STATE OF CONNECTICUT *v.* ANTONIO MILNER
(SC 18844)

Rogers, C. J., and Norcott, Palmer, Zarella, Eveleigh, McDonald and Espinosa, Js.

Argued April 24—officially released August 20, 2013

David J. Reich, for the appellant (defendant).

Michele C. Lukban, senior assistant state's attorney, with whom, on the brief, were *Gail P. Hardy*, state's attorney, and *Chris A. Pelosi*, senior assistant state's attorney, for the appellee (state).

Opinion

ESPINOSA, J. The defendant, Antonio Milner, appeals from the judgment of the Appellate Court dismissing in part his appeal from the judgment of the trial court finding him in violation of probation in violation of General Statutes § 53a-32.[1] We granted certification to appeal limited to the question of "[w]hether the Appellate Court properly held moot an appeal from a violation of probation finding where the criminal conviction constituting the violation is being challenged in a habeas corpus action?" *State* v. *Milner*, 302 Conn. 926, 28 A.3d 336 (2011). During the pendency of the appeal in this court, however, the defendant failed to appear before the habeas court for a status conference, leading that court to dismiss the habeas corpus action. Because the certified question in this appeal presupposes the existence of a habeas corpus action, we first consider a threshold question of justiciability—namely, whether the dismissal of the habeas corpus action has rendered this appeal moot. We conclude that this appeal is indeed moot because the dismissal of the habeas corpus action has extinguished any claim to a live controversy in this appeal. We therefore decline to address the certified question in this appeal, and dismiss the appeal sua sponte.

The record reveals the following relevant facts and procedural history. In 1995, the defendant was convicted, following a jury trial, of burglary in the first degree in violation of General Statutes § 53a-101 and was sentenced to fifteen years imprisonment, execution suspended after ten years, followed by three years probation. *State* v. *Milner*, 130 Conn. App. 19, 21, 21 A.3d 907 (2011). In August, 2005, the defendant was released from prison and began serving his probationary term. Id. Upon his release from prison, the defendant signed a form listing the conditions of his probation, one of which was that he refrain from violating any criminal laws during the probationary period. Id.

In January, 2008, the defendant was arrested in Hartford after crashing a stolen Lexus into a tree while attempting to flee the police. As the officers approached the car, they observed "a lot of movement" inside. After removing the defendant from the car, the officers discovered a loaded Colt .380 caliber pistol on the driver's seat. The defendant was charged with multiple criminal offenses, including larceny, reckless driving, and carrying a pistol without a permit.[2] *State* v. *Milner*, supra, 130 Conn. App. 21. On the basis of these charges, the defendant was also charged with having violated the terms of his probation. Id.

Following a hearing on the violation of probation charge, the court found that the defendant had violated the terms and conditions of his probation by engaging in the criminal conduct for which he was arrested in

January, 2008. Id. Accordingly, the trial court revoked the defendant's probation, and imposed a total effective sentence of forty-eight months imprisonment. Id.

The defendant appealed from the judgment of the trial court to the Appellate Court, claiming, inter alia, that there was insufficient evidence to support the trial court's finding that he had violated his probation, and challenging the court's decision in the dispositional phase to revoke his probation. Id., 25, 33. Between the time that he filed his appeal and oral argument was held in the Appellate Court, however, the defendant agreed to plead guilty in the trial court, pursuant to the *Alford* doctrine,[3] to the charge of carrying a pistol without a permit, and a judgment of conviction was rendered on that charge (gun conviction). Id., 26. The state argued before the Appellate Court that the defendant's challenge to the finding of violation of probation was rendered moot when he agreed to plead guilty to one of the very charges upon which the finding rested. Id., 25–26. The defendant countered that his challenge to the finding of violation of probation was not moot because, although he had failed to appeal from the gun conviction, he had filed a habeas corpus action collaterally attacking that conviction.[4] Id., 26.

The Appellate Court agreed with the state, and dismissed as moot the defendant's appeal regarding his challenge to the sufficiency of the evidence in support of the finding of violation of probation.[5] Id., 36. Quoting our decision in *State* v. *T.D.*, 286 Conn. 353, 366–67, 944 A.2d 288 (2008), the Appellate Court explained: "If a defendant has been convicted of criminal conduct, following either a guilty plea, *Alford* plea or a jury trial, and the defendant does not challenge that conviction by timely appealing it, then the conviction conclusively establishes that the defendant engaged in that criminal conduct. An appeal challenging a finding of violation of probation based on that conduct is, therefore, moot. When, however, the defendant has pursued a timely appeal from a conviction for criminal conduct and that appeal remains unresolved, there exists a live controversy over whether the defendant engaged in the criminal conduct, and an appeal challenging a finding of violation of probation stemming from that conduct is not moot." (Internal quotation marks omitted.) *State* v. *Milner*, supra, 130 Conn. App. 26–27. As the Appellate Court noted, however, neither it nor this court had yet determined "whether a collateral attack on the intervening criminal conviction has the same effect as a direct appeal." Id., 27. The Appellate Court answered this question in the negative, holding that "a collateral attack on the intervening criminal conviction does not serve to revive the controversy such that mootness is averted."[6] Id.

The defendant then petitioned this court for certification. We granted the defendant's petition to consider

his contention that an appeal from a finding of violation of probation is not moot when, as here, the criminal conviction on which that finding is based is being challenged in a habeas corpus action. *State* v. *Milner*, supra, 302 Conn. 926. Between our grant of certification and the date oral argument was held in this court, however, the habeas court dismissed the defendant's habeas corpus action after the defendant, who recently had been released from prison, failed to appear for a status conference and was "unable to be located." The defendant has not appealed from the judgment of dismissal.

I

The dismissal of the habeas corpus action raises the issue of whether the certified question in this appeal has been rendered moot. The defendant contends that the question may be reached under an exception to the mootness doctrine or under the exercise of our supervisory authority. We conclude that the appeal is moot and reject the defendant's arguments seeking to avoid the consequences of mootness.

"Mootness is a question of justiciability that must be determined as a threshold matter because it implicates [this] court's subject matter jurisdiction . . . ." (Internal quotation marks omitted.) *State* v. *Preston*, 286 Conn. 367, 373, 944 A.2d 276 (2008). "For a case to be justiciable, it is required, among other things, that there be an actual controversy between or among the parties to the dispute . . . . [T]he requirement of an actual controversy . . . is premised upon the notion that courts are called upon to determine existing controversies, and thus may not be used as a vehicle to obtain advisory judicial opinions on points of law. . . . Moreover, [a]n actual controversy must exist not only at the time the appeal is taken, but also throughout the pendency of the appeal. . . . When, during the pendency of an appeal, events have occurred that preclude an appellate court from granting any practical relief through its disposition of the merits, a case has become moot." (Citation omitted; internal quotation marks omitted.) *State* v. *T.D.*, supra, 286 Conn. 361. Because mootness implicates a court's subject matter jurisdiction, it presents a question of law over which we exercise plenary review. Id.

Turning to the present case, we conclude that this appeal is moot. Having agreed to plead guilty to the very conduct on which the finding of violation of probation was based, and having failed to maintain *any* type of challenge—collateral or otherwise—to the resulting conviction, the defendant has extinguished any controversy as to whether he violated the conditions of his probation. See id., 366 ("If a defendant has been convicted of criminal conduct, following . . . [an] *Alford* plea . . . and the defendant does not challenge that conviction by timely appealing it, then *the conviction conclusively establishes that the defendant engaged in*

that criminal conduct. An appeal challenging a finding of violation of probation based on that conduct is, therefore, moot." [Emphasis added.]).[7]

Moreover, as we have previously explained, in insisting upon nothing less than "the vigorous presentation of arguments concerning the matter at issue," the requirement of an actual controversy "ensure[s] that courts and parties are not vexed by suits brought to vindicate nonjusticiable interests and that judicial decisions which may affect the rights of others are forged in hot controversy, with each view fairly and vigorously represented." (Internal quotation marks omitted.) *State* v. *Preston*, supra, 286 Conn. 374. By failing to pursue his challenge to the gun conviction, however, the defendant has become a poor proxy for a similarly situated future litigant who might seek to raise the issue embodied in the certified question before this court.[8]

In light of the foregoing, we conclude that this appeal is moot.[9] Because we lack jurisdiction to consider the merits of this appeal, we decline to address the certified question.

II

The defendant argues that if this appeal is moot, we should vacate the decision of the Appellate Court because the substance of that court's opinion concluding that the habeas corpus action did not revive the controversy as to the underlying conviction is wrong and should not be followed in future cases. We decline to do so.[10]

Although we have not attempted "to formulate any overall set of guidelines for vacatur of judgments of the Appellate Court in criminal cases," we have been guided by the "general proposition that vacatur is appropriate when it is in the public interest to prevent a judgment, otherwise unreviewable because of mootness, from spawning legal consequences. . . . In determining whether to vacate a judgment that is unreviewable because of mootness, the principal issue is whether the party seeking relief from [that] judgment . . . caused the mootness by voluntary action. . . . [I]t is the [appellant's] burden, as the party seeking relief from the status quo of the appellate judgment, to demonstrate . . . equitable entitlement to the extraordinary remedy of vacatur." (Citation omitted; internal quotation marks omitted.) *State* v. *Boyle*, 287 Conn. 478, 489, 949 A.2d 460 (2008).

We conclude that the defendant has not met this burden. Indeed, the defendant's failure to prosecute the habeas corpus action diligently is the direct cause of the mootness of this appeal. Because the defendant, as the party seeking vacatur of the Appellate Court's decision, bears sole responsibility for the jurisdictional defects of this appeal, we decline to vacate the decision of the Appellate Court.

The appeal is dismissed.

In this opinion the other justices concurred.

[1] General Statutes § 53a-32 provides in relevant part: "(a) At any time during the period of probation or conditional discharge, the court or any judge thereof may issue a warrant for the arrest of a defendant for violation of any of the conditions of probation or conditional discharge . . . .

"(d) If such violation is established, the court may . . . (4) revoke the sentence of probation or conditional discharge. . . ."

Although § 53a-32 was amended in 2010; see Public Acts 2010, No. 10-43, § 20; and in 2012; see Public Acts 2012, No. 12-114, § 14; those changes are not relevant to the present appeal. In the interest of simplicity, we refer to the current revision of the statute.

[2] Specifically, the defendant was charged with unsafe backing of a motor vehicle in violation of General Statutes § 14-243, reckless driving in violation of General Statutes § 14-222, failure to obey an officer's signal in violation of General Statutes § 14-223 (b), operating a motor vehicle under a suspended license in violation of General Statutes § 14-215, larceny in the second degree in violation of General Statutes (Rev. to 2007) § 53a-123, interfering with a police officer in violation of General Statutes § 53a-167a (a), criminal possession of a weapon in a motor vehicle in violation of General Statutes § 29-38, carrying a pistol without a permit in violation of General Statutes § 29-35, and criminal possession of a pistol in violation of General Statutes § 53a-217c. *State* v. *Milner*, supra, 130 Conn. App. 21.

[3] See *North Carolina* v. *Alford*, 400 U.S. 25, 37, 91 S. Ct. 160, 27 L. Ed. 2d 162 (1970); *State* v. *T.D.*, 286 Conn. 353, 364 n.8, 944 A.2d 288 (2008) ("[w]hen a defendant enters a plea pursuant to the *Alford* doctrine, he does not admit guilt but acknowledges that the state's evidence against him is so strong that he is prepared to accept the entry of a guilty plea nevertheless" [internal quotation marks omitted]).

[4] On October 8, 2009, the defendant appealed from the judgment of the trial court to the Appellate Court. On March 24, 2010, the defendant pleaded guilty to the charge of criminal possession of a pistol without a permit pursuant to the *Alford* doctrine, and was convicted thereon. On May 21, 2010, the defendant filed his brief in the Appellate Court. On June 24, 2010, the defendant filed the petition for a writ of habeas corpus at issue in this appeal. Oral argument before the Appellate Court was held on February 3, 2011. *State* v. *Milner*, supra, 130 Conn. App. 20.

[5] The Appellate Court rejected the defendant's remaining challenges to the finding of violation of probation, and affirmed the judgment of the trial court in all other respects. *State* v. *Milner*, supra, 130 Conn. App. 36. These claims have not been certified for appeal to this court.

[6] The Appellate Court also concluded that the trial court had not abused its discretion in revoking the defendant's probation. *State* v. *Milner*, supra, 130 Conn. App. 33–36.

[7] Because the defendant no longer challenges the finding of violation of probation at issue in this appeal, there is no longer any practical relief this court can grant him.

[8] We reject the defendant's argument that we should nevertheless consider the certified question because the habeas corpus action was not dismissed until after the Appellate Court had issued its decision. The *Appellate Court's* proper exercise of its jurisdiction has no bearing on whether *this court* may consider this appeal now that a fatal jurisdictional defect has emerged. See, e.g., *Peters* v. *Dept. of Social Services*, 273 Conn. 434, 441, 870 A.2d 448 (2005) ("[t]he subject matter jurisdiction requirement may not be waived by any party," and "may be raised . . . by the court sua sponte, at any stage of the proceedings").

[9] We decline the defendant's invitation to review this appeal under the "capable of repetition, yet evading review" exception to the mootness doctrine. See *Loisel* v. *Rowe*, 233 Conn. 370, 382–83, 660 A.2d 323 (1995) (For a moot question to qualify for review under the "capable of repetition, yet evading review" exception, it must meet three requirements: (1) that the challenged action be of inherently limited duration; (2) that there be a reasonable likelihood that the question presented will arise again in the future, and that it will affect either the same complaining party or a reasonably identifiable group for whom that party can be said to act as a surrogate; and (3) that the question have some public importance. "Unless all three requirements are met, the appeal must be dismissed as moot."). We conclude that a habeas corpus action—which may be filed years after the challenged conviction, and take years more to resolve—evidences none of the "function-

ally insurmountable time constraints" that have led us to invoke the exception in the past. Id., 383; cf. *In re Emoni W.*, 305 Conn. 723, 729–33, 48 A.3d 1 (2012) (out-of-state noncustodial parent's challenge to statute which typically delayed exercise of fundamental right to parent children by 135 days or fewer capable of repetition, yet evading review); *Sweeney* v. *Sweeney*, 271 Conn. 193, 202, 856 A.2d 997 (2004) ("the nature of a pendente lite order, entered in the course of dissolution proceedings, is such that its duration is inherently limited because, once the final judgment of dissolution is rendered, the order ceases to exist"); *Hartford Principals' & Supervisors' Assn.* v. *Shedd*, 202 Conn. 492, 498–99, 522 A.2d 264 (1987) (dispute over collective bargaining agreements likely to expire before dispute can be fully litigated of inherently limited duration).

We likewise decline the defendant's invitation to exercise our supervisory authority over the administration of justice in order to reach the merits of this appeal. See, e.g., *State* v. *Wade*, 297 Conn. 262, 296, 998 A.2d 1114 (2010). Even if our supervisory power authorized us to consider the merits of a case over which we lack subject matter jurisdiction, we would have no cause to do so in the present case.

[10] Because we conclude that we are without jurisdiction to consider the merits of this appeal, we decline to consider the Appellate Court's resolution of the question before it, and we take no position thereon. See, e.g., *State* v. *Singleton*, 274 Conn. 426, 440, 876 A.2d 1 (2005) ("when a court dismisses a case for lack of subject matter jurisdiction, any further discussion of the merits of that case is dicta").