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JOHN TAYLOR *v.* COMMISSIONER OF CORRECTION
(AC 30464)

Bishop, Gruendel and Beach, Js.

Argued September 23—officially released December 21, 2010

(Appeal from Superior Court, judicial district of
Tolland, Schuman, J.)

Lauren Weisfeld, senior assistant public defender,
for the appellant (petitioner).

James M. Ralls, senior assistant state's attorney, with
whom, on the brief, were *Michael Dearington*, state's
attorney, and *Linda N. Howe*, former senior assistant
state's attorney, for the appellee (respondent).

BISHOP, J. The petitioner, John Taylor, appeals from the judgment of the habeas court dismissing his petition for a writ of habeas corpus. On appeal, the petitioner claims that the court (1) abused its discretion by denying his petition for certification to appeal and (2) improperly denied his motion to open and to vacate the judgment of dismissal of his habeas corpus petition on the basis that he and his attorney failed to appear for trial. We agree with the petitioner and, accordingly, reverse the judgment of the habeas court.

On September 29, 2004, the petitioner was convicted, after a jury trial, of possession of narcotics in violation of General Statutes § 21a-279 (a) and possession of narcotics within 1500 feet of a school in violation of General Statutes § 21a-279 (d). The petitioner subsequently was sentenced to a total effective term of three years incarceration. This court affirmed his conviction. *State v. Taylor*, 101 Conn. App. 160, 161, 921 A.2d 617, cert. denied, 283 Conn. 903, 927 A.2d 916 (2007).

The petitioner filed his initial petition for a writ of habeas corpus on March 23, 2005, which he later amended to allege ineffective assistance of counsel. On May 27, 2005, attorney Christopher M. Neary was appointed to represent the petitioner and filed an appearance in lieu of the petitioner's pro se appearance and that of the public defender's office. On April 8, 2008, the habeas court entered a scheduling order, which was signed by counsel for both parties, establishing deadlines for various pleadings and court filings, and setting a trial date of August 12, 2008.¹ On July 30, 2008, the petitioner filed a motion to modify the scheduling order to continue the trial date to January, 2009.² The respondent, the commissioner of correction, filed an objection to the petitioner's motion. On August 7, 2008, the habeas court denied the petitioner's motion and sustained the respondent's objection. Counsel for both parties were afforded notice of the court's ruling by telephone and written notice.

On August 12, 2008, both the petitioner and his attorney failed to appear for trial.³ The respondent made an oral motion to dismiss the petitioner's claims, which the court granted, with prejudice. The court also ordered the petitioner's counsel to show cause why he should not be fined for failure to comply with the April 8, 2008 scheduling order.

On August 25, 2008, counsel for the petitioner filed a motion to open and to vacate the judgment, claiming that he had assumed that the court had granted his motion for a continuance because "there was no possible way [that he could] adequately represent the petitioner without the materials" requested by way of discovery. Although counsel acknowledged that notice of the court's denial of his motion was sent on August

7, 2008, he explained that he was in Danbury on that date and did not return to his office until August 12, 2008, due to an illness in the family. Counsel explained that he could not check his telephone messages during that time and did not realize that his motion had been denied until he returned to his office late on August 12, 2008. On September 10, 2008, the court denied the motion to open and to vacate the judgment.⁴ The petitioner next filed a petition for certification to appeal from the judgment of the habeas court, which the habeas court also denied. This appeal followed.

“When confronted with a denial of certification to appeal, we must determine whether this ruling constituted an abuse of discretion. . . . A petitioner satisfies that substantial burden by demonstrating that the issues are debatable among jurists of reason; that a court could resolve the issues [in a different manner]; or that the questions are adequate to deserve encouragement to proceed further. . . . If the petitioner can show that the habeas court abused its discretion in denying the petition for certification to appeal, then the petitioner must demonstrate that the judgment of the habeas court should be reversed on its merits. . . . To determine whether the court abused its discretion, we must consider the merits of the petitioner’s underlying claims.” (Internal quotation marks omitted.) *Greene v. Commissioner of Correction*, 123 Conn. App. 121, 126–27, 2 A.3d 29, cert. denied, 298 Conn. 929, A.3d (2010).

The petitioner claims that the court improperly denied his motion to open and to vacate the judgment of dismissal rendered by the habeas court on the ground that neither he nor his attorney appeared for trial and that the court improperly dismissed his claims without affording him the right to be present in violation of Practice Book § 23-40 (a). We agree.

“[I]n reviewing a court’s ruling on a motion to open, reargue, vacate or reconsider, we ask only whether the court acted unreasonably or in clear abuse of its discretion.” (Internal quotation marks omitted.) *Gianetti v. Gerardi*, 122 Conn. App. 126, 129, 998 A.2d 807 (2010). Practice Book § 23-40 (a) provides in relevant part: “The petitioner . . . shall have the right to be present at any evidentiary hearing and at any hearing or oral argument on a question of law which may be dispositive of the case, unless the petitioner . . . waives such right or is excused by the judicial authority for good cause shown. . . .”

When the court dismissed the petition on August 12, 2008, it noted that counsel for both parties were notified of the denial of the petitioner’s motion to modify the scheduling order. In a subsequent articulation issued by the court, it again explained that counsel for both parties had been notified of that denial. The court never indicated, nor is there any indication in the record, that the petitioner was notified of that order; nor does the

record reflect that the petitioner was ever notified that a scheduling order was in place or that his petition was subject to dismissal for failure to comply with the scheduling order. Because Practice Book § 23-40 (a) mandates that a petitioner be afforded the right to be present at any dispositive hearing, and the petitioner in this case was not afforded that right, we conclude that the court improperly dismissed the petition.⁵ Thus, we conclude that the court abused its discretion in denying the petitioner certification to appeal and that the decision of the court must be reversed.

The judgment is reversed and the case is remanded for further proceedings according to law.

In this opinion GRUENDEL, J., concurred.

¹ The scheduling order indicated that the dates contained therein were “firm dates” that could be modified only by filing a motion to modify and that failure to comply with the order could result in “sanctions, [j]udgment of [d]ismissal or [d]efault.” On the next day, April 9, 2008, the court issued another order confirming the trial date of August 12, 2008, and stating: “Parties must be prepared to go forward. Failure to appear may result in judgment of dismissal or default. . . . Motions for continuance must be filed in writing at least [seven] business days before the scheduled event and will only be granted under exceptional circumstances.”

² In support of the motion to modify the scheduling order, the petitioner’s counsel stated that he needed additional time to complete discovery in order to “adequately represent the petitioner.”

³ At the time of the habeas trial, the petitioner was no longer in the custody of the respondent.

⁴ On August 21, 2008, counsel had filed a “motion re: contempt and cause,” explaining the personal circumstances giving rise to his motion to modify the scheduling order and his failure to appear for trial. The court granted the motion and vacated its show cause order.

⁵ The petitioner also claims that he was deprived of his constitutional and statutory rights. Because we agree that the court violated Practice Book § 23-40, we need not address the petitioner’s additional claims.