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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).

BEAR, J. The defendant, John Vivo III, appeals from the judgment of the trial court dismissing his motion to correct an illegal sentence. On appeal, the defendant claims that the court improperly concluded that it lacked jurisdiction to consider that motion. The defendant's claims in support of his position, however, challenge the validity of his conviction rather than any defect in his sentence or the sentencing proceeding. Therefore, we conclude that the court properly determined that it lacked subject matter jurisdiction to consider the defendant's motion. Accordingly, we affirm the judgment of the court.

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

"Thereafter, the defendant filed a petition for a writ of habeas corpus alleging ineffectiveness of both his trial and appellate counsel. The habeas court, *Hon. Richard M. Rittenband*, judge trial referee, denied the habeas petition and granted certification to appeal. This court reversed the habeas judgment as to the defendant's conviction under § 53-202k, noting that § 53-202k is a sentence enhancement provision, not a separate offense. See *Vivo v. Commissioner of Correction*, 90 Conn. App. 167, 177, 876 A.2d 1216, cert. denied, 275 Conn. 925, 883 A.2d 1253 (2005). Accordingly, we concluded that [a]lthough the [defendant's] total effective sentence was proper, the judgment must be modified to reflect the fact that § 53-202k does not constitute a separate offense and we remanded the case with direction to vacate that conviction and to resentence the [defendant] to a total effective term of seventy-five years incarceration. . . .

"Thereafter, the self-represented defendant filed [an] amended motion to correct an illegal sentence raising three claims: (1) the seventy-five year sentence is contrary 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,<sup>3</sup> 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 discre-  
201 tionary 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,<sup>4</sup> 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.<sup>5</sup> “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 dismiss  
289 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 produced  
292 sufficient evidence to support the defendant’s  
293 conviction for conspiracy to commit robbery in the first  
294 degree. . . . [We have] held that a claim of insufficient  
295 evidence do[es] not concern the legality of [a defendant’s  
296 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 collateral  
300 attack on his conviction and, thus, was not within  
301 the court’s jurisdiction.” (Citation omitted; internal quotation  
302 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 eyewitness  
306 testimony, that, during the shootings, he used  
307 only a MAC-11 firearm, which, pursuant to General Statutes  
308 § 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 proceeding,  
312 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.

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

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

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

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

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

377 <sup>5</sup> We note that the defendant’s criminal conviction pursuant to § 53-202k  
378 was reversed by this court in *Vivo v. Commissioner of Correction*, supra,  
379 90 Conn. App. 177.