STATE OF CONNECTICUT *v.* DERECK THOMAS
(AC 28179)

Bishop, McLachlan and Borden, Js.

Argued October 16, 2007—officially released March 4, 2008

(Appeal from Superior Court, judicial district of New Haven, geographical area number seven, Rubinow, J.)

Christine A. Janis, assistant public defender, for the appellant (defendant).

Timothy F. Costello, deputy assistant state's attorney,

with whom, on the brief, were *Michael Dearington*, state's attorney, and *Seth R. Garbarsky*, assistant state's attorney, for the appellee (state).

Opinion

McLACHLAN, J. The defendant, Dereck Thomas, appeals from the trial court's denial of his motion for specific performance of a plea agreement. On appeal, the defendant claims that the court improperly (1) refused to enforce a valid plea agreement in violation of the defendant's fifth amendment protection against double jeopardy and in violation of his federal and state constitutional due process rights, and (2) refused to enforce a valid plea agreement after having accepted the defendant's guilty plea. We dismiss this appeal for lack of jurisdiction.[1]

The following factual and procedural history is relevant to our consideration of the defendant's appeal. The defendant, a forty-seven year old male, was arrested for engaging in sexual relations with a fifteen year old female. The state charged the defendant with four counts of sexual assault in the second degree in violation of General Statutes § 53a-71, and four counts of risk of injury to a child in violation of General Statutes § 53-21. On October 11, 2005, the defendant appeared in court and pleaded not guilty. Subsequently, the state and the defendant entered into plea negotiations in which the court, *Rubinow*, *J.*, intervened and offered the defendant a more favorable deal. The court offered the defendant five years incarceration suspended after one year served in jail with ten years probation, instead of the state's offer of ten years suspended after five years served in jail. The case was continued, and on December 16, 2005, the defendant pleaded guilty pursuant to the plea agreement to one count of sexual assault in the second degree and one count of risk of injury to a child.[2] During the plea canvass, the court explained to the defendant that "the sentence [it would] likely impose [would] be five years in jail suspended after you serve one full year but that the victim's position may affect the court so that you do the minimum mandatory nine months instead of the potential maximum sentence." Additionally, the defendant requested a presentence investigation, which the court subsequently ordered. The court accepted the defendant's plea and informed the defendant that he would have to attend several continuance dates. The court set forth the continuance dates as January 27, 2006, as a docketing date and February 10, 2006, as the date to obtain the presentence investigation report.[3]

On February 15, 2006, the court held a hearing to address the presentence investigation and to sentence the defendant. At this hearing, the state requested that the plea be vacated on the basis of the presentence investigation report, arguing that "the defendant be allowed to withdraw his pleas based on the fact that the [presentence investigation], in the state's view, is not commensurate with the sentence of one year." In response, the court stated that "to ensure that the impli-

cations of the constitutional provisions at issue are served, this court can not, will not impose sentence until it has extended to the complainant an opportunity to be heard." Thus, the court continued the hearing to March 6, 2006, in order for the court to have ample time to gather input from the complainant. At the March 6, 2006 hearing, the court expressed a strong desire to have input from the complainant and suggested to the complainant's parents that a guardian ad litem be appointed to gather the complainant's position on the defendant's sentencing. The complainant's parents objected to the appointment of a guardian due to her fragile mental condition. The court granted the defendant's request to submit a brief on the defendant's position as to his sentencing. Thereafter, the court set an argument date of May 1, 2006.

On May 1, 2006, the defendant filed a motion for specific performance of the plea agreement, and the court, *M. Taylor*, *J.*, continued the case until June 5, 2006. Once again, on June 5, 2006, the case was continued so that the court could hear from both of the complainant's biological parents prior to sentencing the defendant. On July, 7, 2006, the case was continued. On August 14, 2006, Judge Rubinow, after receiving additional information from the complainant's mother, denied the defendant's motion for specific performance to enforce the plea agreement. As a result of this new information, the court continued the case to allow for an opportunity for the complainant to provide testimony regarding the incident.

On September 11, 2006, the complainant and her father appeared in court. The complainant addressed the court and answered all of the court's questions concerning her relationship with the defendant. After hearing the complainant's testimony, the court continued the case until September 18, 2006, at which time it had intended to impose the defendant's sentence. The case was then moved to, and heard on, September 21, 2006, at which time the court declined to impose the sentence pursuant to the plea agreement and vacated the defendant's guilty plea.[4] On October 27, 2006, the defendant filed this appeal, challenging the court's denial of his motion for specific enforcement of the plea agreement.

On appeal, the defendant sets forth two main contentions. First, he claims that the court's failure to enforce the plea agreement was a violation of his fifth amendment protection against double jeopardy and his due process rights under both the federal and state constitutions. Second, the defendant asserts that the court improperly failed to enforce a valid plea agreement that is binding on the court.

The dispositive issue is whether the defendant's claim is reviewable. The defendant argues that his interlocutory appeal is reviewable under *State* v. *Curcio*, 191

Conn. 27, 463 A.2d 566 (1983), pursuant to the prohibition against double jeopardy contained in the fifth amendment to the federal constitution, and under the due process clause of the state and federal constitutions. In opposition, the state contends that the defendant's appeal should be dismissed because there is no final judgment and that *Curcio* is inapplicable to this case.

"The lack of a final judgment implicates the subject matter jurisdiction of an appellate court to hear an appeal. A determination regarding . . . subject matter jurisdiction is a question of law. . . . The jurisdiction of the appellate courts is restricted to appeals from judgments that are final. General Statutes §§ 51-197a and 52-263; Practice Book § [61-1] . . . . The policy concerns underlying the final judgment rule are to discourage piecemeal appeals and to facilitate the speedy and orderly disposition of cases at the trial court level. . . . The appellate courts have a duty to dismiss, even on [their] own initiative, any appeal that [they lack] jurisdiction to hear." (Internal quotation marks omitted.) *Mazurek* v. *Great American Ins. Co.*, 284 Conn. 16, 33, 930 A.2d 682 (2007).

"The appealable final judgment in a criminal case is ordinarily the imposition of sentence. . . . In both criminal and civil cases, however, we have determined certain interlocutory orders and rulings of the Superior Court to be final judgments for purposes of appeal. An otherwise interlocutory order is appealable in two circumstances: (1) where the order or action terminates a separate and distinct proceeding, or (2) where the order or action so concludes the rights of the parties that further proceedings cannot affect them." (Citation omitted; internal quotation marks omitted.) *State* v. *Curcio*, supra, 191 Conn. 31.

The defendant asserts that we have jurisdiction to review his claim under *Curcio* because the denial of the motion for specific performance of the plea agreement violated his right to be protected against double jeopardy as well as his due process rights. Specifically, the defendant argues that he was placed in jeopardy when his guilty plea was accepted and that, therefore, the present appeal is allowed because *Curcio* permits the interlocutory appeal of a colorable double jeopardy claim. In opposition, the state adamantly contends that we do not have jurisdiction to review the claim. The state's contention is twofold. First, the state claims that the defendant is not entitled to interlocutory appellate review of his double jeopardy claim because he failed to move for a dismissal in pursuing his double jeopardy claim.[5] Second, the state claims that even if this court proceeds to the merits of the claim, jurisdictional prerequisites still are not satisfied because the defendant has failed to present a colorable claim under the second prong of *Curcio*.[6] We agree with the state's contentions

in part.

"*Curcio* attempted to clarify the murky, amorphous area that lies between those appeals that are final judgments for purposes of interlocutory appellate review and those that are not by providing a rule to test the difference. Since *Curcio*, a number of cases have tested which side of the 'gray area' the claimed right to interlocutory appellate review falls." *Sharon Motor Lodge, Inc.* v. *Tai*, 82 Conn. App. 148, 154, 842 A.2d 1140, cert. denied, 269 Conn. 908, 852 A.2d 738 (2004). "[T]here is a small class of cases that meets the test of being effectively unreviewable on appeal from a final judgment and therefore, is subject to interlocutory review. The paradigmatic case in this group involves the right against double jeopardy. . . . Because jeopardy attaches at the commencement of trial, to be vindicated at all, a colorable double jeopardy claim must be addressed by way of interlocutory review. The right not to be tried necessarily falls into the category of rights that can be enjoyed only if vindicated prior to trial, and, consequently, falls within the second prong of *State* v. *Curcio* [supra, 191 Conn. 31]." (Citations omitted; internal quotation marks omitted.) *State* v. *Crawford*, 257 Conn. 769, 775, 778 A.2d 947 (2001), cert. denied, 534 U.S. 1138, 122 S. Ct. 1086, 151 L. Ed. 2d 985 (2002).

In *State* v. *Alvarez*, 257 Conn. 782, 778 A.2d 938 (2001), our Supreme Court stated that it has "been disinclined . . . to extend the privilege of an interlocutory appeal in criminal cases *beyond the double jeopardy circumstance*. This reluctance stems principally from our concern that to allow such appeals would greatly delay the orderly progress of criminal prosecutions in the trial court . . . . [T]he opportunity to appeal in such a situation might well serve the purpose of parties who desire for their own ends to postpone the final determination of the issues. . . . It has been widely recognized that strict adherence to the final judgment rule is necessary in criminal cases because the delays and disruptions attendant upon intermediate appeal are especially inimical to the effective and fair administration of the criminal law." (Citation omitted; emphasis added; internal quotation marks omitted.) Id., 796. Thus, in this case, an interlocutory appeal is permitted only when the defendant asserts a colorable double jeopardy claim and has raised that claim by a motion to dismiss.[7]

At this juncture, the defendant's claim cannot be reviewed and must be dismissed for lack of jurisdiction.[8] Our resolution of the present case is substantiated by three closely related points.

First, in presenting his motion for specific performance of his plea agreement, the defendant did not rely on, or present argument or authority to the court regarding the concept of double jeopardy. Instead, the defendant based his claim solely on the failure of the court to honor his plea agreement. He asserts that his

plea agreement should be honored because under our criminal law, he was entitled to the benefit of the bargain when he entered into a plea agreement. See *State* v. *Garvin*, 242 Conn. 296, 699 A.2d 921 (1997). The defendant, prior to this appeal, however, did not aver that by the court's refusing to enforce the plea bargain, he was deprived of his right not to be tried twice for the same crime, pursuant to the double jeopardy clause. Rather, he filed an immediate appeal alleging this claim after the court denied his motion for specific performance and vacated his guilty plea. Thus, neither the court, nor any other trial judge, was ever presented with the defendant's double jeopardy claim.[9]

Second, this court is deprived of jurisdiction over the defendant's appeal for lack of a final judgment because he failed to move to dismiss the charges pending against him after the trial court denied his motion and vacated his guilty plea. Denial of a motion to dismiss provides the jurisdictional basis for filing an interlocutory appeal on the basis of a double jeopardy claim. The defendant's double jeopardy claim is based on the first prong of double jeopardy protection, the successive prosecution strand of the double jeopardy claim, which protects one "against a second prosecution for the same offense after conviction." (Internal quotation marks omitted.) *State* v. *Crawford*, supra, 257 Conn. 776. With respect to this strand of double jeopardy jurisprudence, our Supreme Court has recognized a limited exception to the established rule that the final judgment in a criminal case is the imposition of sentence. That exception, which is based on the nature of the protection against successive prosecution, is that if the defendant made a colorable claim of double jeopardy by successive prosecution in the trial court, he may file an appeal from the denial of that claim.[10] Id., 777. Our Supreme Court, however, has recognized this exception *only* in cases in which the defendant moved to dismiss the prosecution in the trial court, and the court denied that motion. As the court has stated: "[I]n order to give meaning to the successive prosecution part of the protection against double jeopardy, we permit a defendant to file an interlocutory appeal *from the denial of a motion to dismiss* so long as that motion presents a colorable double jeopardy claim." (Emphasis added.) Id.; see also *State* v. *Van Sant*, 198 Conn. 369, 374 n.5, 503 A.2d 557 (1986) (one of the narrowly defined exceptions to finality rule is "*an order denying a motion to dismiss on the ground that the state's prosecution places the defendant in double jeopardy*" [emphasis added; internal quotation marks omitted]).

Furthermore, *every case* in which our Supreme Court has entertained an interlocutory appeal on the ground of a successive prosecution involved a denial of a motion to dismiss on the ground of double jeopardy. See *State* v. *Crawford*, supra, 257 Conn. 777 n.5; see generally *Shay* v. *Rossi*, 253 Conn. 134, 749 A.2d 1147

(2000), overruled in part on other grounds by *Miller* v. *Egan*, 265 Conn. 301, 325, 828 A.2d 549 (2003); *State* v. *Kruelski*, 250 Conn. 1, 737 A.2d 377 (1999), cert. denied, 528 U.S. 1168, 120 S. Ct. 1190, 145 L. Ed. 2d 1095 (2000); *State* v. *James*, 247 Conn. 662, 725 A.2d 316 (1999); *State* v. *Colton*, 234 Conn. 683, 663 A.2d 339 (1995), cert. denied, 516 U.S. 1140, 116 S. Ct. 972, 133 L. Ed. 2d 892 (1996); *State* v. *Boyd*, 221 Conn. 685, 607 A.2d 376 (en banc), cert. denied, 506 U.S. 923, 113 S. Ct. 344, 121 L. Ed. 2d 259 (1992); *State* v. *Lonergan*, 213 Conn. 74, 566 A.2d 677 (1989), cert. denied, 496 U.S. 905, 110 S. Ct. 2586, 110 L. Ed. 2d 267 (1990), overruled in part on other grounds by *State* v. *Alvarez*, 257 Conn. 782, 794–95, 778 A.2d 938 (2001); *State* v. *Evans*, 205 Conn. 528, 534 A.2d 1159 (1987), cert. denied, 485 U.S. 988, 108 S. Ct. 1292, 99 L. Ed. 2d 502 (1988); *State* v. *McKenna*, 188 Conn. 671, 453 A.2d 435 (1982); *State* v. *Roy*, 182 Conn. 382, 438 A.2d 128 (1980); *State* v. *Moeller*, 178 Conn. 67, 420 A.2d 1153, cert. denied, 444 U.S. 950, 100 S. Ct. 423, 62 L. Ed. 2d 320 (1979); *State* v. *Flower*, 176 Conn. 224, 405 A.2d 655 (1978); *State* v. *Jones*, 166 Conn. 620, 353 A.2d 764 (1974).

Third, the requirement of a denial of a motion to dismiss on the ground of double jeopardy as a precondition to appealability in such cases is consistent with and required by *Curcio*. As discussed previously, the second prong of *Curcio*, on which the defendant relies in the present case, permits an appeal of an otherwise interlocutory appeal "where the order or action so concludes the rights of the parties *that further proceedings cannot affect them*." (Emphasis added.) *State* v. *Curcio*, supra, 191 Conn. 31. In the present case, when the court denied his motion for specific performance of the plea agreement and vacated his plea, there were, in fact, further proceedings that could have affected his double jeopardy rights; namely, he could have filed a motion to dismiss on the basis of his double jeopardy claims. Thus, the defendant should have filed a motion to dismiss in order to invoke the express exception in *Curcio* on which he now relies.[11]

With these points in mind, we are unpersuaded by the defendant's argument concerning our ability to review his claim. Therefore, because the defendant's claim is here prematurely, and because it does not fall into any of the narrow exceptions articulated in *Curcio*, we must abide by our duty to dismiss the appeal for lack of jurisdiction. See *Mazurek* v. *Great American Ins. Co.*, supra, 284 Conn. 33.

The appeal is dismissed.

In this opinion BORDEN, J., concurred.

[1] We lack subject matter jurisdiction to hear this appeal because the denial of a motion for specific performance is not a final judgment.

[2] According to the transcript, the state asserted that it "had made a recommendation of ten years [incarceration] to serve, suspended after five years, and a ten year period of probation, with a cap and a right to argue. After a discussion in pretrial this morning, I believe Your Honor's offer is five

years to serve, suspended after one year, and ten years probation, again, with a cap and a right to argue." The court stated: "The cap, contemplating the minimum mandatory period of nine months, notwithstanding, and the court further had indicated that any credit against that one year would be based upon whether or not the victim was willing to make an appropriate statement to the court, as there have been great inconsistencies between the state's understanding of the victim's position and the position that was identified by the public defender."

[3] The court informed the defendant that the conditions for the continuance were as follows: "If you fail to appear in court on February 10, 2006, for purposes of receiving your sentence on that date, it is, under our law, likely that the preagreement that you've reached between your lawyer and the state and the court is going to be void, it will be vacated. You had indicated . . . you knew the state was looking for ten years hanging over your head, and you know that the court, under all the circumstances, felt that it was worth what the public defender had indicated it was worth, which is a five year sentence, suspended after you do one year in jail."

[4] The court stated that after hearing the input of the complainant, that "the court was not privy to this information at the time the court indicated what sentence it would impose." The court further explained that "[u]nder the totality of the circumstances, the court now declines to impose the sentence of five years suspended after one year with ten years probation. The court is now constrained to vacate [the defendant's] guilty plea. It notes pro forma pleas of not guilty on his behalf."

[5] Specifically the state argues that "[b]ecause the defendant, contrary to the Practice Book, failed to file a motion to dismiss the prosecution in the trial court, claiming a violation of his constitutional rights against double jeopardy, and because the trial court never denied such a motion, the double jeopardy claim raised in the present interlocutory appeal is not properly appealable under the second prong of *Curcio*."

[6] "For a claim to be colorable, the defendant need not convince the trial court that he necessarily will prevail; he must demonstrate simply that he might prevail." (Internal quotation marks omitted.) *State* v. *Crawford*, 257 Conn. 769, 776, 778 A.2d 947 (2001), cert. denied, 534 U.S. 1138, 122 S. Ct. 1086, 151 L. Ed. 2d 985 (2002).

[7] Practice Book § 41-8 provides in relevant part: "The following defenses or objections, if capable of determination without a trial of the general issue, shall, if made prior to trial, be raised by a motion to dismiss the information . . .

"(6) Previous prosecution barring the present prosecution . . . ." See, e.g., *State* v. *Rivers*, 283 Conn. 713, 931 A.2d 185 (2007); *State* v. *Alvarez*, supra, 257 Conn. 782; *State* v. *Crawford*, supra, 257 Conn. 769; *State* v. *Curcio*, supra, 191 Conn. 27; see also *Shay* v. *Rossi*, 253 Conn. 134, 167, 749 A.2d 1147 (2000) ("the denial of a motion to dismiss criminal charges, filed on the basis of a colorable claim of double jeopardy, is an immediately appealable final judgment under the second prong of *Curcio*"), overruled in part on other grounds by *Miller* v. *Egan*, 265 Conn. 301, 325, 828 A.2d 549 (2003).

"The rationale for the rule permitting a criminal defendant to file an interlocutory appeal from the denial of a motion to dismiss on double jeopardy grounds is based on the first two prongs of the double jeopardy protection—protections against successive prosecution for the same offense, namely, (1) a subsequent prosecution after a prior acquittal, and (2) a subsequent prosecution after a prior conviction. The rationale is that those two prongs prevent a defendant even from having to go through a second trial. . . . Thus, in order to give meaning to the successive prosecution part of the protection against double jeopardy, we permit a defendant to file an interlocutory appeal from the denial of a motion to dismiss so long as that motion presents a colorable double jeopardy claim." (Citation omitted.) *State* v. *Crawford*, supra, 257 Conn. 777.

[8] The dissent uses the argument of judicial economy to circumvent the final judgment rule. This argument, however, is inappropriate in the present case. Although appeals to judicial economy are often persuasive, when it comes to interlocutory appeals, particularly in criminal cases, the court should be more concerned with the "slippery slope" rather than judicial economy. See generally *State* v. *Alvarez*, supra, 257 Conn. 796. Judicial economy will not be achieved by allowing a floodgate of interlocutory appeals. Moreover, judicial economy cannot convey subject matter jurisdiction that is otherwise absent.

[9] Because the defendant raises a double jeopardy claim for the first time

on appeal, he asserts that *Golding* will allow for the review of this claim. Because we do not know, however, if he was or would have been deprived of a fair trial under the third prong of *Golding*, he is not entitled to *Golding* review at this time. See *State* v. *Golding*, 213 Conn. 233, 239–40, 567 A.2d 823 (1989).

[10] At this juncture, we refrain from determining whether the defendant has presented a colorable double jeopardy claim. We merely find that under our law, the defendant's claim is not ripe.

[11] The defendant also cannot obtain review of his due process claim in his interlocutory appeal. See *State* v. *Alvarez*, supra, 257 Conn. 796–97 (court declined to address defendant's due process claim in interlocutory appeal because court has been disinclined to extend privilege of interlocutory appeal on that ground).