# GREGG FISK *v.* TOWN OF REDDING ET AL.
## (SC 20333)

Robinson, C. J., and Palmer, McDonald, D'Auria, Mullins, Kahn, and Ecker, Js.*

*Syllabus*

The plaintiff, who sustained injuries when he fell off a retaining wall constructed by the defendant town, sought to recover damages from the town. He claimed that the town created a public nuisance by constructing the wall without a fence on top of it. Following a trial, the jury returned a verdict in favor of the town. Thereafter, the plaintiff filed a motion to set aside the verdict, claiming that the jury's responses to certain interrogatories, in which it indicated that it had found that the wall was an inherently dangerous condition but was not an unreasonable or unlawful use of the land, were inconsistent. The trial court denied the motion and rendered judgment in accordance with the verdict, from which the plaintiff appealed to the Appellate Court. The Appellate Court concluded that, as a matter of law, the jury could not have determined that the retaining wall without a fence was both inherently dangerous and not an unreasonable use of the land. The Appellate Court further concluded that the wall constituted an unreasonable use of the land because it was inherently dangerous and lacked any social utility.

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

Accordingly, the Appellate Court reversed the trial court's judgment and remanded the case for a new trial. On the granting of certification, the town appealed to this court. *Held* that the Appellate Court incorrectly concluded that the trial court had abused its discretion by denying the plaintiff's motion to set aside the verdict, as the jury's responses to the special interrogatories could be harmonized in light of this court's established public nuisance jurisprudence: the proper inquiry for determining the reasonableness of a defendant's use of the land is not whether the inherently dangerous condition alone is reasonable, but whether the defendant's use of the land constitutes a reasonable use in light of the surrounding circumstances, and the Appellate Court improperly focused its inquiry solely on the condition at issue and ignored the multiplicity of factors that the jury could have considered in determining that, despite the inherent dangerousness of the wall, the town's use of the land, when considered in context, was reasonable; moreover, the jury could have reasonably concluded that the town's use of the land was reasonable in light of the benefits of the wall, the steps the town took to mitigate the danger posed by the wall, such as the placement of a guardrail and dense vegetation between the adjacent parking lot and the wall, and the absence of any evidence that other individuals had fallen from the wall prior to the plaintiff's accident.

Argued April 27—officially released November 9, 2020**

*Procedural History*

Action to recover damages for public nuisance, brought to the Superior Court in the judicial district of Fairfield and tried to the jury before *Kamp*, *J.*; verdict for the named defendant; subsequently, the court denied the plaintiff's motions to set aside the verdict and for a new trial, and rendered judgment in accordance with the verdict, from which the plaintiff appealed to the Appellate Court, *Sheldon*, and *Flynn*, *Js.*, with *Elgo*, *J.*, concurring in part and dissenting in part, which reversed the judgment of the trial court and remanded the case for further proceedings, and the named defendant, on the granting of certification, appealed to this court. *Reversed*; *judgment directed.*

*Thomas R. Gerarde*, with whom were *Eric E. Gerarde*, and, on the brief, *Beatrice S. Jordan*, for the appellant (named defendant).

** November 9, 2020, the date that this decision was released as a slip opinion, is the operative date for all substantive and procedural purposes.

*A. Reynolds Gordon*, with whom, on the brief, was *Frank A. DeNicola, Jr.*, for the appellee (plaintiff).

*Opinion*

KAHN, J. This certified appeal requires us to consider whether the jury's verdict in this case contains a fatal inconsistency between two special interrogatories relating to a count alleging absolute public nuisance, one finding that a particular condition on the land was inherently dangerous and the other finding that the defendant's use of the land was reasonable. The plaintiff, Gregg Fisk, brought the present action against the named defendant, the town of Redding,[1] alleging that a specific retaining wall located outside of a local pub should have been guarded by a fence and that the absence of such a fence constituted a public nuisance and caused him to sustain personal injuries. The defendant appeals from the judgment of the Appellate Court, which reversed the judgment rendered in favor of the defendant and remanded the case for a new trial. *Fisk* v. *Redding*, 190 Conn. App. 99, 113, 210 A.3d 73 (2019). Specifically, the defendant claims that the Appellate Court incorrectly concluded that the trial court abused its discretion when it denied the plaintiff's motion to set aside the verdict, which had claimed that the jury's response to the first special interrogatory—that the unfenced retaining wall was inherently dangerous—was fatally inconsistent with its response to the third special interrogatory that the defendant's use of the land was reasonable. Id., 103, 112. Because we conclude that the jury's answers to the first and third special

[1] We note that the plaintiff also named BL Companies, Inc., and M. Rondano, Inc., as defendants in the present action. The defendant BL Companies, Inc., was awarded summary judgment by the trial court, a decision that was subsequently upheld by the Appellate Court. See *Fisk* v. *Redding*, 164 Conn. App. 647, 649, 138 A.3d 410 (2016). Following the Appellate Court's decision in that appeal, the plaintiff voluntarily withdrew his claims against M. Rondano, Inc. In the interest of simplicity, we refer to the town of Redding as the defendant throughout this opinion.

interrogatories can be harmonized in light of our established nuisance jurisprudence, we conclude that the Appellate Court incorrectly concluded that the trial court had abused its discretion by denying the plaintiff's motion to set aside the verdict. We, therefore, reverse the judgment of the Appellate Court.

The jury reasonably could have found the following relevant facts. The retaining wall in question was constructed as a part of the defendant's Streetscape Project (project), which was funded by federal and state grants.[2] This retaining wall is located at one end of a parking lot used by the Lumberyard Pub (pub) in the town of Redding. The primary entrances and exits of that parking lot are connected to Route 57, which borders the parking lot on one side. The retaining wall runs between the parking lot and the intersection of Route 57 and Main Street. That intersection sits partially below the parking lot due to the downward slope of the land and the construction of the retaining wall. To the right of the exit to the parking lot, as Route 57 moves downhill toward Main Street, there is an "area of refuge" between Route 57 and the granite curb. The "area of refuge" is separated from Route 57 by a white line and is designed to be used by pedestrians, bicyclists, and joggers as they approach the intersection of Route 57 and Main Street.

The construction of the retaining wall was supervised by the Department of Transportation (department). During the design phase of the project, the department's design engineer supervisor, Tim Fields, approved the construction of a five foot retaining wall without a fence running atop it. While the retaining wall was being built, it became clear that the final structure would need to be taller than five feet at its highest point due to the downward slope of a driveway situated below the wall. Alterations to the retaining wall's design were imple-

[2] This retaining wall was built in order to replace a timber retaining wall that had previously existed in the same location.

mented through a "change order process" that provided notice to the department of the modifications. The modified construction plan called for the building of a retaining wall that would be just under six feet tall at its highest point, as well as the installation of a "Merritt Parkway" style guardrail at the end of the parking lot, and an area of dense landscaping between the guardrail and the top of the wall. In its final form, the retaining wall complied with the Connecticut State Building Code, which governs the construction of retaining walls within the state. On June 16, 2011, department engineers conducted a semifinal walk-through of the nearly completed project. During the walk-through, no engineers raised any concerns regarding the absence of a fence atop the retaining wall.

The plaintiff was familiar with both the pub and its adjacent parking lot. In fact, prior to moving away from the area in 2007, the plaintiff worked just down the street from the pub for seven years. In May, 2011, the plaintiff moved within a mile of the pub and began frequenting it between one and two times per week. The plaintiff testified that when he left the pub after his weekly or semiweekly visits, he typically walked through the pub's parking lot, out of the designated exit, and onto the "area of refuge," which he used to turn right onto Main Street.

On the evening of August 26, 2011, at approximately 8:30 p.m., the plaintiff went to the pub for dinner and drinks. At around 2 a.m., the plaintiff left the pub after having consumed approximately five beers. In order to reach Main Street more quickly, the plaintiff crossed the pub's parking lot, climbed over the guardrail, walked through the landscaping, and approached the retaining wall. The plaintiff testified that he was aware of the drop but was not aware of the actual distance between the wall and the ground below. As the plaintiff walked

along the top of the retaining wall, he fell and injured his leg and ankle in several places.

The plaintiff subsequently brought the present action against the defendant, alleging that he was injured when he fell off of the retaining wall and that, because the retaining wall "had no protective fencing," it was "inherently dangerous and constituted an absolute nuisance." The defendant filed an answer and asserted the special defenses of assumption of the risk and recklessness. The plaintiff's public nuisance action proceeded to a jury trial on July 19, 2016. During trial, several witnesses offered testimony relevant to both liability and damages. The plaintiff testified about the night in question and the injuries he sustained from his fall. The jury also heard testimony from James Fielding, the project manager who oversaw the construction of the retaining wall, as well as Richard Ziegler, a forensic engineer and the plaintiff's expert witness. Various exhibits were also introduced, including photographs of the retaining wall, the surrounding area, the Merritt Parkway style guardrail, and the landscaping between the guardrail and the retaining wall.

Before the jury began its deliberations, the trial court charged the jury in relevant part: "First, the plaintiff must prove that the retaining wall was inherently dangerous . . . that it had a natural tendency to create danger and to inflict injury upon person or property. It is the condition itself which must have a natural tendency to create danger and inflict injury. You, as the trier of fact, must consider all of the circumstances involved in determining whether . . . the condition in that particular location had a natural tendency to create danger and inflict injury. Second, the plaintiff must prove that the danger was a continuing one. . . . Third, the plaintiff must prove that the use of the land, in this case the retaining wall, was unreasonable or unlawful. In making a determination concerning the reasonable-

ness of the use of the land, all the surrounding factors must be considered. Fourth, the plaintiff must prove that the condition interferes with a right common to the general public. . . . If you find that the plaintiff has proven the above elements of a public nuisance, next the plaintiff must prove that the nuisance was a proximate cause of the injuries suffered by [the plaintiff]. . . . If the plaintiff fails to prove any one element, then a public nuisance has not been established, and you should return a verdict for the defendant."[3]

The trial court, in explaining the verdict forms and the special interrogatories, also instructed the jury: "[F]or example, you respond to question one. If you answer no, as the instructions indicate, you must return a ver-

[3] Although the trial court correctly instructed the jury on the elements of a public nuisance claim, we note that greater specificity regarding the unreasonableness inquiry may be beneficial to jurors who are tasked with navigating this complex area of tort law. To illuminate the contours of this inquiry, trial courts may consider providing jurors with examples of the factors that this court has identified as relevant to determinations of unreasonableness in the nuisance context. See *Walsh* v. *Stonington Water Pollution Control Authority*, 250 Conn. 443, 459, 736 A.2d 811 (1999) ("[t]he conduct for which the utility is being weighed includes both the general activity and what is done about its consequences" (internal quotation marks omitted)); *Kostyal* v. *Cass*, 163 Conn. 92, 99, 302 A.2d 121 (1972) ("[w]hether . . . the particular condition of which the plaintiffs complain constituted a nuisance does not depend merely upon the inherent nature of the condition, but involves also a consideration of all relevant facts, such as its location, its adaptation to the beneficial operation of the property, the right of members of the public to go upon the land adjacent to it, and the use to which they would naturally put that land" (internal quotation marks omitted)); see also footnote 9 of this opinion.

We also note that the plaintiff did not substantively challenge either the trial court's charge to the jury relating to the third element or the wording of the interrogatories. The plaintiff's sole exception to the proposed charge related to the first element and concerned the trial court's decision not to include the modifier "without a fence" after the words "retaining wall" under the first element. We note here, however, that, because the retaining wall lacked a fence at the time of the defendant's fall, the absence of the fence was necessarily considered by the jury when it concluded that the retaining wall, at the time of the defendant's injury, was inherently dangerous. The absence of the plaintiff's requested modifier had no impact on the jury's deliberations under the first element.

dict for the defendant, and you would fill out the defendant's verdict form and that would end your deliberations. If you answer number one yes, as the instructions indicate, then you go on to question two, and you answer that question. After question two, if you were to answer that question no, then you would return a verdict for the defendant using the defendant's verdict form. If you answer yes, you continue to number three. And you continue through the process until you've reached your verdict either using one or the other of the verdict forms. You necessarily also have to complete the jury interrogatories at least completely or to where you stop if you answer a question no."

The trial court then submitted seven special interrogatories to the jury. The special interrogatories relevant to this appeal, special interrogatories one and three, provided: (1) "Has [the] plaintiff proven to you, by a preponderance of the evidence, that the condition complained of, the subject retaining wall was inherently dangerous in that it had a natural tendency to inflict injury on person or property?" And (3) "Has [the] plaintiff proven to you, by a preponderance of the evidence, that the defendant's use of the land was unreasonable or unlawful?"

During its deliberations, the jury submitted a note to the court with the following question: "If we are not all in agreement on questions [one and two] but are on question . . . three, are we able to rule in favor of the defendant?" (Emphasis omitted.) The court and the attorneys for both the plaintiff and the defendant engaged in an extensive discussion of this question outside the presence of the jury. During this discussion, the plaintiff's counsel stated: "[I]f some of them are saying that the wall was . . . inherently dangerous and the danger was continuing, then that means that it has to be unreasonable." The court disagreed, responding that the "law requires that you, on behalf of your client, prove all four elements, and if you can't prove each

element, then there's a defendant's verdict." The plaintiff's attorney responded by noting, "we don't abandon our position."

The court ultimately responded to the jury's question as follows: "Ladies and gentlemen, I instructed you on the law, and you have my charge as a court exhibit. And the plaintiff has the burden of proof, as I indicated in my charge, to prove essentially four elements of an absolute public nuisance . . . . If the jury can unanimously . . . agree that the plaintiff has not proven one of those four elements and you can agree upon that, and in this case, if it's number three and you so indicate on your jury verdict interrogatories and you check that unanimously in the negative, then you . . . can return a verdict in . . . favor of the defendant. But you must all unanimously agree that [the plaintiff] has not proven one element of the cause of action."

At the end of its deliberations, the jury returned a verdict in favor of the defendant and provided answers to three of the seven special interrogatories. The jury responded in the affirmative to special interrogatories one and two, finding that the retaining wall was inherently dangerous and that the danger was a continuing one. In response to special interrogatory three, the jury answered in the negative, indicating that the jury did not believe that the plaintiff had proven by a preponderance of the evidence that the defendant's use of the land was unreasonable.[4]

The plaintiff filed a timely motion to set aside the verdict, claiming, inter alia, that the jury's answer to the first special interrogatory, which found that the condition of an unfenced retaining wall was inherently dangerous, was fatally inconsistent with the jury's answer to the third special interrogatory, which found that the defendant's use of the land was reasonable.

[4] The jury left special interrogatories four, five, six, and seven unanswered.

The court subsequently issued a written memorandum of decision in which it denied the motion, concluding that "the jury's responses to the interrogatories were not inconsistent because there was evidence that allowed the jury to determine that, although the wall was unreasonably dangerous, it was not an unreasonable use of the land." The trial court rendered judgment for the defendant in accordance with the jury's verdict.

The plaintiff thereafter appealed from that judgment to the Appellate Court. See *Fisk* v. *Redding*, supra, 190 Conn. App. 102. In that appeal, the plaintiff argued, inter alia,[5] that the trial court had improperly denied his motion to set aside the verdict because the jury's responses to the first and third special interrogatories were fatally inconsistent and could not be harmonized. Id., 103. In a split decision, the Appellate Court agreed with the plaintiff and reversed the judgment rendered in favor of the defendant and remanded the case for a new trial. Id., 111–13.

In its decision, the Appellate Court concluded that, "as a matter of law, the jury could not have determined that the retaining wall without a fence was both inherently dangerous and not an unreasonable use of the land." Id., 111. The Appellate Court focused much of its reasoning on the third element and stated that the proper focus of the unreasonable use prong of an absolute public nuisance claim is the alleged inherently dangerous condition at issue. Id., 110–11.

In determining whether a juror could have reasonably found that the "condition at issue" did not constitute an unreasonable use of the land, the Appellate Court focused on the utility of the fenceless retaining wall. Id. Concluding that the fenceless retaining wall was

[5] The plaintiff also appealed the trial court's exclusion of evidence of remedial measures taken by the defendant following his injury. *Fisk* v. *Redding*, supra, 190 Conn. App. 101. This issue is not presented to us on appeal.

both inherently dangerous and lacked any social utility, the Appellate Court stated that the retaining wall constituted an unreasonable use of the land as a matter of law. Id. The Appellate Court summarized its conclusion as follows: "[T]here is no scenario under which the jury reasonably could have determined, after concluding that the retaining wall without a fence was inherently dangerous, that the fact that the retaining wall lacked a fence served any utility to either [the town] or the community, or that a weighing of all relevant circumstances could make the use of the land for an unfenced wall that is inherently dangerous and lacks any utility, reasonable." Id., 111.

Writing separately, Judge Elgo disagreed with the majority's conclusion that the trial court had abused its discretion, explaining that, in her view, the jury's answers to the first and third interrogatories were not inconsistent and could be harmonized in accordance with this court's established public nuisance jurisprudence. See id., 114–15 (*Elgo*, *J.*, concurring and dissenting). According to Judge Elgo, the majority erred in focusing merely on "the inherent nature of the condition" itself when determining whether the defendant's use of the land was reasonable. (Emphasis omitted.) Id., 118. Judge Elgo concluded that the trial court's charge to the jury regarding the third element of an absolute public nuisance claim properly reflected this court's jurisprudence and correctly instructed the jury to "consider whether the use of the land on which the retaining wall was erected was unreasonable in light of the surrounding circumstances." Id., 115–16. According to Judge Elgo, evidence presented at trial regarding the circumstances surrounding the retaining wall provided the jury with an "adequate evidentiary basis to conclude that the defendant's use of the land did not constitute an unreasonable interference with a right common to

the general public . . . .'' Id., 122. This certified appeal followed.[6]

In the present appeal, the defendant argues that the Appellate Court incorrectly concluded that the trial court abused its discretion when it denied the plaintiff's motion to set aside the verdict. Specifically, the defendant argues that the Appellate Court made two errors in concluding that the interrogatories were fatally inconsistent and could not be harmonized. First, the defendant contends that the Appellate Court incorrectly focused exclusively on the absence of a fence when analyzing the reasonableness of the defendant's use of the land. Second, the defendant argues that, on the basis of the evidence presented at trial, the jury reasonably could have concluded that the retaining wall in question was inherently dangerous but did not constitute an unreasonable use of the land in light of the surrounding circumstances.

In response, the plaintiff claims that the Appellate Court correctly determined that the interrogatories in question were fatally inconsistent and that, as a result, the trial court abused its discretion by denying his motion to set aside the jury's verdict. The plaintiff argues, inter alia, that the Appellate Court correctly interpreted this court's public nuisance jurisprudence by focusing on the ''condition at issue'' when considering the reasonableness of the defendant's use of the land. (Emphasis omitted; internal quotation marks omitted.)

We begin by noting the standard of review and the general principles of law applicable to the defendant's

[6] This court granted the defendant's petition for certification to appeal, limited to the following question: ''Did the Appellate Court correctly determine that the jury's verdict should be set aside because the jury's response to the first special interrogatory, that the condition of an unfenced retaining wall was inherently dangerous, was fatally inconsistent with its response to the third special interrogatory, that the defendant's use of the land nevertheless was not unreasonable?'' *Fisk* v. *Redding*, 332 Conn. 911, 209 A.3d 645 (2019).

claim. "The proper appellate standard of review when considering the action of a trial court in granting or denying a motion to set aside a verdict is the abuse of discretion standard. . . . In determining whether there has been an abuse of discretion, every reasonable presumption should be given in favor of the correctness of the court's ruling. . . . Reversal is required only [when] an abuse of discretion is manifest or [when] injustice appears to have been done. . . . [T]he role of the trial court on a motion to set aside the jury's verdict is not to sit as [an added] juror . . . but, rather, to decide whether, viewing the evidence in the light most favorable to the prevailing party, the jury could reasonably have reached the verdict that it did." (Citation omitted; internal quotation marks omitted.) *Hall* v. *Bergman*, 296 Conn. 169, 179, 994 A.2d 666 (2010); see also *Rawls* v. *Progressive Northern Ins. Co.*, 310 Conn. 768, 776, 83 A.3d 576 (2014) (noting that trial court, in ruling on motion to set aside verdict, exercises "broad legal discretion . . . that, in the absence of clear abuse, we shall not disturb" (internal quotation marks omitted)).[7] When presented with a claim that a jury's response to a set of interrogatories is internally inconsistent, "the court has the duty to attempt to harmonize the answers" while giving the evidence "the most favorable construction in support of the verdict which is reasonable." *Norrie* v. *Heil Co.*, 203 Conn. 594, 606, 525 A.2d 1332 (1987).

This case involves a claim of absolute public nuisance. "Public nuisance law is concerned with the interference with a public right, and cases in this realm typically involve conduct that allegedly interferes with the public health and safety." *Pestey* v. *Cushman*, 259

[7] We note that this court will review a trial court's ruling on a motion to set aside a verdict under a plenary standard of review when the claim turns on a question of law. See, e.g., *Snell* v. *Norwalk Yellow Cab, Inc.*, 332 Conn. 720, 763, 212 A.3d 646 (2019). The parties agree that an abuse of discretion standard applies to the present appeal.

Conn. 345, 357, 788 A.2d 496 (2002). Claims of public nuisance "fall into three general classes: (1) nuisances which result from conduct of the public authority in violation of some statutory enactment; (2) nuisances which are intentional in the sense that the [public authority] intended to bring about the [condition that] . . . constitute[s] a nuisance; and (3) nuisances which have their origin in negligence . . . ." (Internal quotation marks omitted.) *Kostyal* v. *Cass*, 163 Conn. 92, 98–99, 302 A.2d 121 (1972). A public nuisance that results from the intentional conduct of a public authority, such as in this case, is known as an absolute public nuisance. Id.

In order to prevail on a claim of public nuisance, a plaintiff "must prove that: (1) the condition complained of had a natural tendency to create danger and inflict injury upon person or property; (2) the danger created was a continuing one; (3) the use of the land was unreasonable or unlawful;[8] [and] (4) the existence of the nuisance was [a] proximate cause of the [plaintiff's] injuries and damages. . . . [W]here absolute public nuisance is alleged, the plaintiff's burden includes two other elements of proof: (1) that the condition or conduct complained of interfered with a right common to the general public . . . and (2) that the alleged nuisance was absolute, that is, that the defendants' inten-

[8] The parties do not dispute that this court's established public nuisance jurisprudence requires the fact finder, under the third element of the cause of action, to focus on the reasonableness of the defendant's use of the land. We recognize that, in the private nuisance context, this court has changed the focus of the third element to examine the reasonableness of the defendant's alleged interference with the plaintiff's use and enjoyment of the plaintiff's property. See *Pestey* v. *Cushman*, supra, 259 Conn. 360–61. The Restatement (Second) of Torts embraces a similar approach in its treatment of public nuisance claims. See 4 Restatement (Second), Torts § 821B (1), p. 87 (1979) ("[a] public nuisance is an unreasonable interference with a right common to the general public"). Because the claim before us turns on whether the jury's responses to the first and third special interrogatories can be harmonized under our existing case law, we need not address the distinction between the Restatement (Second) of Torts and the unreasonableness inquiry dictated by our public nuisance jurisprudence.

tional conduct, rather than their negligence, caused the condition deemed to be a nuisance." (Citations omitted; footnote added; internal quotation marks omitted.) *State* v. *Tippetts-Abbett-McCarthy-Stratton*, 204 Conn. 177, 183, 527 A.2d 688 (1987). Whether a plaintiff is able to prove these elements is "a question of fact which is ordinarily determined by the trier of fact." (Internal quotation marks omitted.) *Tomasso Bros., Inc.* v. *October Twenty-Four, Inc.*, 221 Conn. 194, 197, 602 A.2d 1011 (1992).

For the past eighty years, this court has held that "[w]hether . . . a particular condition upon property constitutes a [public] nuisance does not depend merely upon the inherent nature of the condition . . . ." *Balaas* v. *Hartford*, 126 Conn. 510, 514, 12 A.2d 765 (1940). Proving by a preponderance of the evidence that the condition complained of has a natural tendency to create danger and inflict injury is not enough. See *Beckwith* v. *Stratford*, 129 Conn. 506, 508, 29 A.2d 775 (1942). Instead, the third element of a public nuisance claim requires a showing that the defendant's *use of the land* was also unreasonable or unlawful. *Pestey* v. *Cushman*, supra, 259 Conn. 355–56 (identifying four distinct elements of nuisance claim as product of this court's "public nuisance cases"); see also *Beckwith* v. *Stratford*, supra, 508 ("[t]o constitute a nuisance in the use of land, it must appear not only that a certain condition by its very nature is likely to cause injury but also that the use is unreasonable or unlawful").

According to this court's public nuisance jurisprudence, the reasonableness of the defendant's use of the land is determined through a "weighing process, involving a comparative evaluation of [the] conflicting interests" involved. (Internal quotation marks omitted.) *Walsh* v. *Stonington Water Pollution Control Authority*, 250 Conn. 443, 456, 736 A.2d 811 (1999). When weighing the interests at issue, the fact finder is required

to take into account "all relevant facts" pertinent to the defendant's use of the land, "such as its location, its adaptation to the beneficial operation of the property, the right of members of the public to go upon the land adjacent to it, and the use to which they would naturally put that land." (Internal quotation marks omitted.) *Kostyal* v. *Cass*, supra, 163 Conn. 99, quoting *Balaas* v. *Hartford*, supra, 126 Conn. 514. The "multiplicity of factors" relevant to evaluating the reasonableness of the defendant's use of the land also includes "both the general activity [on the land] and what is done about its consequences."[9] (Internal quotation marks omitted.) *Walsh* v. *Stonington Water Pollution Control Authority*, supra, 457–59.

In the present case, we conclude that the trial court did not abuse its discretion when it denied the plaintiff's motion to set aside the verdict because the jury's answers to the first and third interrogatories, finding that the retaining wall was inherently dangerous but not an unreasonable use of the land, can be harmonized in light of our established public nuisance jurisprudence. In reaching the opposite conclusion, the Appellate Court incorrectly focused its analysis under the

[9] The Restatement (Second) of Torts provides that the reasonableness of an intentional invasion of a public right is determined by weighing the gravity of the interference with the utility of the defendant's conduct. See 4 Restatement (Second), Torts § 826, p. 119 (1979) ("[a]n intentional invasion of another's interest in the use and enjoyment of land is unreasonable if . . . the gravity of the harm outweighs the utility of the actor's conduct"); see also id., comment (a), pp. 119–20. We have not previously adopted the weighing analysis articulated in §§ 826 through 831 of the Restatement (Second) of Torts in the context of claims of public nuisance. We note, however, that the inquiry dictated by our public nuisance jurisprudence necessarily requires the fact finder to engage in a similar comparative analysis of the benefits and harms posed by the defendant's use of the land. See, e.g., *Balaas* v. *Hartford*, supra, 126 Conn. 514; see also *Walsh* v. *Stonington Water Pollution Control Authority*, supra, 250 Conn. 457; *Maykut* v. *Plasko*, 170 Conn. 310, 314, 365 A.2d 1114 (1976); *O'Neill* v. *Carolina Freight Carriers Corp.*, 156 Conn. 613, 617–18, 244 A.2d 372 (1968); *Nair* v. *Thaw*, 156 Conn. 445, 452, 242 A.2d 757 (1968).

third element of a public nuisance claim solely on the "nature of the condition" itself, in this case, the narrow concept of a retaining wall without a fence. See *Fisk* v. *Redding*, supra, 190 Conn. App. 118. Analyzing the reasonableness of the fenceless retaining wall in isolation, the Appellate Court ignored the multiplicity of factors that the jury could have taken into account in its determination that the defendant's use of the land, when considered in context, was not unreasonable.

The Appellate Court erred by focusing its inquiry under the third element exclusively on "[t]he condition at issue . . . not the wall itself or [the project], but the wall without a fence atop it."[10] Id., 111. According to the Appellate Court, the jury was required to consider "not . . . whether the wall itself had some use to hold back the earth, but whether there was any useful public purpose to erecting the wall without a fence atop it . . . ." Id., 110–11. Concentrating exclusively on the retaining wall's lack of a fence, the Appellate Court concluded that the fenceless nature of the wall served no "utility to either the defendant or the community" and, therefore, that "a weighing of all relevant circumstances" could not make the use of the land reasonable as a matter of law.[11] Id., 111.

[10] In his brief, the plaintiff commits the same error as the Appellate Court and suggests that the proper focus of the unreasonable use inquiry is the "dangerous condition," in this case, the "retaining wall *without a fence*." (Emphasis in original.)

[11] If an isolated analysis of the inherently dangerous condition could support a finding that the defendant's use of the land was unreasonable and that the complained of condition constituted a public nuisance as a matter of law, the third element of a public nuisance claim would be rendered superfluous. Such an interpretation of the elements of a public nuisance cause of action is inconsistent with our prior case law and the long established principle that the first and third elements of a public nuisance cause of action are distinct. See *Beckwith* v. *Stratford*, supra, 129 Conn. 508 ("[t]o constitute a nuisance in the use of land, it must appear not only that a certain condition by its very nature is likely to cause injury but also that the use is unreasonable or unlawful").

The Appellate Court's treatment of the "condition at issue" as the primary focus of the unreasonable use element of a public nuisance claim is not supported by this court's precedent. Our prior case law demonstrates that the unreasonable use inquiry in the public nuisance context is not assessed by reference solely to the alleged defect or deficiency in the condition at issue. In *Balaas* v. *Hartford*, supra, 126 Conn. 511–12, 514, when determining whether the trial court correctly concluded that a ledge with a fifteen foot drop, located in Goodwin Park in Hartford, did not constitute a public nuisance, this court focused not on the ledge itself, but on how the land surrounding the ledge was generally used and on the absence of evidence that others had used it in a manner similar to the plaintiff. When reviewing a trial court's determination that a public dump amounted to an absolute public nuisance, this court, in *Marchitto* v. *West Haven*, 150 Conn. 432, 436–38, 190 A.2d 597 (1963), looked beyond the condition of the dump itself and considered the surrounding circumstances, including the nature and use of the land around the dump and the absence of security measures designed to prevent the public from improperly accessing the dump. In order to determine whether the complained of nuisance in *Laspino* v. *New Haven*, 135 Conn. 603, 604–605, 609, 67 A.2d 557 (1949), a waterway in a partially developed park, made the defendant's use of the land unreasonable, we focused on the reasonableness of the defendant's overall plan to "[develop and open the] land as a public park," not on the condition of the waterway itself.

The proper inquiry according to our precedent is not whether the inherently dangerous condition alone is reasonable, but whether the defendant's use of the land constitutes a reasonable "use of the property in the particular locality under the circumstances of the case." (Internal quotation marks omitted.) *Nicholson* v. *Connecticut Half-Way House, Inc.*, 153 Conn. 507, 510, 218

A.2d 383 (1966). When considering the reasonableness of the defendant's use of the land, the condition at issue cannot be viewed in isolation but, instead, must be viewed in the context of the surrounding circumstances. See *Pestey* v. *Cushman*, supra, 259 Conn. 352–53 ("[u]nreasonableness cannot be determined in the abstract, but, rather, must be judged under the circumstances of the particular case"); see also *Beckwith* v. *Stratford*, supra, 129 Conn. 508 (noting that "the same conditions may constitute a nuisance in one locality or under certain circumstances, and not in another locality or under other circumstances").

When determining if the defendant's use of the land is reasonable in light of the surrounding circumstances, the fact finder is allowed to consider *all* of the factors surrounding the use in question. See *Walsh* v. *Stonington Water Pollution Control Authority*, supra, 250 Conn. 457 (noting that, under third element, jury "must consider the location of the condition and any other circumstances . . . which indicate whether the defendants [were] making a reasonable use of the property" (emphasis omitted; internal quotation marks omitted)). As we have previously noted, the factors that this court has looked to when determining the reasonableness of the use of land in the public nuisance context include the "location, its adaptation to the beneficial operation of the property, the right of members of the public to go upon the land adjacent to it . . . the use to which they naturally put that land"; (internal quotation marks omitted) *Kostyal* v. *Cass*, supra, 163 Conn. 99, quoting *Balaas* v. *Hartford*, supra, 126 Conn. 514; and both "the general activity [on the land] and what is done about its consequences." (Internal quotation marks omitted.) *Walsh* v. *Stonington Water Pollution Control Authority*, supra, 459. In considering these factors, this court has looked to the location of the condition itself; see *Kostyal* v. *Cass*, supra, 99; the absence of evidence that

persons other than the plaintiff had been injured by the condition; see *Balaas* v. *Hartford*, supra, 514; and the defendant's failure to adopt reasonable safety measures that could have mitigated the danger posed by the condition. See *Marchitto* v. *West Haven*, supra, 150 Conn. 436–37.

In this case, the trial court's following instruction to the jury correctly reflected the focus of the inquiry, as dictated by our prior precedent: "In making a determination concerning the reasonableness of the use of the land, *all the surrounding factors* must be considered." (Emphasis added.) Judge Elgo aptly summarized the inquiry put to the jury under the third interrogatory: "Unlike the first interrogatory, which required the jury to determine whether the retaining wall itself was inherently dangerous, the inquiry under the third interrogatory required the jury to consider whether the use of the land on which the retaining wall was erected was unreasonable in light of the surrounding circumstances." (Emphasis omitted.) *Fisk* v. *Redding*, supra, 190 Conn. App. 116 (*Elgo*, *J.*, concurring in part and dissenting in part). When conducting this inquiry, "the jury was not confined to a review of the retaining wall in isolation. Rather, the jury was required to 'take into account a multiplicity' of surrounding factors . . . including 'both the general activity [on the land] and what is done about its consequences.' " (Citation omitted.) Id., 118.

During the trial, the jury received considerable evidence of the various circumstances surrounding the retaining wall. As Judge Elgo noted, the jury "was presented with an abundance of documentary and testimonial evidence, including several photographs of the land in question, indicating that both a guardrail barrier and a dense landscaping buffer separated the retaining wall from the adjacent parking lot, from which it is undisputed that the plaintiff entered the land. . . . Fielding, who served as the project manager and oversaw con-

struction of the retaining wall, testified at trial that installing a fence on the retaining wall 'was never discussed' because the defendant 'had the guardrail in place serving to protect vehicles and pedestrians.' Beyond that, the plaintiff's own expert witness, forensic engineer . . . Ziegler, conceded at trial that the guardrail barrier was an effective means of keeping people out of the area between the retaining wall and the parking lot." (Citation omitted.) Id., 118–19. The jury was also presented with no evidence that any individual, including the plaintiff himself, had previously walked over the guardrail barrier, navigated through the dense landscaping, and fallen off the wall. See id., 120 and n.7. In terms of the overall utility of the retaining wall, the jury was presented with "evidence of the necessity and, hence, utility, of the retaining wall, as it was constructed to replace an existing retaining wall and meant to preserve the public's right to traverse Main Street below, particularly pedestrians, bicyclists, and joggers." Id., 118.

Reviewing the totality of the evidence presented at trial, the jury in the present case could have reasonably concluded that the defendant's use of the land was reasonable in light of the benefits of the retaining wall, the steps that the defendant took to mitigate the danger posed by the retaining wall, such as the placement of the guardrail and dense vegetation between the parking lot and the retaining wall, and the absence of any evidence that other individuals had fallen off of the retaining wall prior to the defendant's accident. Id., 119–20 (*Elgo*, *J.*, concurring in part and dissenting in part). By framing the third element as an inquiry "not [into] whether the wall itself had some use to hold back the earth, but whether there was any useful public purpose to erecting the wall without a fence atop it," the Appellate Court incorrectly restricted the focus of the inquiry and, as a result, failed to consider the various factors that could support the jury's conclusion that,

despite the inherent dangerousness of the retaining wall, the defendant's use of the land was reasonable in light of the surrounding circumstances. Id., 110–11.

Viewing the evidence presented in this case in accordance with our established nuisance jurisprudence and in a light most favorable to upholding the jury's verdict; see, e.g., *Hall* v. *Bergman*, supra, 296 Conn. 179; it is clear that the jury reasonably could have concluded that, although the retaining wall was inherently dangerous, the defendant's use of the land was reasonable in light of the surrounding circumstances. Because the jury's answers to the first and third special interrogatories are not inconsistent, the trial court did not abuse its discretion in denying the plaintiff's motion to set aside the verdict.

The judgment of the Appellate Court is reversed and the case is remanded to that court with direction to render judgment affirming the judgment of the trial court.

In this opinion the other justices concurred.

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## STATE OF CONNECTICUT *v.* KERLYN T.*
## (SC 20380)

Robinson, C. J., and McDonald, D'Auria, Mullins, Kahn, Ecker and Keller, Js.

*Syllabus*

Convicted of, among other crimes, aggravated sexual assault in the first degree, home invasion, risk of injury to a child and assault in the second degree with a firearm, the defendant appealed to the Appellate Court, claiming, inter alia, that his convictions should be reversed because the

* In accordance with our policy of protecting the privacy interests of the victims of sexual assault and the crime of risk of injury to a child, we decline to identify the victims or others through whom the victims' identities may be ascertained. See General Statutes § 54-86e.

Moreover, in accordance with federal law; see 18 U.S.C. § 2265 (d) (3) (2018); we decline to identify any party protected or sought to be protected under a protective order or a restraining order that was issued or applied for, or others through whom that party's identity may be ascertained.

trial court incorrectly determined that his jury trial waiver was knowing, intelligent and voluntary. The Appellate Court affirmed the trial court's judgments of conviction, specifically rejecting the defendant's claims that his waiver was constitutionally infirm because he was suffering from an unspecified mental illness at the time of the waiver and that trial court's canvass was constitutionally infirm because the court failed to elicit from him additional information about his background, experience, conduct, and mental and emotional state, and to explain, among other things, the mechanics of a jury trial. On the granting of certification, the defendant appealed to this court, renewing his claim in the Appellate Court challenging the validity of his jury trial waiver. *Held* that the Appellate Court having fully addressed the issues raised by the defendant before this court concerning whether the trial court had correctly determined that his jury trial waiver was knowing, intelligent and voluntary, this court adopted the Appellate Court's thorough and well reasoned opinion as a proper statement of the issues and the applicable law concerning those issues and, accordingly, affirmed the judgment of the Appellate Court.

Argued September 18—officially released November 9, 2020**

*Procedural History*

Substitute information, in the first case, charging the defendant with the crimes of criminal attempt to commit assault in the first degree, intimidating a witness, strangulation in the second degree, and assault in the third degree, and substitute information, in the second case, charging the defendant with three counts of the crime of threatening in the first degree, and with one count each of the crimes of aggravated sexual assault in the first degree, home invasion, risk of injury to a child, assault in the second degree with a firearm, assault in the third degree, kidnapping in the first degree with a firearm, unlawful restraint in the first degree, criminal possession of a firearm, and criminal violation of a protective order, brought to the Superior Court in the judicial district of Danbury, where the cases were consolidated and tried to the court, *Russo*, *J.*; thereafter, the court, *Russo*, *J.*, granted the defendant's motion for a judgment of acquittal as to the charge of criminal attempt to commit assault in the first degree; subse-

** November 9, 2020, the date that this decision was released as a slip opinion, is the operative date for all substantive and procedural purposes.

quently, verdicts and judgments of guilty of two counts each of assault in the third degree and threatening in the first degree, and one count each of aggravated sexual assault in the first degree, home invasion, risk of injury to a child, assault in the second degree with a firearm, and unlawful restraint in the first degree, from which the defendant appealed to the Appellate Court, *Prescott*, *Elgo* and *Pellegrino*, *Js.*, which affirmed the judgments of the trial court, and the defendant, on the granting of certification, appealed to this court. *Affirmed.*

*James B. Streeto*, senior assistant public defender, for the appellant (defendant).

*Melissa L. Streeto*, senior assistant state's attorney, with whom, on the brief, were *Stephen J. Sedensky III*, state's attorney, and *Sharmese Walcott*, executive assistant state's attorney, for the appellee (state).

*Opinion*

PER CURIAM. Following a trial to the court, the defendant, Kerlyn T., was convicted of numerous offenses, including aggravated sexual assault in the first degree, home invasion, risk of injury to a child, and assault in the second degree with a firearm. On appeal to the Appellate Court, the defendant claimed that his convictions should be reversed because the trial court incorrectly determined that his jury trial waiver was knowing, intelligent and voluntary. The Appellate Court disagreed and affirmed the trial court's judgments. *State* v. *Kerlyn T.*, 191 Conn. App. 476, 478–79, 215 A.3d 1248 (2019). We granted the defendant's petition for certification to appeal, limited to the following question: "Did the Appellate Court correctly hold that the trial court properly found the defendant's waiver of his right to jury trial was constitutionally valid?" *State* v. *Kerlyn T.*, 333 Conn. 928, 218 A.3d 68 (2019). We answer that question in the affirmative and, accordingly, affirm the judgment of the Appellate Court.

The opinion of the Appellate Court sets forth the following relevant facts and procedural history. "On May 26, 2013, the defendant confronted and assaulted the victim. On May 28, 2014, the defendant broke into the victim's Danbury apartment armed with a semiautomatic assault style rifle. Although the victim was not present, the defendant remained in the apartment, concealing himself therein. The victim returned to the apartment later that evening accompanied by her minor child[1] and a coworker. Once inside, they were confronted by the defendant and held at gunpoint . . . for approximately three hours. During that time, the defendant forcefully restrained the victim, bound her to a chair, taped her mouth shut and, thereafter, assaulted her both physically and sexually, while the minor child and the coworker were present in the apartment. [When the child tried to intervene to protect the victim, the defendant shoved him violently against the wall.]

"The defendant was subsequently arrested [and] . . . charged . . . with aggravated sexual assault in the first degree in violation of [General Statutes] § 53a-70a (a) (1), home invasion in violation of [General Statutes] § 53a-100aa (a) (2), risk of injury to a child in violation of [General Statutes] § 53-21 (a) (1), assault in the second degree with a firearm in violation of [General Statutes] § 53a-60a (a), unlawful restraint in the first degree in violation of [General Statutes] § 53a-95 (a), two counts of assault in the third degree in violation of [General Statutes] § 53a-61 (a) (1), three counts of threatening in the first degree in violation of [General Statutes] § 53a-61aa (a) (3), criminal attempt to commit assault in the first degree in violation of General Statutes §§ 53a-49 (a) (2) and 53a-59 (a) (1), strangulation in the second degree in violation of General Statutes (Rev. to 2013) § 53a-64bb (a), intimidating a witness in violation of General Statutes § 53a-151a, kidnapping in the first

[1] "The defendant is the biological father of the minor child." *State* v. *Kerlyn T.*, supra, 191 Conn. App. 479 n.2.

degree with a firearm in violation of General Statutes § 53a-92a, criminal possession of a firearm in violation of General Statutes § 53a-217 (a) (1), and criminal violation of a protective order in violation of General Statutes (Rev. to 2013) § 53a-223." (Footnote in original; footnote omitted.) *State* v. *Kerlyn T.*, supra, 191 Conn. App. 479–80.

"On January 22, 2015, following the defendant's arrest, Attorney Mark Johnson, a public defender, appeared before the court on behalf of the defendant and requested a formal competency evaluation of the defendant pursuant to General Statutes § 54-56d, on the basis of Attorney Johnson's belief that the defendant was unable to assist in his own defense.[2] During an otherwise brief hearing, the court granted the motion after Attorney Johnson stated that the defendant's state of mind was impairing his ability to prepare a proper defense.

"The competency evaluation was conducted on February 13, 2015, by the Office of Forensic Evaluations [of the Department of Mental Health and Addiction Services], which determined that the defendant, at that time, was not competent to stand trial. It further concluded that there was a 'substantial probability [that the defendant] could be restored to competence within the maximum statutory time frame,' and, therefore, 'recommend[ed] an initial commitment period of sixty days . . . [in] the *least restrictive setting* . . . .' " (Emphasis in original; footnote altered.) Id., 481. "After the court adopted the evaluation, the defendant was admitted to Whiting Forensic Division of Connecticut Valley Hospital (Whiting) for treatment and rehabilitation. On May 7, 2015, the court, *Russo, J.*, adopted the conclusion of a second competency evaluation administered at

[2] General Statutes § 54-56d (a) provides in relevant part: "[A] defendant is not competent if the defendant is unable to understand the proceedings against him or her or *to assist in his or her own defense*." (Emphasis added.)

Whiting on April 23, 2015, that determined that the defendant was competent to stand trial.[3]

"On November 6, 2015, after the defendant rejected the state's offer of a plea agreement, the court notified the defendant that the matter would be placed on the trial list and that jury selection would commence the following month. On February 6, 2016, when the defendant appeared before Judge Russo for jury selection, the defendant requested that the court provide him with more time to consider whether to elect a jury trial or a court trial. The court denied his request.

"At that hearing, defense counsel, Attorney Gerald Klein,[4] was unable to ascertain whether the defendant wanted to elect a jury trial or a court trial and moved for a second § 54-56d competency evaluation due to his belief that the defendant was unable to continue assisting with his own defense. In response, the court engaged the defendant in a lengthy colloquy and permitted him to speak freely about various grievances, which ranged from his frustrations with the discovery process

[3] "The following colloquy took place between defense counsel, Attorney Johnson, and the court during the defendant's second competency hearing on May 7, 2015.

" 'The Court: [I have] . . . a report dated April 27, 2015, from the Department of Mental Health and Addiction Services. That report [is] very comprehensive, and it does conclude that [the defendant], who is present in court today . . . has been restored to competency and does demonstrate a sufficient understanding of the proceedings and can ably assist in his own defense. [Attorney] Johnson?

" '[Attorney] Johnson: Yes, Your Honor . . . as I said, [we would stipulate to the findings contained in that exhibit and request] that he be released back to [the Department of Correction] at this time.' " *State* v. *Kerlyn T.*, supra, 191 Conn. App. 482 n.7.

[4] "Attorney Johnson represented the defendant during the preliminary stages of his criminal proceedings relating to the May, 2014 home invasion, in addition to [representing him in] a number of other matters that arose prior to that arrest. Attorney Johnson was later replaced by privately retained counsel, Attorney Klein, in June, 2015. Thereafter, Attorney Klein represented the defendant during all relevant proceedings." *State* v. *Kerlyn T.*, supra, 191 Conn. App. 482 n.8.

to an alleged assault that occurred during his confinement at Whiting.

"At the conclusion of the colloquy, the court denied Attorney Klein's request for a second competency evaluation, stating: '[A]fter spending nearly [one and one-half hours] with [the defendant] on a number of topics, [I] cannot justify ordering the examination for a variety of reasons. For one, [the defendant] has presented himself here today, as I have witnessed him in the past, [as] a competent, articulate, [and] to steal a phrase from [Attorney] Klein, [as] a very measured individual, who, at least in my view, certainly understands the nature of the proceedings here in court, certainly understands the function of the personnel that are assembled in this very room, certainly understands the nature of the proceedings against him and the charges that have been alleged against him. . . . I also believe—and I realize that . . . [Attorney] Klein may [disagree] on this point—that [the defendant] does have the ability to assist in his own defense. . . . So, I do not find that the examination at this point in time is justified.' " (Footnote altered; footnote in original.) Id., 481–83.

"The court [then] proceeded to address the issue of whether the defendant would elect a jury or a court trial. Taking into account the defendant's earlier request for more time [in which to make that decision], the court [called a recess to allow] the defendant to meet with Attorney Klein [privately. Before leaving the courtroom, Attorney Klein informed the court that he and the defendant had already discussed the issue at length and that he did not believe that further discussions would be 'fruitful.'] After a forty minute recess, the defendant [returned to the courtroom and] waived his right to a jury trial . . . . Prior to [the defendant's] making that decision, the [court allowed the defendant to meet briefly with his mother so that he could explain his decision to her, after which the] following canvass occurred on the record.

" 'The Court: . . . I would ask both counsel to pay particular[ly] close attention to my questions. If I miss any, please let me know, so that we can complete the canvass. . . . [O]n the issue of waiving your constitutional right to a jury trial . . . the United States constitution and our state constitution both mandate that you have a constitutional right to be tried by a jury of your peers. Do you understand that, [sir]?

" 'The Defendant: Yes, Your Honor.

" 'The Court: And after speaking with you and, equally as important, speaking with [Attorney] Klein, you have elected to waive that right to a jury trial and you've elected to have [what is] called a courtside trial, meaning that, likely me or someone like me, another Superior Court judge, would be the finder of fact in the trial and also would be the sentencing judge if you were found guilty. . . . Is that your understanding, [sir]?

" 'The Defendant: Yes, I understand . . . .

* * *

" 'The Court: [Sir], are you on any drugs or medication that would affect your ability to understand what I'm saying right now?

" 'The Defendant: No, Your Honor.

" 'The Court: And have you had time to consult with [Attorney] Klein about your election to waive your constitutional right to a trial by jury and [to] elect a courtside trial? . . .

" 'The Defendant: Yes, Your Honor.

" 'The Court: And I believe [Attorney] Klein . . . said that he would encourage you to waive your right to a jury trial and elect a trial by the court. And do you agree with him on that suggestion, [sir]?

" 'The Defendant: Yes, Your Honor.

" 'The Court: And are you aware . . . [that], as you stand there today, you are cloaked with the presumption of innocence, and I look at you as a person who is presumed innocent?

" 'The Defendant: Yes, Your Honor.

* * *

" 'The Court: Do you understand, [sir], that you have been charged with those charges that I've just recited for you here today on the record? . . .

" 'The Defendant: Yes, Your Honor, I understand.

* * *

" 'The Court: Is there any other question that either counselor would feel comfortable if I ask?

* * *

" '[Attorney] Klein: . . . I would suggest . . . [that] the court [tell] him that this is a final decision as to these matters, and he can't change his mind [and come in on the 17th and say I prefer a jury. And I think if I can share . . . a little bit of what he said to his mother before the canvass about the trust that he has with not this court necessarily or exclusively, but with the judge in general as opposed to—

" 'The Court: Right. Judge versus a jury of six or eight.[5] Right.

" 'Attorney Klein: Or his people on the street, as he put it. I think his intention is to make this permanent and ask for the court trial.]

" 'The Court: All right. And [the defendant is] nodding his head in agreement with [defense counsel]. I do take that as his—

" 'The Defendant: Yes, Your Honor.

[5] We note that, in referencing the number eight, the trial court was probably alluding to the fact that, in addition to six regular jurors, it was likely that two alternate jurors would be selected.

" 'The Court: —his affirmation to the court that he won't change his mind and it will be a courtside trial.

* * *

" '[Attorney] Klein: Thank you, Your Honor.

" 'The Court: Thank you, [sir].

" 'The Defendant: No, thank you, Your Honor. I appreciate that. God bless.' "[6] (Footnote added.) Id., 483–85.

Following a seven day trial to the court, the trial court found the defendant guilty on nine of the sixteen counts[7] contained in the operative informations and sentenced him to a total effective term of twenty-two years of imprisonment followed by ten years of special parole and five years of probation. The defendant appealed to the Appellate Court, claiming, inter alia, that the trial court improperly found that his jury trial waiver was knowing, intelligent and voluntary.[8] Id., 478.

[6] During the two weeks between the time of the defendant's jury trial waiver and the start of trial, the defendant never sought to change his election back to a jury trial. Following his convictions, the defendant also did not file a motion to vacate the judgment pursuant to General Statutes § 54-82b (b) on the ground that his jury trial waiver was not knowing, intelligent and voluntary. We note, moreover, that, on the second day of trial, the trial court, *Eschuk, J.*, granted defense counsel's request for another competency evaluation. The defendant was subsequently examined by a team from the Office of Forensic Evaluations, which concluded for a second time that the defendant was competent to stand trial.

[7] "During trial, the defendant moved for a judgment of acquittal, and the court dismissed one count of criminal attempt to commit assault in the first degree. After the close of evidence, the court found the defendant not guilty of strangulation in the second degree, criminal violation of a protective order, kidnapping in the first degree with a firearm, one count of threatening in the first degree, and criminal possession of a firearm. The court also dismissed one count of intimidating a witness for improper pleading." *State* v. *Kerlyn T.*, supra, 191 Conn. App. 480 n.4.

[8] Although the defendant failed to preserve his claim in the trial court, the Appellate Court reviewed it 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, 781, 120 A.3d 1188 (2015), because the record was adequate for review and the claim is of constitutional magnitude. See *State* v. *Kerlyn T.*, supra, 191

Although he did not challenge the trial court's multiple findings regarding his competency to stand trial, the defendant nonetheless argued that "the trial court's canvass was constitutionally inadequate because he was suffering from an unspecified mental illness at the time he waived his right to a jury trial, and, therefore, his waiver could not be knowing, intelligent, and voluntary." Id., 488. The defendant further argued that his waiver was invalid "because, despite stating that he was not ready to make such a decision, the choice was 'imposed on [him] by the combined pressure of the court, the prosecutor, and [defense counsel].' " Id., 480–81. According to the defendant, prior to accepting his waiver, "the court should have informed [him] of, among other things, the number of jurors that comprise a jury panel and that a jury's verdict must be unanimous." Id., 481. Finally, the defendant asserted that the canvass improperly "failed to elicit information regarding 'the defendant's background, experience, conduct, and . . . mental and emotional state.' Specifically, the defendant argue[d] that, because he was reared in a country with a civil legal system, and because he does not possess a high school diploma, the court's failure to provide a more thorough canvass constitute[d] reversible error." Id., 489. The Appellate Court disagreed with each of these contentions. See id., 490.

Before addressing the merits, the Appellate Court set forth the legal standards governing the defendant's claims. Specifically, the court explained that the waiver of a fundamental right such as the right to a jury trial must be knowing, intelligent and voluntary and that, in determining whether such a waiver has occurred, a reviewing court must inquire into the totality of the circumstances surrounding it, "including the background, experience, and conduct of the accused." (Internal quo-

Conn. App. 485–86. The court concluded, however, that the defendant had failed to establish that a constitutional violation exists and deprived him of a fair trial. Id., 490.

tation marks omitted.) Id., 486, quoting *State* v. *Gore*, 288 Conn. 770, 777, 955 A.2d 1 (2008). The Appellate Court further explained that, "[i]n *Gore*, [this court] concluded that [although] the right to a jury trial must be personally and affirmatively waived by the defendant in order to render such waiver valid . . . [the] canvass need not be overly detailed or extensive . . . . [Rather] it should be sufficient to allow the trial court to obtain assurance that the defendant: (1) understands that he or she personally has the right to a jury trial; (2) understands that he or she possesses the authority to give up or waive the right to a jury trial; and (3) voluntarily has chosen to waive the right to a jury trial and to elect a court trial." (Internal quotation marks omitted.) *State* v. *Kerlyn T.*, supra, 191 Conn. App. 487. Finally, the Appellate Court emphasized that this court has held on numerous occasions that, "even when a defendant has a history of mental illness and/or incompetency, if he presently is competent, the trial judge need not engage in a more searching canvass than typically is required before accepting the defendant's waiver of his right to a jury." (Internal quotation marks omitted.) Id., quoting *State* v. *Rizzo*, 303 Conn. 71, 110, 31 A.3d 1094 (2011), cert. denied, 568 U.S. 836, 133 S. Ct. 133, 184 L. Ed. 2d 64 (2012). "In such a case," the court explained, as in all cases, "we look to the totality of the circumstances analysis to determine whether the defendant's personal waiver of a jury trial was made knowingly, intelligently and voluntarily." (Internal quotation marks omitted.) *State* v. *Kerlyn T.*, supra, 487, quoting *State* v. *Gore*, supra, 782 n.12.

Applying these principles to the present case, the Appellate Court rejected the defendant's contention that his waiver was constitutionally infirm because he was suffering from an unspecified mental illness at the time of the waiver. *State* v. *Kerlyn T.*, supra, 191 Conn. App. 488. The Appellate Court explained that, prior to the waiver, the trial court twice had found the defendant

competent to stand trial—findings that the defendant did not challenge on appeal—and that, under well established precedent, "any criminal defendant who has been found competent to stand trial, ipso facto, is competent to waive the right to [a jury trial] as a matter of federal constitutional law." (Internal quotation marks omitted.) Id., quoting *State* v. *Ouellette*, 271 Conn. 740, 753, 859 A.2d 907 (2004). The Appellate Court further noted that, under our case law, the fact that the defendant was represented by counsel at the time of the waiver and stated on the record that he (1) had sufficient time to discuss the matter with his attorney, and (2) was satisfied with his attorney's advice, supported a finding that the waiver was constitutionally valid. *State* v. *Kerlyn T.*, supra, 488–89. The court also observed that, when asked during the canvass whether he understood the right that he was giving up, "the defendant's responses were delivered in a clear and unequivocal, 'yes, Your Honor,' 'no, Your Honor,' " thereby reflecting the defendant's " 'strong desire to proceed to trial before the court, not a jury'. . . ." Id., 489, quoting *State* v. *Scott*, 158 Conn. App. 809, 818, 121 A.3d 742, cert. denied, 319 Conn. 946, 125 A.3d 527 (2015).

The Appellate Court also rejected the defendant's assertion that the trial court's canvass was constitutionally infirm because it failed (1) to elicit from him additional information about his background, experience, conduct, and mental and emotional state, and (2) to explain, among other things, the mechanics of a jury trial, including the number of persons that comprise a jury and that the jury's verdict must be unanimous. *State* v. *Kerlyn T.*, supra, 191 Conn. App. 489–90. In rejecting this assertion, the Appellate Court observed, inter alia, that the defendant, who was thirty-two years old at the time of the waiver, had spent most of his life in the United States and, according to the record, had extensive experience with our criminal justice system. Id., 490. The Appellate Court concluded, therefore, that

the defendant's background, experience and conduct all supported a finding that his waiver was knowing, intelligent and voluntary. See id. With respect to the defendant's assertion that the canvass should have included more particularized information about the right to a jury trial, the Appellate Court stated: "[T]he court's failure to include in its canvass [certain information, such as] the number of jurors to which the defendant would be entitled and the requirement that the jury's verdict be unanimous does not compel the conclusion that the defendant's waiver was constitutionally deficient. Our courts [repeatedly] have declined to require [such] a formulaic canvass and have rejected claims that an otherwise valid waiver of the right to a jury is undermined by the trial court's failure to include a specific item of information in its canvass."[9] (Internal quotation marks omitted.) Id. Accordingly, the Appellate Court affirmed the judgments of the trial court. Id., 494. This certified appeal followed.

On appeal, the defendant renews his claim in the Appellate Court that the trial court incorrectly determined that his jury trial waiver was knowing, intelligent and voluntary. As he did in the Appellate Court, the defendant argues that the trial court should have recognized "that the defendant felt himself unready and incapable of making such an important decision on February 9, 2016, that his counsel agreed he was incapable of making such an important decision . . . and that the defendant was in fact completely incapable of making such an important decision," as evidenced by his attorney's request for a competency hearing and the defendant's persistent "rambling about inconsequen-

[9] The Appellate Court also declined the defendant's request that it "use its supervisory authority to establish a more uniform procedure for conducting a canvass on the waiver of the right to a jury trial," stating that "traditional protections are adequate to safeguard the rights of a defendant who waives his right to a jury trial and to safeguard the integrity of the judicial system . . . ." *State* v. *Kerlyn T.*, supra, 191 Conn. App. 486 n.11.

tial" and "unrelated" matters during the hearing. After examining the record and briefs on appeal, including the briefs filed in the Appellate Court, we conclude that the judgment of the Appellate Court should be affirmed. The Appellate Court's thorough and well reasoned opinion fully addresses the defendant's arguments before this court, and, accordingly, there is no need for us to repeat the discussion contained therein. We therefore adopt the Appellate Court's opinion as the proper statement of the issues and the applicable law concerning those issues.[10] See, e.g., *State* v. *Henderson*, 330 Conn. 793, 799, 201 A.3d 389 (2019).

The judgment of the Appellate Court is affirmed.

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[10] Like the Appellate Court, we decline the defendant's invitation to exercise our supervisory authority to "mandate a more particularized canvass" requiring our trial courts to inform a defendant, prior to accepting a waiver of his right to a jury trial, of a litany of facts delineating the differences between a bench trial and a jury trial. We continue to believe that competent counsel is capable of explaining those basic differences—that a jury of six or twelve, with alternates, comprised of a defendant's peers, selected with the defendant's participation, would have to be unanimous—sufficiently to enable a defendant to make an informed decision when selecting one over the other. See, e.g., *State* v. *Rizzo*, supra, 303 Conn. 104 n.26 ("[w]hen a defendant indicates that he has been advised by counsel and is satisfied with the advice received, the trial court is entitled to rely on that representation in determining whether a jury waiver is knowing and intelligent"); *State* v. *Woods*, 297 Conn. 569, 586, 4 A.3d 236 (2010) ("[t]he fact that the defendant was represented by counsel and that he conferred with counsel concerning waiver of his right to a jury trial supports a conclusion that his waiver was constitutionally sound"). Although not constitutionally required, we also recommend that our trial courts elicit from a defendant proper assurances that he or she, in fact, understands those differences. Of course, if circumstances not existing in the present case indicate a need for a more particularized judicial explanation of the right being waived, such as a statement by the defendant that counsel has not provided a clear explanation, we recommend that our trial courts adjust the canvass accordingly.

# STATE OF CONNECTICUT *v.* RICHARD ROLON (SC 20423)

Robinson, C. J., and McDonald, D'Auria, Mullins, Kahn, Ecker and Vertefeuille, Js.*

*Syllabus*

Convicted, on a conditional plea of nolo contendere, of the crime of possession of a controlled substance with intent to sell, the defendant appealed, claiming that the trial court improperly denied his motion to suppress certain evidence that was seized after the police detained him, without a warrant, in the parking lot of the apartment building in which his codefendant, E, lived. The police had obtained an arrest warrant for a suspected drug trafficker, R, and a search warrant for R's apartment, which was in the same building as E's apartment.. Prior to executing the warrants, the police were surveilling the parking lot when they observed an unknown male, later identified as the defendant, engage in a brief conversation with R. The defendant and R then got into their respective vehicles and departed. A short time later, R was arrested for selling narcotics to an undercover officer, and the police prepared to execute the search warrant for R's apartment. At that time, however, the defendant and E returned to the parking lot in the defendant's vehicle. Approximately four or five uniformed police officers, at least one of whom had his gun drawn, immediately approached the defendant's parked vehicle. Upon reaching the driver's door, one of the officers opened the door and detected the odor of marijuana. The officer also observed a marijuana cigarette and drug packaging inside the vehicle. Both the defendant and E were removed from the vehicle and placed into custody. The police subsequently obtained a search warrant for E's apartment, and that search yielded additional narcotics and other related evidence. The defendant moved to suppress the evidence seized by the police, claiming that the warrantless search and seizure of his person and vehicle violated his constitutional rights. The trial court denied the motion, concluding that the warrantless seizure fell within the exception to the fourth amendment warrant requirement that authorizes law enforcement officers executing a search warrant to detain the occupants of the premises while a proper search is conducted. On appeal from the judgment of conviction, the defendant claimed that the trial court improperly denied his motion to suppress because he was not an occupant or in the immediate vicinity of the premises to be searched within the meaning of that exception. *Held* that the trial court improperly denied the defendant's motion to suppress, the state having failed to

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

satisfy its burden of establishing that the defendant was in the immediate vicinity of R's apartment when the defendant was detained by the police: the record was devoid of any evidence concerning the spatial factors used to ascertain whether the defendant was in the immediate vicinity of the premises to be searched, including whether the defendant was detained within the lawful limits of R's apartment, whether he was detained within the line of sight of R's apartment, and whether his location made it easy for him to enter or reenter R's apartment; accordingly, the warrantless search and seizure of the defendant and his vehicle were not justified under the relevant exception to the warrant requirement.

Argued June 5—officially released November 13, 2020**

*Procedural History*

Substitute information charging the defendant with the crimes of possession of a controlled substance with intent to sell, possession of a controlled substance, and operation of a drug factory, brought to the Superior Court in the judicial district of Hartford, where the court, *Gold*, *J.*, denied the defendant's motion to suppress certain evidence; thereafter, the defendant was presented to the court, *Baldini*, *J.*, on a conditional plea of nolo contendere to the charge of possession of a controlled substance with intent to sell; judgment of guilty in accordance with the plea; subsequently, the state entered a nolle prosequi as to the charges of possession of a controlled substance and operation of a drug factory, and the defendant appealed. *Reversed*; *further proceedings*.

*Ronald S. Johnson*, with whom was *Shawn Adams*, for the appellant (defendant).

*Sarah Hanna*, senior assistant state's attorney, with whom, on the brief, were *Gail P. Hardy*, state's attorney, and *David L. Zagaja*, senior assistant state's attorney, for the appellee (state).

*Opinion*

ECKER, J. The defendant, Richard Rolon, appeals from the judgment of conviction rendered by the

** November 13, 2020, the date that this decision was released as a slip opinion, is the operative date for all substantive and procedural purposes.

trial court following his conditional plea of nolo contendere to the charge of possession of a controlled substance with intent to sell in violation of General Statutes § 21a- 277 (a). The defendant claims that the trial court improperly denied his motion to suppress evidence seized after his warrantless detention in the parking lot of a multiunit apartment building, contending that he was not an "occupant" within the "immediate vicinity" of the premises subject to a search warrant under the exception to the fourth amendment's warrant requirement established in *Michigan* v. *Summers*, 452 U.S. 692, 705, 101 S. Ct. 2587, 69 L. Ed. 2d 340 (1981), and *Bailey* v. *United States*, 568 U.S. 186, 193, 133 S. Ct. 1031, 185 L. Ed. 2d 19 (2013) (*Summers* exception). We agree and, therefore, reverse the judgment and remand the case to the trial court with direction to grant the defendant's motion to suppress.

The controlling facts are those found by the trial court following an evidentiary hearing on the defendant's motion to suppress. "Members of the Statewide Narcotics Task Force conducted a six week long investigation into the suspected narcotics trafficking of an individual named Richard Rivera . . . . During the course of that investigation, an undercover police officer made a number of controlled drug purchases from Rivera at his home located at apartment C-1 of 12-14 South Street, Hartford.[1] On the basis of that investigation, [the] police applied for and obtained a search warrant for Rivera's apartment, as well as arrest warrants for Rivera based on his prior sales of narcotics to the undercover officer.

"After securing these warrants, [the] police developed an operational plan for their coordinated execution. On the date the warrants would be served, the plan contemplated that [the] police would conduct surveillance of the driveway and parking area of 12-14 South Street,

[1] "[T]he address of 12-14 South Street is a multiunit apartment building" that "consists of ten to twelve separate residences."

doing so by means of a city of Hartford street camera that [the] police could remotely access and direct toward the target location. This camera allowed [the] police from an off-site location to view via a live feed the events occurring in the targeted area. The plan also anticipated that an additional controlled purchase from Rivera would be arranged by the undercover officer, with that purchase to be conducted at a location some distance away from Rivera's South Street apartment. [The] [p]olice would be prepared to arrest Rivera when that sale was consummated and then to immediately execute the search warrant at his apartment. Between the officers assigned to surveillance, those responsible for the arrest of Rivera, and the members of the search warrant execution team, approximately twenty to thirty police officers were tasked with carrying out the operational plan.

"On January 31, 2017, the police put their plan into effect. Consistent with that plan, officers established their street camera surveillance of the driveway and parking area of 12-14 South Street and monitored the activities occurring there from approximately 10 a.m. until noon.[2] At approximately 11:13 a.m., [officers] on the surveillance team saw a car enter the driveway of the target address and back into a parking space against a chain-link fence that separated 12-14 South Street from a neighboring parcel. The car was recognized by officers as one that Rivera or his criminal associates had been seen operating during the course of the police investigation.

"As the car was backing into the space, [the] police observed a man walk from the area of the rear entrance of 12-14 South Street toward the area in which Rivera's car had just parked. The man's identity was unknown to [the] police at the time, as he had not previously come

[2] "The images captured by the surveillance camera were preserved and were introduced as evidence at the hearing on the motions to suppress."

to their attention during the course of their investigation into Rivera's activities. The man, who was subsequently identified as the defendant . . . walked past the driver's side door of Rivera's car and then out of view of the camera. As [the defendant] passed Rivera's car, [the] police saw the driver's door of the car open and a man emerge from the driver's seat. Upon exiting his vehicle, this man, who [the] police recognized and later confirmed was Rivera, stood just outside his car between the open door and the car itself. [The] [p]olice then observed Rivera begin to engage in a conversation with someone who was out of the camera's view. In order to determine the identity of the party with whom Rivera was conversing, [the] police slightly adjusted the direction of the camera. By doing so, [the] police were able to observe that the other party to this conversation was [the defendant], who was standing by the driver's door of a second car that was parked in the space next to Rivera's.[3] [Because] the surveillance camera did not have audio capability, [the] police were unable to overhear the content of the conversation.

"The conversation lasted approximately thirty seconds and appeared to end when Rivera, at approximately 11:14 a.m., sat back down in his driver's seat and closed his car door. As that occurred, a woman was seen walking from the rear of 12-14 South Street toward the area of Rivera's and [the defendant's] cars. This woman had not previously come to the attention of [the] police during their investigation into Rivera but was later identified as the [defendant's codefendant], Yashira [A.] Espino. As Espino approached the cars, [the] police observed [the defendant] reenter the camera's view, pass by Espino, and return to the rear entrance area of 12-14 South Street.

[3] "The two cars were positioned in such a way that Rivera and [the defendant] conducted their conversation over and across the roof of [the defendant's] vehicle."

"Approximately [one] minute later, at 11:16 a.m., [the] police saw [the defendant] again leave the rear of 12-14 South Street and walk back toward his car. Within seconds, [the] police observed [the defendant's] car, a dark Camry with New Jersey license plates, exit its parking space and proceed down the driveway toward South Street, passing the front of Rivera's parked car while doing so. As soon as [the defendant's] car passed Rivera's, [the] police saw Rivera pull his car out of its parking space and follow [the defendant's] car down the driveway. The positioning of the street camera did not allow [the] police to see the cars actually entering onto South Street.

"Approximately forty-five minutes later, and in accordance with the police operational plan, Rivera was arrested on Franklin Avenue after selling an additional quantity of narcotics to the undercover officer. Upon learning of Rivera's arrest, Detective [Sean] Mikeal, who was assigned to the search warrant execution team, drove immediately to the arrest location and retrieved Rivera's keys to apartment C-1 of 12-14 South Street . . . . Mikeal then returned to South Street and rejoined the other members of the search warrant execution team who were at that time staged in several vehicles in close proximity to the target address preparing to execute the search warrant at Rivera's apartment.

"As Mikeal and the other members of his team were about to drive their vehicles into the driveway of 12-14 South Street to commence the execution of the search warrant, [the defendant's] Camry was observed entering the driveway just ahead of them and then backing into the same space it had occupied earlier. The car's reappearance on the scene, particularly in the moments just before the warrant's execution, was entirely unexpected by [the] police. Even before any occupants of [the defendant's] car had exited it, the search warrant execution team members drove their vehicles into the driveway of 12-14 South Street. Approximately four or

five officers, all of whom were wearing shirts or vests clearly identifying themselves as police officers, immediately exited their vehicle and approached [the defendant's] parked car—at least one of the officers doing so with [a] gun drawn. . . . Mikeal, who may or may not have had his gun drawn, went directly to the driver's side of [the defendant's] car. Trooper Dawn Pagan simultaneously approached the passenger side of the vehicle. These officers determined that the car was occupied by a male driver later identified as [the defendant], a female front seat passenger later identified as Espino, and a small child in the backseat.

"Upon reaching the driver's door, Mikeal opened the door and immediately detected the odor of marijuana coming from inside the vehicle. From his vantage point outside the vehicle, Mikeal also observed a marijuana cigarette in the car's center console and a number of white baggies in the area of the driver's side door handle—baggies he recognized to be of a type used for the packaging of heroin. As Pagan reached the passenger's door, she, too, detected the odor of marijuana coming from the vehicle and observed a marijuana cigarette in the front center console area. Both [the defendant] and Espino were then removed from [the] vehicle and placed into custody. [They] later informed [the] police that Espino was the tenant in apartment C-2 of 12-14 South Street and that [the defendant] frequently resided with her at that address." (Footnote altered; footnotes in original; footnotes omitted.)

On the basis of the evidence obtained during the search and seizure of the defendant, Espino, and the defendant's motor vehicle, the police obtained a search warrant for Espino's apartment at C-2 of 12-14 South Street. During the execution of that search warrant, the police discovered more than 5000 bags of powdered heroin, approximately five ounces of marijuana, narcotics packaging materials, and more than $20,000 in cash.

The defendant was arrested and charged with (1) possession of a controlled substance with intent to sell in violation of § 21a-277 (a), (2) possession of a controlled substance or more than one-half ounce of marijuana in violation of General Statutes § 21a-279 (a) (1), and (3) operation of a drug factory in violation of § 21a-277 (c). The defendant and Espino both moved to suppress the evidence seized by the police, claiming that the warrantless seizure in the parking lot of 12-14 South Street violated their rights under the fourth amendment to the United States constitution and article first, §§ 7 and 9, of the Connecticut constitution because the police lacked a reasonable, articulable suspicion to believe that they were engaged in criminal activity.[4] The state opposed the motions. The state initially did not seek to justify the warrantless seizure under the *Summers* exception, which was the ground on which the trial court ultimately denied the motions to suppress. Instead, the state argued that the seizure was permissible under *Terry* v. *Ohio*, 392 U.S 1, 88 S. Ct. 1868, 20 L. Ed. 2d 889 (1968), because the police officers had a reasonable, articulable suspicion to believe that the defendant and Espino "may be returning to the scene in order to interfere with the execution of the search warrant [on apartment] C-1" in light of the defendant's brief conversation with Rivera in the parking lot of 12-14 South Street on the morning of January 31, 2017,

[4] The defendant claimed that the evidence seized from Espino's apartment was the "fruit of the poisonous tree" of the earlier warrantless seizure. See *State* v. *Jevarjian*, 307 Conn. 559, 565 n.5, 58 A.3d 243 (2012) (describing "fruit of the poisonous tree" doctrine as "an extension of the general exclusionary rule that specifically applies to evidence derived indirectly from an unlawful search rather than all evidence unlawfully seized" (internal quotation marks omitted)). In the trial court proceedings, the parties "agreed that the court's ruling on the constitutionality of the warrantless search [and seizure] will also resolve the suppression issues relating to the later search of [Espino's] home." Likewise, on appeal, the parties do not dispute that the constitutionality of the initial warrantless seizure in the parking lot of 12-14 South Street is dispositive of the constitutionality of the later search of Espino's apartment.

and his return to the parking lot at the same "point [in] time officers were about to search [apartment] C-1" following Rivera's arrest.

The trial court conducted a joint evidentiary hearing on the motions to suppress, at which the state conceded that the defendant and Espino "were seized . . . when the police officers en masse approach[ed] [the defendant's] vehicle" because the "liberty [of their] movements" had been restricted. Thus, the sole question for the trial court was whether the warrantless seizure and subsequent search of the defendant, Espino, and the defendant's motor vehicle fell within an applicable exception to the fourth amendment's warrant requirement. The state's argument was limited to two exceptions: *Terry* v. *Ohio*, supra, 392 U.S 21–22,[5] and the plain view doctrine. Specifically, the state argued that the initial investigatory detention of the defendant and Espino fell within the *Terry* exception because the police had a reasonable, articulable suspicion to believe that they were engaged in criminal activity. The subsequent search of the defendant, Espino, and the defendant's motor vehicle, the state argued, was justified by the plain view doctrine because the police observed drugs in plain view during the course of the investigatory detention.

During closing argument following the evidentiary hearing, the trial court asked the state whether the warrantless seizure fell within a third exception to the warrant requirement, namely, the *Summers* exception, "because that's not something [the state had] addressed." In response, the prosecutor explained that he "just [did

[5] "In *Terry*, the United States Supreme Court held that police may detain an individual when the following three conditions are met: '(1) the officer must have a reasonable suspicion that a crime has occurred, is occurring, or is about to occur; (2) the purpose of the stop must be reasonable; and (3) the scope and character of the detention must be reasonable when considered in light of its purpose.' " *State* v. *Kelly*, 313 Conn. 1, 9 n.6, 95 A.3d 1081 (2014).

not] think" that *Bailey* and *Summers* "appl[ied] to these facts." The trial court replied by observing that "*Bailey* and *Summers* would advantage the state because [the *Summers* exception] would allow a detention to take place even in the absence of [a] reasonable and articulable suspicion. So, if you're not pursuing that, then the only argument that would be for me to decide is whether . . . [a] reasonable and articulable suspicion existed." The prosecutor then stated that, "[c]ertainly, if the court feels that . . . that exception could apply to these facts then, you know, I'd be a fool not to ask the court to entertain it."

The trial court subsequently issued a written memorandum of decision in which it denied the motions to suppress. The trial court rejected the state's claim that the initial seizure was justified under the *Terry* doctrine, reasoning that neither the defendant nor Espino "had come to the attention of [the] police during any aspect of the Rivera investigation," and the "police observations of [their] activities" on January 31, 2017, alone, although sufficient to "[raise] investigative concerns in the minds of police officers," were insufficient to give the "police [a] reasonable and articulable suspicion specifically to believe that the [defendant and Espino] were engaged in or had been engaged in criminal activity." The trial court, however, did not stop there; it proceeded to decide that the warrantless seizure of the defendant and Espino was justified pursuant to the *Summers* exception—the legal theory belatedly raised by the trial court following the evidentiary hearing. In arriving at this conclusion, the trial court determined that the parking lot where the seizure occurred "fell within the 'immediate vicinity' of the premises that were to be searched [pursuant to the warrant], as that term was employed by the court in *Bailey* v. [*United States*], supra, 568 U.S. 186." The trial court further determined that the defendant and Espino were " 'occupants' of the prem-

ises to be searched" because the police had "an articulable basis to connect [them] to the premises to be searched, or to the [resident] of [the] premises." In the trial court's view, the intrusion on the defendant's liberty was reasonable when weighed against the state's interest in promoting officer safety because the defendant's detention "was exceedingly brief in duration and no more intrusive than was necessary for [the] police to take command of the situation, to safely approach the [defendant's] vehicle, and then to confirm or dispel the validity of their suspicions." During the course of the seizure, "the officers detected the odor of marijuana emanating from the car and drugs in the car within plain view," which at that point provided them with "reasonable suspicion" under the *Terry* doctrine—if "not probable cause—to believe that the [defendant and Espino] were engaged in criminal activity . . . ." Accordingly, the trial court determined that no fourth amendment violation occurred in connection with either the warrantless seizure of the defendant and Espino or the subsequent, warrantless search of their persons and motor vehicle.

After the denial of his motion to suppress, the defendant entered a conditional plea of nolo contendere to the charge of possession of a controlled substance with intent to sell in violation of § 21a-277 (a), which was "conditional on the right to take an appeal from the court's denial of the defendant's motion to suppress . . . ." General Statutes § 54-94a.[6] The state entered a

[6] 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."

nolle prosequi as to each of the two remaining charges. The trial court sentenced the defendant to fifteen years of imprisonment, execution suspended after eight years, followed by three years of probation. This appeal followed.[7]

On appeal, the defendant claims that the trial court improperly denied his motion to suppress because neither the defendant nor Espino was an "occupant" in the "immediate vicinity" of the premises to be searched under the *Summers* exception to the fourth amendment's warrant requirement.[8] Our standard of review for a motion to suppress is well settled. "A finding of fact will not be disturbed unless it is clearly erroneous in view of the evidence and pleadings in the whole record . . . . [W]hen a question of fact is essential to the outcome of a particular legal determination that implicates a defendant's constitutional rights, [however] and the credibility of witnesses is not the primary issue, our customary deference to the trial court's factual findings is tempered by a scrupulous examination of the record to ascertain that the trial court's factual findings are supported by substantial evidence. . . . [W]here the legal conclusions of the court are challenged, [our review is plenary, and] we must determine whether they are legally and logically correct and whether they find support in the facts set out in the memorandum of decision . . . ." (Internal quotation marks omitted.) *State* v. *Kendrick*, 314 Conn. 212, 222,

[7] The defendant appealed from the judgment of the trial court to the Appellate Court, and we transferred the appeal to this court pursuant to General Statutes § 51-199 (c) and Practice Book § 65-1.

[8] The defendant has not raised or briefed a separate claim under our state constitution or challenged the trial court's determination that the subsequent search of the defendant's person and motor vehicle was justified by the plain view doctrine. We therefore limit our analysis to the constitutionality of the initial warrantless seizure of the defendant under the *Summers* exception to the fourth amendment's warrant requirement. See, e.g., *State* v. *Boyd*, 323 Conn. 816, 818–19 n.2, 151 A.3d 355 (2016) (limiting analysis to federal constitution in absence of appellate claim that state constitution affords greater rights than federal constitution).

100 A.3d 821 (2014). We exercise plenary review here because the defendant challenges the trial court's legal conclusion that its factual findings permit application of the *Summers* exception. See id.

The fourth amendment to the United States constitution, which applies to the states through the due process clause of the fourteenth amendment, prohibits unreasonable searches and seizures by government agents.[9] "Subject to a few well defined exceptions, a warrantless search and seizure is per se unreasonable." *State* v. *Eady*, 249 Conn. 431, 436, 733 A.2d 112, cert. denied, 528 U.S. 1030, 120 S. Ct. 551, 145 L. Ed. 2d 428 (1999); accord *Katz* v. *United States*, 389 U.S. 347, 357, 88 S. Ct. 507, 19 L. Ed. 2d 576 (1967); see also *State* v. *Clark*, 255 Conn. 268, 291, 764 A.2d 1251 (2001). "The state bears the burden of proving that an exception to the warrant requirement applies when a warrantless search [and seizure have] been conducted." *State* v. *Clark*, supra, 291; accord *Mincey* v. *Arizona*, 437 U.S. 385, 390–91, 98 S. Ct. 2408, 57 L. Ed. 2d 290 (1978).

We begin our analysis with *Michigan* v. *Summers*, supra, 452 U.S. 692, because the state relies solely on the fourth amendment exception created by that case to justify the initial warrantless seizure of the defendant.[10] In *Summers*, police officers encountered the defendant, George Summers, descending the front steps

[9] The fourth amendment to the United States constitution provides: "The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no warrants shall issue, but upon probable cause, supported by oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized." U.S. Const., amend. IV. The fourth amendment's protection against unreasonable searches and seizures is made applicable to the states through the due process clause of the fourteenth amendment. See, e.g., *Mapp* v. *Ohio*, 367 U.S. 643, 655, 81 S. Ct. 1684, 6 L. Ed. 2d 1081 (1961).

[10] The state has abandoned its claim that the initial warrantless seizure of the defendant was supported by a reasonable, articulable suspicion under the *Terry* doctrine. See, e.g., *Traylor* v. *State*, 332 Conn. 789, 804, 213 A.3d 467 (2019) ("[a party's] failure to brief a challenge to the trial court's

of his residence when they arrived at his house to execute a search warrant for narcotics. Id., 693. The officers detained Summers and requested his assistance in gaining entry to the residence. Id. "After finding narcotics in the basement and ascertaining that [Summers] owned the house, the police arrested him, searched his person, and found in his coat pocket an envelope containing 8.5 grams of heroin." Id. Summers "moved to suppress the heroin as the product of an illegal search in violation of the [f]ourth [a]mendment . . . ." (Footnote omitted.) Id., 694.

The United States Supreme Court held that Summers' limited detention for the duration of the execution of the search warrant was justified by the operative "law enforcement interest[s]" viewed in light of "the nature of the 'articulable facts' supporting the detention . . . ." Id., 702. The court explained that a limited detention attendant to the execution of a search warrant served the legitimate interests of "preventing flight in the event that incriminating evidence is found," "minimizing the risk of harm" to both "the police and the occupants" of the premises, and facilitating "the orderly completion of the search" by ensuring that the occupants of the premises are available to "open locked doors or locked containers to avoid the use of force that is not only damaging to property but may also delay the completion of the task at hand." Id., 702–703. As for "the nature of the 'articulable facts' supporting the detention"; id., 702; the court determined that the existence of a search warrant obtained from a "neutral and detached magistrate [who] had found probable cause to believe that the law was being violated in [the occupant's own] house"; id., 701; connects the occupant of the premises to criminal activity, thereby giving police officers "an easily identifiable and certain basis for determining that suspicion

conclusions in its memorand[um] of decision abandons any such challenge to those conclusions").

of criminal activity justifies a detention of that occupant." Id., 704. Furthermore, the detention, "although admittedly a significant restraint on . . . liberty," is "less intrusive than the search itself," partly because it is in the occupant's "own residence" and does not involve the "inconvenience [or] the indignity" of a public arrest or "a compelled visit to the police station." Id., 701–702. Accordingly, "for [f]ourth [a]mendment purposes . . . a warrant to search for contraband founded on probable cause implicitly carries with it the limited authority to detain the occupants of the premises while a proper search is conducted." (Footnote omitted.) Id., 705.

The United States Supreme Court imposed limits on the *Summers* exception in *Bailey* v. *United States*, supra, 568 U.S. 186, and explained that such limits were necessary particularly inasmuch as "[t]he rule in *Summers* extends further than some earlier exceptions [to the fourth amendment's warrant requirement] because it does not require law enforcement to have particular suspicion that an individual is involved in criminal activity or poses a specific danger to the officers. . . . An officer's authority to detain incident to a search is categorical; it does not depend on the quantum of proof justifying detention or the extent of the intrusion to be imposed by the seizure." (Citation omitted; internal quotation marks omitted.) Id., 193; see also id., 200 ("[b]ecause this exception grants substantial authority to police officers to detain outside of the traditional rules of the [f]ourth [a]mendment, it must be circumscribed"). *Bailey* addressed whether the *Summers* exception applies to an occupant who is stopped and detained approximately one mile "away from the premises to be searched when the only justification for the detention [is] to ensure the safety and efficacy of the search." Id., 189–90. The court noted that, as a categorical and far-reaching "exception to the [f]ourth [a]mendment rule prohibiting detention absent probable cause,"

the scope of the *Summers* exception "must not diverge from its purpose and rationale." Id., 194. To determine the scope of the *Summers* exception, the court addressed whether "the reasons for the rule" support extending the *Summers* exception to a detention one mile away from the premises to be searched. Id.

The court in *Bailey* held that a detention incident to the execution of a search warrant is not constitutionally permissible under such circumstances because none of the "three important law enforcement interests that, taken together justify" the *Summers* exception—namely, "officer safety, facilitating the completion of the search, and preventing flight"—weighed in favor of "extending the power to detain persons stopped or apprehended away from the premises where the search is being conducted." Id., 194–95. First, with respect to officer safety, persons who are not in the immediate vicinity of the premises to be searched "[pose] little risk to the officers at the scene." Id., 196. Although there is a "risk that a departing occupant might notice the police surveillance and alert others still inside the residence," this risk is "an insufficient safety rationale to justify expanding the existing categorical authority to detain so that it extends beyond the immediate vicinity of the premises to be searched." Id., 197. The court explained that, if the *Summers* rule extended to persons beyond the immediate vicinity of the premises to be searched, "the [safety] rationale would justify detaining anyone in the neighborhood who could alert occupants that the police are outside, all without individualized suspicion of criminal activity or connection to the residence to be searched. This possibility demonstrates why it is necessary to confine the *Summers* rule to those who are present when and where the search is being conducted." Id.

Second, the court in *Bailey* stated that the law enforcement interest in the orderly completion of the search "must be confined to those persons who are on

site and so in a position, when detained, to at once observe the progression of the search"; otherwise, the *Summers* exception "would have no limiting principle . . . ." Id., 198. An individual who is not in the immediate vicinity of the premises at the time of the execution of the search warrant can "[serve] no purpose in ensuring the efficient completion of the search." Id.

Third, *Bailey* held that law enforcement's interest in preventing flight "does not independently justify detention of an occupant beyond the immediate vicinity of the premises to be searched" because this interest is limited to "the damage that potential flight can cause to the integrity of the search." Id., 199. "The need to prevent flight, if unbounded, might be used to argue for detention, while a search is underway, of any regular occupant regardless of his or her location at the time of the search. . . . The interest in preventing escape from [the] police cannot extend this far without undermining the usual rules for arrest based on probable cause or a brief stop for questioning under [the] standards derived from *Terry*. Even if the detention of a former occupant away from the premises could facilitate a later arrest should incriminating evidence be discovered, 'the mere fact that law enforcement may be made more efficient can never by itself justify disregard of the [f]ourth [a]mendment.' " Id., quoting *Mincey* v. *Arizona*, supra, 437 U.S. 393.

*Bailey* also expressed concern about the extent of the constitutional deprivation that would occur if the *Summers* exception to the warrant requirement were to be extended beyond the immediate proximity of the search location. Not only are law enforcement's interests insufficient to justify "the detention of recent occupants beyond the immediate vicinity of the premises to be searched," the court explained, but the detention of an occupant "away from his home" introduces "an additional level of intrusiveness." *Bailey* v. *United States*, supra, 568 U.S. 199–200. "A public detention,

even if merely incident to a search, will resemble a full-fledged arrest" and will expose the occupant to "the additional indignity of a compelled transfer back to the premises, giving all the appearances of an arrest." Id., 200. Such detentions are, therefore, "more severe"; id., 201; than a detention that "occurs in the individual's own home . . . ." Id., 200.

In light of these considerations, the court in *Bailey* concluded that "[a] spatial constraint defined by the immediate vicinity of the premises to be searched is therefore required for detentions incident to the execution of a search warrant." Id., 201. A warrantless detention one mile away from the premises is "beyond any reasonable understanding of the immediate vicinity of the premises in question," and the court therefore found no "necessity [or] . . . occasion to further define the meaning of immediate vicinity. In closer cases courts can consider a number of factors to determine whether an occupant was detained within the immediate vicinity of the premises to be searched, including the lawful limits of the premises, whether the occupant was within the line of sight of his dwelling, the ease of reentry from the occupant's location, and other relevant factors." Id.

The present case is one of those "closer cases" that necessitates an examination of the *Bailey* factors—including whether the detention occurred within the lawful limits of the premises, in the line of sight of Rivera's apartment, and in a location that would facilitate the ease of reentry—to determine whether the defendant was within the "immediate vicinity" of the premises to be searched under the *Summers* exception.

At the outset, we address the defendant's argument that the *Summers* exception is inapplicable because he was not an "occupant" of the premises to be searched within the meaning of *Summers* and its progeny. The defendant argues that the use of the term "occupant" in *Summers* serves as a doctrinal limitation separate

and distinct from the "immediate vicinity" requirement. According to the defendant, the state must prove not only that he was a person in the immediate vicinity of Rivera's apartment, but that he also was a *resident* of that apartment. The defendant's legal argument, if correct, would be dispositive because it is undisputed that the defendant was not a resident, lessee or owner of Rivera's apartment; nor did he have a known connection to Rivera's apartment. For example, the police never observed the defendant entering or exiting the apartment; nor did they have any reason to believe that the defendant was a visitor—frequent or otherwise—to Rivera's apartment. The record reflects that, during the state's six week investigation into Rivera's suspected narcotics trafficking enterprise, neither the defendant nor Espino had ever come to the attention of the police. In support of his legal claim, the defendant relies on the literal language of *Summers*, which repeatedly uses the term "occupant" to describe those persons subject to the exception, as well as other sources of authority favoring a restrictive definition of "occupant," including the views of Professor Wayne R. LaFave[11] and this court's decision in *State* v. *Torres*, 197 Conn. 620, 625, 500 A.2d 1299 (1985), in which we questioned the applicability of the *Summers* exception.[12] The defen-

[11] See 2 W. LaFave, Search and Seizure (5th Ed. 2012) § 4.9 (e), pp. 924–26 ("[e]specially because the [c]ourt [in *Summers*] elsewhere refers to the category of persons covered as 'residents' who would ordinarily 'remain in order to observe the search of their possessions,' it would seem that the word 'occupants' is not to be loosely construed as covering anyone present, but instead is to be interpreted literally (though many cases have interpreted *Summers* otherwise)" (footnotes omitted)).

[12] In *Torres*, the defendant, Confessor Torres, entered the apartment that he was visiting, accompanied by the tenant and another individual, approximately one hour after the police had conducted a search of the premises pursuant to a valid warrant. *State* v. *Torres*, supra, 197 Conn. 622–23. Torres was detained at the scene, and cocaine was discovered on his person. Id., 623. The trial court concluded that Torres' warrantless detention was lawful under *Summers*. Id., 625. We affirmed, but on the alternative ground that Torres' detention was justified under *Terry* v. *Ohio*, supra, 392 U.S. 29–30. *State* v. *Torres*, supra, 625. In doing so, we expressed doubt about the

dant's position is that *Summers* does not apply under these circumstances, regardless of his geographic location at the time of his detention.

The state takes a diametrically opposed view regarding the legal significance of the defendant's status as an occupant. The state argues that physical presence in the immediate vicinity of the premises to be searched, combined with a connection to a resident of the premises, is enough to satisfy the *Summers* occupancy requirement. According to the state, the defendant was an occupant of Rivera's apartment because he was in the immediate vicinity of the apartment and "the police possessed articulable facts connecting the defendant" to Rivera, which "necessarily also connected him to the premises subject to the search warrant." More broadly, the state contends that reasonableness is the touchstone of the fourth amendment and that reasonableness, rather than the artificial categories of occupancy or residency, must define the scope of the *Summers* exception. Thus, in the state's view, if a person in the immediate vicinity of the search poses a potential risk to an officer or public safety, or the orderly execution of the search warrant, then *Summers* permits the person to be detained for the purpose of safeguarding those interests.

The definition of the term "occupant" under *Summers* is a sharply contested legal issue of substantial interest,[13] but it is not one that we must resolve in this

applicability of the *Summers* exception, stating that, "[i]n this case, [Torres] was a visitor to [the tenant's] apartment and not an 'occupant' as it appears that term may have been used in *Summers*." Id.

[13] In both *Summers* and *Bailey*, the defendants were residents of the premises to be searched. In the absence of such definitive facts, "the [United States] Supreme Court has not directly resolved the issue of who qualifies as an 'occupant' for the purposes of the *Summers* rule." *State* v. *Wilson*, 371 N.C. 920, 925, 821 S.E.2d 811 (2018). There is a split of authority whether the "occupant and immediate vicinity questions are separate requirements . . . ." *United States* v. *Freeman*, 964 F.3d 774, 781 (8th Cir. 2020). Some courts have defined the term "occupant" broadly to include persons on the

case because we conclude that the state failed to satisfy

premises or in the immediate vicinity of the premises to be searched. See, e.g., *Bailey* v. *United States*, supra, 568 U.S. 203 (Scalia, J., concurring) ("[O]ccupants" means "persons within the immediate vicinity of the premises to be searched. . . . It really is that simple." (Citation omitted; internal quotation marks omitted.)); *United States* v. *Sanchez*, 555 F.3d 910, 918 (10th Cir.) ("occupant" includes "all persons present on the premises" regardless of residency), cert. denied, 556 U.S. 1145, 129 S. Ct. 1657, 173 L. Ed. 2d 1027 (2009); *Burchett* v. *Kiefer*, 310 F.3d 937, 943 (6th Cir. 2002) (noting that "the Supreme Court's discussion of 'occupants' in *Summers* included nonresidents who are present at the scene of a search when [the] police arrive" and those "who arrive at the scene of a search, even if they were not inside the residence or present when [the] police first arrived"). Under such a broad construction, "an occupant is defined by his or her location—i.e., an occupant *is* a '[person] within the immediate vicinity of the premises to be searched.' " (Emphasis in original.) *United States* v. *Freeman*, supra, 780–81, quoting *Bailey* v. *United States*, supra, 586 U.S. 203 (Scalia, J., concurring).

Other courts have construed the term "occupant" narrowly to include only those persons who reside at the premises. See, e.g., *United States* v. *Reid*, 997 F.2d 1576, 1579 (D.C. Cir. 1993) ("unlike Summers, [the defendant] was not a resident of the apartment which was to be searched under the warrant, and the trial did not disclose that he had any proprietary or residential interest in the suspect premises" (emphasis omitted)), cert. denied, 510 U.S. 1132, 114 S. Ct. 1105, 127 L. Ed. 2d 417 (1994); *State* v. *Kaul*, 891 N.W.2d 352, 356 (N.D. 2017) (declining "to expand the meaning of 'occupants' under *Summers* to a person approaching the premises as a visitor"); *Lippert* v. *State*, 664 S.W.2d 712, 720 (Tex. Crim. App. 1984) (holding that *Summers* exception cannot "be extended to a [nonoccupant]" who was not target of warrant and entered premises after commencement of search). Under a narrow construction, the "occupant" and "immediate vicinity" questions are separate and distinct inquiries.

Still other courts view the occupancy requirement as a separate doctrinal limitation on the *Summers* exception, but one that is inextricably intertwined with the immediate vicinity inquiry. Under this hybrid approach, an "occupant" is someone present on the premises or in the immediate vicinity of the premises who also has a demonstrable connection to the premises, a resident of the premises, or the criminal activity conducted at the premises. See, e.g., *United States* v. *Freeman*, supra, 964 F.3d 781 ("a passenger of a car parked on a street in front of a premises subject to a search warrant who was connected to the [premises'] occupant . . . was also an 'occupant' under *Summers*"); *Stanford* v. *State*, 353 Md. 527, 536, 727 A.2d 938 (1999) (recognizing that some jurisdictions permit visitors to be detained under *Summers* exception "if the police can point to reasonably articulable facts that associate the visitor with the residence or the criminal activity being investigated in the search warrant").

its unquestioned burden of establishing that the defendant—"occupant" or otherwise—was in the immediate vicinity of the premises to be searched at the time of his detention.

As we previously discussed, *Bailey* identifies three specific factors that will help determine whether the defendant was in the "immediate vicinity" of the premises to be searched for purposes of ascertaining the applicability of the *Summers* exception: (1) whether the defendant was within the lawful limits of the premises; (2) whether the defendant was within the line of sight of the premises; and (3) whether the defendant's location was conducive to ease of reentry to the premises. *Bailey* v. *United States*, supra, 568 U.S. 201. We emphasize that these factors are neither talismanic nor exclusive in nature, and they should not be understood as anything more than a useful means to ascertain the answer to the underlying "immediate vicinity" question. Ultimately, the "immediate vicinity" inquiry asks whether the defendant's geographic proximity to the premises to be searched places him in a location where, absent detention, he poses a genuine danger to the safe and efficient execution of the search warrant.

There is no evidence in the record with respect to the first *Bailey* factor, namely, whether the defendant was detained within the "lawful limits of the premises . . . ." Id. The premises to be searched was a single apartment in a multiunit building comprised of approximately ten to twelve apartments. Even if we assume, without deciding, that the "lawful limits" of an apartment may include the interior and exterior common areas to which occupants of a multiunit building have legal access—a hallway, staircase, or even parking lot or other outside area in close proximity to the premises to be searched—the state failed in the present case to adduce sufficient evidence to support a reasonable inference that the parking lot of 12-14 South Street was an exterior common area for the use and benefit of the

building's tenants. See, e.g., *United States* v. *Murray*, 659 Fed. Appx. 1023, 1027 (11th Cir. 2016) (driveway of property adjacent to premises to be searched was "beyond 'the lawful limits' "), cert. denied, U.S. , 137 S. Ct. 699, 196 L. Ed. 2d 575 (2017); *United States* v. *Jones*, 311 F. Supp. 3d 761, 767 (E.D. Va. 2018) (concluding that parking lot was within lawful limits of premises to be searched because "[t]he evidence . . . showed that the parking area [was] shared by all of the businesses in the office building"); *United States* v. *Ruiz*, Docket No. EP-14-CR-868-PRM, 2014 WL 10183873, *8 (W.D. Tex. August 25, 2014) (defendant's stop less than 130 yards from his apartment was not within lawful limits of premises). For example, there was no evidence that the tenants of 12-14 South Street had parking privileges in the lot in which the defendant was detained under the terms of a lease agreement or otherwise. Given the complete dearth of evidence on this particular issue, a reasonable fact finder could not conclude that the parking lot was within the lawful limits of the premises to be searched.

Likewise, there is no evidence in the record with respect to the second *Bailey* factor, which asks whether the defendant was within the line of sight of the premises to be searched at the time of his warrantless seizure. No testimony or other evidence adduced at the suppression hearing indicated where or on what floor Rivera's apartment was located at 12-14 South Street, whether the apartment faced the parking lot, the actual distance between the parking lot and the exterior entrance to the building, or whether the defendant could observe Rivera's apartment and/or the exterior entrance to the building from the location where he was seized.[14] As a

[14] We have reviewed the surveillance video that was introduced into evidence at the suppression hearing. See footnote 2 of this opinion. The video does not depict the exterior entrance to 12-14 South Street, so it is impossible to determine the distance between the exterior entrance and the location where the defendant was seized. Even if the approximate distance to the building entrance could be estimated, there is no basis for determining lines

result, we conclude that the second *Bailey* factor also cannot justify application of the *Summers* exception. See *United States* v. *Moore*, Docket No. 15-116(1)&(2) (DWF/JSM), 2015 WL 8779926, *6 (D. Minn. December 15, 2015) (police officer "could not recall the location of the car [in which the defendant was detained] with precision," and, therefore, evidence was insufficient to find defendant was in line of sight of premises to be searched), aff'd sub nom. *United States* v. *Claybron*, 716 Fed. Appx. 564 (8th Cir. 2017); *Widi* v. *McNeil*, Docket No. 2:12-cv-00188-JAW, 2015 WL 8334962, *2 n.1 (D. Me. December 8, 2015) (declining to decide whether defendant's "presence at a gas station 300 yards away from the searched residence would be deemed in the 'immediate vicinity' " but noting that "[t]here [was] no evidence in [the] record for some of the *Bailey* factors, including line of sight"), appeal dismissed sub nom. *Widi* v. *United States Attorneys Office*, Docket Nos. 17-1948 and 17-2001, 2018 WL 11199004 (1st Cir. September 21, 2018); *Cabral* v. *New York*, Docket No. 12 Civ. 4659 (LGS), 2014 WL 4636433, *4 (S.D.N.Y. September 17, 2014) ("[N]othing in the record suggests—and [the] [d]efendants do not claim—that [the] [p]laintiff was an occupant of the searched apartment at any relevant time, had any intention of entering it or otherwise had any connection to it. Moreover, [the] [p]laintiff was inside a vehicle that was '[a]round the block' from the apartment according to [the detective], not within the line of sight, and access to the apartment presumably would have required passage through at least one if not two doors. These facts are far from satisfying the *Summers* standard, and could not have justified [the] [p]laintiff's initial detention as effected incident to the search of the apartment." (Footnote omitted.)), aff'd, 662 Fed. Appx. 11 (2d Cir. 2016).

of sight because the record does not reveal the location of Rivera's apartment in relation to either the parking lot generally or the particular location where the defendant was seized.

The third and final *Bailey* factor—the ease with which the defendant could have reentered the premises to be searched—also suffers from a deficiency of proof. As we previously explained, there is no evidence in the record regarding the spatial proximity between the site at which the defendant was seized and Rivera's apartment or the presence or absence of physical impediments (such as locked exterior doors) that may have affected the defendant's ease of access. Compare *Cabral* v. *New York*, supra, 2014 WL 4636433, *4 (finding no ease of reentry because "access to the apartment presumably would have required passage through at least one if not two doors"), with *United States* v. *Ruiz*, supra, 2014 WL 10183873, *8 (third *Bailey* factor supported finding that defendant was in immediate vicinity of premises because government's testimony and exhibits established that "reentry to [the] [d]efendant's residence from the location of the stop could have been easily achieved given the proximity of the two locations and the absence of physical impediments between them"). Indeed, there is no basis on this record to believe that the defendant had any ability to enter, much less reenter, Rivera's apartment. In the absence of such evidence, this factor, like the other *Bailey* factors, fails to support a conclusion that the defendant was within the immediate vicinity of Rivera's apartment and "pose[d] a real threat to the safe and efficient execution of [the] search warrant . . . ." *Bailey* v. *United States*, supra, 568 U.S. 201.

The lack of pertinent evidence in this case is not surprising: the state did not undertake or intend to prove at the evidentiary hearing on the motions to suppress that the defendant was an "occupant" within the "immediate vicinity" of the premises to be searched under *Summers* and *Bailey*. Instead, the state sought to prove that the warrantless search and seizure of the defendant and his motor vehicle were justified by the

*Terry* and plain view doctrines. When the trial court first brought up the *Summers* exception after the close of evidence, the prosecutor unequivocally expressed his view that, with respect "to *Summers* and *Bailey*, I just don't think that they apply to these facts." It was only after the trial court pointed out that "*Bailey* and *Summers* would advantage the state because [they] would allow a detention to take place even in the absence of [a] reasonable and articulable suspicion" under the *Terry* doctrine that the prosecutor said that he would be "a fool not to ask the court to entertain it." Although the state belatedly raised a *Summers* argument in response to the trial court's posthearing observations, it failed to meet its burden of providing the trial court with the factual predicate necessary to establish the applicability of the exception.

The state points out that numerous courts have applied the *Summers* exception under factual circumstances similar to the present case and urges this court to follow out-of-state precedent such as *United States* v. *Jennings*, 544 F.3d 815 (7th Cir. 2008), and *Burchett* v. *Kiefer*, 310 F.3d 937 (6th Cir. 2002). See *United States* v. *Jennings*, supra, 818 (defendant's detention was justified under *Summers* because "he entered the security perimeter surrounding the apartment where the narcotics search was underway"); *Burchett* v. *Kiefer*, supra, 939, 943–44 (holding that defendant's fourth amendment rights were not violated under 42 U.S.C. § 1983, even though he "neither was a resident of the searched premises nor arrived at the searched premises," because police have authority under *Summers* to "detain an individual who approaches a property being searched pursuant to a warrant, pauses at the property line, and flees when the officers instruct him to get down"). These cases cannot guide our inquiry, however, because they predate *Bailey* and consequently fail to consider whether the defendant was in the immediate vicinity of the premises to be searched using the spatial analysis

that *Bailey* requires.[15] In the absence of a spatial analysis under the *Bailey* factors, it is unclear whether the police had "the power to detain persons stopped or apprehended away from the premises where the search is being conducted." *Bailey* v. *United States*, supra, 568 U.S. 195.

Lastly, the state claims that the warrantless seizure of the defendant was justified under the *Summers* exception because the important law enforcement interests in officer safety, orderly completion of the search, and prevention of flight outweighed the brief and limited intrusion on the defendant's liberty. We reject the state's claim because it contravenes the very

[15] In its brief, the state cites two cases that were decided after *Bailey*: *State* v. *Wilson*, 371 N.C. 920, 821 S.E.2d 811 (2018), and *State* v. *Davis*, 158 Idaho 857, 353 P.3d 1091 (App. 2015). Both cases are readily distinguishable. In *Wilson*, the nonresident defendant, Terry Jerome Wilson, was detained in the driveway of a house in which the police were executing a search warrant. *State* v. *Wilson*, supra, 921. The Supreme Court of North Carolina held that Wilson's warrantless seizure was justified by the *Summers* exception because Wilson was "within the immediate vicinity of the premises being searched." Id., 924. Applying the *Bailey* factors, the court reasoned that Wilson "was well within the lawful limits of the property containing the house being searched. And, had he not been stopped by police, [he] could easily have accessed the house. Thus the spatial requirements of the *Summers* rule were met here." Id., 924–25. In contrast to *Wilson*, there was no evidence in the present case to establish that the defendant was within the lawful limits or line of sight of the premises to be searched or that he easily could have entered the premises as required by *Summers* and *Bailey*.

*Davis* is distinguishable for similar reasons. The defendant, Russell Glenn Davis, was a nonresident detained "on a communal sidewalk that led to the common entry area of only four apartments." *State* v. *Davis*, supra, 158 Idaho 862. Davis was walking toward the stairs of the only entrance to the second floor apartment being searched, and he was "perhaps [eight] to [ten] feet, at the most, from the bottom of the stairs" when he was detained. Id. The Court of Appeals of Idaho held that Davis was "in the immediate vicinity of the premises being searched" in light of the layout of the property, Davis' presence in a communal area, and his close proximity to the entry of the apartment being searched. Id. Not incidentally, the court cautioned that its holding was limited to the facts presented and that, "[i]n context of the important interests outlined by the [United States] Supreme Court in *Summers*, officers would not be justified in detaining an individual who walks past a [fifty story] apartment building while a search occurs in one of the apartments because the individual usually would not be within the immediate vicinity of the premises being searched." Id.

premise of *Summers* and its progeny, which rejects a reliance on generic principles of reasonableness under an amorphous balancing test in this context. Indeed, the United States Supreme Court has emphasized that the *Summers* exception is categorical in nature and does not require us to evaluate "the quantum of proof justifying [the] detention or the extent of the intrusion . . . imposed by the seizure." (Internal quotation marks omitted.) *Bailey* v. *United States*, supra, 568 U.S. 193; see also *Muehler* v. *Mena*, 544 U.S. 93, 98, 125 S. Ct. 1465, 161 L. Ed. 2d 299 (2005) ("[a]n officer's authority to detain incident to a search is categorical"); *Croom* v. *Balkwill*, 645 F.3d 1240, 1247–48 (11th Cir. 2011) ("[i]mportantly, [although] its decision in *Summers* was driven by a careful balancing of factors and facts, the [c]ourt clarified that [its] rule thus established did not call for a repetition of that balancing in each of its applications"). If an occupant is "present when and where the search is being conducted"; *Bailey* v. *United States*, supra, 197; a warrantless detention, "under *Summers*, [is] plainly permissible." *Muehler* v. *Mena*, supra, 98. "Once an individual has left the immediate vicinity of a premises to be searched, however, detentions must be justified by some other rationale." *Bailey* v. *United States*, supra, 202. We acknowledge that this case, like *Bailey* itself, illustrates that some amount of line drawing is inevitable even in the *Summers* context, as courts demarcate the boundaries within which the bright-line rule operates, but we nonetheless adhere to the United States Supreme Court's expressed preference to eschew case-by-case interest balancing when applying the *Summers* exception. We hold that the *Summers* exception did not justify the defendant's warrantless seizure in the present case because the state failed to meet its burden of establishing that the defendant was within the immediate vicinity of the premises to be searched. We therefore conclude that the defendant's fourth amendment rights were violated and his motion to suppress should have been granted.

The judgment is reversed and the case is remanded with direction to grant the defendant's motion to suppress.

In this opinion the other justices concurred.

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## STATE OF CONNECTICUT *v.* YASHIRA A. ESPINO (SC 20428)

Robinson, C. J., and McDonald, D'Auria, Mullins, Kahn, Ecker and Vertefeuille, Js.*

*Syllabus*

Convicted, on a conditional plea of nolo contendere, of the crime of possession of a controlled substance with intent to sell, the defendant appealed, claiming that the trial court improperly denied her motion to suppress certain evidence that was seized after the police detained her, without a warrant, in a vehicle in the parking lot of the apartment building in which she lived while executing an unrelated search warrant on an apartment in that building. More specifically, the defendant claimed that the trial court incorrectly had concluded that the warrantless seizure fell within the exception to the fourth amendment warrant requirement that authorizes law enforcement officers executing a search warrant to detain the occupants of the premises while a proper search is conducted because, inter alia, she was not in the immediate vicinity of the premises to be searched within the meaning of that exception. *Held* that the exception to the warrant requirement on which the trial court relied in denying the defendant's motion to suppress was inapplicable, as the defendant was not within the immediate vicinity of the premises to be searched when she was detained by the police, and, accordingly, her fourth amendment rights were violated, and the evidence obtained as a result of the warrantless seizure should have been suppressed; because the facts of this case and the issue presented on appeal were identical to those in the companion case of *State* v. *Rolon*, (337 Conn. 397), this court's reasoning in *Rolon* controlled the present case.

Argued June 5—officially released November 13, 2020**

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

** November 13, 2020, the date that this decision was released as a slip opinion, is the operative date for all substantive and procedural purposes.

*Procedural History*

Substitute information charging the defendant with the crimes of possession of a controlled substance with intent to sell, possession of a controlled substance, and operation of a drug factory, brought to the Superior Court in the judicial district of Hartford, where the court, *Gold*, *J.*, denied the defendant's motion to suppress certain evidence; thereafter, the defendant was presented to the court, *Baldini*, *J.*, on a conditional plea of nolo contendere to the charge of possession with intent to sell; judgment of guilty in accordance with the plea; subsequently, the state entered a nolle prosequi as to the charges of possession of a controlled substance and operation of a drug factory, and the defendant appealed. *Reversed*; *further proceedings*.

*Mark Rademacher*, assistant public defender, for the appellant (defendant).

*Sarah Hanna*, senior assistant state's attorney, with whom, on the brief, were *Gail P. Hardy*, state's attorney, and *David L. Zagaja*, senior assistant state's attorney, for the appellee (state).

*Opinion*

ECKER, J. This is a companion case to *State* v. *Rolon*, 337 Conn. 397, A.3d (2020), which we release today. The defendant, Yashira A. Espino, appeals from the judgment of conviction rendered by the trial court following her conditional plea of nolo contendere to the charge of possession of a controlled substance with intent to sell in violation of General Statutes § 21a-277 (a).[1] On appeal, the defendant claims that she was

[1] The defendant originally was charged with possession of a controlled substance with intent to sell in violation of § 21a-277 (a), possession of a controlled substance or more than one-half ounce of marijuana in violation of General Statutes § 21a-279 (a) (1), and operation of a drug factory in violation of § 21a-277 (c). Following the defendant's conditional guilty plea to possession of a controlled substance with intent to sell, the state entered a nolle prosequi as to each of the remaining charges. The trial court sentenced the defendant to seven years of imprisonment, execution suspended, and three years of probation.

illegally detained, along with her codefendant, Richard Rolon,[2] in a car in the parking lot of a multiunit apartment building in violation of the fourth amendment to the United States constitution because the police lacked either a warrant or a reasonable, articulable suspicion of criminal activity. She contends that the trial court improperly denied her motion to suppress evidence under these circumstances.[3] The issue in this case, as in the companion case, is whether the defendant's detention was permissible under the exception to the fourth amendment's warrant requirement articulated in *Michigan* v. *Summers*, 452 U.S. 692, 705, 101 S. Ct. 2587, 69 L. Ed. 2d 340 (1981), and *Bailey* v. *United States*, 568 U.S. 186, 193, 133 S. Ct. 1031, 185 L. Ed. 2d 19 (2013) (*Summers* exception), which permits the police to detain "occupants" within the "immediate vicinity" of a premises subject to a search warrant. For the reasons explained in *Rolon*, we agree with the defendant that the *Summers* exception is inapplicable because she was not within

[2] The defendant and Rolon both moved to suppress evidence obtained as a consequence of the allegedly unconstitutional seizure. See footnote 3 of this opinion. The trial court held a joint evidentiary hearing on the motions to suppress and issued a single written memorandum of decision, in which it denied both motions under *Michigan* v. *Summers*, 452 U.S. 692, 705, 101 S. Ct. 2587, 69 L. Ed. 2d 340 (1981), and *Bailey* v. *United States*, 568 U.S. 186, 193, 133 S. Ct. 1031, 185 L. Ed. 2d 19 (2013). As the state acknowledges in its brief, because the defendant and Rolon were detained simultaneously in Rolon's motor vehicle, and "there was simply no practical way that law enforcement officers could detain Rolon without also detaining the defendant," there is no "distinction between the [warrantless seizure of the] defendant and Rolon" under *Summers* and *Bailey*.

[3] During the warrantless detention, the police discovered a marijuana cigarette and narcotics packaging materials in plain view in Rolon's motor vehicle. As a result, the police obtained a search warrant for the defendant's apartment, where they found narcotics, narcotics packaging materials, approximately five ounces of marijuana, and more than $20,000 in cash. The defendant moved to suppress the foregoing evidence as the fruit of the allegedly unconstitutional detention. See, e.g., *State* v. *Jevarjian*, 307 Conn. 559, 565 n.5, 58 A.3d 243 (2012) ("fruit of the poisonous tree doctrine" is "an extension of the general exclusionary rule that specifically applies to evidence derived indirectly from an unlawful search" or seizure (internal quotation marks omitted)).

the "immediate vicinity" of the apartment to be searched and, therefore, reverse the trial court's judgment.

The facts in the present case are identical to those set forth in detail in our decision in *State* v. *Rolon*, supra, 337 Conn. 399–408. It would serve no useful purpose here to repeat those facts or the attendant legal analysis. For the reasons explained in *State* v. *Rolon*, supra, 409–24, we conclude in the present case that the *Summers* exception is inapplicable because the state failed to adduce sufficient evidence to establish that Rolon and the defendant were in the "immediate vicinity" of the premises subject to a search warrant. See *Bailey* v. *United States*, supra, 568 U.S. 195, 201 (declining to extend *Summers* exception to occupants outside immediate vicinity of premises subject to search warrant, reasoning that occupants "stopped or apprehended away from the premises where the search is being conducted" do not "[pose] a real threat to the safe and efficient execution of [the] search warrant"). Because the state does not claim that the warrantless seizure of the defendant was justified by some other exception to the fourth amendment's warrant requirement, we are compelled to conclude that the defendant's rights under the fourth amendment were violated and the evidence obtained as a result of the warrantless seizure should have been suppressed. See id., 202 (warrantless seizure outside "the immediate vicinity of a premises to be searched . . . must be justified by some . . . rationale" other than *Summers* exception).

The judgment is reversed and the case is remanded with direction to grant the defendant's motion to suppress.

In this opinion the other justices concurred.