amount of temporary severance damages was $51,000. Gold testified that it was his opinion that it would be more difficult to rent the commercial space located in the buildings on the property during the period of construction and, consequently, his $51,000 estimate represented a 10 percent decrease to the fair market rental value of the commercial space during the 2.8 years of construction on the property. To support his estimate, Gold focused on the negative impact of the construction on the entrance to the property, which temporarily impeded access to tenants and occupants within the buildings. Gold also supported his estimate with the fact that the construction caused noise, dust, and disruption to the property, including the loss of five parking spaces. Gold averred that, although the veterinary hospital occupying the two-story building essentially was owner-occupied, his methodology was founded on the measure of temporary loss of market rental value and not on any contract leases during the time period. To arrive at his $51,000 estimate, Gold reviewed and analyzed the rent for seventeen similar properties within Norwalk. On the basis of this comparison, Gold estimated the market rent for the first-floor retail/flex space in the two-story building was $25 per square foot, the second-floor office space in the two-story building was $16 per square foot, and the one-story building comprising hybrid retail/flex and warehouse space was $12 per square foot. Consequently, Gold estimated that the unaffected market rent for the two buildings on the property was $182,856 per year, multiplied by the duration of the construction, 2.8 years, to equal $511,996.80. Gold then applied his estimated 10 percent loss of market rent value to reach his appraisal for the temporary severance damages in the amount of $51,000.

When asked by the court as to how he determined that the construction caused a 10 percent diminution in the market rental value, Gold testified that it represented his subjective judgment as to the degree of loss and that it was not a product of quantitative analysis. Gold explained that his 10 percent estimate was "predicated on many years of experience doing appraisals and analyzing properties of this type" and an "accumulation of factors" involving the nature of the disruption at the property, including the loss of five parking spaces, and "the disruption caused by the inability to have easy access to the property at all times." He averred that "these are not conclusions that are readily abstracted from the market or from market data" and that his 10 percent estimate represented a reasonable negative market reaction to the fact that construction significantly affecting the property would occur over a two year span. The court stated that "it would seem to me it might be comforting and preferable if you had hard numbers," to which Gold responded that the method he employed to arrive at his 10 percent estimate was customary and was recently accepted in a similar Route 1 construction condemnation action—*Commissioner of Transportation* v. *J. West Associates, LLC*, Superior Court, judicial district of Stamford-Norwalk, Docket No. CV-17-6034495-S (October 20, 2020).

During cross-examination, the commissioner's counsel questioned Gold with respect to the factual basis for his opinion that noise and dust affected the market rental value of the property. Gold answered that, although he was not aware of any specific documents evincing those disruption aspects, it was reasonable for him to include those factors in his estimate because noise and dust normally arise from construction. Gold also confirmed that his 10 percent estimate represented his best judgment with respect to the loss in market value due to the temporary inconvenience caused by

the construction, not on any specific market research of any other similarly affected properties. After cross-examination, the court again expressed its concern that Gold's 10 percent estimate could be characterized as a bald expression of opinion. In response, Gold testified that his valuation process involved the assessment of the impact of the disruption to the property and that his estimate was a fair reflection of the extent of the disruption.

In contrast to Gold, Kerr's opinion was that the defendant was not entitled to any temporary severance damages because there was no damage to the remainder of the property as a result of the taking. Kerr testified that the defendant had access to the property at all times and that it actually received the benefit of a new driveway. He averred that noise and dust are not part of severance damages because those factors are "general impacts" to all property owners along the affected area of Route 1, not just the defendant's property. He testified that there were no severance damages because the construction at the entrance to the property "would generally be accepted by . . . the market." Kerr characterized Gold's opinion on severance damages as utilizing an arbitrary number that had no factual basis.

After the evidentiary hearing, the court conducted a site visit to the property in the presence of counsel on October 14, 2021. Thereafter, the parties submitted posttrial memoranda of law and reply briefs in which the principal dispute was the issue of severance damages. In his posttrial written submissions, the commissioner contended that Gold's severance damages estimate was flawed because he did not use a quantitative analysis founded on scientific or documentary evidence and that his valuation was purely speculative. The defendant, in its posttrial memoranda, argued that Gold's estimate was proper and should be credited because it was made on the basis of his professional

experience and the conditions of the property during construction.

On April 14, 2022, the court issued a memorandum of decision in which it reassessed the total value stemming from the partial taking from $72,500 to $138,500 and awarded the defendant interest of 5 percent on the amount of the increase from the date of the taking, an appraiser's fee of $8400, and court costs. To arrive at the $138,500 reassessed value, the court credited Gold's opinion with respect to the condemned fee interest in the amount of $87,500, as well as temporary severance damages in the amount of $51,000. As for severance damages, the court held that the defendant had "demonstrated its entitlement to severance damages. The facts establish that its remaining property was impacted by the rights imposed upon it. These impacts include the loss of five parking spaces, diminished access to its business as a result of the relocation of the utility lines and the reconstruction of its driveway, among other things. . . . Gold's approach is based on the uncertainty created by these rights allowing the [department] entry and the right to construct the driveway at any time during the projected project period. To quantify this impact . . . Gold developed a market rent for the improvements based on appropriate comparable properties. He then assessed a diminution of rental value of 10 percent," which resulted in a total estimate of severance damages in the amount of $51,000.

The court then rejected each of the arguments advanced by the commissioner as to why Gold's estimate as to temporary severance damages was flawed. The court was not persuaded by the commissioner's argument that Gold improperly relied on the existence of noise and dust during the construction because cases such as *Bowen* v. *Ives*, 171 Conn. 231, 238, 368 A.2d 82 (1976), hold that such impacts are proper considerations for severance damages. The court also rejected

the commissioner's argument that Gold's estimate of a 10 percent diminution of market rental value was arbitrary because, although Gold testified that he subjectively developed this percentage, "Gold credibly explained that making such a judgment is an integral part of preparing an appraisal, for example when adjusting comparable sales to accommodate differences in size, age or location. . . . Kerr used a 10 percent factor on two occasions when adjusting his comparable sales—once to calculate a diminution of value and once to estimate an increase of value. . . . Gold testified that he used the factor in similar situations, and the court notes that it was accepted in this case's twin, *Commissioner of Transportation* v. [*J. West Associates, LLC*, supra, Superior Court, Docket No. CV-17-6034495-S]. Accordingly, the court finds this method to be valid, especially in light of . . . Gold's expertise." (Footnote omitted.) This appeal followed.

On appeal, the commissioner claims that the court improperly relied on Gold's opinion to award the defendant temporary severance damages because that opinion was both arbitrary and speculative. The commissioner contends that the present case is controlled by *Commissioner of Transportation* v. *Larobina*, 92 Conn. App. 15, 27, 882 A.2d 1265, cert. denied, 276 Conn. 931, 889 A.2d 816 (2005). The commissioner argues that, "[u]nder *Larobina*, Connecticut courts must reject an expert's severance damages calculation when the expert estimates a decrease in value by using an arbitrary percentage factor that is not supported by evidence and a quantitative analysis relating specifically to a condemnation's effect on the property." He contends that the court's reliance on Gold's opinion ran afoul of *Larobina* for two reasons: (1) Gold's estimation of a 10 percent decrease in market rental value was arbitrary because it was mere conjecture and not supported by any qualitative analysis; and (2) Gold's opinion was speculative because it was predicated, at least

in part, on the existence of construction noise and dust at the property, yet there was no evidence in the record of noise and dust resulting from the construction. For the reasons that follow, we disagree with the commissioner that *Larobina* compels us to reverse the trial court's severance damages award, and, instead, we defer to the weight that the court, as the sole arbiter of credibility, afforded to Gold's opinion.

We first set forth our standard of review and relevant legal principles. "In a condemnation matter, it is the condemnee's burden to show loss or damages in excess of the condemnor's figures. . . . When only a portion of a party's property is taken, the landowner is entitled not only to compensation for the value of the property taken, but also to severance damages for the diminution in the value of the landowner's remaining property that the severance of a portion of the property causes." (Citations omitted; internal quotation marks omitted.) *Commissioner of Transportation* v. *Chudy*, 219 Conn. App. 202, 207–208, 295 A.3d 128 (2023). "[I]n highway easement cases . . . the landowner is entitled to compensation for severance damages that might result from prospective uses of the easement as well as the damages immediately flowing from the presently contemplated highway improvement project for which the land was taken." *Alemany* v. *Commissioner of Transportation*, 215 Conn. 437, 445, 576 A.2d 503 (1990). Severance damages may be awarded, for instance, "[i]f, on the date of the taking, a prospective purchaser had known that for several years the property would be covered with debris, that he would suffer discomfort, and that traffic in front of the [property] would increase, it is reasonable to believe that the price he would pay for the property would be affected." *Bowen* v. *Ives*, supra, 171 Conn. 238.

"[T]he purpose of offering in evidence the opinions of experts as to the value of land is to aid the trier to

arrive at his own conclusion, which is to be reached by weighing those opinions in the light of all the circumstances in evidence bearing upon value and his own general knowledge of the elements going to establish it. . . . In a condemnation case, the [court] is more than a trier of facts or an arbiter of differing opinions of witnesses. [The court] is charged . . . with the duty of making an independent determination of value and fair compensation in the light of all the circumstances, the evidence, [its] general knowledge and [its] viewing of the premises." (Citations omitted; internal quotation marks omitted.) Id., 239. "Ultimately, the determination of the value of the property [is] a matter of opinion and depend[s] on the considered judgment of the [trial court], taking into account the divergent opinions expressed by the witnesses and the claims advanced by the parties." (Internal quotation marks omitted.) *Dept. of Transportation* v. *Cheriha, LLC*, 155 Conn. App. 181, 191, 112 A.3d 825 (2015); see also *Commissioner of Transportation* v. *Rocky Mountain, LLC*, 277 Conn. 696, 728, 894 A.2d 259 (2006) (in condemnation action, " 'question of what is just compensation is an equitable one rather than a strictly legal or technical one' ").

Because "[v]aluation is a matter of fact to be determined by the [court's] independent judgment," the trial court "has the right to accept so much of the testimony of the experts and the recognized appraisal methods which they employed as [the court] finds applicable; [the court's] determination is reviewable only if [it] misapplies, overlooks, or gives a wrong or improper effect to any test or consideration which it was [its] duty to regard. . . . On appeal, this court must determine whether the decision of the trial court is clearly erroneous. . . . A finding of fact is clearly erroneous when there is no evidence in the record to support it . . . or when although there is evidence to support it,

the reviewing court on the entire evidence is left with the definite and firm conviction that a mistake has been committed." (Citations omitted; internal quotation marks omitted.) *Commissioner of Transportation* v. *Chudy*, supra, 219 Conn. App. 208.

Additionally, "[i]t is well settled that [t]he weight to be given the evidence and the credibility of the witnesses are within the sole province of the trial court. . . . The credibility and the weight of expert testimony is judged by the same standard, and the trial court is privileged to adopt whatever testimony [it] reasonably believes to be credible. . . . [T]he trial judge . . . is free to accept or reject, in whole or in part, the testimony offered by either party. . . . Because it is the trial court's function to weigh the evidence and determine credibility, we give great deference to its findings. . . . In reviewing factual findings, [w]e do not examine the record to determine whether the [court] could have reached a conclusion other than the one reached. . . . Instead, we make every reasonable presumption . . . in favor of the trial court's ruling." (Citation omitted; internal quotation marks omitted.) Id., 209; see also *Abrams* v. *PH Architects, LLC*, 183 Conn. App. 777, 800, 193 A.3d 1230 ("'[if] expert testimony conflicts, it becomes the function of the trier of fact to determine credibility' "), cert. denied, 330 Conn. 925, 194 A.3d 290 (2018).

In light of the foregoing, we turn to the commissioner's contention that *Larobina* compels us to reverse the court's reliance on Gold's opinion. In *Larobina*, the defendant appealed to this court from the trial court's reassessment of damages resulting from a partial taking by the commissioner. *Commissioner of Transportation* v. *Larobina*, supra, 92 Conn. App. 17. The trial court " 'for the most part' " agreed with the commissioner's expert appraiser that there were no severance damages

and expressly discredited the testimony of the defendant's expert appraiser, Glucksman, but nevertheless awarded $2500 of severance damages for the possibility that a future buyer may be wary that the commissioner retained the right to pave the partial taking area. Id., 21–22. On appeal, the defendant argued, inter alia, that the court's award of severance damages of just $2500 was clearly erroneous because the court improperly had discredited Glucksman's expert opinion with respect to severance damages. Id., 22, 25. After outlining the deference that this court affords to a trial court's credibility determination, this court rejected the defendant's claim, stating that the trial court's decision "suggest[ed] that the reason the court disregarded [Glucksman's] estimate was because it found it to be without factual support and also because it found Glucksman in general to be severely lacking in credibility. Glucksman's estimate of severance damages consisted of $67,200 in lost rents; the court explicitly found that lost rents had not been proven. Additionally, the court characterized Glucksman's testimony and report overall as inconsistent, inaccurate and speculative. . . . After reviewing Glucksman's report and his testimony, we see no reason not to defer to the court's assessment and rejection thereof." (Citation omitted.) Id., 25.

This court in *Larobina* provided several reasons why the trial court "understandably declined to adopt Glucksman's estimate" as to severance damages. Id., 25–27. Primarily, this court stated that "[t]he weight of an [expert appraiser's] opinion is materially affected by the substantiating factual data that is introduced into evidence. See 5 P. Nichols, Eminent Domain [J. Sackman ed., 3d Ed. Rev. 2004] § 23.09, p. 23-125. 'Some courts have stated that the opinion must be rejected in the absence of such supporting evidence, or in the event the supporting evidence is insufficient to justify the opinion.' Id., § 23.07 [1], pp. 22-72 through 22-74. 'An

opinion based on mere conjecture or guesswork has no probative value and is insufficient to sustain a [damages award].' Id., § 23.09, pp. 23-125 through 23-126; see also 27 [Am.] Jur. 2d 217, Eminent Domain § 591 (2004) ('[n]o weight may be accorded to an expert opinion which is totally conclusory in nature and which is unsupported by any discernible, factually based chain of underlying reasoning')." *Commissioner of Transportation* v. *Larobina*, supra, 92 Conn. App. 26. On the basis of these legal principles, this court held that the trial court reasonably afforded Glucksman's opinion little weight because he estimated that the defendant's rental income would sustain a 12 percent decrease; however, "[t]he portion of Glucksman's report prefacing, and purportedly establishing, the 12 percent decrease, consists of a generalized, qualitative narrative discussing the negative effects of pollution, noise and inconvenience caused by vehicular traffic, citing to two newspaper articles as authority. Glucksman conceded at trial, however, that he had no statistics or documentary evidence regarding the traffic volume . . . ." Id., 25–26. This court also highlighted other inconsistencies with Glucksman's estimate, including that he improperly used contrasting valuation methods to estimate the before and after value of the property, and that he erroneously utilized improper statistics regarding the property, such as overstating the gross living area by one third, underestimating the age of the building, and assigning a square foot value that exceeded his comparable ranges. Id., 26–27. In sum, this court concluded that the trial court's severance damages award was not clearly erroneous because, "[t]aken together, it is not difficult to understand why the court afforded [Glucksman's opinion] little weight." (Internal quotation marks omitted.) Id., 27.

Here, the commissioner contends that *Larobina* compels this court to *reverse* the trial court's credibility assessment of Gold's opinion because Gold's opinion

was arbitrary and speculative, just like Glucksman's opinion in *Larobina*. We are not persuaded. Contrary to the commissioner's argument, *Larobina* does not stand for the broad proposition, as the commissioner contends, that "Connecticut courts must reject an expert's severance damages calculation when the expert estimates a decrease in value by using an arbitrary percentage factor that is not supported by evidence and a quantitative analysis relating specifically to a condemnation's effect on the property." On the contrary, *Larobina* made clear that this court on appeal will not reweigh the credibility of experts. Id., 25. Indeed, this court repeatedly emphasized in *Larobina* that the weaknesses of the appraiser's opinion went to the *weight* that the trial court afforded to that opinion. Id., 25–27. Although this court highlighted the arbitrary and speculative nature of Glucksman's opinion as reasons to support the trial court's decision to give little to no weight to that opinion; see id., 27; it did not announce a rule that requires or permits us to reverse a court's factual finding whenever such a finding is based, at least in part, upon an expert's subjective analysis. As in *Larobina*, it was the function of the trial court in the present case, as the sole arbiter of credibility, to determine whether Gold's opinion was arbitrary and speculative, as the commissioner claimed, and to assign whatever weight it deemed appropriate to that opinion.

The commissioner has provided no authority, nor are we aware of any, in which this court has reversed a trial court's condemnation award that was made on the basis of an expert's opinion on the ground that such an opinion was the product of the expert's subjective views. Conversely, in line with *Larobina*, our appellate jurisprudence for at least six decades has consistently rejected this type of claim. See, e.g., *Melillo* v. *New Haven*, 249 Conn. 138, 151–54, 732 A.2d 133 (1999) (rejecting claim in condemnation action that trial court

improperly weighed valuation opinions of parties' expert appraisers because " '[i]t is the proper function of the court to give credence to one expert over the other' "); *Pandolphe's Auto Parts, Inc.* v. *Manchester*, 181 Conn. 217, 221–25, 435 A.2d 24 (1980) (rejecting claim that trial court improperly relied on opinion of expert as to value of condemned property because " 'the trial court has the right to accept so much of the testimony of the experts and the recognized appraisal methods which they employed as [the trial court] finds applicable' "); *Laurel, Inc.* v. *Commissioner of Transportation*, 180 Conn. 11, 36–46, 428 A.2d 789 (1980) (upholding trial court's award of severance damages amounting to lost profits in condemnation action and rejecting commissioner's claim that such profits were speculative and conjectural because trial court "may weigh the opinions of the appraisers, the claims of the parties in light of all the circumstances in evidence which bear on value, and his own general knowledge of the elements which pertain to value"); *Maykut* v. *Shugrue*, 171 Conn. 286, 288, 370 A.2d 923 (1976) (affirming trial court's decision to not award severance damages in condemnation action because court's independent judgment as to value of land is dependent on court's considered judgment, "taking into account the divergent opinions expressed by the witnesses and the claims advanced by the parties"); *Humphrey* v. *Argraves*, 145 Conn. 350, 354–55, 143 A.2d 432 (1958) (rejecting claim that trial court improperly discredited credit expert witness' testimony as to value of condemned property because " '[n]othing in our law is more elementary than that the trier is the final judge of the credibility of witnesses and of the weight to be accorded their testimony' "); *Commissioner of Transportation* v. *Chudy*, supra, 219 Conn. App. 210–11 (upholding trial court's award of severance damages because, although testimony of experts conflicted, "[i]t was within the exclusive province of the court, as the trier of fact, to make those

credibility determinations, which we may not second-guess"); *Cavanagh* v. *Richichi*, 212 Conn. App. 402, 424–25, 275 A.3d 701 (2022) (rejecting claim that trial court improperly credited arbitrary opinion of expert witness with respect to amount of fair market rent because " 'trial court is privileged to adopt whatever testimony [it] reasonably believes to be credible' "); *Merrell* v. *Southington*, 42 Conn. App. 292, 297–98, 679 A.2d 404 (rejecting claim that trial court improperly determined value of condemned property on ground that it failed to give appropriate weight to testimony of expert appraiser because "trial court limited the value that it placed on the plaintiff's appraiser's testimony because it determined that the testimony was not credible"), cert. denied, 239 Conn. 918, 682 A.2d 1003 (1996); *Sorenson Transportation Co.* v. *State*, 3 Conn. App. 329, 333, 488 A.2d 458 (rejecting claim that trial court improperly relied on opinion of expert as to value of condemned property because "trial court was presented with conflicting evidence and it is apparent that credibility was a crucial factor" and "[w]e cannot retry the facts or pass upon the credibility of witnesses"), cert. denied, 196 Conn. 801, 491 A.2d 1105 (1985).

If the commissioner believed that Gold's opinion was too arbitrary or speculative to support an award of severance damages, the proper method to preclude the court's reliance on that opinion was to challenge the admissibility of Gold's opinion on those grounds by way of a pretrial motion in limine or an objection at the evidentiary hearing. The issue of whether an expert's opinion as to valuation is too speculative or arbitrary to warrant consideration is often determined as a threshold evidentiary matter. See, e.g., *Kohl's Dept. Stores, Inc.* v. *Rocky Hill*, 219 Conn. App. 464, 480, 486, 295 A.3d 470 (2023) (analyzing whether court properly admitted into evidence valuation opinion over objection that opinion was speculative and depended on flawed

data); *Banco Popular North America* v. *du'Glace*, *LLC*, 146 Conn. App. 651, 657–60, 79 A.3d 123 (2013) (analyzing whether court properly denied motion in limine to preclude expert valuation opinion on ground that opinion was unreliable); see also Conn. Code Evid. §§ 7-2 and 7-4. The commissioner, however, never challenged the admissibility of Gold's opinion. Prior to the evidentiary hearing, the commissioner did not file a motion in limine challenging the admissibility of Gold's opinion. Moreover, at that evidentiary hearing, the commissioner's counsel stipulated that Gold was an expert appraiser and did not object to the introduction of Gold's report into evidence or to Gold's testimony with respect to severance damages.

Accordingly, Gold's opinion was admitted into evidence without objection, and the court was free to use, or not use, that opinion as it saw fit to reach its independent finding regarding a reasonable valuation of severance damages. See *Banco Popular North America* v. *du'Glace*, *LLC*, supra, 146 Conn. App. 659–60 ("[t]he court was free to accept or reject in whole or in part the evidence before it regarding valuation"). Here, the court carefully considered the commissioner's contention that Gold's opinion was arbitrary or speculative. At the evidentiary hearing, the court posed its own questions to the expert valuation witnesses, including inquiries as to how Gold arrived at his 10 percent estimate. Gold was subject to adept cross-examination by the commissioner's counsel, who thoroughly questioned Gold as to the factual basis for his decision that noise and dust affected the market rental value of the property and the methodology, if any, he used to arrive at his 10 percent estimate. The commissioner presented the testimony of Kerr, who offered his own contrasting opinion on severance damages and characterized Gold's opinion as arbitrary. In his posttrial written submissions, the commissioner, relying on *Larobina*, advanced

well articulated arguments as to why the court should reject Gold's opinion. Nevertheless, the court, as the sole arbiter of credibility, expressly rejected the commissioner's arguments that Gold's opinion was arbitrary and speculative, credited Gold's opinion, and determined the amount of severance damages. The commissioner on appeal disagrees with the court's credibility assessment, but that is not a basis on which we can reverse the court's judgment. In sum, we conclude that the court's severance damages award was not clearly erroneous.

The judgment is affirmed.

In this opinion the other judges concurred.

STATE OF CONNECTICUT *v.* PHILLIP RUSSO (AC 45314)

Prescott, Elgo and Seeley, Js.

Syllabus

Pursuant to statute (§ 53a-71 (a) (8)), a person is guilty of sexual assault in the second degree when that person engages in sexual intercourse with another person and, inter alia, the actor is a school employee and the other person is a student enrolled in a school in which the actor works.

The defendant, who had been convicted, following a conditional plea of nolo contendere, of the crime of sexual assault in the second degree, appealed to this court, claiming that the trial court improperly denied his motions to dismiss. The defendant was employed as an assistant soccer coach for a girls soccer team at a local public high school. The victim attended the same high school and was a player on the girls soccer team. The victim, then seventeen years old, and the defendant began a sexual relationship in November, 2018, after the end of the soccer season, and the relationship continued through August, 2019. From the start of their relationship until the end of the school year, the victim remained a student at the high school but was no longer a member of the soccer team as a result of the season ending. The high school principal stated to the police that the defendant had resigned his position as a coach of the girls soccer team following their meeting in May, 2019, due to his travel associated with his employment as a pharmaceutical representative and his recent move. The defendant was arrested and charged, by way of a substitute information, with sexual assault in the

second degree in violation of § 53a-71 (a) (8). The defendant filed two motions to dismiss the substitute information, both of which the court denied. Thereafter, the defendant entered a plea of nolo contendere that was conditioned on his right to appeal the denials of his motions to dismiss. On the defendant's appeal to this court, *held*:

1. The trial court properly denied the defendant's first motion to dismiss that claimed that the facts set forth in the arrest warrant affidavit were insufficient to support a finding of probable cause that the defendant committed the crime of sexual assault in the second degree in violation of § 53a-71 (a) (8) because he was not a school employee under the statutory definition: contrary to the defendant's claim, the contents of the arrest warrant affidavit and the additional information contained in the state's proffer in response to the first motion to dismiss, viewed in the light most favorable to the state, set forth sufficient facts to show probable cause that would warrant a person of reasonable caution to believe that the defendant was a school employee, as defined by statute (§ 53a-65 (13)), at the time that he had engaged in sexual intercourse with the victim in violation of § 53a-71 (a) (8), including the defendant's attendance at a January, 2019 soccer banquet, his participation at fitness drills for the high school girls soccer team in the spring of 2019, his discussions with the head coach of the high school girls soccer team in the spring of 2019, his attendance at a meeting in May, 2019, with the high school administration regarding his alleged relationship with the victim, and his oral resignation of his position as an assistant coach for the soccer team following that meeting; moreover, the question of whether the defendant was an employee was a factual question, and therefore a key inquiry for the jury to consider, as well as an element of the offense charged.

2. The defendant could not prevail on his claim that the trial court improperly denied his second motion to dismiss that alleged that § 53a-71 (a) (8) is unconstitutionally overbroad:

   a. This court was not persuaded by the state's argument that, because the trial court conducted a vagueness analysis in its memorandum of decision denying the defendant's second motion to dismiss, rather than addressing the overbreadth argument, and the defendant failed to make any effort to bring this discrepancy to the trial court's attention, the defendant's overbreadth claim was unreviewable: because the defendant appealed pursuant to the statute (§ 54-94a) governing appeals from conditional pleas of nolo contendere, this court was limited to a determination of whether it was proper for the trial court to have denied the motions to dismiss, which was the very claim raised by the defendant in his appeal, and in making his claim concerning the denial of his second motion to dismiss, he argued that the denial of his motion was improper because § 53a-71 (a) (8) was unconstitutionally overbroad, the same argument he raised in his second motion to dismiss, at the hearing on that motion and on his conditional plea form, bringing the claim within

the parameters of § 54-94a and, thus, making it reviewable; moreover, although the trial court failed to address the overbreadth claim in its memorandum of decision, this court's review of the overbreadth claim was appropriate under the circumstances of this case in light of the level of review this court affords to such claims and to decisions denying motions to dismiss, including that the overbreadth claim was not a new claim raised for the first time on appeal, the issue was fully briefed and argued before the trial court, both parties briefed the issue in their appellate briefs, the state conceded at the hearing before the trial court that it had no objection to the court making a finding that its rulings denying the motions to dismiss were dispositive of the case, and the state suffered no prejudice in light of this court's conclusion that the defendant could not prevail on the merits of the claim.

b. The defendant failed to meet his burden of demonstrating that the constitutional rights of individuals are substantially burdened in relation to the plainly legitimate sweep of § 53a-71 (a) (8), as the state has a legitimate interest in promoting a safe and healthy school environment for elementary and secondary school students by prohibiting teachers or other school employees from using a position of authority to pursue a sexual relationship with students enrolled in the educational system in which they are employed and misusing their access to students as a conduit for sexual activity; moreover, although the defendant provided a list of hypothetical scenarios in which § 53a-71 (a) (8), through its incorporation of the definition of a school employee in § 53a-65 (13), criminalizes conduct that he alleged would not advance the legitimate goal of protecting students, the defendant failed to demonstrate that § 53a-71 (a) (8) encompasses a substantial amount of constitutionally protected conduct, as the mere fact that one can conceive of some impermissible applications of a statute is not sufficient to render it susceptible to an overbreadth challenge; furthermore, there must be a realistic danger that the statute itself will significantly compromise recognized first amendment protections of parties not before the court for it to be facially challenged on overbreadth grounds, the defendant did not make any showing that there are real individuals who fall into the hypothetical situations set forth in his second motion to dismiss or specify whose relationships have been chilled by the allegedly overbroad statute, the record contained no information or data concerning the percentage of adult students who are affected by the statute in relation to its legitimate sweep of protecting school students, the vast majority of whom likely are not adults, and the defendant's speculation about the impact of the statute on those hypothetical relationships was insufficient to demonstrate its overbreadth.

Argued April 18—officially released October 3, 2023

Procedural History

Substitute information charging the defendant with sexual assault in the second degree, brought to the

Superior Court in the judicial district of Middlesex, where the court, *Dewey*, *J.*, denied the defendant's motions to dismiss; thereafter, the defendant was presented to the court, *Dewey*, *J.*, on a conditional plea of nolo contendere; judgment of guilty, from which the defendant appealed to this court. *Affirmed.*

Jeffrey C. Kestenband, for the appellant (defendant).

Timothy F. Costello, supervisory assistant state's attorney, with whom, on the brief, were *Michael A. Gailor*, state's attorney, *Jeffrey Doskos*, former supervisory assistant state's attorney, and *Kevin M. Shay*, former senior assistant state's attorney, for the appellee (state).

Opinion

SEELEY, J. Following a conditional plea of nolo contendere, made pursuant to General Statutes § 54-94a,[1] the defendant, Phillip Russo, appeals from the judgment of conviction of sexual assault in the second degree in violation of General Statutes § 53a-71 (a) (8).[2] The defendant entered his conditional plea following the court's denials of his two motions to dismiss, the first

[1] General Statutes § 54-94a provides: "When a defendant, prior to the commencement of trial, enters a plea of nolo contendere conditional on the right to take an appeal from the court's denial of the defendant's motion to suppress or motion to dismiss, the defendant after the imposition of sentence may file an appeal within the time prescribed by law provided a trial court has determined that a ruling on such motion to suppress or motion to dismiss would be dispositive of the case. The issue to be considered in such an appeal shall be limited to whether it was proper for the court to have denied the motion to suppress or the motion to dismiss. A plea of nolo contendere by a defendant under this section shall not constitute a waiver by the defendant of nonjurisdictional defects in the criminal prosecution."

[2] General Statutes § 53a-71 (a) provides in relevant part: "A person is guilty of sexual assault in the second degree when such person engages in sexual intercourse with another person and . . . (8) the actor is a school employee and such other person is a student enrolled in a school in which the actor works or a school under the jurisdiction of the local or regional board of education which employs the actor . . . ."

of which alleged that the facts set forth in the arrest warrant affidavit were insufficient to sustain a charge alleging a violation of § 53a-71 (a) (8), and the second of which claimed that § 53a-71 (a) (8) is unconstitutionally overbroad. In connection with his first motion to dismiss, the defendant specifically argued that the arrest warrant lacked probable cause that he committed a crime because the allegations in the arrest warrant affidavit did not establish that he was a "school employee" for purposes of § 53a-71 (a) (8). As to his second motion to dismiss, the defendant contended that the statute impermissibly criminalizes a range of consensual romantic relationships that the state has no legitimate basis to regulate. We are not persuaded by the defendant's claims and, therefore, affirm the judgment of conviction.

On December 2, 2021, the state recited the following facts prior to the trial court's acceptance of the defendant's plea of nolo contendere. The defendant was employed as an assistant soccer coach for a girls soccer team at a local public high school. The victim[3] attended this high school and was a player on the girls soccer team. In November, 2018, the victim, then seventeen years old, babysat the defendant's children. After the forty year old defendant returned home, he watched television with the victim, and the two eventually engaged in sexual intercourse. The defendant and the victim continued their sexual relationship for the remainder of the school year. During this period, the victim remained a student at the high school but was no longer a member of the soccer team as a result of the season ending.

After a police investigation, the defendant was arrested on October 23, 2019, and charged with sexual assault

[3] In accordance with our policy of protecting the privacy interests of the victims of sexual assault, we decline to identify the victim or others through whom the victim's identity may be ascertained. See General Statutes § 54-86e.

in the second degree in violation of § 53a-71 (a) (9) (A).[4] The state subsequently charged the defendant by substitute information with sexual assault in the second degree in violation of § 53a-71 (a) (8). The defendant subsequently filed two motions to dismiss the information, both of which the court denied. Thereafter, the defendant entered a plea of nolo contendere that was conditioned on his right to appeal the denials of his motions to dismiss. On February 10, 2022, the court sentenced the defendant to a term of incarceration of four years, execution suspended after nine months, with a five year period of probation.[5] Additional facts will be set forth as necessary.

I

The defendant's first claim challenges the court's denial of his first motion to dismiss, in which he alleged that the facts set forth in the arrest warrant affidavit were insufficient to support a finding of probable cause that the defendant committed the crime of sexual assault in the second degree in violation of § 53a-71 (a) (8). Specifically, he argues that the arrest warrant affidavit failed to establish probable cause that he was an employee of the high school, as that term is defined by General Statutes § 53a-65 (13),[6] at the time he

[4] General Statutes § 53a-71 (a) provides in relevant part: "A person is guilty of sexual assault in the second degree when such person engages in sexual intercourse with another person and . . . (9) the actor is a coach in an athletic activity or a person who provides intensive, ongoing instruction and such other person is a recipient of coaching or instruction from the actor and (A) is a secondary school student and receives such coaching or instruction in a secondary school setting . . . ."

[5] The court stayed execution of the defendant's sentence pending this appeal.

[6] General Statutes § 53a-65 (13) provides: " 'School employee' means: (A) A teacher, substitute teacher, school administrator, school superintendent, guidance counselor, school counselor, psychologist, social worker, nurse, physician, school paraprofessional or *coach employed by a local or regional board of education or a private elementary, middle or high school or working in a public or private elementary, middle or high school*; or (B) any other person who, in the performance of his or her duties, has regular

engaged in sexual intercourse with the victim and, therefore, that his conduct did not constitute a violation of § 53a-71 (a) (8). The state responds, inter alia, that the arrest warrant affidavit and the proffer to the court contain sufficient factual allegations to establish probable cause to prosecute the defendant for violating § 53a-71 (a) (8). We agree with the state.

The following procedural history and additional facts are necessary for the resolution of this claim. On October 22, 2019, the police prepared an application for an arrest warrant on the ground that the defendant had violated § 53a-71 (a) (9) (A). The affidavit attached to the arrest warrant (arrest warrant affidavit) contained the following allegations.[7] The defendant began the process of building an emotional connection with the victim when she was a sophomore and fifteen years old. He gave her advice regarding her relationship with her then boyfriend, as well as other matters. Their sexual relationship began in November, 2018, after the end of the soccer season, and continued through August, 2019. The high school principal stated to the police that the defendant had resigned his position as a coach of the high school girls soccer team following their meeting in May, 2019, due to his travel associated with his employment as a pharmaceutical representative and his

contact with students and who provides services to or on behalf of students enrolled in (i) a public elementary, middle or high school, pursuant to a contract with the local or regional board of education, or (ii) a private elementary, middle or high school, pursuant to a contract with the supervisory agent of such private school." (Emphasis added.)

[7] Our Supreme Court has explained that, "[i]n this state, the initial step to commence a prosecution, when an arrest is to be made by virtue of a warrant, is the presentation of an application for a warrant, which is accompanied by an affidavit, by a prosecutorial official to a judicial authority. If the judicial authority finds that the accompanying affidavit shows probable cause to believe that an offense has been committed, and that the person complained against committed it, the judicial authority may issue an arrest warrant. General Statutes § 54-2a." *State* v. *Crawford*, 202 Conn. 443, 449, 521 A.2d 1034 (1987).

recent move.[8] The defendant spoke with the affiant at the police department regarding his relationship with the victim and provided a verbal statement that was video and audio recorded, in which he stated "that he maintained his position as the assistant girls soccer coach at [the high school] from 2012 until 2019" and admitted to having a sexual relationship with the victim. The defendant also acknowledged that he knew the victim was seventeen years old at the time when their sexual relationship began. The court signed the warrant on October 22, 2019, after concluding that there was probable cause that the defendant had violated § 53-71 (a) (9) (A). The defendant was arrested the next day.[9]

On April 28, 2021, the state filed a substitute information charging the defendant with violating § 53a-71 (a) (8). On May 13, 2021, the defendant filed his first motion to dismiss pursuant to Practice Book § 41-8 (2).[10] Specifically, the defendant challenged the allegations contained in the affidavit attached to the arrest warrant, asserting that the allegations concerned "activity which does not violate . . . [§] 53a-71 (a) (8)." The defendant argued that the allegations in the affidavit established that his sexual relationship with the victim did not begin until the soccer season, and the victim's high school soccer career, had concluded. He further argued that, because the soccer season had ended and he no longer was coaching the soccer team during the period of the

[8] The record is inconsistent as to whether this meeting occurred in May or June of 2019.

[9] "An arrest warrant requires a finding of probable cause that an offense was committed and that the defendant committed the offense." *State* v. *Smith*, 344 Conn. 229, 256, 278 A.3d 481 (2022); see also *State* v. *Brown*, 98 Conn. App. 829, 833, 912 A.2d 525 (2006) (discussing probable cause), cert. denied, 281 Conn. 920, 918 A.2d 272 (2007).

[10] Practice Book § 41-8 provides in relevant part: "The following defenses or objections, if capable of determination without a trial of the general issue, shall, if made prior to trial, be raised by a motion to dismiss the information . . . (2) Defects in the information including failure to charge an offense . . . ."

sexual relationship with the victim, there were no facts to support an allegation that he was a school employee as defined by § 53a-65 (13).

On June 9, 2021, the state filed a response to the first motion to dismiss. It countered that "[t]he employment relationship of the defendant during this time frame is an essential element of the charge. In light of all the potential evidence that the state seeks to admit, this is not a defense that can be determined without a trial on this issue." Additionally, the state noted its intention to present evidence regarding the defendant's attendance at a January, 2019 soccer banquet, his participation at fitness drills for the high school girls soccer team in the spring of 2019, his discussions with the head coach of the high school girls soccer team in the spring of 2019, his attendance at a meeting in June, 2019, with the high school administration regarding his alleged relationship with the victim, and his oral resignation of his position as an assistant coach for the soccer team at that meeting.

On July 14, 2021, the court held a hearing on the defendant's motions to dismiss. Defense counsel noted that the prosecution initially began with the charge that the defendant had violated § 53a-71 (a) (9), but the state subsequently filed a substitute information alleging that he violated § 53a-71 (a) (8). Defense counsel then argued that the defendant's responsibilities as a coach concluded at the end of the soccer season, before his alleged relationship with the victim began. Specifically, defense counsel claimed that the defendant was paid about one week after the end of the season, and he then returned various equipment to the school. Defense counsel further stated that the defendant's primary employment was in pharmaceutical sales and not as a teacher in the school system. Defense counsel concluded by stating that "what's in the affidavit doesn't

support the offense that's being alleged under [§ 53a-71 (a) (8)]."

The prosecutor countered that, although the defendant disputed the contention that he was a school employee at the time of the sexual relationship with the victim, the resolution of that issue was to be made by the fact finder at the time of trial, rather than via a motion to dismiss filed pursuant to Practice Book § 41-8. Defense counsel responded that he was not claiming a lack of sufficient evidence but, rather, that the information itself was defective because the conduct alleged did not fall within the parameters of § 53a-71 (a) (8).

On September 29, 2021, the court, *Dewey, J.*, issued a memorandum of decision denying the defendant's first motion to dismiss. The court stated that "[t]he defendant in the present matter asserts that he was not an employee of [the high school] when the sexual relationship began because his employment terminated at the end of the soccer season." The court further described this as a "key inquiry" for the consideration of the jury. The court then discussed cases from other jurisdictions that addressed the time frame of employment for purposes of establishing liability pursuant to statutes similar to § 53a-71 (a) (8). Ultimately, the court denied the defendant's motion to dismiss, concluding: "The state will be required to establish the precise temporal scope of the defendant's employment status at the time when the relationship commenced. In short, the question of whether the defendant was an employee is a factual question but it is also an element of the offense charged."

On appeal, the defendant argues that § 53a-71 (a) (8) proscribes sexual intercourse between a person presently employed at a high school and a presently enrolled student, and the affidavit attached to the arrest warrant contained no facts to support the allegation that the

defendant remained an employee following the conclusion of the soccer season. The defendant further contends that the references in the affidavit to his "resignation" as a coach for the high school soccer team in May or June of 2019 merely served as his notice that he would not act in that capacity for the upcoming season.

With respect to the defendant's claim that the arrest warrant affidavit does not contain sufficient facts to sustain a charge of sexual assault in the second degree, the state counters in its appellate brief that the defendant, who had filed his first motion to dismiss pursuant to Practice Book § 41-8 (2), should have raised this claim pursuant to Practice Book § 41-8 (5) and General Statutes § 54-56.[11] As the state explains: "[W]hen deciding a motion to dismiss under Practice Book § 41-8 (2), a court reviews only the four corners of an information to determine whether it conforms to Practice Book requirements and provides adequate notice of a charge. A court does not decide whether the facts presented in an arrest warrant affidavit were adequate to make out a charge specified in a subsequent substitute information." The state further contends, in the alternative, that, "even if a court can review the adequacy of the state's potential proof under Practice Book § 41-8 (2), *or if this court treats the defendant's motion as one brought pursuant to Practice Book § 41-8 (5)* and . . . § 54-56, a trial court is not constrained to review only the facts alleged in an arrest warrant affidavit, absent concession that the facts alleged in the affidavit represent the entirety of the state's available proof [and thus] the trial court was obliged to hear the state's proffer

[11] General Statutes 54-56 provides: "All courts having jurisdiction of criminal cases shall at all times have jurisdiction and control over informations and criminal cases pending therein and may, at any time, upon motion by the defendant, dismiss any information and order such defendant discharged if, in the opinion of the court, there is not sufficient evidence or cause to justify the bringing or continuing of such information or the placing of the person accused therein on trial."

of its available evidence beyond the arrest warrant affidavit's allegations. Finally . . . the state's proffered proof, viewed in the light most favorable to the state, was sufficient to sustain a charge under . . . § 53a-71 (a) (8)." (Emphasis added.)

At oral argument before this court, the state specifically represented that it would not take issue if we were to assume that the defendant brought this motion to dismiss under Practice Book § 41-8 (5) and focus our analysis on whether the facts set forth in the arrest warrant affidavit and subsequent proffer before the court established probable cause. We will proceed with the state's suggested analytical pathway, bypassing the procedural questions regarding subdivisions (2) and (5) of Practice Book § 41-8, and limit our consideration to the merits of the defendant's claim, that is, whether the court improperly denied the motion to dismiss alleging insufficient evidence or cause to justify the bringing or continuing of the state's substitute information that charged him with violating § 53a-71 (a) (8). Ultimately, we conclude that the court properly denied the defendant's first motion to dismiss.

We begin with our standard of review. "A motion to dismiss . . . properly attacks the jurisdiction of the court, essentially asserting that the plaintiff cannot as a matter of law and fact state a cause of action that should be heard by the court. . . . [O]ur review of the trial court's ultimate legal conclusion and resulting [denial] of the motion to dismiss [is] de novo. . . . Factual findings underlying the court's decision, however, will not be disturbed unless they are clearly erroneous. . . . The applicable standard of review for the denial of a motion to dismiss, therefore, generally turns on whether the appellant seeks to challenge the legal conclusions of the trial court or its factual determinations." (Citations omitted; internal quotation marks omitted.) *State* v. *Bonner*, 290 Conn. 468, 477–78, 964

A.2d 73 (2009); see also *State* v. *A. B.*, 341 Conn. 47, 55, 266 A.3d 849 (2021); *State* v. *Samuel M.*, 323 Conn. 785, 794–95, 151 A.3d 815 (2016). In the present case, the court heard no testimony and was not required to make any credibility determinations or factual findings at the hearing on the motions to dismiss filed by the defendant, and therefore the clearly erroneous standard does not apply. See *State* v. *Pelella*, 327 Conn. 1, 9 n.9, 170 A.3d 647 (2017); *State* v. *Taupier*, 197 Conn. App. 784, 796–97, 234 A.3d 29, cert. denied, 335 Conn. 928, 235 A.3d 525 (2020), cert. denied, U.S. , 141 S. Ct. 1383, 209 L. Ed. 2d 126 (2021).

Additionally, we note the following relevant legal principles. Our Supreme Court has explained that, "[w]hen assessing whether the state has sufficient evidence to show probable cause to support continuing prosecution, the court must view the proffered proof, and draw reasonable inferences from that proof, in the light most favorable to the state. . . . The quantum of evidence necessary to establish probable cause . . . is less than the quantum necessary to establish proof beyond a reasonable doubt at trial . . . . In [ruling on the defendant's motion to dismiss], the court [must] determine whether the [state's] evidence would warrant a person of reasonable caution to believe that the [defendant had] committed the crime." (Citations omitted; internal quotation marks omitted.) *State* v. *Cyr*, 291 Conn. 49, 55–56, 967 A.2d 32 (2009); see also *State* v. *Greene*, 186 Conn. App. 534, 545–46, 200 A.3d 213 (2018) ("quantum of evidence necessary to establish probable cause exceeds mere suspicion, but is substantially less than that required for conviction" (internal quotation marks omitted)).

This court has explained that, "[w]here a motion to dismiss an information against an accused is made prior to trial, only probable cause sufficient to justify the

continued prosecution need be established. The probable cause determination is, simply, an analysis of probabilities. . . . The determination is not a technical one, but is informed by the factual and practical considerations of everyday life on which reasonable and prudent [persons], not legal technicians, act. . . . The existence of probable cause does not turn on whether the defendant could have been convicted on the same available evidence. . . . Furthermore, we have concluded that proof of probable cause requires less than proof by a preponderance of the evidence. . . . To establish probable cause, the state was not required to present evidence as to each of the elements of the offense in a form that would be admissible at a later trial. In *State* v. *Kinchen*, [243 Conn. 690, 702–703, 707 A.2d 1255 (1998)], our Supreme Court found information contained in a written police report sufficient to establish probable cause to justify the continued prosecution of a defendant." (Citation omitted; internal quotation marks omitted.) *State* v. *Howell*, 98 Conn. App. 369, 378–79, 908 A.2d 1145 (2006). Finally, we note that if the evidence supports a finding of probable cause, then the motion to dismiss must be denied, even if such evidence might also support a contrary conclusion. See *State* v. *Pelella*, supra, 327 Conn. 19; see also *State* v. *Taupier*, supra, 197 Conn. App. 796; see generally *State* v. *McMillan*, 51 Conn. App. 676, 686, 725 A.2d 342 (dismissal of information is drastic action), cert. denied, 248 Conn. 911, 732 A.2d 179 (1999).

The defendant focuses his challenge on whether the state established probable cause that he was a "[s]chool employee" as defined in § 53a-65 (13)[12] at the time he engaged in sexual intercourse with the victim. After reviewing the contents of the arrest warrant affidavit and the additional information set forth in the state's proffer, viewed in the light most favorable to the state,

[12] See footnote 6 of this opinion.

we conclude that probable cause existed that would warrant a person of reasonable caution to believe that the defendant was a "[s]chool employee" at the time that he had engaged in sexual intercourse with the victim in violation of § 53a-71 (a) (8).

As we previously have noted, the arrest warrant affidavit states that, according to both the defendant and the victim, the sexual relationship did not start until November, 2018, after the girls soccer season had ended. The principal of the high school told the police that the defendant had "resigned from his job" as the assistant coach of the soccer team following a meeting in May, 2019, during which he was confronted by school administrators about the nature of his relationship with the victim. During an interview with the police, the defendant stated that he "maintained his position as the assistant girls soccer coach at [the high school] from 2012 until 2019. The [defendant] said that he resigned from his assistant soccer coach job because his territory expanded for his work, he is a pharmaceutical representative."

In addition to the allegations contained in the arrest warrant affidavit, the state, in its proffer submitted in response to the defendant's motion to dismiss, alleged that, after the conclusion of the soccer season in 2018 and the start of his sexual relationship with the victim, the defendant had attended a banquet as part of his association with the high school soccer team in January, 2019, which was paid for by the town, and that during the spring of 2019, he had assisted at several fitness drills for current players and had several discussions with the head coach regarding the upcoming season. The proffer also alleged that on June 6, 2019, the defendant attended a meeting with the school's athletic director, the principal, and the acting superintendent regarding the allegations of his alleged relationship with the

victim and that he orally resigned his position at the end of that meeting.

The allegations in the arrest warrant affidavit and in the state's proffer submitted in response to the defendant's motion to dismiss, therefore, established probable cause to believe that the defendant was employed as a coach at the victim's high school until he resigned in the spring of 2019, which included the time period during which he had engaged in sexual intercourse with the victim.[13]

On appeal, the defendant relies on the decision of the Vermont Supreme Court in *State* v. *Graham*, 202 Vt. 43, 147 A.3d 639 (2016). In that case, the state appealed from the dismissal of charges against the defendant of three counts of sexual exploitation of a minor, which were based on the defendant's sexual acts with a student during the summer break. Id., 44; see Vt. Stat. Ann. tit. 13, § 3258 (a) (2014). The defendant was employed for three consecutive school years under a collective bargaining agreement. *State* v. *Graham*, supra, 44. The terms of employment established that she began working two days before school started, and her employment terminated one day after the last day of student instruction. Id. The defendant was charged with engaging in sexual acts with a student in the time

[13] We conclude that the state met the standard for probable cause, despite the evidence that the girls soccer season had ended before the defendant engaged in sexual intercourse with the victim. See, e.g., *State* v. *Kaster*, 264 Wis. 2d 751, 754–55, 763, 663 N.W.2d 390 (App.) (defendant coach for boys and girls swim teams at high school was charged with sexual assault stemming from contact with student four months after girls swimming season ended and one month after boys swimming season ended; state's evidence that, despite conclusion of his coaching duties, defendant had out of season contact with athletic director for planning, scheduling, budgeting, and evaluation purposes, and coordinated open swims and fundraising for upcoming season, was sufficient for jury to conclude that defendant provided services to school at time of criminal conduct), review denied, 265 Wis. 2d 418, 668 N.W.2d 558 (2003).

period after her contract for the 2013–2014 school year ended and before her contract for the 2014–2015 school year began. Id., 45. The trial court granted the defendant's motion to dismiss, reasoning that the plain meaning of the Vermont statute required "the actor to be in a position of power, authority, or supervision at the time of the sex act, and that [the] defendant was not employed by [the union] at the time of the charged sex acts." Id., 46.

In affirming the decision of the trial court, the Vermont Supreme Court rejected the state's argument that the question of whether the defendant was a school employee during the summer of 2014 was a factual question for the jury to decide. Id., 47. Specifically, it reasoned: "The evidence, viewed most favorably to the [s]tate, supports the trial court's findings that [the] defendant was a school-year employee who was not under contract with [the union] during the summer of 2014 and had no supervisory responsibilities for . . . students at that time. . . . Accordingly, the trial court did not err by not submitting to a jury the question of whether [the] defendant was an employee . . . during the summer of 2014." Id. The Vermont Supreme Court also determined that the statute at issue imposed criminal liability "only when the sex act occurred during the time period in which the actor was in a position of supervision and was undertaking the responsibilities that put the actor in a position of supervision." Id., 49.

The present case is distinguishable from *State* v. *Graham*, supra, 202 Vt. 43. First, the statute at issue in *Graham*, which requires supervision or authority at the time of the acts, is more stringent than § 53a-71 (a) (8), which merely requires that the defendant be employed by the school and the victim be a student, and they need not be at the same school. Moreover, in *Graham*, the trial court conducted an evidentiary hearing with

witnesses, at which evidence and testimony was presented establishing that the defendant was a contract employee with a defined period of employment and that the alleged sex acts occurred during a gap in her employment. Id., 44–46. In contrast, the present case lacks such clear delineation, as the hearing on the defendant's motion to dismiss was not an evidentiary hearing. Also, the trial court was limited to considering the arrest warrant affidavit and the evidentiary proffer from the state, which did not definitively establish, like in *Graham*, that the defendant in the present case was not an employee at the time of his sexual relationship with the victim. As noted, when the state's proffered proof is viewed in the light most favorable to the state, a person of reasonable caution could conclude that the defendant was employed at the time he engaged in the prohibited conduct with the victim. Under these circumstances, the court in the present case determined that the defendant's employment status at the time of the sexual relationship was, in part, a factual question and "a key inquiry for a jury to consider" and, in part, an element of the offense that the state would be required to establish. Accordingly, we conclude that the defendant's reliance on *Graham* is unavailing.

For these reasons, in the present case, we conclude that the court properly denied the defendant's first motion to dismiss the information.

II

The defendant next claims that the court improperly denied his second motion to dismiss, in which he alleged that § 53a-71 (a) (8) is unconstitutionally overbroad. Specifically, he argues that there are numerous scenarios in which § 53a-71 (a) (8), through its incorporation of the definition of a school employee as set forth in § 53a-65 (13), "criminalizes conduct that would not advance the legitimate goal of protecting students."

The state counters that this claim is unreviewable because the trial court did not address the defendant's overbreadth claim in its memorandum of decision. Additionally, the state asserts that, if the claim is reviewable, the defendant failed to demonstrate that § 53a-71 (a) (8) reaches a substantial amount of constitutionally protected conduct. We disagree with the state's reviewability argument but, on the merits, conclude that the defendant cannot prevail on his overbreadth claim.

The following additional undisputed facts and procedural history are relevant to our resolution of this claim. On May 13, 2021, the defendant filed his second motion to dismiss the information pursuant to the fifth and fourteenth amendments to the United States constitution on the ground that § 53a-71 (a) (8) is unconstitutionally overbroad.[14] Specifically, he contended that § 53a-71 (a) (8) threatens certain rights protected by the federal constitution and makes illegal constitutionally protected speech or conduct. In his second motion to dismiss, the defendant set forth various examples of constitutionally protected activities that would be prohibited and would subject the actors to a felony conviction and up to ten years of incarceration for each act.[15]

[14] The defendant also filed his second motion to dismiss pursuant to article first, §§ 8, 9 and 10, of the Connecticut constitution. On appeal, he has not argued or briefed any claim relating to the state constitution. Accordingly, we deem any such claim abandoned. See *State* v. *Stephenson*, 207 Conn. App. 154, 187 n.14, 263 A.3d 101 (2021), cert. denied, 342 Conn. 912, 272 A.3d 198 (2022); see generally *Ramos* v. *Vernon*, 254 Conn. 799, 815, 761 A.2d 705 (2000) (our Supreme Court repeatedly has apprised litigants that claim made under state constitution will not be considered and will be deemed abandoned in absence of separate briefing and analysis).

[15] The defendant identified the following as examples to support the overbreadth argument in his second motion to dismiss:

"1. A thirty-two year old kindergarten teacher who has a consensual relationship with a thirty-four year old (whom, unbeknownst to her) is a night student at a local high school, would be liable under [§] 53a-71 (a) (8);

"2. An eighteen year old administrative secretary at the local or region[al] board of education who has a consensual relationship with an eighteen year old (whom, unbeknownst to her) has recently moved into the school district and become a student at a local high school, would be liable under [§] 53a-71 (a) (8);

On July 1, 2021, the state filed its response to the defendant's second motion to dismiss. Therein, it argued that, pursuant to *State* v. *McKenzie-Adams*, 281 Conn. 486, 499, 915 A.2d 822, cert. denied, 552 U.S. 888, 128 S. Ct. 248, 169 L. Ed. 2d 148 (2007), overruled in part on other grounds by *State* v. *Elson*, 311 Conn. 726, 91 A.3d 862 (2014), "[a]ny fundamental right of sexual privacy 'does not protect sexual intimacy in the context of an inherently coercive relationship, such as the teacher-student relationship, wherein consent might not easily be refused.' " The state, therefore, requested that the trial court deny the defendant's second motion to dismiss alleging his overbreadth claim. The defendant filed a reply to the state's response on July 7, 2021.

At the July 14, 2021 hearing, the court heard argument on the defendant's second motion to dismiss concerning his overbreadth claim. At the outset, defense counsel specifically stated that he was making an overbreadth argument and not presenting a claim that the statute is unconstitutionally vague. He then referred to the various examples he had set forth in his motion, claiming that § 53a-71 (a) (8) criminalizes permissible behavior between consenting adults. In response, the state, again, referred to *State* v. *McKenzie-Adams*, supra, 281 Conn. 486. Specifically, the state acknowledged that the analysis in that case focused on a void for vagueness argument but emphasized the court's determination that

"3. A twenty-one year old graduate student employed part-time as a paraprofessional at an elementary school who has a consensual relationship with his fiancé, an eighteen year old senior enrolled in a local high school, would be liable under [§] 53a-71 (a) (8);

"4. An eighteen year old assistant basketball coach at one high school who has a consensual relationship with an eighteen year old senior at another high school within the same school district would be liable under [§] 53a-71 (a) (8);

"5. A nineteen year old substitute teacher at an elementary school who has a consensual relationship with an eighteen year old senior at the local high school would be liable under [§] 53a-71 (a) (8);

"6. A high school student, employed in the cafeteria at his own high school, who has . . . a consensual relationship with an eighteen year old classmate at the same high school would be liable under [§] 53a-71 (a) (8)."

"any fundamental right of sexual privacy does not protect sexual intimacy in the context of an inherently coercive relationship, such as the teacher-student relationship . . . ." It further argued that the defendant failed to demonstrate that § 53a-71 (a) (8) reaches a substantial amount of constitutionally protected conduct.

On September 29, 2021, the court issued a memorandum of decision denying the defendant's second motion to dismiss, in which it focused its decision on whether the statute is void for vagueness.[16] In doing so, the court failed to address the specific constitutional claim raised in the defendant's second motion to dismiss, namely, his overbreadth claim. Despite this, the defendant did not take any steps to prompt the court to reconsider or correct its decision.

[16] "A statute . . . [that] forbids or requires conduct in terms so vague that persons of common intelligence must necessarily guess at its meaning and differ as to its application violates the first essential of due process. . . . Laws must give a person of ordinary intelligence a reasonable opportunity to know what is prohibited so that he may act accordingly. . . . A statute is not void for vagueness unless it clearly and unequivocally is unconstitutional, making every presumption in favor of its validity. . . . To demonstrate that [a statute] is unconstitutionally vague as applied to [him], the [defendant] therefore must . . . demonstrate beyond a reasonable doubt that [he] had inadequate notice of what was prohibited or that [he was] the victim of arbitrary and discriminatory enforcement. . . . [T]he void for vagueness doctrine embodies two central precepts: the right to fair warning of the effect of a governing statute . . . and the guarantee against standardless law enforcement. . . . If the meaning of a statute can be fairly ascertained a statute will not be void for vagueness since [m]any statutes will have some inherent vagueness, for [i]n most English words and phrases there lurk uncertainties. . . . References to judicial opinions involving the statute, the common law, legal dictionaries, or treatises may be necessary to ascertain a statute's meaning to determine if it gives fair warning. . . . Thus, even [a] facially vague law may . . . comport with due process if prior judicial decisions have provided the necessary fair warning and ascertainable enforcement standards." (Internal quotation marks omitted.) *State* v. *Ares*, 345 Conn. 290, 303–304, 284 A.3d 967 (2022); see also *State* v. *Charles L.*, 217 Conn. App. 380, 395–96, 288 A.3d 664, cert. denied, 346 Conn. 920, 291 A.3d 607 (2023).

On December 2, 2021, pursuant to § 54-94a, the defendant entered a plea of nolo contendere to the charge of sexual assault in the second degree in violation of § 53a-71 (a) (8), reserving the right to appeal from the denials of his motions to dismiss.[17] During that proceeding, the court found that its decisions denying the motions to dismiss were dispositive of the case.

A

We first address the state's reviewability argument. The state contends that, because the trial court did not address the defendant's overbreadth argument in its memorandum of decision denying the defendant's second motion to dismiss but, instead, conducted a vagueness analysis, coupled with the defendant's failure to make any effort to bring this discrepancy to the attention of the trial court, we should not review this claim.[18] Specifically, the state argues that, "absent the

[17] At the plea hearing, the following colloquy occurred between the court and the defendant:

"The Court: Now, in this case you're pleading what is known as nolo contendere. Although you're pleading guilty you don't admit some or all of the factual claims or you don't acknowledge that the state has the legal authority to prosecute you. Do you understand that?

"The Defendant: Yes.

"The Court: So, your counsel will be taking an appeal. If you're successful in the appeal, the charges must be dismissed. If you're not successful, you are subject to the terms of this plea agreement. Do you understand that?

"The Defendant: Yes.

"The Court: Once I accept your plea, you can't withdraw it except for good reason and with court permission. Do you understand that?

"The Defendant: Yes."

[18] We note "that [o]ur case law and rules of practice generally limit [an appellate] court's review to issues that are distinctly raised at trial. . . . [O]nly in [the] most exceptional circumstances can and will this court consider a claim, constitutional or otherwise, that has not been raised *and decided* in the trial court. . . . The reason for the rule is obvious: to permit a party to raise a claim on appeal that has not been raised at trial—after it is too late for the trial court or the opposing party to address the claim—would encourage trial by ambuscade, which is unfair to both the trial court and the opposing party. . . . [T]he determination of whether a claim has been properly preserved will depend on a careful review of the record to ascertain whether the claim on appeal was articulated below with sufficient clarity to place the trial court [and the opposing party] on reasonable notice

defendant compelling a decision on his overbreadth claim prior to asking the court to accept his conditional nolo plea, the trial court cannot be said to have determined, in accordance with . . . § 54-94a, 'that a ruling on such . . . motion to dismiss would be dispositive of the case' because there is no indication that the court discerned the issue in rendering its judgment."[19] In other

of that very same claim." (Citations omitted; emphasis added; internal quotation marks omitted.) *Budlong & Budlong, LLC* v. *Zakko*, 213 Conn. App. 697, 714–15, 278 A.3d 1122 (2022). Notably, however, the state does not rely on this general rule in arguing that this court should not review the defendant's claim. Instead, the state's argument concerning reviewability centers on the issue of whether the defendant's claim falls within the parameters of § 54-94a. Our analysis, therefore, relates to the argument raised by the state on appeal. We note, however, that, for the reasons set forth in this opinion, the fairness and notice issues underlying this general rule are not present in this case.

[19] At the December 2, 2021 proceeding before the court at which the defendant entered his plea of nolo contendere, the state indicated to the court that it had "no objection to the court making a finding that [its rulings denying both motions to dismiss] would be dispositive of the . . . case." In light of that concession, the state cannot now assert on appeal that the trial court could not be said to have determined that its ruling on the second motion to dismiss would be dispositive of the case. In making that assertion, the state attempts to parse the court's determination that its ruling is dispositive of the case with respect to particular issues, namely, the overbreadth one. The court in the present case, however, did not make an issue-specific ruling; it merely determined, as required by § 54-94a, that its rulings denying both motions to dismiss were dispositive of the case. For that reason, we conclude that the state's reliance on *State* v. *Paradis*, 91 Conn. App. 595, 881 A.2d 530 (2005), is misplaced.

In *Paradis*, this court had remanded the case to the trial court for a determination of whether its ruling denying the defendant's motion to suppress was dispositive of the case. Id., 600. The trial court subsequently determined that its ruling denying the motion to suppress was dispositive of the case, subject to an articulation it provided, in which it specifically stated that several issues raised by the defendant were not dispositive and that the sole dispositive issue related to the search of a garage. Id., 600–601. Under those circumstances, this court limited its review on appeal to the single dispositive issue found by the trial court. Id., 603. In contrast, in the present case, the trial court determined that its *ruling* denying the second motion to dismiss was dispositive. Moreover, the plea form contains a notation that the plea was conditioned on the defendant's appeal from the ruling on his motion to dismiss based on "overbreadth," and the court signed the form just below that notation, indicating that its ruling on the motion

words, the state argues that the claim raised on appeal by the defendant does not fall within the parameters of § 54-94a. The state cites *State* v. *Revelo*, 256 Conn. 494, 503, 775 A.2d 260, cert. denied, 534 U.S. 1052, 122 S. Ct. 639, 151 L. Ed. 2d 558 (2001), for the proposition that, "[i]n the absence of a showing of good cause, an appellate court should decline to review an issue that has not been raised in accordance with the provisions of § 54-94a." (Internal quotation marks omitted.) We are not persuaded by the state's argument.

A review of § 54-94a and the legal principles germane to the state's reviewability argument is appropriate. We start with the language of § 54-94a, which provides: "When a defendant, prior to the commencement of trial, enters a plea of nolo contendere conditional on the right to take an appeal from the court's denial of the defendant's motion to suppress or motion to dismiss, the defendant after the imposition of sentence may file an appeal within the time prescribed by law provided a trial court has determined that a ruling on such motion to suppress or motion to dismiss would be dispositive of the case. The issue to be considered in such an appeal shall be limited to whether it was proper for the court to have denied the motion to suppress or the motion to dismiss. A plea of nolo contendere by a defendant under this section shall not constitute a waiver by the defendant of nonjurisdictional defects in the criminal prosecution."

Section 54-94a permits a defendant to enter a conditional plea of nolo contendere[20] while preserving the

to dismiss would be dispositive of the case. See *State* v. *Munoz*, 104 Conn. App. 85, 92–93, 932 A.2d 443 (2007) (state, which stipulated at trial that trial court's ruling on motion to suppress was dispositive of case, was estopped from asserting otherwise or that motion to suppress did not fit within parameters of § 54-94a). Accordingly, the state's claim is unavailing.

[20] "A nolo contendere plea has the same effect as a guilty plea, but a nolo contendere plea cannot be used against the defendant as an admission in a subsequent criminal or civil case." (Internal quotation marks omitted.) *State* v. *Dayton*, 176 Conn. App. 858, 869 n.12, 171 A.3d 482 (2017); see also *State* v. *Madera*, 198 Conn. 92, 97 n.5, 503 A.2d 136 (1985).

right to appeal in certain specified circumstances, namely, the denial of a motion to dismiss or a motion to suppress that is dispositive of the case. See, e.g., *State* v. *Turner*, 267 Conn. 414, 424–25, 838 A.2d 947, cert. denied, 543 U.S. 809, 125 S. Ct. 36, 160 L. Ed. 2d 12 (2004); *State* v. *Munoz*, 104 Conn. App. 85, 90, 932 A.2d 443 (2007). "In enacting § 54-94a, the legislature created a new, expedited route to the appellate courts but it did not create a new jurisdictional doorway into those courts. Section 54-94a is intended to promote judicial economy by allowing the parties to litigate a suppression or dismissal issue fully in the trial court, and thereafter allowing the defendant to obtain review of an adverse ruling without the parties' or the court's expending additional resources." (Internal quotation marks omitted.) *State* v. *Paradis*, 91 Conn. App. 595, 602, 881 A.2d 530 (2005). We emphasize, however, that this statute neither creates nor curtails appellate subject matter jurisdiction; rather, it abrogates the waiver of constitutional rights that is implicit in a guilty or nolo contendere plea in the context of a denial of a motion to dismiss or a motion to suppress when the ruling on such a motion is dispositive of the case. See *State* v. *Joseph*, 161 Conn. App. 850, 857, 129 A.3d 183 (2015), cert. denied, 320 Conn. 923, 133 A.3d 878 (2016); see also *State* v. *Revelo*, supra, 256 Conn. 501 n.14. "The appellate courts in this state consistently have required that § 54-94a be interpreted strictly. . . . Our Supreme Court has refused to expand this statutory right to plead conditionally and appeal beyond the issues explicitly enumerated in § 54-94a." (Citation omitted; internal quotation marks omitted.) *State* v. *Joseph*, supra, 857.[21]

[21] The cases cited by the state in its appellate brief in support of its argument that the defendant's claim on appeal is not reviewable are inapposite, as they address attempts by a defendant to challenge the denials of motions other than those of suppression and dismissal. See, e.g., *State* v. *Kelley*, 206 Conn. 323, 333–36, 537 A.2d 483 (1988) (Supreme Court declined to review defendant's claim regarding validity of transfer to regular criminal docket from juvenile docket following conditional plea of nolo contendere); *State* v. *Greene*, 81 Conn. App. 492, 501–502, 839 A.2d 1284 (Appellate Court

In the present case, it is undisputed that the defendant entered a nolo contendere plea conditioned, in part, on the right to appeal the denial of his second motion to dismiss, which is one of the enumerated motions set forth in § 54-94a. As required by § 54-94a, the trial court also determined that its decision denying that motion was dispositive of the case. The defendant clearly raised his overbreadth argument in his second motion to dismiss and at the hearing on that motion. The trial court denied that motion, albeit on a different ground, and it determined that its decision was dispositive of the case. On his plea form, the defendant indicated that he was entering a plea of nolo contendere conditioned on his right to appeal pursuant to § 54-94a. In the space reserved for naming the specific motions that were denied by the trial court and on which the defendant based his conditional plea, the defendant specifically noted: "motions to dismiss based on warrant affidavit [and] overbreadth dated May 13, 2021." Below the defendant's notation, the form states: "A trial court determined that a ruling on the above motions to suppress or motion[s] to dismiss would be dispositive of the case . . . ." That is followed by the signature of the trial judge, who checked the "yes" box to that statement.

The defendant has appealed pursuant to § 54-94a. In such an appeal, this court is limited to a determination of whether it was proper for the court to have denied the motions to dismiss, which is the very claim raised by the defendant in this appeal. In making that claim concerning the denial of his second motion to dismiss, the defendant argues that the denial of his motion was improper because § 53a-71 (a) (8) is unconstitutionally

declined to review defendant's claim regarding denial of motion for disclosure because it was not within ambit of § 54-94a), cert. denied, 268 Conn. 923, 848 A.2d 472 (2004); see generally *State* v. *Madera*, 198 Conn. 92, 98–99, 503 A.2d 136 (1985).

overbroad, which is the same argument he raised in his second motion to dismiss, at the hearing on that motion and on his conditional plea form. Under these circumstances, we conclude that the defendant's claim in this appeal falls within the parameters of § 54-94a.

Having determined that the defendant's overbreadth claim on appeal falls within the parameters of § 54-94a and is, thus, reviewable, we also conclude that our review of the defendant's overbreadth claim, despite the court's failure to address the claim in its memorandum of decision denying the motion to dismiss, is appropriate under the circumstances of this case in light of the level of review we afford to such claims and to decisions denying motions to dismiss. Specifically, a claim challenging the constitutionality of a statute "presents a question of law over which our review is plenary." (Internal quotation marks omitted.) *Your Mansion Real Estate, LLC* v. *RCN Capital Funding, LLC*, 206 Conn. App. 316, 331, 261 A.3d 110, cert. denied, 339 Conn. 908, 260 A.3d 1227 (2021). Moreover, as we stated previously in this opinion, "[o]ur review of the trial court's ultimate legal conclusion and resulting [denial] of the motion to dismiss will be de novo." (Internal quotation marks omitted.) *State* v. *Bonner*, supra, 290 Conn. 478. Accordingly, because the issue on appeal presents a pure question of law, "the legal analysis undertaken by the trial court is not essential to this court's consideration of the [issue] on appeal." (Internal quotation marks omitted.) *State* v. *Crespo*, 145 Conn. App. 547, 562 n.7, 76 A.3d 664 (2013), aff'd, 317 Conn. 1, 115 A.3d 447 (2015). Moreover, it also bears repeating that the defendant's overbreadth claim is not a new issue raised on appeal but, rather, was fully briefed and argued before the trial court, both parties have briefed the issue in their appellate briefs to this court, and the state conceded at the hearing before the trial court that it had no objection to the court making a finding that

its rulings denying the motions to dismiss would be dispositive of the case. See footnote 22 of this opinion. As a result, this is not a situation in which it would be unfair to the state or the court for this court to review the defendant's claim that § 53a-71 (a) (8) is unconstitutionally overbroad. See *Imperial Casualty & Indemnity Co.* v. *State*, 246 Conn. 313, 320–23, 714 A.2d 1230 (1998). Moreover, the state also has suffered no prejudice in the circumstances of this case in light of our conclusion that the defendant cannot prevail on the merits of his overbreadth claim. See *Blumberg Associates Worldwide, Inc.* v. *Brown & Brown of Connecticut, Inc.*, 311 Conn. 123, 158 n.28, 84 A.3d 840 (2014) ("[r]eviewing an unpreserved claim when the party that raised the claim cannot prevail is appropriate because it cannot prejudice the opposing party and such review presumably would provide the party who failed to properly preserve the claim with a sense of finality that the party would not have if the court declined to review the claim"). We, therefore, proceed to a review of the merits of the defendant's claim.[22]

B

In claiming that § 53a-71 (a) (8) is unconstitutionally overbroad, the defendant argues that there are numerous scenarios in which § 53a-71 (a) (8), through its incorporation of the definition of a school employee in § 53a-65 (13), "criminalizes conduct that would not advance the legitimate goal of protecting students." The defendant further contends that, by prohibiting a wide range of normal, widely accepted romantic relationships that the government lacks a legitimate interest in regulating, the statute criminalizes conduct that is

[22] In light of our determination that the defendant's overbreadth claim is reviewable, we need not address the defendant's argument, in the alternative, that he is entitled to have his claim reviewed pursuant to *State* v. *Golding*, 213 Conn. 233, 239–40, 567 A.2d 823 (1989), as modified by *In re Yasiel R.*, 317 Conn. 773, 780–81, 120 A.3d 1188 (2015).

constitutionally protected. The state counters that the defendant has failed to demonstrate that this statute encompasses a substantial amount of constitutionally protected conduct. We agree with the state.

As an initial matter, we note that "[l]egislative enactments carry with them a strong presumption of constitutionality. . . . A party challenging the constitutionality of a validly enacted statute bears the heavy burden of proving the statute unconstitutional beyond a reasonable doubt. . . . In the absence of weighty countervailing circumstances, it is improvident for the court to invalidate a statute on its face." (Internal quotation marks omitted.) *State* v. *Bennett-Gibson*, 84 Conn. App. 48, 56, 851 A.2d 1214, cert. denied, 271 Conn. 916, 859 A.2d 570 (2004); see also *State* v. *Billings*, 217 Conn. App. 1, 26, 287 A.3d 146 (2022), cert. denied, 346 Conn. 907, 288 A.3d 217 (2023). This burden is especially heavy in the context of a facial challenge. See *State* v. *Ryan*, 48 Conn. App. 148, 154, 709 A.2d 21, cert. denied, 244 Conn. 930, 711 A.2d 729, cert. denied, 525 U.S. 876, 119 S. Ct. 179, 142 L. Ed. 2d 146 (1998). Additionally, we indulge every presumption in favor of the constitutionality of the statute and approach a claim of unconstitutionality "with caution, examine it with care, and sustain the [statute] unless its invalidity is clear." (Internal quotation marks omitted.) *State* v. *McKenzie-Adams*, supra, 281 Conn. 500.

Our Supreme Court previously has stated: "[I]n evaluating the defendant's challenge to the constitutionality of the statute, we read the statute narrowly in order to save its constitutionality, rather than broadly in order to destroy it. . . . In so doing, we take into account any prior interpretations that this court, our Appellate Court and the Appellate Session of the Superior Court have placed on the statute. . . . [W]e may also add interpretive gloss to a challenged statute in order to render it constitutional. In construing a statute, the

court must search for an effective and constitutional construction that reasonably accords with the legislature's underlying intent." (Citations omitted; footnote omitted; internal quotation marks omitted.) *State* v. *Indrisano*, 228 Conn. 795, 805–806, 640 A.2d 986 (1994).

Next, we set forth a general description of the overbreadth doctrine. "The essence of an overbreadth challenge is that a statute that proscribes certain conduct, even though it may have some permissible applications, sweeps within its proscription conduct protected by the first amendment. . . . Overbroad statutes, like vague ones, inhibit the exercise of constitutionally protected conduct. . . . A party has standing to raise an overbreadth claim, however, only if there [is] a realistic danger that the statute will significantly compromise recognized [f]irst [a]mendment protections of parties not before the [c]ourt . . . . In *Broadrick* v. *Oklahoma*, 413 U.S. 601, 615, 93 S. Ct. 2908, 37 L. Ed. 2d 830 (1973), the Supreme Court stated that where conduct and not merely speech is involved, we believe that the overbreadth of a statute must not only be *real*, but *substantial* as well, judged in relation to the statute's plainly legitimate sweep." (Citations omitted; emphasis added; internal quotation marks omitted.) *State* v. *Snyder*, 49 Conn. App. 617, 623–24, 717 A.2d 240 (1998); see also *Virginia* v. *Hicks*, 539 U.S. 113, 118–19, 123 S. Ct. 2191, 156 L. Ed. 2d 148 (2003).[23] Finally, we note that in *Broadrick* v. *Oklahoma*, supra, 613, the United States Supreme Court stated that "[a]pplication of *the overbreadth doctrine* . . . is, *manifestly*, *strong medicine. It has been employed by the* [*c*]*ourt sparingly and only as a last resort.* Facial overbreadth has not

[23] "The scope of our overbreadth doctrine does not extend to all manners of expressive activity. For example, our overbreadth doctrine does not apply to commercial speech. See *State* v. *Leary*, 217 Conn. 404, 418, 587 A.2d 85 (1991)." *Ramos* v. *Vernon*, 254 Conn. 799, 849 n.3, 761 A.2d 705 (2000) (*Sullivan*, *J.*, concurring).

been invoked when a limiting construction has been or could be placed on the challenged statute." (Emphasis added.) Id.; see also *United States* v. *Hansen*, 599 U.S. 762, 770, 143 S. Ct. 1932, 216 L. Ed. 2d 692 (2023) ("[b]ecause it destroys some good along with the bad, [i]nvalidation for overbreadth is strong medicine that is not to be casually employed" (internal quotation marks omitted)).

Our Supreme Court has explained the rationale underlying the overbreadth doctrine. "A clear and precise enactment may . . . be overbroad if in its reach it prohibits constitutionally protected conduct. . . . A single impermissible application of a statute, however, will not be sufficient to invalidate the statute on its face; rather, to be invalid, a statute must reach a substantial amount of constitutionally protected conduct. . . . A [defendant] may challenge a statute as facially overbroad under the first amendment, even if the [defendant's] conduct falls within the permissible scope of the statute, to vindicate two substantial interests: (1) eliminating the statute's chilling effect on others who fear to engage in the expression that the statute unconstitutionally prohibits; and (2) acknowledging that every [person] has the right not to be prosecuted for expression under a constitutionally overbroad statute. . . . Thus, the [defendant] has standing to raise a facial overbreadth challenge to the [statute] and may prevail on that claim if he can establish that the [statute] reaches a substantial amount of constitutionally protected conduct even though he personally did not engage in such conduct." (Internal quotation marks omitted.) *State* v. *Cook*, 287 Conn. 237, 244–45, 947 A.2d 307, cert. denied, 555 U.S. 970, 129 S. Ct. 464, 172 L. Ed. 2d 328 (2008).

Our Supreme Court's decision in *State* v. *McKenzie-Adams*, supra, 281 Conn. 486, is particularly helpful to the resolution of this appeal, as it addressed both an

alleged constitutional right to sexual privacy and the purpose underlying § 53a-71 (a) (8). In that case, the defendant, a teacher, was convicted of thirteen counts of sexual assault in the second degree in violation of § 53a-71 (a) (8), involving two victims who were students at the school where he taught. Id., 489, 491. On appeal, he claimed, inter alia, that this statute violated his right to sexual privacy under the federal and state constitutions. Id., 489–90. Specifically, he argued that § 53a-71 (a) (8) is invalid on its face and as applied to the facts of his case because it violated his right to sexual privacy, which included the right to engage in noncommercial consensual sexual intercourse with individuals over the age of consent. Id., 498. In rejecting the defendant's claim, our Supreme Court stated: "We need not decide whether a fundamental right of sexual privacy exists generally because we agree with the state that, even if such a right exists, it does not protect sexual intimacy in the context of an inherently coercive relationship, such as the teacher-student relationship, wherein consent might not easily be refused." Id., 498–99.

With respect to the rationale underlying § 53a-71 (a) (8), our Supreme Court stated: "It is beyond cavil that the government has a legitimate interest in providing a safe and healthy educational environment for elementary and secondary school students. . . . To this end, the legislature reasonably could have concluded that school employees are given unique access to students, and are thereby vested with great trust and confidence by the school, parents, and public, and [the legislature could have] sought to preserve or strengthen that trust by unequivocally prohibiting school employees from misusing their access to students as a conduit for sex. . . . Moreover, the legislature reasonably could have concluded that a sexually charged learning environment likely would confuse, disturb and distract students,

thereby undermining the quality of education in the state." (Citations omitted; internal quotation marks omitted.) Id., 507–508.

Guided by these principles, we turn to the specifics of the defendant's arguments on appeal. He contends that numerous circumstances exist in which conduct that does not support the goal of protecting students is criminalized by § 53a-71 (a) (8). He then lists hypothetical examples to support this supposition, including situations involving a thirty-two year old kindergarten teacher engaged in a consensual sexual relationship with a thirty-four year old night student in a local high school, an eighteen year old administrative assistant for a board of education engaged in a consensual relationship with an eighteen year old high school student, a twenty-one year old college student employed on a part-time basis as a paraprofessional at an elementary school engaged in a consensual sexual relationship with his fiancé, who is an eighteen year old high school student, and an eighteen year old basketball coach who is engaged in a sexual relationship with an eighteen year old student who attends a different school in the same school district.

For purposes of the present analysis, we assume that a right to sexual privacy[24] exists under the federal constitution. See, e.g., *State* v. *Stephens*, 301 Conn. 791, 798–99, 22 A.3d 1262 (2011) (United States Supreme Court has stated repeatedly "that overbreadth analysis is appropriate only when first amendment rights are implicated," and Connecticut courts have followed that principle); but see *URI Student Senate* v. *Narragansett*, 631 F.3d 1, 12–13 (1st Cir. 2011) (overbreadth claim

[24] See *State* v. *McKenzie-Adams*, supra, 281 Conn. 506; see also *Roberts* v. *United States Jaycees*, 468 U.S. 609, 617–20, 104 S. Ct. 3244, 82 L. Ed. 2d 462 (1984).

failed when plaintiffs' facial challenge to town ordinance did not implicate protections of first amendment).

Next, we proceed to our Supreme Court's directive that, "[t]o determine whether a statute reaches a substantial amount of constitutionally protected conduct, we must first interpret its language and determine the scope of its prohibitions." *State* v. *Linares*, 232 Conn. 345, 365, 655 A.2d 737 (1995). Section 53a-71 (a) (8) prohibits a school employee, as that term is defined in § 53a-65 (13), from engaging in sexual intercourse, as that term is defined in § 53a-65 (2), with another person who is enrolled in a school in which the employee works or another school under the jurisdiction of the local or regional board of education. The express terms of the statute, therefore, limit its applicability to situations in which the actor and the other person are employed by, and enrolled in, respectively, the same school or a school within the jurisdiction of the local or regional board of education that employes the actor. See id., 375 (locational element limited "statute's restrictive effect on protected speech").

Mindful of this textual limitation regarding the scope of § 53a-71 (a) (8), we next consider whether it "reaches a substantial amount of constitutionally protected conduct even though [the defendant] personally did not engage in such conduct." (Internal quotation marks omitted.) *State* v. *Cook*, supra, 287 Conn. 245. In doing so, we are guided by the following observations from the United States Supreme Court: "*The concept of substantial overbreadth is not readily reduced to an exact definition. It is clear, however, that the mere fact that one can conceive of some impermissible applications of a statute is not sufficient to render it susceptible to an overbreadth challenge.* On the contrary, the requirement of substantial overbreadth stems from the underlying justification for the overbreadth exception itself—

the interest in preventing an invalid statute from inhibiting the speech of third parties who are not before the [c]ourt. The requirement of substantial overbreadth is directly derived from the purpose and nature of the doctrine. While a sweeping statute, or one incapable of limitation, has the potential to repeatedly chill the exercise of expressive activity by many individuals, the extent of deterrence of protected speech can be expected to decrease with the declining reach of the regulation. . . . In short, there must be a *realistic danger* that the statute itself will *significantly compromise recognized* [*f*]*irst* [*a*]*mendment protections* of parties not before the [c]ourt for it to be facially challenged on overbreadth grounds." (Citation omitted; emphasis added; footnote omitted; internal quotation marks omitted.) *Members of City Council of Los Angeles* v. *Taxpayers for Vincent*, 466 U.S. 789, 800–801, 104 S. Ct. 2118, 80 L. Ed. 2d 772 (1984).

Stated differently, "where conduct and not merely speech is involved . . . the overbreadth of a statute must not only be real, but substantial as well, judged in relation to the statute's plainly legitimate sweep." (Internal quotation marks omitted.) *State* v. *Snyder*, supra, 49 Conn. App. 624. Moreover, "[t]he overbreadth claimant bears the burden of demonstrating, from the text of [the law] and from *actual fact*, that substantial overbreadth exists." (Emphasis added; internal quotation marks omitted.) *Virginia* v. *Hicks*, supra, 539 U.S. 122; see also *United States* v. *Hansen*, supra, 599 U.S. 784 (to succeed on claim, defendant must show that overbreadth is substantial relative to statute's plainly legitimate sweep); *State* v. *Culmo*, 43 Conn. Supp. 46, 73, 642 A.2d 90 (1993) ("[t]he task of demonstrating that a statute will significantly compromise recognized first amendment rights of parties not before the court, thus triggering facial overbreadth analysis, is on the defendant").

The analysis conducted by the Texas Court of Appeals in *In re Shaw*, 204 S.W.3d 9 (Tex. App. 2006), is instructive to our resolution of the overbreadth claim in the present case. In *In re Shaw*, the petitioner was charged with violating Texas Penal Code Ann. § 21.12 (Vernon Supp. 2006), which prohibits an employee of a public or private secondary school from engaging in sexual contact with a person enrolled in that public or private secondary school. Id., 13 and n.1. The petitioner filed a pretrial motion for a writ of habeas corpus on the ground that the statute was, inter alia, unconstitutionally overbroad. Id., 13–14. In rejecting this claim, the Texas Court of Appeals explained: "[The petitioner] imagines a number of circumstances involving sexual conduct between consenting adults where she alleges the statute would be applied unconstitutionally. However, we cannot say the statute is impermissibly broad when judged in relation to the statute's plainly legitimate sweep, i.e., employees and students in primary and secondary schools when the vast majority of such students are undoubtedly not adults. The record before us contains no data about what percentage of secondary school students affected by this statute are adults. Thus, even if this statute could be said to infringe on fundamental [f]irst [a]mendment rights of those students and employees who are of age, there is no evidence before us indicating [that the statute] reaches a substantial amount of constitutionally protected conduct. . . . Accordingly, we reject [the petitioner's] contention that [the statute] violates the [f]irst [a]mendment by being overly broad." (Citation omitted; internal quotation marks omitted.) Id., 15.

In the present case, the defendant has failed to meet his burden of demonstrating that the constitutional rights of individuals are substantially burdened in relation to the plainly legitimate sweep of § 53a-71 (a) (8). See *United States* v. *Thompson*, 896 F.3d 155, 166–67

(2d Cir. 2018), cert. denied, U.S. , 139 S. Ct. 2715, 204 L. Ed. 2d 1113 (2019). As noted previously, the state has a legitimate interest in promoting a safe and healthy school environment for elementary and secondary school students by prohibiting teachers or other school employees from using a position of authority to pursue a sexual relationship with students enrolled in the educational system in which they are employed and misusing their access to students as a conduit for sexual activity. *State* v. *McKenzie-Adams*, supra, 281 Conn. 507–508. Absent from the record in the present case is any evidence to support the defendant's speculation regarding a substantial number of relationships that exist outside of the statute's legitimate scope. See *United States* v. *Thompson*, supra, 167–68; see also *New York State Club Assn., Inc.* v. *City of New York*, 487 U.S. 1, 14, 108 S. Ct. 2225, 101 L. Ed. 2d 1 (1988). The defendant did not make any showing that there are real individuals who fall into the hypothetical situations set forth in his second motion to dismiss or specify whose relationships have been chilled by the allegedly overbroad statute, and his speculation about the impact of the statute on those hypothetical relationships is insufficient to demonstrate its overbreadth. See *United States* v. *Stevens*, 559 U.S. 460, 485, 130 S. Ct. 1577, 176 L. Ed. 2d 435 (2010) (Alito, J., dissenting) (court determining whether statute's overbreadth is substantial must "consider . . . statute's application to real-world conduct, not fanciful hypotheticals"); *United States* v. *Ackell*, 907 F.3d 67, 77 (1st Cir. 2018) ("in the absence of veridical examples, [court was] not inclined to rely on hypotheticals" to invalidate statute on overbreadth grounds), cert. denied, U.S. , 139 S. Ct. 2012, 204 L. Ed. 2d 220 (2019); *United States* v. *Sayer*, 748 F.3d 425, 435–36 (1st Cir. 2014) (defendant did not establish that statute was substantially overbroad when he presented one factual example of statute's unconstitutional application along with list of hypotheticals);

United States v. *Morison*, 844 F.2d 1057, 1084 (4th Cir.) ("[t]he [United States] Supreme Court has cautioned that to reverse a conviction on the basis of other purely hypothetical applications of a statute, the overbreadth must not only be real, but substantial as well" (internal quotation marks omitted)), cert. denied, 488 U.S. 908, 109 S. Ct. 259, 102 L. Ed. 2d 247 (1988).

We conclude that the defendant has not shown substantial overbreadth from the text of the law or from actual fact. See *Regan* v. *Time, Inc.*, 468 U.S. 641, 650, 104 S. Ct. 3262, 82 L. Ed. 2d 487 (1984) ("an overbreadth challenge can be raised on behalf of others only when the statute is substantially overbroad, i.e., when the statute is unconstitutional in a substantial portion of cases to which it applies"). It was the defendant's burden to demonstrate a "realistic danger that the statute itself will significantly compromise recognized [f]irst [a]mendment protections of parties not before the [c]ourt . . . ." *Members of City Council of Los Angeles* v. *Taxpayers for Vincent*, supra, 466 U.S. 801. To meet that burden, the defendant had to present something more than his examples of hypothetical people involved in hypothetical situations, all of which involved scenarios with adults. The record before us contains no information or data concerning the percentage of adult students who are affected by the statute in relation to its legitimate sweep of protecting school students, the vast majority of whom likely are not adults. See *In re Shaw*, supra, 204 S.W.3d 15. Accordingly, the present case is not one in which the " 'strong medicine' " of the overbreadth doctrine should be employed. *New York* v. *Ferber*, 458 U.S. 747, 769, 102 S. Ct. 3348, 73 L. Ed. 2d 1113 (1982); see id., 773 (because legitimate reach of state statute dwarfed its arguably impermissible applications, statute was not substantially overbroad).

As a result, we conclude that the defendant's overbreadth claim fails and, therefore, that the court properly denied the defendant's second motion to dismiss.

The judgment is affirmed.

In this opinion the other judges concurred.