STATE OF CONNECTICUT *v.* PEDRO CUSTODIO
(SC 18767)

Rogers, C. J., and Norcott, Palmer, Zarella, Eveleigh, Harper and Vertefeuille, Js.

Argued September 27—officially released November 27, 2012

Temmy Ann Pieszak, chief of habeas corpus services, for the appellant (defendant).

Robert J. Scheinblum, senior assistant state's attorney, with whom, on the brief, were *Maureen Platt*, state's attorney, *Eva Lenczewski*, supervisory assistant state's attorney, and *Catherine Brannelly Austin*, senior assistant state's attorney, for the appellee (state).

Opinion

PER CURIAM. In this certified appeal, the defendant, Pedro Custodio, appeals from the judgment of the Appellate Court affirming the finding and order of the trial court, which committed the defendant to the custody of the commissioner of mental health and addiction services (commissioner) and required the defendant to submit to periodic competency examinations pursuant to General Statutes (Rev. to 2009) § 54-56d (m).[1] We granted the defendant's petition for certification to appeal, limited to the following issues: "1. Did the Appellate Court properly determine that . . . Public Acts 1998, No. 98-88, § 2 [(P.A. 98-88), which amended General Statutes (Rev. to 1997) § 54-56d (m) by authorizing a court to order periodic competency examinations in certain circumstances],[2] applied retroactively?" *State* v. *Custodio*, 300 Conn. 934, 17 A.3d 70 (2011). "2. Did the Appellate Court properly determine that the trial court had properly exercised in personam jurisdiction over the defendant, when it was conceded that the defendant had no notice of the proceeding [that] resulted in an arrest warrant for failure to appear?" Id. "3. Did the Appellate Court properly determine that the trial court did not abuse its discretion in ordering periodic competency exam[inations] when there was no possibility that the defendant will ever regain competence?" Id. We answer these questions in the affirmative and, accordingly, affirm the judgment of the Appellate Court.

The opinion of the Appellate Court sets forth the following relevant facts and procedural history. "On Cherry Street in [the city of] Waterbury in 1991, the defendant allegedly fired multiple gunshots into the neck of the victim, Americo Pagan Cruz, causing his death. He subsequently was arrested and charged . . . with murder in violation of General Statutes § 53a-54a. Following a hearing, the court found that the state had presented sufficient evidence to find probable cause to believe that the defendant [had] committed the crime charged. A competency hearing thereafter was conducted on October 25, 1991, pursuant to General Statutes (Rev. to 1991) § 54-56d, at the conclusion of which the court found that the defendant was incompetent and ordered that efforts be made to restore his competency. On February 10, 1992, the court conducted a second competency hearing. At its conclusion, the court found that the defendant remained incompetent and that there was no substantial probability that he would regain competence. Accordingly, the court ordered that he be committed to the custody of the [commissioner] for purposes of applying for civil [commitment]. The defendant subsequently was civilly committed and placed in the Fairfield Hills Hospital in . . . 1992.

"Months later and unbeknownst to the court or the [state], the defendant was released from that hospital

and thereafter lived at various residences in Waterbury for approximately eighteen years. At all times, his criminal case remained open on the criminal docket of the Superior Court for the judicial district of Waterbury.

"In July, 2010, the clerk's office brought the defendant's open criminal file to the attention of the court. In response, the court, *Damiani*, *J.*, ordered a hearing to be held on July 26, 2010. Because notice of the hearing was not provided to the defendant, he did not appear. At that hearing, the [supervisory assistant] state's attorney explained that she recently had learned, 'to . . . [her] horror . . . that [the defendant had been] released later in 1992. . . . We were never notified, the state was never notified, [and] the clerk's office was never notified. This file apparently is kept in their statistical list of . . . somewhat active cases, and no one had any idea that this had occurred.' [The state] therefore requested that a failure to appear warrant issue. [Defense counsel] objected to that request due to the lack of notice to the defendant. In granting the state's request, the court stated: 'Here, we have a man who's charged with murder, an alleged shooting, going back to 1991; he's found to be not competent and not restorable, [and] he's committed to the [commissioner] . . . . He gets committed. They then release him in 1992. He never tells the court one way or another . . . [and] doesn't contact his lawyer, the [state] or the court. They release him [into] the community. [The defendant], if he's still alive, has been walking as a free man for the past eighteen years, charged with murder. I understand . . . if in fact the state went to trial on a failure to appear charge [that it] could not prove a wilful, intentional failure to appear, but I have to set the wheels in motion to find [the defendant], to get him before me, [and] to order another competency exam[ination]; if he is not restorable, see where he's going to go so we know exactly where he is, rather than having him walking the streets and, God forbid, something happen[s]. . . . If [the defendant] comes in, I'll dismiss the failure to appear [charge] . . . .' The defendant was arrested later that day.

"On July 27, 2010, the defendant was arraigned. At the outset, the court noted that, '[a]t present, [the defendant] is charged with murder and failure to appear in the first degree.' Acknowledging that the defendant was not provided notice of the prior day's proceeding, the court dismissed the failure to appear charge. As to the remaining murder charge, the court advised the defendant of his rights, ordered a bond in the amount of $200,000 and scheduled a competency hearing for August 24, 2010.

"On August 2, 2010, the defendant filed an objection to the proceedings predicated on lack of personal jurisdiction due to his allegedly unlawful arrest and the retroactive application of [P.A. 98-88, § 2]. The defen-

dant also filed a motion to recuse the trial judge and an offer to participate in voluntary reexamination of his competency, subject to certain conditions. After hearing argument thereon, the court denied those motions.

"The court held a competency hearing on August 24, 2010. At its conclusion, the court found that the defendant remained incompetent and that there was not a substantial probability that his competence could be restored. Pursuant to [General Statutes (Rev. to 2009)] § 54-56d (m), the court ordered that the defendant be committed to the custody of the commissioner, that he be provided services in a less restrictive setting than civil confinement and that he submit to periodic competency [examinations]." *State* v. *Custodio*, 126 Conn. App. 539, 542–45, 13 A.3d 1119 (2011).

The defendant appealed to the Appellate Court from the trial court's finding and order, claiming, inter alia, that the trial court "improperly (1) concluded that [General Statutes (Rev. to 2009)] § 54-56d (m) [which included the provisions in P.A. 98-88, § 2, pertaining to periodic competency examinations] applies retroactively,[3] (2) concluded that it possessed personal jurisdiction over him, [and] (3) ordered him to submit to periodic competency [examinations] . . . ." Id., 542. With respect to his first claim, the defendant maintained that P.A. 98-88, § 2, was substantive in nature and, therefore, could not be applied to him retroactively. See id., 549. The Appellate Court disagreed, concluding that P.A. 98-88, § 2, was remedial in nature and, therefore, "implicate[d] the presumption that such statutes 'are intended to apply retroactively absent a clear expression of legislative intent to the contrary . . . .' " Id., 553–54, quoting *State* v. *Skakel*, 276 Conn. 633, 680, 888 A.2d 985, cert. denied, 549 U.S. 1030, 127 S. Ct. 578, 166 L. Ed. 2d 428 (2006). Specifically, the Appellate Court concluded: "We are mindful of our observation in [*State* v. *Curtis*, 22 Conn. App. 199, 205, 576 A.2d 1299 (1990)] that the imposition of periodic competency evaluations on a defendant is not an inconsequential matter. . . . At the same time . . . the defendant in the present case stands accused of murder and is subject to certain procedures set forth by the legislature to deal with such persons in the event that they are found to be incompetent. . . . [T]he act here affects an area of the criminal process far removed from the actual criminal conduct for which the defendant originally was charged. [It] does not change the elements of the crime with which the defendant was charged, alter the elements of his defense to that crime or make more burdensome the punishment for that crime, after its commission. Moreover, the imposition of periodic competency [examinations] on a defendant accused of a crime such as murder does not implicate any ex post facto concerns . . . because such evaluations are not penal in nature. . . . Rather, a statute authorizing the imposi-

tion of periodic competency [examinations] is a procedural measure that attempts to safeguard the state's vital interest in prosecuting competent individuals accused of crimes that resulted in death or serious physical injury . . . while at the same time shielding from prosecution an incompetent defendant." (Citations omitted; internal quotation marks omitted.) *State* v. *Custodio*, supra, 126 Conn. App. 554–55.

The Appellate Court also disagreed with the defendant's claim that the trial court lacked personal jurisdiction over him because the trial court improperly signed the failure to appear warrant when it was apparent that the defendant had not been provided notice of the July 26, 2010 proceeding. Although the Appellate Court agreed that the failure to appear warrant was improper, it concluded that "[a]ny impropriety in the manner in which the defendant was brought before the court . . . [was] harmless in light of the court's continuing jurisdiction over his criminal case. . . . [It] has long [been] held that an illegal arrest does not deprive the court of personal jurisdiction over the defendant and, therefore, that it does not provide a valid basis for a motion to dismiss." (Citation omitted; internal quotation marks omitted.) Id., 557.

Finally, the Appellate Court considered and rejected the defendant's claim that the trial court "lacked a rational basis for ordering periodic competency [examinations] when there is no possibility that he ever will regain competence." Id., 559. In rejecting this claim, the Appellate Court noted that General Statutes (Rev. to 2009) § 54-56d (m) "contains no such limitation on the discretion of the court" to order periodic competency evaluations. Id. The court further noted that the legislative history surrounding P.A. 98-88, § 2, which authorized periodic competency examinations of incompetent defendants, evinced a clear legislative intent to provide the state with "a formal mechanism to follow the progress of a harmless incompetent defendant who stands little chance of recovery" and to "[keep] abreast of possible improvements in the defendant's mental state that may allow for the prosecution to go forward . . . ." (Internal quotation marks omitted.) Id. This certified appeal followed.

We turn first to the defendant's third claim and the third certified question in this appeal because they both contain a false factual predicate, namely, that "there is no possibility" that the defendant will ever again attain competence. The record indicates that Keith Shebairo, the court-appointed psychiatrist and sole witness to appear at the defendant's August 24, 2010 competency hearing, testified that there was a "substantial probability" that the defendant would not be restored to competency. In accordance with this testimony, the trial court found that the defendant was not competent and that there was not a substantial probability that he would

attain competency. In setting forth the facts and procedural history of this case, the Appellate Court correctly states that "the [trial] court found that the defendant remained incompetent and that there was not a substantial probability that his competence could be restored." *State* v. *Custodio*, supra, 126 Conn. App. 545. Although the Appellate Court summarized the defendant's claim before that court as one asserting "that the court lacked a rational basis for ordering periodic competency evaluations when there [was] no possibility that he ever [would] regain competence"; id., 559; the Appellate Court's reasons for rejecting that claim make clear its understanding that, consistent with the findings of the trial court, there was at least some possibility that the defendant could attain competency. See id. Accordingly, we agree with the state that the defendant's third claim must fail because it is predicated on facts that were not found by the trial court and that are not supported by the record.[4] Moreover, there simply is nothing in the language, purpose or pertinent legislative history to indicate that General Statutes (Rev. to 2009) § 54-56d (m) is inapplicable merely because there is not a substantial probability that the defendant will attain competency.

With respect to the remaining certified questions, "[o]ur examination of the record and briefs and our consideration of the arguments of the parties [persuade] us that the judgment of the Appellate Court should be affirmed on [those] certified issue[s]." (Internal quotation marks omitted.) *State* v. *Robinson*, 290 Conn. 381, 385, 963 A.2d 59 (2009). Because that court properly resolved those issues and fully addressed all related arguments, we adopt the Appellate Court's opinion "as a proper statement of [those] issue[s] and the applicable law concerning [those] issue[s]. It would serve no useful purpose for us to repeat the discussion contained therein." (Internal quotation marks omitted.) Id.

The judgment of the Appellate Court is affirmed.

[1] General Statutes (Rev. to 2009) § 54-56d (m) provides in relevant part: "If at any time the court determines that there is not a substantial probability that the defendant will attain competency within the period of treatment allowed by this section, or if at the end of such period the court finds that the defendant is still not competent, the court shall consider any recommendation made by the examiners pursuant to subsection (d) of this section and any opinion submitted by the treatment facility pursuant to subparagraph (C) of subsection (j) of this section regarding eligibility for, and the appropriateness of, civil commitment to a hospital for psychiatric disabilities and shall either release the defendant from custody or order the defendant placed in the custody of the Commissioner of Mental Health and Addiction Services, the Commissioner of Children and Families or the Commissioner of Developmental Services. . . . If the court orders the release of a defendant charged with the commission of a crime that resulted in the death or serious physical injury . . . of another person, or orders the placement of such defendant in the custody of the Commissioner of Mental Health and Addiction Services, the court may, on its own motion or on motion of the prosecuting authority, order, as a condition of such release or placement, periodic examinations of the defendant as to the defendant's competency. . . . Periodic examinations ordered by the court under this subsection shall continue until the court finds that the defendant has attained competency or until the time within which the defendant may be prosecuted for the crime with which

the defendant is charged, as provided in section 54-193 or 54-193a, has expired, whichever occurs first. . . .”

The trial court issued its finding and order on August 24, 2010, and General Statutes (Rev. to 2009) § 54-56d (m) was the effective version of § 54-56d (m) at that time.

[2] “In 1998, the legislature . . . amended [General Statutes (Rev. to 1997)] § 54-56d (m) by inserting language that allows the court to order, as a condition of release, periodic competency examinations of defendants charged with crimes resulting in the death or serious physical injury of another person. [P.A.] 98-88, § 2 . . . . The legislative history of P.A. 98-88 [§ 2] reveals that the amendment was enacted in response to the Appellate Court’s decision in *State* v. *Curtis*, 22 Conn. App. 199, 203–204, 576 A.2d 1299 (1990), [in which the court concluded] that the trial court had no authority under General Statutes (Rev. to 1987) § 54-56d (m) to order the periodic examination of a defendant, who had been charged with murder, after [he] was found incompetent and not restorable to competency.” *State* v. *Johnson*, 301 Conn. 630, 651–52, 26 A.3d 59 (2011).

[3] Specifically, the defendant claimed that the amendments in P.A. 98-88, § 2, pertaining to the periodic competency examinations, which were part of General Statutes (Rev. to 2009) § 54-56d (m) but not part of General Statutes (Rev. to 1991) § 54-56d (m), the effective version of the statute at the time of the alleged murder, should not have been applied retroactively to him.

[4] We do not suggest that the result in the present case necessarily would be different even if there had been a finding that there was no possibility that the defendant could attain competency. Indeed, the Appellate Court reasons persuasively to the contrary. Nevertheless, we need not resolve the issue definitively because it is not before us.