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STATE OF CONNECTICUT *v.* JOHN VIVO III
(AC 42909)

Bright, Moll and Bear, Js.

Syllabus

The defendant, who had been previously convicted of the crimes of murder and assault in the first degree and whose sentence was enhanced pursuant to statute (§ 53-202k) for the commission of class A and B felonies with a firearm, appealed to this court from the judgment of the trial court dismissing his motion to correct an illegal sentence. On appeal, the defendant claimed that the trial court improperly concluded that it lacked jurisdiction to consider his motion because there was evidence that, in the course of the underlying shootings, he had used a weapon that was specifically exempted from the ambit of § 53-202k, and, therefore, his sentence enhancement pursuant to that statute was illegal. *Held* that the trial court properly dismissed the defendant's motion to correct an illegal sentence; for that court to have jurisdiction over that motion after the sentence had been executed, the sentencing proceeding, and not the proceedings leading to the conviction, had to be the subject of the attack, and the defendant's claim here, in essence, that the state did not present sufficient evidence to prove that § 53-202k was applicable, did not challenge the legality of his sentence or the sentence proceeding but, rather, the evidence that underpinned his conviction, and, therefore, a motion to correct an illegal sentence was not the proper procedural path for the defendant to raise such a claim, as it challenged his underlying conviction.

Argued January 21—officially released May 19, 2020

Procedural History

Substitute information charging the defendant with the crimes of murder and assault in the first degree, brought to the Superior Court in the judicial district of Fairfield and tried to the jury before *Gormley, J.*; verdict and judgment of guilty, and sentence enhanced for the commission of a class A, B or C felony with a firearm, from which the defendant appealed to the Supreme Court, which affirmed the judgment of the trial court; thereafter, the court, *Devlin, J.*, dismissed the defendant's motion to correct an illegal sentence, and the defendant appealed to this court. *Affirmed.*

John Vivo III, self-represented, the appellant (defendant).

C. Robert Satti, Jr., supervisory assistant state's attorney, with whom, on the brief, was *John C. Smriga*, state's attorney, for the appellee (state).

62 BEAR, J. The defendant, John Vivo III, appeals from
63 the judgment of the trial court dismissing his motion
64 to correct an illegal sentence. On appeal, the defendant
65 claims that the court improperly concluded that it
66 lacked jurisdiction to consider that motion. The defen-
67 dant's claims in support of his position, however, chal-
68 lenge the validity of his conviction rather than any
69 defect in his sentence or the sentencing proceeding.
70 Therefore, we conclude that the court properly deter-
71 mined that it lacked subject matter jurisdiction to con-
72 sider the defendant's motion. Accordingly, we affirm
73 the judgment of the court.

74 The following facts and procedural history are rele-
75 vant to this appeal. In *State v. Vivo*, 147 Conn. App.
76 414, 81 A.3d 1241 (2013), cert. denied, 314 Conn. 901,
77 99 A.3d 1170 (2014), cert. denied, 574 U.S. 1126, 135 S.
78 Ct. 1164, 190 L. Ed. 2d 920 (2015), this court set forth
79 some of the background relevant to the defendant's
80 claims in this appeal. "In 1995, the defendant was found
81 guilty by a jury of murder in violation of General Stat-
82 ues § 53a-54a (a), assault in the first degree in violation
83 of General Statutes § 53a-59 (a) (1), and commission
84 of a class A and class B felony with a firearm in violation
85 of General Statutes § 53-202k.¹ The court, *Gormley, J.*,
86 sentenced him to sixty years imprisonment on the mur-
87 der conviction, ten years on the assault conviction, and
88 five years on the violation of § 53-202k, all the sentences
89 to run consecutively to each other, for a total effective
90 sentence of seventy-five years imprisonment. [Our]
91 Supreme Court affirmed the judgment of conviction.
92 See *State v. Vivo*, 241 Conn. 665, 697 A.2d 1130 (1997).²

93 "Thereafter, the defendant filed a petition for a writ
94 of habeas corpus alleging ineffectiveness of both his
95 trial and appellate counsel. The habeas court, *Hon.*
96 *Richard M. Rittenband*, judge trial referee, denied the
97 habeas petition and granted certification to appeal. This
98 court reversed the habeas judgment as to the defen-
99 dant's conviction under § 53-202k, noting that § 53-
100 202k is a sentence enhancement provision, not a sep-
101 arate offense. See *Vivo v. Commissioner of Correction*,
102 90 Conn. App. 167, 177, 876 A.2d 1216, cert. denied,
103 275 Conn. 925, 883 A.2d 1253 (2005). Accordingly, we
104 concluded that [a]lthough the [defendant's] total effec-
105 tive sentence was proper, the judgment must be mod-
106 ified to reflect the fact that § 53-202k does not consti-
107 tute a separate offense and we remanded the case with
108 direction to vacate that conviction and to resentence
109 the [defendant] to a total effective term of seventy-five
110 years incarceration. . . .

111 "Thereafter, the self-represented defendant filed [an]
112 amended motion to correct an illegal sentence raising
113 three claims: (1) the seventy-five year sentence is con-
114 trary to the initial remand order of this court; (2) he is

115 entitled to a new trial and a jury determination regarding
116 the applicability of the § 53-202k enhancement provi-
117 sion; and (3) he was never resentenced as required by
118 the remand order of this court. The trial court, *Devlin*,
119 *J.*, denied the first two claims. As to the third, Judge
120 Devlin noted that, following this court's remand in the
121 habeas action, the habeas file indicated that the habeas
122 court, *Bryant, J.*, had filed its own Motion for Judg-
123 ment and resentenced the defendant to a total effective
124 sentence of seventy-five years imprisonment without,
125 however, the defendant's presence and without any-
126 thing being placed on the record. In addition, the judg-
127 ment mittimus was never modified to reflect the vacated
128 conviction under § 53-202k. Accordingly, Judge Devlin
129 vacated the conviction under § 53-202k and resentenced
130 the defendant as follows: sixty years imprisonment on
131 the murder conviction, and ten years on the assault
132 conviction enhanced to fifteen years pursuant to § 53-
133 202k, to run consecutively to the sentence on the mur-
134 der conviction, for a total effective sentence of seventy-
135 five years imprisonment. Judge Devlin also amended
136 the mittimus to reflect the vacated conviction." (Cita-
137 tion omitted; footnotes added; footnote omitted; inter-
138 nal quotation marks omitted.) *State v. Vivo*, supra, 147
139 Conn. App. 416-17.

140 Thereafter, the defendant appealed to this court,
141 claiming that "(1) Judge Devlin abused his discretion
142 in denying the defendant appointed counsel to pursue
143 his motion to correct an illegal sentence; (2) Judge Dev-
144 lin improperly denied the defendant's motion to correct
145 an illegal sentence; (3) Judge Devlin abused his discre-
146 tion in determining that the defendant was not entitled
147 to a new trial and jury determination as to the applic-
148 ability of § 53-202k; (4) his sentence is unconstitutional
149 and, therefore, his incarceration is illegal; (5) his resen-
150 tencing by Judge Bryant was imposed in an illegal man-
151 ner; (6) his sentence under § 53-202k constituted double
152 jeopardy; (7) Judge Devlin abused his discretion when
153 he vacated the conviction under § 53-202k on the mitti-
154 mus and sentence[d] the defendant . . . on the assault
155 charge and imposed [five] years without due process
156 of law; and (8) the denial of his request for appellate
157 counsel violated his constitutional rights under the fed-
158 eral and state constitutions, and his rights under Gen-
159 eral Statutes § 51-296." (Internal quotation marks omit-
160 ted.) *Id.*, 417-18. We concluded that the defendant's
161 claims were without merit, and we, therefore, affirmed
162 the court's judgment. *Id.*, 418.

163 On February 10, 2015, the defendant filed another
164 motion to correct an illegal sentence. After a hearing,
165 the court, *Devlin, J.*, dismissed the motion. The defen-
166 dant appealed to this court, and we affirmed the court's
167 judgment. See *State v. Vivo*, 179 Conn. App. 906, 176
168 A.3d 1261, cert. denied, 328 Conn. 939, 184 A.3d 759,
169 cert. denied, 586 U.S. 929, 139 S. Ct. 349, 202 L. Ed. 2d
170 246 (2018).

171 On October 22, 2018, the defendant filed another
172 motion to correct an illegal sentence claiming that he
173 was sentenced illegally pursuant to § 53-202k. After a
174 hearing, the court, *Devlin, J.*, on January 15, 2019, dis-
175 missed the motion on the ground that it lacked jurisdic-
176 tion. This appeal followed.

177 On appeal, the defendant advances numerous claims,
178 including that the trial court improperly concluded that
179 it lacked jurisdiction and the alleged defect in the defen-
180 dant's sentence enhancement related to his underlying
181 conviction, and that the firearm he used is exempt from
182 § 53-202k, making his sentence enhancement under
183 § 53-202k illegal. The state counters, *inter alia*, that the
184 defendant's claims relate to his underlying conviction,
185 and, therefore, the court properly dismissed the motion
186 to correct because it lacked jurisdiction. We agree with
187 the state.

188 Initially, we set forth our standard of review. "The
189 issue of whether a defendant's claim may be brought
190 by way of a motion to correct an illegal sentence, pursu-
191 ant to Practice Book § 43-22,³ involves a determination
192 of the trial court's subject matter jurisdiction and, as
193 such, presents a question of law over which our review
194 is plenary." (Footnote added.) *State v. Abraham*, 152
195 Conn. App. 709, 716, 99 A.3d 1258 (2014).

196 "The Superior Court is a constitutional court of gen-
197 eral jurisdiction. In the absence of statutory or constitu-
198 tional provisions, the limits of its jurisdiction are deline-
199 ated by the common law. . . . It is well established
200 that under the common law a trial court has the dis-
201 cretionary power to modify or vacate a criminal judgment
202 before the sentence has been executed. . . . This is so
203 because the court loses jurisdiction over the case when
204 the defendant is committed to the custody of the [C]om-
205 missioner of [C]orrection and begins serving the sen-
206 tence. . . . Because it is well established that the juris-
207 diction of the trial court terminates once a defendant
208 has been sentenced, a trial court may no longer take
209 any action affecting a defendant's sentence unless it
210 expressly has been authorized to act." (Internal quota-
211 tion marks omitted.) *State v. Robles*, 169 Conn. App.
212 127, 132, 150 A.3d 687 (2016), cert. denied, 324 Conn.
213 906, 152 A.3d 544 (2017).

214 "Although the [trial] court loses jurisdiction over [a]
215 case when [a] defendant is committed to the custody of
216 the [C]ommissioner of [C]orrection and begins serving
217 [his] sentence . . . [Practice Book] § 43-22 embodies
218 a common-law exception that permits the trial court to
219 correct an illegal sentence or other illegal disposition.
220 . . . Thus, if the defendant cannot demonstrate that
221 his motion to correct falls within the purview of § 43-
222 22, the court lacks jurisdiction to entertain it. . . . [I]n
223 order for the court to have jurisdiction over a motion
224 to correct an illegal sentence after the sentence has

225 been executed, the sentencing proceeding [itself] . . .
226 must be the subject of the attack. . . . [T]o invoke suc-
227 cessfully the court's jurisdiction with respect to a claim
228 of an illegal sentence, the focus cannot be on what
229 occurred during the underlying conviction. . . .

230 "Connecticut courts have considered four categor-
231 ies of claims pursuant to [Practice Book] § 43-22. The
232 first category has addressed whether the sentence was
233 within the permissible range for the crimes charged.
234 . . . The second category has considered violations of
235 the prohibition against double jeopardy. . . . The third
236 category has involved claims pertaining to the computa-
237 tion of the length of the sentence and the question of
238 consecutive or concurrent prison time. . . . The fourth
239 category has involved questions as to which sentencing
240 statute was applicable. . . . [I]f a defendant's claim
241 falls within one of these four categories the trial court
242 has jurisdiction to modify a sentence after it has com-
243 menced. . . . If the claim is not within one of these
244 categories, then the court must dismiss the claim for a
245 lack of jurisdiction and not consider its merits." (Cita-
246 tions omitted; internal quotation marks omitted.) *State*
247 v. *St. Louis*, 146 Conn. App. 461, 466–67, 76 A.3d 753,
248 cert. denied, 310 Conn. 961, 82 A.3d 628 (2013).

249 We turn now to the defendant's claims, which can
250 be distilled into a single claim, namely, that the court
251 improperly concluded that it lacked jurisdiction
252 because there was evidence that in the course of the
253 shootings he had used a MAC-11,⁴ a weapon specifically
254 exempted from the ambit of § 53-202k, and, instead,
255 subject to the provisions of General Statutes § 53-202j.
256 He argues that his sentence enhancement pursuant to
257 § 53-202k is illegal because he used a MAC-11 assault
258 weapon in the perpetration of the crimes. We conclude
259 that this claim challenges the correctness of the defen-
260 dant's underlying criminal conviction and that it, there-
261 fore, does not fall within any of the four categories that
262 are a prerequisite for relief pursuant to Practice Book
263 § 43-22.⁵ "In order for the court to have jurisdiction over
264 a motion to correct an illegal sentence after the sen-
265 tence has been executed, the sentencing proceeding,
266 and not the trial leading to the conviction, must be the
267 subject of the attack." *State v. Lawrence*, 281 Conn.
268 147, 158, 913 A.2d 428 (2007).

269 In reviewing the defendant's claim on appeal, our
270 decision in *State v. Thompson*, 190 Conn. App. 660, 212
271 A.3d 263, cert. denied, 333 Conn. 906, 214 A.3d 382
272 (2019), serves as a useful guide. Although we note that
273 the underlying conviction in *Thompson* was for conspir-
274 acy to commit robbery in the first degree, robbery in
275 the first degree, and kidnapping in the first degree, and
276 did not involve a sentence enhancement pursuant to
277 § 53-202k as in the present case, the defendants in both
278 cases failed to challenge their sentences or the relevant
279 sentencing proceedings in their motions to correct an

280 illegal sentence. Accordingly, *Thompson* is helpful in
281 the resolution of this appeal.

282 In *Thompson*, the defendant, following his conviction
283 filed a motion to correct an illegal sentence, claiming
284 that his sentence should be vacated because there
285 existed no evidence to show there was a plan between
286 him and a codefendant to support his conviction for
287 conspiracy to commit robbery in the first degree. *Id.*,
288 663. We affirmed the judgment of the trial court to dis-
289 miss the motion to correct for lack of subject matter
290 jurisdiction. *Id.*, 667. Specifically, we stated: “[T]he only
291 claim before the court was whether the state had pro-
292 duced sufficient evidence to support the defendant’s
293 conviction for conspiracy to commit robbery in the first
294 degree. . . . [W]e have held that a claim of insufficient
295 evidence do[es] not concern the legality of [a defen-
296 dant’s sentence] or the manner in which it was imposed
297 and therefore lies outside the court’s jurisdiction in
298 regard to a motion to correct an illegal sentence. Put
299 differently, the defendant’s motion constituted a collat-
300 eral attack on his conviction and, thus, was not within
301 the court’s jurisdiction.” (Citation omitted; internal quo-
302 tation marks omitted.) *Id.*, 666; see also *State v. Starks*,
303 121 Conn. App. 581, 590, 997 A.2d 546 (2010).

304 In the present case, the defendant essentially claims
305 that the state did not disprove his claim, based on eye-
306 witness testimony, that, during the shootings, he used
307 only a MAC-11 firearm, which, pursuant to General Stat-
308 utes § 53-202a, is defined as an assault weapon, and is,
309 thereby, exempted from the ambit of § 53-202k. Similar
310 to *Thompson*, in which the defendant did not challenge
311 the legality of his sentence or the sentencing proceed-
312 ing, the defendant’s appeal in the present case attacks
313 the evidence underpinning his conviction by claiming
314 that the state did not offer evidence sufficient to prove
315 that the sentence enhancement statute should apply.
316 Thus, as the court noted in its ruling, the problem with
317 the defendant’s claim is not the potential merit of the
318 claim but that a motion to correct an illegal sentence
319 is not the proper procedural path for the defendant to
320 raise such a claim because it challenges his underlying
321 conviction. The court, therefore, properly concluded
322 that it lacked jurisdiction to consider the defendant’s
323 motion to correct an illegal sentence.

324 The judgment is affirmed.

325 In this opinion the other judges concurred.

326 1 General Statutes § 53-202k provides: “Any person who commits any class
327 A, B or C felony and in the commission of such felony uses, or is armed
328 with and threatens the use of, or displays, or represents by his words or
329 conduct that he possesses any firearm, as defined in section 53a-3, except
330 an assault weapon, as defined in section 53-202a, shall be imprisoned for a
331 term of five years, which shall not be suspended or reduced and shall
332 be in addition and consecutive to any term of imprisonment imposed for
333 conviction of such felony.”

334 General Statutes § 53-202a provides in relevant part: “As used in this
335 section and sections 53-202b to 53-202k, inclusive: (1) ‘Assault weapon’
336 means:

337 “(A) (i) Any selective-fire firearm capable of fully automatic, semiauto-

339 matic or burst fire at the option of the user or any of the following specified
340 semiautomatic firearms . . . MAC-10, MAC-11 and MAC-11 Carbine type
341 . . .”

342 We note that although the legislature has made amendments to § 53-202a
343 since the events underlying the present appeal; see Public Acts 2013, No.
344 13-220, §§ 3, 4 and 21; Public Acts 2013, No. 13-3, § 25; Public Acts 2001,
345 No. 01-130, § 1; Public Acts 1993, No. 93-306, § 1; those amendments have
346 no bearing on this appeal.

347 ² Our Supreme Court set forth the following facts underlying the defendant’s conviction. “On February 23, 1994, at approximately 7:15 p.m., Yolanda
348 Martinez and William Terron were crossing a courtyard at the Evergreen
349 Apartments in Bridgeport when the defendant and two other persons, armed
350 with semiautomatic weapons, ran up to them. Martinez identified the two
351 others as Joel Rodriguez and Eric Floyd. The defendant pulled Terron near
352 a fence where he shot Terron ten times, killing him. At the same time, Rodriguez
353 shot Martinez in the hand and in the upper right arm, before he and
354 Floyd ran to a nearby car. The defendant then ran over to where Martinez
355 lay on the ground and shot her in the legs three times. . . . [When the]
356 police responded to a report of gunshots at the Evergreen Apartments . . .
357 they found Terron, who had suffered multiple gunshot wounds to the head,
358 chest and back and . . . pronounced [him] dead at the scene. The police
359 also found Martinez, who had suffered multiple gunshot wounds to the
360 lower part of her body. Martinez told Detective Donald Jacques that she
361 and Terron had been shot by the defendant, that the defendant had an Uzi
362 type weapon and that two other persons had been involved in the shootings.
363 Other witnesses had heard rapid-fire gun shots during this episode. The
364 police also found numerous nine millimeter bullet fragments at the scene.”
365 *State v. Vivo*, supra, 241 Conn. 667-71.

366 ³ Practice Book § 43-22 provides: “The judicial authority may at any time
367 correct an illegal sentence or other illegal disposition, or it may correct a
368 sentence imposed in an illegal manner or any other disposition made in an
369 illegal manner.”

370 ⁴ During the defendant’s underlying criminal trial, Edward Jachimowicz,
371 a forensic scientist for the forensic science laboratory of what is now the
372 Department of Emergency Services and Public Protection, testified that a
373 MAC-11 is a semiautomatic firearm resembling an Uzi, chambered in nine
374 millimeter, originally manufactured by Military Armaments Corporation but
375 now manufactured by S.W. Daniel, Inc.

376 ⁵ We note that the defendant’s criminal conviction pursuant to § 53-202k
377 was reversed by this court in *Vivo v. Commissioner of Correction*, supra,
378 90 Conn. App. 177.