IN RE EARL B.*
(AC 30491)

Bishop, Alvord and Foti, Js.

Argued November 17, 2009—officially released May 18, 2010

(Appeal from Superior Court, judicial district of New Haven, Juvenile Matters, B. Kaplan, J. [delinquency judgment], Brown, J. [motion to correct illegal sentence].)

James Jude Connolly, supervisory assistant public defender, for the appellant (respondent).

Melissa L. Streeto, assistant state's attorney, with

whom, on the brief, were *Michael Dearington*, state's attorney, and *Cathleen Edwards*, supervisory juvenile prosecutor, for the appellee (state).

Opinion

FOTI, J. The respondent, Earl B., appeals from the judgment of the trial court denying his motion to correct an illegal sentence. On appeal, he claims that the sentencing court exceeded its statutory authority by imposing that portion of his agreed on sentence that banished him from New Haven County for forty-two months. Specifically, the respondent argues that the court, in accepting his plea agreement, exceeded its authority pursuant to General Statutes § 46b-140 (i)[1] in two ways. First he claims that the court extended the maximum length of the sentence allowed under the statute from twelve months to forty-two months. He also contends that the court exceeded its statutory authority, which allows a court only to place a juvenile in a residential facility, by issuing an order of banishment from New Haven County. We dismiss the appeal as moot.

The respondent and three co-conspirators carjacked a woman at gunpoint, forced her into the trunk of her car and drove to a secluded area where two of the co-conspirators raped and beat her nearly to death. The co-conspirators who committed the sexual assault were each tried as adults, convicted and sentenced to eighty-five years incarceration. See *State* v. *Foreman*, 288 Conn. 684, 690, 954 A.2d 135 (2008); *State* v. *Sargeant*, 288 Conn. 673, 678, 954 A.2d 839 (2008). As a result of those incidents, the respondent was charged with kidnapping in the first degree with a firearm in violation of General Statutes § 53a-92a, robbery in the first degree in violation of General Statutes § 53a-134, conspiracy to commit kidnapping in the first degree with a firearm in violation of General Statutes §§ 53a-92a and 53a-48, conspiracy to commit robbery in the first degree in violation of General Statutes §§ 53a-48 and 53a-134, sexual assault in the first degree in violation of General Statutes § 53a-70, assault in the first degree in violation of General Statutes § 53a-59, conspiracy to commit sexual assault in the first degree in violation of General Statutes §§ 53a-70 and 53a-48, and conspiracy to commit assault in the first degree in violation of General Statutes §§ 53a-48 and 53a-59. Being only thirteen years old when the crime was committed, the respondent could not be tried as an adult. The state negotiated a plea agreement with the respondent in which he pleaded guilty under the *Alford* doctrine[2] to conspiracy to commit robbery in the first degree in violation of §§ 53a-48 and 53a-134, a serious juvenile offense as defined by General Statutes (Rev. to 2003) § 46b-120 (12). The record reveals that the banishment order was part of the voluntary plea agreement the state reached with the respondent. In oral argument to this court, the state claimed that the banishment order was meant to assure the victim that she could leave her apartment without inadvertently encountering the respondent.

On September 23, 2005, after the respondent had been

convicted via the plea agreement as delinquent, he was committed, pursuant to an agreed on sentence, to the custody of the commissioner of children and families (commissioner) for a period not to exceed four years. Also, on that date, as part of the respondent's agreed on sentence, the court issued a separate order for three and one-half years of banishment from New Haven County. The banishment order was set to expire on March 23, 2009. The court, also as part of the agreed upon sentence, ordered the department of children and families (department) to keep apprised the victim, the victim's advocate and the state's attorney's office in Juvenile Court in New Haven of the respondent's location if he was to be outside of the training school's secured setting. The court noted that the state, in resolving the respondent's disposition and coming to an agreed on sentence that included the banishment order, took into consideration many factors including the victim's well-being and safety.[3] See General Statutes § 46b-140 (a) ("[i]n determining the appropriate disposition of a child convicted as delinquent, the court shall consider . . . [t]he seriousness of the offense, including the existence of any aggravating factors such as . . . the impact of the offense on any victim"). The respondent immediately was placed at the Connecticut Juvenile Training School; subsequently, however, he was released from the training school and placed in a residential treatment program in Pennsylvania. *Earl B.* v. *Commissioner of Children & Families*, 288 Conn. 163, 167–69, 175, 952 A.2d 32 (2008).

On April 2, 2008, the commissioner filed with the court a motion for review of the department's permanency plan for the respondent.[4] The department's plan called for the continuation of the respondent's commitment as a serious juvenile offender and for reunification with his mother. At that time, the respondent's mother was residing in Meriden with her brother, the respondent's uncle.[5] Another aspect of the permanency plan was for the respondent to earn community passes in order for him to visit his uncle's home in Meriden. In his report that was filed with the motion, the department social worker estimated that the respondent would earn his first community pass some time in July, 2008. On May 7, 2008, the court held a permanency plan hearing. Present at the hearing were attorneys Jessica Gauvin, representing the department, James Jude Connolly, the respondent's attorney, and juvenile prosecutor Vincent Duva, representing the state. During the hearing, Connolly orally moved for the banishment order to be modified to allow the respondent to "return to Meriden and that [would be] the only town or city in New Haven County [in which] he would be allowed." The court granted the motion to modify the banishment order to allow the respondent to reside in Meriden, with his mother and uncle, and stated that was "the only location within New Haven County that he will be able

to reside in that will not result in a violation of the banishment order." The court then found that the department made reasonable efforts at reunification and approved the plan.

On May 9, 2008, the state[6] filed with the court a motion for reconsideration and immediate rehearing. On May 19, 2008, the respondent filed a motion to dismiss the state's motion for lack of subject matter jurisdiction. The court held a hearing on May 20, 2008, in order to consider the motions, at the conclusion of which the court continued the hearing to allow for additional briefing and stayed its May 7, 2008 order modifying the banishment order. On June 20, 2008, the respondent filed a motion to correct an illegal sentence. On July 8, 2008, the parties concluded their arguments concerning all matters involving the various motions before the court. By memorandum of decision filed November 6, 2008, the court dismissed the state's motion for reconsideration, reasoning that once a child who has been adjudicated delinquent has been committed to the department, the state, in its role as juvenile prosecutor, no longer is a party to subsequent proceedings involving that child's commitment. The court also denied the respondent's motion to correct an illegal sentence, concluding that both the commitment and the banishment order each were within the bounds of § 46b-140 (i).

On appeal, the respondent challenges the propriety of the forty-two month banishment order. Because the banishment order expired on March 23, 2009, the parties each concede that the respondent's appeal is moot.[7] We agree, however, that this does not end our analysis because an otherwise moot question may qualify for review under the "capable of repetition, yet evading review" exception to the mootness doctrine. To qualify for review under that exception, an otherwise moot question must meet the three requirements set out in *Loisel* v. *Rowe*, 233 Conn. 370, 660 A.2d 323 (1995). "First, the challenged action, or the effect of the challenged action, by its very nature must be of a limited duration so that there is a strong likelihood that the substantial majority of cases raising a question about its validity will become moot before appellate litigation can be concluded. Second, there must be a reasonable likelihood that the question presented in the pending case will arise again in the future, and that it will affect either the same complaining party or a reasonably identifiable group for whom that party can be said to act as surrogate. Third, the question must have some public importance. Unless all three requirements are met, the appeal must be dismissed as moot." Id., 382–83.

"The first element in the analysis pertains to the length of the challenged action. . . . The basis for this element derives from the nature of the exception. If an action or its effects is not of inherently limited duration, the action can be reviewed the next time it arises, when

it will present an ongoing live controversy. Moreover, if the question presented is not strongly likely to become moot in the substantial majority of cases in which it arises, the urgency of deciding the pending case is significantly reduced." (Citations omitted.) Id., 383–84. "[A] party typically satisfies this prong if there exists a 'functionally insurmountable time [constraint]' "; *Dutkiewicz* v. *Dutkiewicz*, 289 Conn. 362, 367, 957 A.2d 821 (2008); or "the challenged action had an intrinsically limited lifespan." *Loisel* v. *Rowe*, supra, 233 Conn. 383.

Because the limits of a Juvenile Court's authority are fixed by statute; see *Dart* v. *Mecum*, 19 Conn. Sup. 428, 432, 116 A.2d 668 (1955); in addressing this first element of the *Loisel* test, we will examine applicable statutes governing the sentencing of juveniles in the circumstances present here. Cf. *State* v. *Boyle*, 287 Conn. 478, 487 n.3, 949 A.2d 460 (2008) (examination undertaken of statutes governing probationary periods in determining if action or effects not of inherently limited duration). The respondent was convicted of conspiracy to commit robbery in the first degree, a serious juvenile offense as defined by General Statutes (Rev. to 2003) § 46b-120 (12). Pursuant to General Statutes § 46b-141 (a) (2), the maximum commitment for a serious juvenile offense is four years. Also, pursuant to § 46b-140 (i), when a child is convicted of a serious juvenile offense "the court may set a minimum period of twelve months during which the child shall be placed in a residential facility operated by or under contract with said department . . . ." General Statutes § 46b-140 (i). Therefore, the plain language of the applicable statutes governing sentencing of serious juvenile offenders provides the court a window for the disposition of such a juvenile of between twelve months and four years.

The respondent's banishment order was for forty-two months. Although, after our research, we find no express statutory provision authorizing the banishment of a child convicted of a serious juvenile offense, the duration of the order was within the statutory confines established for a child convicted of a serious juvenile offense. Because a child convicted as a serious juvenile offender may face a sentence that varies in length from twelve months to four years, we cannot conclude that banishment orders of the type present here, by their very nature, are "of a limited duration so that there is a strong likelihood that the substantial majority of cases raising a question about [their] validity will become moot before appellate litigation can be concluded." (Internal quotation marks omitted.) *State* v. *Boyle*, supra, 287 Conn. 487 n.3; cf. *Patterson* v. *Commissioner of Correction*, 112 Conn. App. 826, 836, 964 A.2d 1234 (2009) (because defendant may face probationary period that varies from two years to great number of years, probationary periods not of limited duration); *Ruffin* v. *Commissioner of Correction*, 89 Conn. App. 724, 728, 874 A.2d 857 (2005) (because issue of presen-

tence time calculation could have been raised by inmates with lengthier prison terms, issue not likely to evade review).[8]

The dissent, citing *Earl B.* v. *Commissioner of Children & Families*, supra, 288 Conn. 163, concludes that "[o]ur Supreme Court has suggested . . . that appeals from delinquency placement determinations are likely to evade review because they are inherently time limited." We, however, find the exceptions to mootness previously recognized by our Supreme Court in juvenile delinquency cases inapplicable to the present case. In *Earl B.*, the plaintiff, who is the respondent in the present case, sought a hearing to challenge a condition of his commitment, namely, his placement at a juvenile training school for high risk offenders. The placement was required to be reviewed and subject to modification every six months. See General Statutes § 17a-15 (b). Although his claim had become moot,[9] our Supreme Court held that it was nevertheless reviewable as capable of repetition yet evading review. *Earl B.* v. *Commissioner of Children & Families*, supra, 172. The court noted that most cases addressing the issue of whether a juvenile committed to the custody of the commissioner may challenge his or her continued placement through a treatment plan hearing would become moot before appellate litigation could be concluded because § 17a-15 (b) requires the commissioner every six months to review the treatment plan of each child committed to the commissioner's custody, and there is a strong likelihood that, as a result of the review, the department would change the juvenile's placement during the pendency of the appeal. Id., 170–71.

The same reasoning does not apply to the present case. The banishment order was not a condition of the respondent's four year commitment to the commissioner. It also was not a component of the treatment plan devised by the commissioner pursuant to § 17a-15 (a) or subject to review and modification every six months under § 17a-15 (b). It was a separate order entered by the court pursuant to the parties' agreement during the respondent's delinquency adjudication. As such, it was subject to challenge on direct appeal or pursuant to Practice Book § 43-22.[10] See *State* v. *Casiano*, 282 Conn. 614, 625, 922 A.2d 1065 (2007). The respondent, however, failed to avail himself of the opportunity for prompt review; he did not bring a direct appeal or prompt challenge to the order. His claim became moot because of his delay,[11] not because the banishment order was "by its very nature" limited in duration; *In re Steven M.*, 264 Conn. 747, 755, 826 A.2d 156 (2003); or presented a " 'functionally insurmountable time [constraint].' "[12] *Dutkiewicz* v. *Dutkiewicz*, supra, 289 Conn. 362. Accordingly, we conclude that the respondent's claim does not satisfy the first prong of the *Loisel* test.[13]

The respondent has failed to satisfy the first prong of *Loisel*, and, therefore, his claim does not qualify for review under the "capable of repetition, yet evading review" exception, as it is unable to meet each of *Loisel*'s three requirements. Because we cannot afford the respondent any practical relief and the respondent has failed to establish an exception to the mootness doctrine, we must dismiss the case for lack of subject matter jurisdiction.

The appeal is dismissed.

In this opinion ALVORD, J., concurred.

* In accordance with the spirit and intent of General Statutes § 46b-142 (b) and Practice Book § 79-3, the names of the parties involved in this appeal are not disclosed. The records and papers of this case shall be open for inspection only to persons having a proper interest therein and upon order of the Appellate Court.

[1] General Statutes § 46b-140 (i) provides: "If the delinquent act for which the child is committed to the Department of Children and Families is a serious juvenile offense, the court may set a minimum period of twelve months during which the child shall be placed in a residential facility operated by or under contract with said department, as determined by the Commissioner of Children and Families. The setting of such minimum period shall be in the form of an order of the court included in the mittimus. For good cause shown in the form of an affidavit annexed thereto, the Department of Children and Families, the parent or guardian of the child or the child may petition the court for modification of any such order."

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

[3] At the respondent's dispositional hearing held on September 23, 2005, the victim addressed the court. "My life has been forcibly changed since the night of September 26, 2003. . . . My clock has been stopped since that night. There is not a day that I don't think about what had happened to me that night. I'm often paralyzed by flashbacks. Everyday life reminds me of the attack. When I stop at [a] red light I get anxious because it reminds me of when I was screaming at—with guns pointed in my face. When I open the trunk, I remember the time that I was put in it, and I'm struck with the same feelings, thoughts and fears that I had the time I was in the trunk and asking for help to the police. . . . I remember how they tried to snap my neck and the feeling of a rock being smashed against my head repeatedly even after I pretended to be dead."

[4] General Statutes § 17a-15 provides in relevant part: "(a) The commissioner shall prepare and maintain a written plan for care, treatment and permanent placement of every child and youth under the commissioner's supervision . . . .

"(b) The commissioner shall at least every six months, review the plan of each child and youth under the commissioner's supervision for the purpose of determining whether such plan is appropriate and make any appropriate modifications to such plan."

[5] Meriden is located in New Haven County.

[6] The motion provided that it was made by the state "acting through the [j]uvenile [p]rosecutor."

[7] "Mootness implicates a court's subject matter jurisdiction and, therefore, presents a question of law over which we exercise plenary review. . . . For a case to be justiciable, it is required, among other things, that there be an actual controversy between or among the parties to the dispute . . . . [T]he requirement of an actual controversy . . . is premised upon the notion that courts are called upon to determine existing controversies, and thus may not be used as a vehicle to obtain advisory judicial opinions on points of law. . . . Moreover, [a]n actual controversy must exist not only at the time the appeal is taken, but also throughout the pendency of the appeal. . . . When, during the pendency of an appeal, events have occurred that preclude an appellate court from granting any practical relief through its disposition of the merits, a case has become moot." (Internal quotation marks omitted.) *State* v. *Mapp*, 118 Conn. App. 470, 475, 984 A.2d 108 (2009), cert. denied, 295 Conn. 903, 988 A.2d 879 (2010).

[8] The respondent argues that the court exceeded its statutory authority

in issuing the order of banishment. He argues that a banishment from a geographical location is beyond the power of a court when setting "a minimum period of twelve months during which the child shall be placed in a residential facility operated by or under contract with said department . . . ." General Statutes § 46b-140 (i). Moreover, he contends that this circumstance must be considered in analyzing the first element of the *Loisel* test. We disagree. Whether the court exceeded its statutory authority in issuing the banishment order in that it restricted the respondent from New Haven County has no bearing on the determination of whether "there exists a 'functionally insurmountable time [constraint]' "; *Dutkiewicz* v. *Dutkiewicz*, supra, 289 Conn. 367; or "the challenged action had an intrinsically limited lifespan." *Loisel* v. *Rowe*, supra, 233 Conn. 383.

[9] After the appeal was filed in *Earl B.*, the department released him from the training school and transferred him to a residential treatment program in Pennsylvania. *Earl B.* v. *Commissioner of Children & Families*, supra, 288 Conn. 169.

[10] Practice Book § 43-22 provides: "The judicial authority may at any time correct an illegal sentence or other illegal disposition, or it may correct a sentence imposed in an illegal manner or any other disposition made in an illegal manner."

[11] We note that had the respondent challenged the validity of his banishment at the same time he challenged the conditions of his commitment; see *Earl B.* v. *Commissioner of Children & Families*, supra, 288 Conn. 163; his claim would likely not have become moot because *Earl B.* was decided on July 29, 2008, eight months before the banishment order expired.

[12] Additionally, the forty-two month banishment order at issue in this case was more than twice as long as the eighteen month commitments in *In re William D.*, 284 Conn. 305, 308, 933 A.2d 1147 (2007), and *In re Steven M.*, supra, 264 Conn. 752. Further, the appeals in those cases became moot because the respondents in those cases became eighteen years of age during the pendency of their appeals and, as a result, were no longer subject to the jurisdiction of the department. See *In re William D.*, supra, 309 n.5; *In re Steven M.*, supra, 754. In contrast, the respondent in this case became eighteen years of age before filing his appeal; neither party argues that the enforcement of the banishment order was affected by his attaining the age of majority.

[13] Although under the *Loisel* test an individual must meet each prong to satisfy its requirements, given the unique facts and circumstances of this case, we address the dissent's analysis of the second prong of the test in its determination that the banishment order here was capable of repetition yet evades review. That prong requires that "there must be a reasonable likelihood that the question presented in the pending case will arise again in the future, and that it will affect either the same complaining party or a reasonably identifiable group for whom that party can be said to act as surrogate." *Loisel* v. *Rowe*, supra, 233 Conn. 382. "This analysis entails two separate inquiries: (1) whether the question presented will recur at all; and (2) whether the interests of the people likely to be affected by the question presented are adequately represented in the current litigation." Id., 384.

The dissent bases the conclusion that the order meets the first requirement under the second prong "not by reference to any anecdotal evidence of a raft of cases in which banishment orders have been issued, but rather on the apparent maintenance by the judicial branch of an outdated form which appears to contemplate the issuance of such an order." That form, JD-JM-16 Rev. 9-2002, indicates that a child may be "[p]laced out of said child's . . . town of residence" for a period of time. Initially, we note that nowhere on the form does it state that such placement requires the *exclusion* of the child from his or her town of residence for the duration of the placement. Banishment, by its very nature, contemplates the exclusion of the individual banished from an area for a specified time period, as evidenced by the order in this case. See Black's Law Dictionary (6th Ed. 1990) ("Banishment. A punishment inflicted upon criminals, by compelling them to leave a country for a specified period of time, or for life.").

Moreover, the dissent's assertion that the "continuing use of this outdated form provides an adequate basis for [it] to conclude that there is a reasonable likelihood that the legal efficacy of banishment orders in juvenile delinquency matters will likely arise in the future," is undermined by the dearth of such juvenile cases both cited to by the dissent and found in our research. The dissent cites only to the docket from one unnamed case in which a trial judge issued a banishment order, as well as an unpublished trial court opinion from 1999 in which the court was confronted with a banishment

order. The latter case concerned an adult habeas trial that involved a condition of probation that the respondent leave Connecticut and never return. "*Loisel* does not provide an exception to the mootness doctrine when it is merely possible that an issue could recur, but states instead that 'there must be a reasonable likelihood that the question presented in the pending case will arise again in the future' . . . ." (Citation omitted.) *Carmona* v. *Commissioner of Correction*, 110 Conn. App. 194, 199, 954 A.2d 265 (2008). We conclude that the trial court's use of JD-JM-16 Rev. 9-2002, that form's continued use by our courts and the cases cited by the dissent fail to establish a reasonable likelihood that a banishment order such as the one at issue here will arise again in the future. Therefore, the second prong of *Loisel* is not met.