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STATE OF CONNECTICUT v. TARRANCE LAWRENCE
(AC 24716)

Dranginis, McLachlan and Dupont, Js.

Argued September 21, 2004—officially released January 11, 2005

(Appeal from Superior Court, judicial district of New Haven, Licari, J.; Fasano, J.)

Donald D. Dakers, special public defender, for the appellant (defendant).

Michele C. Lukban, assistant state's attorney, with whom, on the brief, were *Michael Dearington*, state's attorney, and *John M. Waddock*, supervisory assistant state's attorney, for the appellee (state).

Opinion

DUPONT, J. The primary issue in this appeal is whether the trial court properly rendered judgment dismissing the motion to correct an illegal sentence¹ that was filed by the defendant, Tarrance Lawrence. The court concluded that it lacked jurisdiction to consider the motion. We hold that the court had jurisdiction to consider the claim, but that, as a matter of law, the sentence was not illegal. We therefore reverse the judgment, remand the case and direct the court to render judgment denying the motion.

The defendant was charged with one count each of murder, carrying a pistol without a permit and tampering with physical evidence in violation of General Statutes §§ 53a-54a (a), 29-35 and 53a-155 (a) (1), respectively. The murder charge alleged that the defendant caused death by use of a firearm. The defendant invoked the affirmative defense of extreme emotional disturbance to the murder charge. The jury found the defendant guilty of carrying a pistol without a permit and tampering with physical evidence and not guilty by reason of extreme emotional disturbance as to the murder charge. The jury also found the defendant guilty of manslaughter in the first degree with a firearm under General Statutes § 53a-55a. In accord with the instructions to the jury, as requested by the defendant's counsel, the jury, after finding the defendant not guilty of murder because of extreme emotional disturbance, considered whether he was guilty of manslaughter in the first degree with a firearm. The court sentenced the defendant to thirty-five years incarceration on the latter offense. He received concurrent sentences on the other two charges. The defendant appealed on grounds unrelated to the present claim of an illegal sentence, and this court affirmed the judgment. *State v. Lawrence*, 67 Conn. App. 284, 786 A.2d 1227 (2001), cert. denied, 259 Conn. 919, 791 A.2d 567 (2002). Subsequently, the defendant filed the motion to correct an illegal sentence that is the subject of this appeal.

This case presents an issue of first impression. The question is whether Practice Book § 43-22 is an appropriate device to challenge the propriety of a sentence that is imposed pursuant to a statute under which the defendant argues he could not, as a matter of law, have been convicted.² The defendant claims that his sentence was illegal because it exceeded the maximum statutory limit of twenty years for the crime of manslaughter in the first degree, as provided in General Statutes § 53a-35a (5), which he claims is the crime for which he should have been sentenced. He argues that it was the only crime for which he could have been found guilty after he was found not guilty of murder by reason of extreme emotional disturbance, as provided in § 53a-54a. There is no dispute that this issue was not raised at trial, that it could have been raised as an unpreserved

constitutional issue or as plain error on direct appeal and that it was not. There also is no dispute that the sentence the defendant received facially matched that permitted for the crime for which he was convicted, namely, manslaughter in the first degree with a firearm, or that his counsel requested the very jury instruction that the court gave as to that crime. The determination of whether a sentence is legal is a question of law. *State v. Barksdale*, 79 Conn. App. 126, 138, 829 A.2d 911 (2003). Furthermore, such a claim may be raised for the first time on direct appeal; *id.*, 139; or by way of a motion to correct an illegal sentence. *Cobham v. Commissioner of Correction*, 258 Conn. 30, 38, 779 A.2d 80 (2001).

We begin with a brief review of this court's and the Supreme Court's interpretation and application of Practice Book § 43-22. In *State v. McNellis*, 15 Conn. App. 416, 443-44, 546 A.2d 292, cert. denied, 209 Conn. 809, 548 A.2d 441 (1988), this court defined an illegal sentence as "essentially one which either exceeds the relevant statutory maximum limits, violates a defendant's right against double jeopardy, is ambiguous, or is internally contradictory." A sentence imposed in an illegal manner is one "within the relevant statutory limits but . . . imposed in a way which violates [the] defendant's right . . . to be addressed personally at sentencing and to speak in mitigation of punishment . . . or his right to be sentenced by a judge relying on accurate information or considerations solely in the record, or his right that the government keep its plea agreement promises" (Internal quotation marks omitted.) *Id.*, 444.

The Supreme Court recently addressed the scope of Practice Book § 43-22 in *Cobham v. Commissioner of Correction*, *supra*, 258 Conn. 30. In *Cobham*, the petitioner appealed from the judgment of the habeas court dismissing his petition for a writ of habeas corpus in which he claimed that the sentence imposed was illegal. *Id.*, 31. As in this case, the petitioner in *Cobham* neither objected to the sentence at trial nor raised the issue on direct appeal. *Id.*, 39. Affirming the judgment of the habeas court, the Supreme Court held that the habeas court properly dismissed the petition because the petitioner had brought the petition for a writ of habeas corpus prematurely. *Id.*, 31. In order for the petitioner to challenge the legality of the sentence imposed by the trial court, the Supreme Court held, he first had to appeal directly from the sentence or file a motion in the trial court to correct an illegal sentence under Practice Book § 43-22. *Cobham v. Commissioner of Correction*, *supra*, 31-32. The Supreme Court, quoting *McNellis*, held that Practice Book § 43-22 provides the trial court with express authority to retain jurisdiction after a defendant's sentence has begun and may take action as to the sentence.³ *Cobham v. Commissioner of Correction*, *supra*, 37-38. *Cobham* specifically addressed the scope of Practice Book § 43-22, stating that "a defen-

dant may challenge his or her criminal sentence on the ground that it is illegal by raising the issue on direct appeal *or by filing a motion pursuant to* [Practice Book] § 43-22 *with the judicial authority, namely, the trial court.*” (Emphasis added.) *Cobham v. Commissioner of Correction*, supra, 38, citing *Copeland v. Warden*, 225 Conn. 46, 47 n.2, 621 A.2d 1311 (1993).

Following *McNellis* and *Cobham*, this court recently stated in *State v. Pagan*, 75 Conn. App. 423, 429–30, 816 A.2d 635, cert. denied, 265 Conn. 901, 829 A.2d 420 (2003),⁴ that a trial court has jurisdiction to correct a claimed illegal sentence under Practice Book § 43-22. See also *State v. Raucci*, 21 Conn. App. 557, 563, 575 A.2d 234 (recognizing that Practice Book § 935, forerunner of Practice Book § 43-22, provides jurisdiction to trial court to grant or deny motion to correct illegal sentence), cert. denied, 215 Conn. 817, 576 A.2d 546 (1990).

A reason for granting jurisdiction to a trial court to review the issue of a claimed illegal sentence under Practice Book § 43-22 is that it is an expeditious way, if correction is needed, to reconstruct a sentence or to resentence a defendant if the original sentence was illegal. *Cobham v. Commissioner of Correction*, supra, 258 Conn. 39. The trial court retains jurisdiction for resentencing, if required, either after a direct appeal has led to a remand or pursuant to a motion to correct an illegal sentence. *State v. Raucci*, supra, 21 Conn. App. 563.

The difference between a dismissal of a motion to correct an illegal sentence for lack of jurisdiction and a denial of relief sought is whether the claim could have been considered at all, as opposed to its being denied or granted after a consideration of it on the merits. A dismissal is mandatory if jurisdiction is lacking, whereas denial of the motion requires the court to address the merits of the claim. In this case, our review of recent appellate decisions leads us to conclude that the court did have jurisdiction and, therefore, that the merits of the defendant’s claim must be reached.⁵

The most compelling reason for concluding that jurisdiction exists lies in the unanimous opinion of the Supreme Court in *Cobham v. Commissioner*, supra, 258 Conn. 30. The court held that a habeas corpus action is premature and cannot be used to challenge the legality of a sentence unless the sentence previously has been the subject of a direct appeal or a motion to correct an illegal sentence. *Id.*, 39. If we adhere to that holding, as we must, a defendant who did not on direct appeal challenge a sentence as being illegal would have no forum in which to do so because the remedy of a habeas corpus petition would not be available. If, subsequent to a direct appeal, a defendant wanted to challenge for the first time a sentence as being illegal, and a trial court has no jurisdiction to review such a

claim pursuant to Practice Book § 43-22, a defendant could never obtain review of that claim. Under the holding in *Cobham*, a defendant would be precluded from raising that claim by way of a petition for a writ of habeas corpus, and a finding of no jurisdiction in the trial court would preclude any other review. Such a defendant would be left without any remedy in the event that his sentence was illegal or “imposed in an illegal manner” or constituted “any other disposition made in an illegal manner.”⁶ Practice Book § 43-22.

This case presents an issue that is similar to that in a case this court recently decided in which we held that a sentence that failed to conform to the legally operative statute was an illegal sentence. See *State v. Barksdale*, supra, 79 Conn. App. 139. In *Barksdale*, the defendant was convicted of three counts of sexual assault in the second degree in violation of General Statutes § 53a-71 (a) (1) and received a sentence of twenty years, execution suspended after four years. *State v. Barksdale*, supra, 138. The sentences on those counts were to be served concurrently. *Id.* On appeal, the defendant claimed that he had been sentenced illegally because at the time he committed the crimes, they were class C felonies for which the maximum period of incarceration was ten years. *Id.* The court noted that in 2002, the legislature amended the relevant statute to change the classification from a class C felony to a class B felony. *Id.*, 138 n.12. The statute as it read prior to the 2002 amendment was the legally operative statute and was the statute in effect at the time the defendant was sentenced. Concluding that the sentence imposed did not conform to the legally operative statute, this court held, pursuant to Practice Book § 43-22, that the defendant had been sentenced illegally. *State v. Barksdale*, supra, 138–39.

In this case, although the sentence of thirty-five years incarceration is facially legal for violation of § 53a-55a, manslaughter in the first degree with a firearm, it exceeds the statutory maximum for violation of § 53a-55, manslaughter in the first degree, the only crime for which the defendant claims he should have been sentenced on a finding of not guilty of murder by reason of extreme emotional disturbance, as provided in § 53a-54a. The defendant’s claim, therefore, is that he was not sentenced under the legally operative statute. Had he been, the defendant asserts, his sentence would have been subject to a statutory maximum of twenty years incarceration.

We emphasize that in this case, the defendant argues in his motion to correct an illegal sentence that his sentence was illegal, not that his conviction of a crime was illegal.⁷ In essence, the defendant’s argument is that his sentence exceeds the maximum allowed under the legally operative statute and is, therefore, illegal, which is one of the grounds cited by the Supreme Court

in *Cobham*, for filing such a motion. We are not concerned with the propriety of the defendant's conviction, but with the propriety of his sentence. His basic claim is that he received a sentence of fifteen years more than what he argues was allowable under the applicable statutory framework. This case does not involve an alleged error that occurred during trial or an instructional error in the usual sense. It is the rare case that involves the invocation of Practice Book § 43-22, and we are not, therefore, fearful that if we determine, on the facts of this case, that jurisdiction existed, a deluge of motions to correct illegal sentences will result. We do not foresee an undue interference with the principle of finality of judgments if we conclude, as we do, that the trial court had jurisdiction to consider the defendant's motion to correct.

Our next question is whether the motion of the defendant should have been granted or denied on its merits. It is appropriate to consider, on an appeal from the improper dismissal of a motion to correct, the merits of the granting or denial of a motion to correct an illegal sentence once it is established that jurisdiction existed. See *State v. Raucci*, supra, 21 Conn. App. 563. In the event a sentence is deemed by this court to be illegal, the matter would have to be remanded to the trial court for further action, namely, correction of the illegal sentence. In this case, however, we conclude that the sentence was proper and remand the matter with direction to deny the defendant's motion.

Our analysis leading to that conclusion depends on a review of the relevant statutes involved in this case. The defendant was charged with murder, a violation of § 53a-54a (a), which provides an exception to a finding of guilt when there is "an affirmative defense that the defendant committed the proscribed act . . . under the influence of extreme emotional disturbance . . . provided nothing contained in this subsection shall constitute a defense to a prosecution for, or preclude a conviction of, manslaughter in the first degree or any other crime."

The jury found the defendant not guilty of murder by reason of extreme emotional disturbance, but guilty of manslaughter in the first degree with a firearm in violation of § 53a-55a (a). The defendant argues that he could have been found guilty only of manslaughter in the first degree. The penalty for manslaughter in the first degree with a firearm may not exceed forty years; General Statutes § 53a-35a (4); whereas the penalty for manslaughter in the first degree may not exceed twenty years. General Statutes § 53a-35a (5).

The defendant's argument ignores the fact that § 53a-54a expressly provides that the affirmative defense of extreme emotional disturbance shall not constitute a defense to or preclude a conviction of manslaughter in the first degree *or any other crime*. In this case, the

defendant also was found guilty of carrying a pistol without a permit in violation of § 29-35 and had been charged with the “intent to cause the death of another person . . . by use of a firearm.”

The meaning of the statutory language as applied within the context of the facts of this case causes us to conclude that the defendant’s sentencing was not illegal. The words of the statute involved are the single most important factors in statutory interpretation. See *State v. Courchesne*, 262 Conn. 537, 565, 816 A.2d 562 (2003). The statute proscribing manslaughter in the first degree with a firearm provides for guilt if, in the commission of the offense of manslaughter in the first degree, a person “uses, or is armed with . . . a pistol, revolver, shotgun . . . or other firearm. . . .” General Statutes § 53a-55a (a). On the facts of this case, the defendant properly was found guilty under that statute once the jury determined that he had committed the proscribed act, namely, murder with a firearm, under the influence of extreme emotional disturbance. The proscribed act was murder with a firearm rather than murder by some other means. The legislature had the option to provide for a greater penalty for murder involving a firearm committed under the influence of extreme emotional disturbance than for murder not involving a firearm committed under the same condition. The defendant would not have been properly found guilty of the crime of manslaughter in the first degree because he was charged here with murder with the use of a firearm, and § 53a-54a allows a conviction of crimes other than manslaughter in the first degree if his affirmative defense is proven.

The form of the judgment is improper, the judgment dismissing the defendant’s motion to correct an illegal sentence is reversed and the case is remanded with direction to render judgment denying the motion.

In this opinion McLACHLAN, J., concurred.

¹ Practice Book § 43-22, titled, “Correction of Illegal Sentence,” 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.”

² We disagree with the dissent’s claim that the defendant impermissibly is challenging his conviction. For the reasons we discuss, we hold that the defendant’s use of Practice Book § 43-22 to challenge the legality of his sentence was permissible, although unavailing.

³ *Cobham* assumes that Practice Book § 43-22 constitutionally grants continuing jurisdiction to the trial court to correct an illegal sentence after the execution of the sentence has begun. We note that there is a difference between conferring original subject matter jurisdiction on a court and providing for continuing jurisdiction in certain unique circumstances.

⁴ The court in *State v. Pagan*, supra, 75 Conn. App. 430 n.9, recognized that the petition for certification to appeal was denied in *State v. McNellis*, 209 Conn. 809, 548 A.2d 441 (1988), and that *State v. McNellis*, supra, 15 Conn. App. 416, has not been overruled by the Supreme Court or by an en banc panel of the Appellate Court. It also noted that a previous Appellate Court case determined that the trial court lacked jurisdiction in a similar situation. See *State v. Pagan*, supra, 430 n.9, discussing *State v. Francis*, 69 Conn. App. 378, 793 A.2d 1224, cert. denied, 260 Conn. 935, 820 A.2d 88, cert. denied, 537 U.S. 1056, 123 S. Ct. 630, 154 L. Ed. 2d 536 (2002).

⁵ We subject the defendant’s claim to plain error review as a claim affecting

a substantial right subject to correction that cannot be forfeited or waived by the defendant, although it was not raised at trial or on direct appeal. A defendant does not waive his right to complain of an illegal jury instruction merely by agreeing to the instruction at trial. *United States v. Perez*, 116 F.3d 840, 844–45 (9th Cir. 1997).

⁶ It is assumed in *Cobham v. Commissioner of Correction*, supra, 258 Conn. 30, that the petitioner's claim properly constituted a claim of an illegal sentence. It was the petitioner's contention in that case that his sentence was legally and logically impossible because it required him to serve two concurrent sentences while simultaneously requiring him to serve consecutively two mandatory minimum sentences. *Id.*, 37. The contention of the defendant in the present case is similar. He claims that it is logically impossible for him to have been found not guilty of murder by reason of extreme emotional disturbance, yet guilty of manslaughter in the first degree with a firearm. If he were correct, he would have received an illegal sentence of fifteen more years of incarceration.

⁷ “[I]n a criminal case, the sentence imposed by the court constitutes the judgment of conviction.” *State v. Waterman*, 264 Conn. 484, 489 n.6, 825 A.2d 63 (2003).