STATE OF CONNECTICUT *v.* STEEVE LAFLEUR
(AC 35418)

Keller, Mullins and Pellegrino, Js.

Argued January 14—officially released April 7, 2015

(Appeal from Superior Court, judicial district of New Haven, Holden, J.)

Richard E. Condon, Jr., senior assistant public defender, for the appellant (defendant).

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

Opinion

KELLER, J. The defendant, Steeve LaFleur, who was convicted of the crimes of assault in the third degree and two counts of violating a protective order, appeals from the sentence imposed by the trial court in a resentencing proceeding following his direct appeal. The defendant claims that the trial court (1) improperly relied on the aggregate package theory, (2) imposed a sentence that was motivated by vindictiveness against him for having challenged successfully a portion of the judgment of conviction, and (3) violated his right against double jeopardy. We affirm the judgment of the trial court.

The following procedural history is relevant to the claims raised in the present appeal. "A jury found the defendant . . . guilty on various charges in two informations, both involving the physical assault of a female victim, which had been joined for trial pursuant to the state's motion. In the first case, regarding the victim, Larrisha Washington (Washington case), the defendant was found guilty of assault in the third degree in violation of General Statutes § 53a-61 (a), a class A misdemeanor, and two separate counts of violating a protective order in violation of General Statutes § 53a-223, a class D felony, and was found not guilty of one additional count of violating a protective order. In the second case, regarding the victim, Diana Hazard (Hazard case), the defendant was found guilty of assault in the first degree in violation of General Statutes § 53a-59 (a) (1), a class B felony, and violation of the conditions of release in the first degree in violation of General Statutes § 53a-222, a class D felony. The defendant thereafter pleaded guilty in the second part of the information in the Hazard case to a charge of being a persistent dangerous felony offender pursuant to General Statutes (Rev. to 2007) § 53a-40. After the trial court rendered judgment in accordance with the jury's verdict and the subsequent plea, the defendant appealed, claiming that he is entitled to a judgment of acquittal on the charge of assault in the first degree in the Hazard case and a new trial in the Washington case. . . .

"The jury reasonably could have found the following facts regarding the Hazard case. Hazard met the defendant in 2007 and started dating him in June, 2008. She lived with the defendant at his third floor apartment on West Division Street in New Haven for approximately three weeks in the summer of 2008. Thereafter, she moved to a friend's apartment that was located a couple of blocks from the defendant's apartment. On August 21, 2008, between midnight and 1 a.m., Hazard was walking home from a deli located at the comer of Dixwell Avenue and Bassett Street in New Haven. While walking on Dixwell Avenue, she came upon the defendant, who asked her with a raised and stern voice if she was 'going to stop dealing with him, was that it?'

When Hazard replied 'yes,' the defendant, using his fists, began to assault Hazard. He first hit her very hard on the right side of her nose. Hazard heard her nose crack and felt pressure throughout her face. The defendant thereafter hit Hazard many times in the face, until she fell to the ground. While on the ground, the defendant kicked her in the abdomen. After the defendant left, Hazard remained on the ground for approximately five minutes and then went home to go to sleep. The next day, Hazard went to a police station to report the assault and then went to the emergency room, where she was treated for a number of facial fractures, including fractures to both bones in her nose, multiple fractures of her right eye socket and sinus, and substantial swelling and bruising above and below her right eye and throughout the nasal bridge. She received inpatient treatment for five days at Yale New-Haven Hospital and then stayed at a home in Greenwich for her safety.

"The jury reasonably could have found the following facts regarding the Washington case. Washington and the defendant had been involved in a five year relationship and had one child. Shortly before July 24, 2008, Washington learned that the defendant had impregnated another woman. Washington telephoned the defendant at one point to confront him and threaten to take their child to Virginia. On July 24, at approximately 6:30 p.m., the defendant telephoned Washington and asked her to bring their daughter to see him at his apartment. When Washington and her daughter arrived in the vicinity of the defendant's apartment, Washington was admittedly angry, and she and the defendant exchanged words on Dixwell Avenue. The defendant punched Washington in the right side of her face. Subsequently, Washington went to the police station and reported that the defendant had punched her in the right side of her face; a police officer noticed a bump on the right side of her face." (Footnotes omitted.) *State* v. *LaFleur*, 307 Conn. 115, 118–22, 51 A.3d 1048 (2012). At the conclusion of the consolidated trial encompassing the charges in the Washington and Hazard cases, the trial court, *Holden*, *J.*, sentenced the defendant to a total effective sentence of twenty-five years incarceration, execution suspended after eighteen years, followed by five years of probation. Id., 119 n.5.

In his direct appeal,[1] the defendant claimed (1) that his conviction of assault in the first degree in the Hazard case should be reversed on the ground of instructional error, (2) that he was entitled to a judgment of acquittal with regard to the assault in the first degree charge in the Hazard case, (3) the joinder of the Hazard and Washington cases violated his due process right to a fair trial, and (4) the court improperly admitted Hazard's entire statement as a prior consistent statement. Id., 119–20.

Our Supreme Court agreed with the defendant's first

claim, that the trial court improperly had instructed the jury in the Hazard case that a fist can be a dangerous instrument within the meaning of § 53a-59 (a) (1). Id., 140. Consistent with its resolution of the first claim, our Supreme Court agreed with the defendant's second claim, that the evidence did not support his conviction of assault in the first degree in the Hazard case. By way of a remedy of these claims related to the Hazard case, our Supreme Court reversed the defendant's conviction of assault in the first degree, his conviction for violating the conditions of his release, and his conviction for being a persistent dangerous felony offender. Id., 153–54. The court remanded the Hazard case to the trial court with direction to render judgment of acquittal on these three charges. Id., 154. Our Supreme Court rejected the defendant's third claim, which was limited to the second factor of the joinder test set forth in *State* v. *Boscarino*, 204 Conn. 714, 722–24, 529 A.2d 1260 (1987),[2] that the trial court's decision to join the Hazard and Washington cases was improper. *State* v. *LaFleur*, supra, 307 Conn. 120, 154, 156. Having rejected the defendant's joinder claim, the only claim involving the convictions in the Washington case, our Supreme Court affirmed the judgment of the trial court with respect to the Washington case. Id., 163. In light of its resolution of the first three claims raised on appeal, the court deemed it unnecessary to reach the merits of the defendant's fourth claim, which was related to the court's admission of evidence that was germane to the charges in the Hazard case. Id., 120.

With regard to the proceedings to be undertaken by the trial court on remand, our Supreme Court stated: "Although we have concluded that the judgment in the Washington case should be affirmed, our reversal of the defendant's convictions in the Hazard case affects the sentencing in the Washington case. In the Washington case, the defendant was sentenced to one year on the assault in the third degree charge (count one) and five years each on two separate counts of violating a protective order (counts two and four). Count two was to run concurrently with count one. Count four was to run concurrently with counts one and two. All of the sentences were to run concurrently with the twenty-five year sentence, suspended after eighteen years, received in connection with the persistent dangerous felony offender conviction. In view of the fact that we are reversing the assault in the first degree conviction and, consequently, the convictions of being a persistent dangerous felony offender and violating conditions of release in the first degree, and the fact that we are directing the trial court to render judgment of acquittal on those charges, we must remand convictions reached in connection with the Washington case for resentencing. This court has 'endorsed the Appellate Court's adoption of the "aggregate package" theory of sentencing. See *State* v. *Raucci*, 21 Conn. App. 557, 563, 575

A.2d 234, cert. denied, 215 Conn. 817, 576 A.2d 546 (1990). Pursuant to that theory, we must vacate a sentence in its entirety when we invalidate any part of the total sentence. On remand, the resentencing court may reconstruct the sentencing package or, alternatively, leave the sentence for the remaining valid conviction or convictions intact. . . . Thus, we must remand this case for resentencing on the sole count[s] on which the defendant stands convicted.' . . . *State* v. *Miranda*, 274 Conn. 727, 735 n.5, 878 A.2d 1118 (2005)." *State* v. *LaFleur*, supra, 307 Conn. 163–64.

In *LaFleur*, the court's rescript stated: "The judgment in the Hazard case is reversed and the case is remanded with direction to render judgment of acquittal on all counts in that case. The judgment in the Washington case is affirmed, but the sentence is vacated and the case is remanded with direction to resentence the defendant in accordance with this opinion." Id., 164.

Pursuant to our Supreme Court's remand order, the trial court, *Holden*, *J.*, held a resentencing proceeding on November 28 and 30, 2012. Initially, the court rendered a judgment of acquittal on all counts in the Hazard case. Thereafter, the court heard argument concerning resentencing in the Washington case.

On the first day of the resentencing proceeding, the prosecutor argued that, in imposing a new sentence for the three counts in the Washington case, the court had the discretion to impose a sentence that exceeded the five year sentence that the court imposed in that case at the first sentencing proceeding. The prosecutor argued that, in light of the defendant's criminal history, the maximum possible sentence of eleven years of incarceration was appropriate. The defendant's attorney disagreed with this argument, stating that if the court imposed a sentence that exceeded the five year sentence imposed previously in the Washington case, the defense could raise claims relating to vindictiveness and a violation of double jeopardy protections. He stated that because the court did not impose consecutive sentences with regard to each of the three counts in the Washington case at the time of the original sentencing, it could not do so in the present resentencing proceeding. Additionally, he argued that it was improper for the Supreme Court to have vacated the sentence in the Washington case under the aggregate package theory of sentencing. He speculated that neither party had raised that issue before the Supreme Court, but that he currently was raising that issue. Relying on a statement delivered by the victim in the Washington case at the resentencing proceeding,[3] and other considerations, the defendant's attorney argued that the court should impose a lesser effective sentence than that which it previously had imposed in the Washington case.

On the second day of the resentencing proceeding,

the defendant's attorney spelled out in greater detail his argument that the aggregate package theory did not apply to the present case. He stated that, in remand proceedings, courts had applied that theory in cases in which a reviewing court had reversed convictions under some—but not all—counts of *a single information*. He argued that the present case was materially different in that a reviewing court had reversed *a conviction under all counts of an information that had been joined for trial with another information*. Under these circumstances, he argued, application of the aggregate package theory would be improper. The prosecutor observed that in the present case the Supreme Court explicitly had invoked the aggregate package theory.

Thereafter, the court stated: "In review of the presentence investigation, factoring those things in which the court can consider in fashioning a sentence, including facts that result in an acquittal, facts that are presented to the court outside the parameters, if you will, of the court, that are reliable and the court can rely on those in fashioning a sentence.

"This presentence investigation with the convictions [in the Hazard case] . . . demonstrate a person who [is] . . . a poster boy . . . for domestic violence. It is . . . replete with incidents of violence directed toward women. The court notes a prior history dated 1996 where he served a period of incarceration for violent crimes and drug possession. . . .

"He's charged now and convicted of two counts of violation of a protective order and assault in the third degree. The same victim. College educated. Family history. Intact family. Not the usual scenario we see generally in this criminal courtroom. We know that this is . . . pervasive conduct. It transcends everything and everyone in our society, no matter the . . . economic status, ethnicity. Domestic violence."

Thereafter, the court sentenced the defendant. With respect to the two violation of a protective order counts (counts two and four), the court sentenced the defendant to a five year term of incarceration, execution suspended after two and one-half years served. The sentence in count four was to run consecutively to that in count two. With respect to the assault in the third degree count (count one), the court sentenced the defendant to one year incarceration, execution suspended in its entirety. This sentence, if served, was to run consecutively to the sentences in counts two and four. The court stated that, in addition to its total effective sentence of incarceration of eleven years, execution suspended after five years, the defendant was to serve a three year period of probation with a variety of conditions. This appeal followed.

I

The defendant's first claim is that the court improp-

erly relied on the aggregate package theory of resentencing. On the basis of our Supreme Court's clear remand order to the trial court, we disagree.

The defendant's thorough analysis of this claim before this court expands on the arguments that he raised before the trial court when he objected to that court's reliance on the aggregate package theory. The defendant's analysis focuses on his assertion that the Washington and Hazard cases were unrelated. He also relies on the facts that the court joined these cases prior to trial for the purpose of judicial economy, and that, as a result of his successful appeal to our Supreme Court, he obtained a judgment of acquittal with regard to all counts in one of these cases. The state, recognizing that the trial court's authority to resentence the defendant resulted from our Supreme Court's remand order, nonetheless responds to the defendant's arguments concerning whether the trial court properly relied on the aggregate package theory.

As a starting point of our analysis, it is appropriate that we set forth principles governing proceedings on remand. " 'Determining the scope of a remand is a matter of law because it requires the trial court to undertake a legal interpretation of the higher court's mandate in light of that court's analysis. . . . Because a mandate defines the trial court's authority to proceed with the case on remand, determining the scope of a remand is akin to determining subject matter jurisdiction. . . . We have long held that because [a] determination regarding a trial court's subject matter jurisdiction is a question of law, our review is plenary.' . . . *Hurley* v. *Heart Physicians, P.C.*, 298 Conn. 371, 383, 3 A.3d 892 (2010); see also *Matey* v. *Estate of Dember*, 85 Conn. App. 198, 206, 856 A.2d 511 (2004) (following remand, trial court's jurisdiction and duties are limited to scope of remand order); 5 Am. Jur. 2d 453, Appellate Review § 784 (1995) (lower court powerless to undertake any proceedings beyond those specified by higher court's opinion and mandate). . . .

" 'Well established principles govern further proceedings after a remand by this court. In carrying out a mandate of this court, the trial court is limited to the specific direction of the mandate as interpreted in light of the opinion. . . . This is the guiding principle that the trial court must observe. . . . The trial court should examine the mandate and the opinion of the reviewing court and proceed in conformity with the views expressed therein. . . . *West Haven Sound Development Corp.* v. *West Haven*, 207 Conn. 308, 312, 541 A.2d 858 (1988); see *Wendland* v. *Ridgefield Construction Services, Inc.*, 190 Conn. 791, 794–95, 462 A.2d 1043 (1983); *State* v. *Avcollie*, 188 Conn. 626, 643, 453 A.2d 418 (1982), cert. denied, 461 U.S. 928, 103 S. Ct. 2088, 77 L. Ed. 2d 299 (1983); *Nowell* v. *Nowell*, 163 Conn. 116, 121, 302 A.2d 260 (1972).' . . . *Bauer* v. *Waste*

Management of Connecticut, Inc., 239 Conn. 515, 522, 686 A.2d 481 (1996). 'These principles apply to criminal as well as to civil proceedings.' *State* v. *Lafferty*, 191 Conn. 73, 76, 463 A.2d 238 (1983). 'The trial court cannot adjudicate rights and duties not within the scope of the remand.' . . . *State* v. *Avcollie*, supra, 643." *State* v. *Tabone*, 301 Conn. 708, 713–14, 23 A.3d 689 (2011); see also *Higgins* v. *Karp*, 243 Conn. 495, 502–503, 706 A.2d 1 (1998) (duty of trial court to comply with Supreme Court mandate according to its true intent and meaning).

We do not proceed to an analysis of the arguments raised by the parties concerning the *propriety* of the trial court's reliance on the aggregate package theory. This is because the trial court's reliance on that theory was mandated by our Supreme Court's analysis and remand order in *State* v. *LaFleur*, supra, 307 Conn. 163–64. As set forth previously in this opinion, a remand order is to be interpreted in light of the reviewing court's opinion and strictly followed. In the context of determining a proper disposition in this case, our Supreme Court in *LaFleur* unambiguously invoked and then applied the aggregate package theory of resentencing. Id. After our Supreme Court mandated that the trial court render a judgment of acquittal with respect to the charges in the Hazard case, it did not merely vacate the sentence imposed with respect to the convictions in the Hazard case and order the court to resentence the defendant in accordance with the sentence the court previously had imposed for the convictions in the Washington case. Instead, our Supreme Court, relying on the aggregate package theory, *vacated the sentence imposed in its entirety.* Id., 164. Our Supreme Court affirmed the judgment in the Washington case, but vacated the sentence in that case and remanded the Washington case to the trial court "with direction to resentence the defendant in accordance with [its] opinion." Id.

In light of the analysis and remand order in *LaFleur*, we conclude that the trial court, by relying on the aggregate package theory of resentencing, properly followed our Supreme Court's remand order. Although the defendant frames the present claim as a challenge to the trial court's ruling, in reality, the claim is a challenge to our Supreme Court's remand order. Regardless of whether, in the context of the direct appeal to our Supreme Court, the parties addressed the propriety of that order, we will neither reevaluate nor reexamine it. As an intermediate court of appeal, we are unable to overrule, reevaluate, or reexamine controlling precedent of our Supreme Court. See *Stuart* v. *Stuart*, 297 Conn. 26, 45–46, 996 A.2d 259 (2010). As our Supreme Court has stated: "[O]nce this court has finally determined an issue, for a lower court to reanalyze and revisit that issue is an 'improper and fruitless' endeavor. *State* v. *Shipman*, 142 Conn. App. 161, 166, 64 A.3d 338, cert.

denied, 309 Conn. 918, 70 A.3d 41 (2013); see also *Cannizzaro* v. *Marinyak*, 139 Conn. App. 722, 734, 57 A.3d 830 (2012) (explaining that it is not lower court's province to reevaluate Supreme Court precedent), [aff'd, 312 Conn. 361, 93 A.2d 584 (2014)]." *Reville* v. *Reville*, 312 Conn. 428, 459 n.29, 93 A.3d 1076 (2014).

II

The defendant's second claim, brought under *North Carolina* v. *Pearce*, 395 U.S. 711, 89 S. Ct. 2072, 23 L. Ed. 2d 656 (1969), and its progeny, is that the court, in violation of his right to due process, imposed a sentence that was motivated by vindictiveness against him for having challenged successfully a portion of the judgment of conviction. We disagree.

"[W]hether a trial court's decision resentencing a defendant following a successful appeal violates the defendant's federal due process rights presents a question of law subject to plenary review. . . . In [*Pearce*], the United States Supreme Court examined the constitutional constraints imposed on a court which metes out a greater sentence upon retrial than that which the defendant originally received. After holding that neither the equal protection clause nor the double jeopardy provision imposes an absolute bar to a harsher sentence upon reconviction, the court considered the impact of the due process clause on such a position. . . . Where a conviction has been set aside, the action of a court in imposing a harsher sentence upon reconviction for the purpose of punishing a defendant for exercising his rights in seeking to have the conviction set aside is a flagrant violation of due process of law. . . . Due process requires that vindictiveness must not [play a part in] resentencing that results from a successful attack on a defendant's conviction. . . . A defendant's fear of such vindictive behavior may unconstitutionally deter the exercise of the right to appeal or to attack collaterally a conviction, and thus, due process requires that a defendant be free from such apprehension. . . . To ensure that retaliatory motivation does not [play a part in] the resentencing process, whenever a court imposes a harsher sentence following a new trial, the court must state its reasons upon the record. . . .

"The United States Supreme Court has subsequently examined the applicability of the *Pearce* presumption of vindictiveness. . . .

"The decision in . . . *Pearce* . . . was only premised on the apparent need to guard against vindictiveness in the resentencing process. . . . [I]n certain cases in which action detrimental to the defendant has been taken after the exercise of a legal right . . . it [is] necessary to presume an improper vindictive motive. Given the severity of such a presumption, however—which may operate in the absence of any proof of an improper motive and thus may block a legitimate

response to criminal conduct—[the presumption applies] only in cases in which a reasonable likelihood of vindictiveness exists. . . . The *Pearce* requirements thus do not apply in every case [in which] a convicted defendant receives a higher sentence on retrial. Like other judicially created means of effectuating the rights secured by the [United States constitution] . . . [the United States Supreme Court has] restricted application of *Pearce* to areas where its objectives are thought most efficaciously served . . . .

"The violation of due process [found in cases] such as *Pearce* . . . does not arise from the possibility that a defendant may be discouraged from exercising legal rights, but instead from the danger that the [s]tate might be retaliating against the accused for lawfully attacking his conviction. . . . [W]here the presumption applies, the sentencing authority or the prosecutor must rebut the presumption that an increased sentence or charge resulted from vindictiveness; where the presumption does not apply, the defendant must affirmatively prove actual vindictiveness. . . .

"The United States Supreme Court . . . revisited this issue in *Alabama* v. *Smith*, 490 U.S. 794, 109 S. Ct. 2201, 104 L. Ed. 2d 865 (1989). *Smith* clarified the scope of the *Pearce* rule, stating that [w]hile the *Pearce* opinion appeared on its face to announce a rule of sweeping dimension, [the court's] subsequent cases have made clear that its presumption of vindictiveness do[es] not apply in every case [in which] a convicted defendant receives a higher sentence on retrial. . . . The court further explained that the application of the *Pearce* rule is limited to circumstances where its objectives are thought most efficaciously served, [namely] those [circumstances] in which there is a reasonable likelihood . . . that the increase in sentence is the product of actual vindictiveness on the part of the sentencing authority. . . . On the basis of this conclusion, the court reasoned that when a greater penalty is imposed after trial than was imposed after a prior guilty plea, the increase in sentence is not more likely than not attributable to . . . vindictiveness on the part of the sentencing judge. . . .

"In light of the foregoing precedent, the [defendant] can prevail on his claim of presumptive judicial vindictiveness under *Pearce* and its progeny only if all of the following conditions are met: (1) the sentence he received following his second trial is greater than the sentence he received after his first trial; (2) the circumstances culminating in the greater sentence give rise to a reasonable likelihood that the sentence is the product of actual vindictiveness on the part of the sentencing judge; and (3) that judge failed to articulate reasons sufficient to justify the greater sentence. . . .

"[B]efore undertaking a *Pearce* analysis, we must determine whether the [second] sentence imposed . . .

was, in fact, greater than the sentence originally imposed. . . . In determining whether the sentence was more severe, [i]t is the actual effect of the new sentence as a whole on the total amount of punishment lawfully imposed by [the judge] on the defendant . . . which is the relevant inquiry . . . . Further[more], [i]n determining whether the second sentence is harsher than the first, we look not at the technical length of the sentence but at its overall impact [on the defendant]." (Internal quotation marks omitted.) *State* v. *Wade*, 297 Conn. 262, 278–81, 998 A.2d 1114 (2010).

As stated previously in this opinion, the defendant raised the issue of vindictiveness at the resentencing proceeding. In this appeal, the defendant argues that the *Pearce* presumption of vindictiveness arises in the present case because the court's total effective sentence arising from the resentencing proceeding (term of incarceration of eleven years, execution suspended after five years, followed by three years of probation) exceeds the court's total effective sentence for the three counts in the Washington case at the original sentencing (term of incarceration of five years). Thereafter, he argues that the circumstances surrounding the more severe sentence on remand give rise to a presumption of vindictiveness and that the court did not provide a constitutionally legitimate reason for the more severe sentence.

The defendant's claim is inherently intertwined with his first claim in this appeal that the aggregate package theory of resentencing does not apply in this case. Consistent with the rationale underlying his first claim, he argues that, in an evaluation of the issue of whether the court imposed a more severe sentence on remand, this court should compare the aggregate sentence imposed on the nonreversed counts after his appeal with the original sentence imposed on the nonreversed counts.

In cases in which the aggregate package theory of resentencing applies, such as the present case, our Supreme Court has not followed this "remainder aggregate" approach to evaluating claims of vindictiveness. See *State* v. *Wade*, supra, 297 Conn. 281. Rather, the correct approach is to compare, *in the aggregate*, the sentence imposed following a successful appeal with that which was imposed prior to the appeal to determine if the second sentence constitutes a greater penalty under *Pearce*. Id. Applying this proper standard, we readily conclude that the defendant's *second sentence* is not more severe than his aggregate *original sentence* that included the sentences that he received for all of the counts in the Washington and Hazard cases. As stated previously in this opinion, the defendant's sentence arising from the resentencing proceeding consisted of a term of incarceration of eleven years, execution suspended after five years, followed by three years of probation. His original sentence consisted of

a twenty-five year term of incarceration, execution suspended after eighteen years, followed by five years of probation. For purpose of evaluating whether a second sentence is more severe than an original sentence, *Pearce* and its progeny "consistently equate a more severe sentence with either a longer term of imprisonment or a longer combined sentence." *State* v. *Faria*, 254 Conn. 613, 627–28, 758 A.2d 348 (2000).

The defendant has not demonstrated that, under *Pearce*, a presumption of vindictiveness exists by virtue of a greater sentence imposed at the resentencing proceeding.[4] Accordingly, we reject his claim that the court violated his right to due process.

III

The defendant's third claim is that the court violated his right against double jeopardy. We disagree.

The present claim expands upon the double jeopardy objection that the defendant raised during the resentencing proceeding. The defendant argues that the court violated the prohibition against multiple punishments for the same offense because he had an expectation of finality in the original sentence imposed for the counts in the Washington case. He argues that this is because, at the time of resentencing, he had already served three years and seven months of that sentence, rendering him eligible for parole. Additionally, he argues that he had an expectation of finality in that portion of the original sentence arising from the counts in the Washington case because, after our Supreme Court affirmed the judgment of conviction as it pertained to that case, he had a justifiable expectation that the original sentence imposed for the counts related thereto would remain unchanged. He argues that the double jeopardy clause "prohibits *enhancement* of a defendant's sentence after the defendant has developed an expectation of finality in the original sentence." (Emphasis added; internal quotation marks omitted.)

As was the case with the defendant's vindictiveness claim, his double jeopardy claim essentially is contingent on the success of his claim that the court improperly sentenced him under the aggregate package theory. As he correctly recognizes in his brief, that theory has been "applied to reject double jeopardy claims post resentencing." As we have explained previously in this opinion, we will neither reevaluate nor reconsider the issue of whether the trial court properly applied the aggregate package theory in the present case because the court clearly followed the remand order of our Supreme Court.

"A defendant's double jeopardy claim presents a question of law, over which our review is plenary. . . . The double jeopardy clause of the fifth amendment to the United States constitution provides: [N]or shall any person be subject for the same offense to be twice put

in jeopardy of life or limb. The double jeopardy clause [applies] to the states through the due process clause of the fourteenth amendment. . . . This constitutional guarantee prohibits not only multiple trials for the same offense, but also multiple punishments for the same offense in a single trial. . . . Although the Connecticut constitution does not include a double jeopardy provision, the due process guarantee of article first, § 9, of our state constitution encompasses protection against double jeopardy." (Citation omitted; internal quotation marks omitted.) *State* v. *Bernacki*, 307 Conn. 1, 9, 52 A.3d 605 (2012), cert. denied, U.S. , 133 S. Ct. 1804, 185 L. Ed. 2d 811 (2013).

The defendant's arguments are unpersuasive because his sentence following remand was the result of his successful appeal in a case in which, our Supreme Court concluded, the aggregate theory of sentencing applies. In his direct appeal, the defendant raised claims that challenged every aspect of his convictions in the Washington and Hazard cases. As stated previously in this opinion, the defendant raised three claims that challenged his convictions in the Hazard case and, by claiming that the court improperly joined the Hazard and Washington cases, directly challenged his convictions in the Washington case. Even if the defendant had raised claims that challenged only *some* of the counts under which he had been convicted, the fact that he exercised his right to an appeal undermines his argument to an expectation of finality in the sentence originally imposed. The defendant was successful in undermining a portion of a sentencing package, and the legal consequence of doing so resulted in a resentencing proceeding in which the trial court properly resentenced him pursuant to the remand order. The defendant is not on solid ground by asserting an expectation of finality in the original sentence imposed for the counts in the Washington case following our Supreme Court's remand order. Our Supreme Court's remand order, which explicitly vacated the defendant's original sentence in its entirety, plainly belies the legitimacy of such an expectation.

"It is well established that resentencing a defendant does not trigger double jeopardy concerns when the original sentence was illegal or erroneous. . . . Jeopardy does not attach until the avenues for challenging the validity of a sentence have been exhausted, and, therefore, resentencing has repeatedly been held not to involve double jeopardy when the first sentence was, for some reason, erroneous or inconclusive. . . . In the specific context of a remand order for resentencing when a defendant successfully challenges one portion of a sentencing package, the United States Supreme Court has held that a trial court may resentence a defendant on his conviction of the other crimes without offending the double jeopardy clause of the United States constitution. *Pennsylvania* v. *Goldhammer*, 474

U.S. 28, 29–30, 106 S. Ct. 353, 88 L. Ed. 2d 183 (1985). Indeed, the resentencing court is free to restructure the defendant's entire sentencing package, even for those components assigned to convictions that have not been fully served, as long as the overall term has not expired, without offending double jeopardy." (Citations omitted; internal quotation marks omitted.) *State* v. *Tabone*, 292 Conn. 417, 440–41, 973 A.2d 74 (2009). Accordingly, the defendant's double jeopardy claim is without merit.

The judgment is affirmed.

In this opinion the other judges concurred.

[1] After the defendant appealed directly to this court, our Supreme Court granted the defendant's motion to transfer the appeal to that court. *State* v. *LaFleur*, supra, 307 Conn. 119 n.5.

[2] In *Boscarino*, our Supreme Court "identified several factors that a trial court should consider in deciding whether a severance [or denial of joinder] may be necessary to avoid undue prejudice resulting from consolidation of multiple charges for trial. These factors include: (1) whether the charges involve discrete, easily distinguishable factual scenarios; (2) whether the crimes were of a violent nature or concerned brutal or shocking conduct on the defendant's part; and (3) the duration and complexity of the trial. . . . If any or all of these factors are present, a reviewing court must decide whether the trial court's jury instructions cured any prejudice that might have occurred." (Internal quotation marks omitted.) *State* v. *LaFleur*, supra, 307 Conn. 156.

[3] At the sentencing hearing, the victim in the Washington case stated to the court that she did not want the defendant to serve any additional time in jail beyond the time that he had served. The defendant also addressed the court briefly. The defendant apologized to the victim in the Washington case and to the court. The court indicated that it had before it a presentence investigation report. That report has been submitted to this court as a sealed court exhibit. The defendant's attorney argued that, because the court had rendered a judgment of acquittal with regard to the Hazard case, it should not consider *any* information in the report related to that case. The prosecutor disagreed with this broad assertion, noting that, apart from the conviction that had been overturned, the court was free to consider evidence of the defendant's conduct toward the victim in the Hazard case. Additionally, the defendant's attorney asserted that no events following the date of the defendant's conviction justified an increase in his sentence.

[4] Before this court, the defendant's argument is based on a presumption of vindictiveness; he does not attempt to demonstrate actual vindictiveness.