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STATE OF CONNECTICUT v. TARRANCE LAWRENCE
(AC 24716)

Lavery, C. J., and Schaller, Dranginis, Flynn, Bishop, DiPentima, McLachlan,
Harper and Dupont, Js.

Argued May 4—officially released October 4, 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

DRANGINIS, J. The defendant, Tarrance Lawrence, appeals¹ from the judgment of the trial court dismissing his motion to correct an illegal sentence, filed pursuant to Practice Book § 43-22. On appeal, the defendant claims that the court improperly concluded that it lacked jurisdiction to consider the motion. We disagree and, accordingly, affirm the judgment of the trial court.²

The defendant was charged with one count each of murder in violation of General Statutes § 53a-54a (a), carrying a pistol without a permit in violation of General Statutes § 29-35 and tampering with evidence in violation of General Statutes § 53a-155 (a) (1). The murder charge alleged that the defendant caused the death of a person by use of a firearm. At trial, the defendant presented a defense of extreme emotional disturbance with respect to the murder charge. The court instructed the jury regarding that defense with the following instruction as the defendant requested: "If you unanimously find that the state has proven each of said elements of the crime of murder beyond a reasonable doubt, and if you also unanimously find that the defendant has proven by the preponderance of the evidence each of the elements of the affirmative defense of extreme emotional disturbance, you shall find the defendant guilty of manslaughter in the first degree with a firearm by reason of extreme emotional disturbance and not guilty of murder." The jury subsequently found the defendant guilty of manslaughter in the first degree with a firearm in violation of § 53a-55a (a) as well as guilty on the other two counts with which he had been charged. The court rendered judgment in accordance with the verdict and sentenced the defendant to thirty-five years on the count of manslaughter in the first degree with a firearm, two years on the count of carrying a pistol without a permit and three years on the count of tampering with evidence. All sentences were to run concurrently, resulting in a total effective sentence of thirty-five years incarceration. The defendant appealed from his conviction on grounds unrelated to his present claim, 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).

The defendant subsequently filed in the trial court a motion to correct an illegal sentence pursuant to Practice Book § 43-22,³ in which he claimed that his conviction for manslaughter in the first degree with a firearm was improper; he asserted that because the jury had acquitted him of murder on the basis of the affirmative defense of extreme emotional disturbance, the proper conviction should have been of manslaughter in the first degree in violation of General Statutes § 53a-55 (a) (2). The maximum sentence for manslaughter in the first degree is twenty years incarceration; see General

Statutes § 53a-35a (5); and, therefore, the defendant, in his motion, requested that the court refer the matter to the sentencing judge. The court, after considering the defendant's claims and the relief requested, dismissed the defendant's motion for lack of jurisdiction. This appeal followed.

The crux of the defendant's claim on appeal is that he was convicted of the wrong crime. He argues that, had he been convicted of the correct crime, namely, manslaughter in the first degree, his sentence of imprisonment could not have exceeded twenty years. He claims, therefore, that, because he was sentenced to thirty-five years imprisonment, his sentence exceeds the statutory maximum permitted under the sentencing statute. The claim of an illegal sentence, then, is dependent on the claim of a wrongful conviction. As long as the defendant stands convicted of manslaughter in the first degree with a firearm, his sentence of thirty-five years imprisonment is valid and legal.⁴ The question the defendant's appeal presents to this court, therefore, is whether Practice Book § 43-22 is an appropriate procedural vehicle by which to challenge an allegedly improper conviction or whether the finality of the defendant's conviction, subject to any collateral challenges the defendant may raise via a petition for a writ of habeas corpus, has left the court without jurisdiction to entertain his claim. The answer to the second prong of this question informs the first, so that our preliminary task is to determine the extent of the court's jurisdiction in this matter.

"Jurisdiction involves the power in a court to hear and determine the cause of action presented to it and its source is the constitutional and statutory provisions by which it is created." *Connecticut State Employees Assn., Inc. v. Connecticut Personnel Policy Board*, 165 Conn. 448, 456, 334 A.2d 909 (1973); see *Andrew Ansaldo Co. v. Planning & Zoning Commission*, 207 Conn. 67, 73, 540 A.2d 59 (1988) (*Shea, J.*, concurring). "Article fifth, § 1 of the Connecticut constitution proclaims that [t]he powers and jurisdiction of the courts shall be defined by law, and General Statutes § 51-164s provides that [t]he superior court shall be the sole court of original jurisdiction for all causes of action, except such actions over which the courts of probate have original jurisdiction, as provided by statute. . . ." (Internal quotation marks omitted.) *State v. Carey*, 222 Conn. 299, 305, 610 A.2d 1147 (1992), on appeal after remand, 228 Conn. 487, 636 A.2d 840 (1994). "The Superior Court is a constitutional court of general jurisdiction. . . . In the absence of statutory or constitutional provisions, the limits of its jurisdiction are delineated by the common law." (Citation omitted.) *State v. Luzietti*, 230 Conn. 427, 431, 646 A.2d 85 (1994).

"It is well established that under the common law a trial court has the discretionary power to modify or

vacate a criminal judgment before the sentence has been executed. . . . This is so because the court loses jurisdiction over the case when the defendant is committed to the custody of the commissioner of correction and begins serving the sentence.” (Citations omitted.) *Id.*, 431–32. There are a limited number of circumstances in which the legislature has conferred on the trial courts “continuing jurisdiction to act on their judgments after the commencement of sentence See, e.g., General Statutes §§ 53a-29 through 53a-34 (permitting trial court to modify terms of probation after sentence is imposed); General Statutes § 52-270 (granting jurisdiction to trial court to hear petition for a new trial after execution of original sentence has commenced); General Statutes § 53a-39 (allowing trial court to modify sentences of less than three years provided hearing is held and good cause shown).” (Internal quotation marks omitted.) *State v. Boulter*, 49 Conn. App. 702, 705, 716 A.2d 134 (1998). Without a legislative or constitutional grant of continuing jurisdiction, however, the trial court lacks jurisdiction to modify its judgment. *State v. Luziatti*, *supra*, 230 Conn. 431.⁵

In this case, the defendant’s conviction has been finalized on direct appeal. The defendant has not cited, nor have we found, any statutory or constitutional grant of continuing jurisdiction that would permit a trial court to review his conviction prior to his filing a petition for a writ of habeas corpus. The defendant, therefore, relies on our rules of practice authorizing a defendant, by way of a motion, to request that the court correct his allegedly illegal sentence as a way of challenging his conviction under an improper statute.⁶ We have recognized that there is no legislative or constitutional grant of jurisdiction to give the court power to consider the defendant’s claim. Unless, therefore, his claim properly fits within the common-law confines of jurisdiction to correct an illegal sentence, this motion to correct can provide him with no recourse or relief.

Under the common law, the court has continuing jurisdiction to correct an illegal sentence. See, e.g., *Bozza v. United States*, 330 U.S. 160, 166, 67 S. Ct. 645, 91 L. Ed. 818 (1947) (“an excessive sentence should be corrected . . . by an appropriate amendment of the invalid sentence by the court of original jurisdiction”); *Murphy v. Massachusetts*, 177 U.S. 155, 157, 20 S. Ct. 639, 44 L. Ed. 711 (1900) (“in many jurisdictions it has been held that the appellate court has the power, when there has been an erroneous sentence, to remand the case to the trial court for sentence according to law”); *In re Bonner*, 151 U.S. 242, 259–60, 14 S. Ct. 323, 38 L. Ed. 149 (1894) (“where the conviction is correct . . . there does not seem to be any good reason why jurisdiction of the prisoner should not be reassumed by the court that imposed the sentence in order that its defect may be corrected”). That common-law grant of jurisdiction has been codified for the federal courts in rule 35

of the Federal Rules of Criminal Procedure.⁷ *Hill v. United States*, 368 U.S. 424, 430 n.8, 82 S. Ct. 468, 7 L. Ed. 2d 417 (1962). In Connecticut, that grant of jurisdiction is recognized and the procedure by which it may be invoked is regulated by Practice Book § 43-22.⁸ See *State v. Daniels*, 207 Conn. 374, 387, 542 A.2d 306, after remand for articulation, 209 Conn. 225, 550 A.2d 885 (1988), cert. denied, 489 U.S. 1069, 109 S. Ct. 1349, 103 L. Ed. 2d 817 (1989). Rules of practice, however, merely regulate the procedure by which the court's jurisdiction may be invoked; they do not and cannot confer jurisdiction on the court to consider matters otherwise outside the court's jurisdiction.⁹ For the court to have jurisdiction to consider the defendant's claim of an illegal sentence, the claim must fall into one of the categories of claims that, under the common law, the court had jurisdiction to review.

Connecticut has recognized two types of circumstances in which the court has jurisdiction to review a claimed illegal sentence. The first of those is when the sentence itself is illegal, namely, when the sentence "either exceeds the relevant statutory maximum limits, violates a defendant's right against double jeopardy, is ambiguous, or is internally contradictory." *State v. McNellis*, 15 Conn. App. 416, 443-44, 546 A.2d 292, cert. denied, 209 Conn. 809, 548 A.2d 441 (1988); see also *United States v. Pavlico*, 961 F.2d 440, 443 (4th Cir.), cert. denied, 506 U.S. 848, 113 S. Ct. 144, 121 L. Ed. 2d 96 (1992). The other circumstance in which a claimed illegal sentence may be reviewed is that in which the sentence is within the relevant statutory limits, but was "imposed in a way which violates 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.) *State v. McNellis*, supra, 444; see also *United States v. Guevremont*, 829 F.2d 423, 427 (3d Cir. 1987).¹⁰ Both types of illegal sentence claims share the requirement that the sentencing proceeding, and not the trial leading to conviction, be the subject of the attack. Such has been the understanding of the federal courts since the matter first was discussed by the United States Supreme Court in *Hill v. United States*, supra, 368 U.S. 424, in which Justice Black, in dissent, recognized that extending rule 35 to cover sentences imposed in an illegal manner "does not of course mean that Rule 35 permits attack upon a sentence based upon mere trial errors. Rule 35 applies to any 'illegal sentence,' not to any illegal conviction, and thus by its terms the Rule protects only those rights which a defendant retains even if the judgment of guilt against him is proper." (Emphasis added.) *Id.*, 432 n.2 (*Black, J.*, dissenting). This court adopted that same understanding of the common-law right to challenge an

illegal sentence in *State v. Mollo*, 63 Conn. App. 487, 491, 776 A.2d 1176, cert. denied, 257 Conn. 904, 777 A.2d 194 (2001), in which we recognized that “the relief allowed by Practice Book § 43-22 require[s], as a precondition, a valid conviction.” The defendant’s claim, by its very nature, presupposes an *invalid* conviction and, therefore, Practice Book § 42-33 can provide him with no avenue of relief.¹¹

The essence of the defendant’s claim is that he was convicted of the wrong crime. He does not claim, nor could he, that the sentence he received exceeded the maximum statutory limits for the sentence prescribed for the crime for which he was convicted. The defendant also does not claim that he was denied due process at his sentencing hearing or that his sentence is ambiguous or internally contradictory. If the defendant’s claim were to fall into any of those categories, Practice Book § 43-22 would be the proper vehicle for the defendant to seek relief from the court. Because the defendant’s claim falls outside that set of narrow circumstances in which the court retains jurisdiction over a defendant once that defendant has been transferred into the custody of the commissioner of correction to begin serving his sentence, the court cannot consider the claim pursuant to a motion to correct an illegal sentence under Practice Book § 43-22. Accordingly, the court properly concluded that the defendant’s sentence was not subject to review pursuant to a Practice Book § 43-22 motion to correct an illegal sentence and properly concluded that it lacked the jurisdiction to review the defendant’s attack on the underlying conviction.

The judgment is affirmed.

In this opinion LAVERY, C. J., and SCHALLER, FLYNN, BISHOP, DiPENTIMA, McLACHLAN and HARPER, Js., concurred.

¹ This appeal originally was argued on September 21, 2004, before a panel of three members of this court, which reversed the trial court’s judgment dismissing the defendant’s motion to correct an illegal sentence and remanded the matter to the trial court with direction to deny the defendant’s motion. *State v. Lawrence*, 86 Conn. App. 784, 863 A.2d 235 (2005). Thereafter, we granted the motions filed by both the state and the defendant for reconsideration en banc.

² Because we conclude that the court properly determined that it lacked subject matter jurisdiction to consider the defendant’s motion, we do not decide the merits of the defendant’s claim that his conviction of manslaughter in the first degree with a firearm was improper. This claim would have been proper for review in the defendant’s direct appeal. The defendant also has conceded that following the dismissal of his motion, and the unsuccessful appeal therefrom, provides him with the avenue of a further collateral attack on the conviction via a petition for a writ of habeas corpus. See footnote 11 of this opinion.

³ Practice Book § 43-22 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.”

⁴ The defendant essentially requests this court to remand this case with direction that, on the current conviction of manslaughter in the first degree with a firearm, the court shall not impose a sentence of more than twenty years incarceration. This limitation, however, is governed by no statutory authority. For the defendant to receive the relief he requests, this court

would have to vacate his conviction of manslaughter in the first degree with a firearm and remand the case to the trial court with direction that it impose on the defendant a judgment of conviction of manslaughter in the first degree. Only then would the defendant be assured that, pursuant to the legally operative sentencing statute, he could receive only a twenty year sentence.

⁵ We note that the continuing jurisdiction that the court may have to modify a judgment is separate and distinct from the continuing jurisdiction that the court has to enter further orders enforcing its judgment, which may derive from the court's inherent power to vindicate judgments. See *AvalonBay Communities, Inc. v. Planning & Zoning Commission*, 260 Conn. 232, 241, 796 A.2d 1164 (2002).

⁶ The dissent cites *State v. Waterman*, 264 Conn. 484, 489 n.6, 825 A.2d 63 (2003), for the proposition that the criminal conviction and sentence are one and the same. This statement was incidental to the holding in *Waterman*, which considered whether the imposition of a sexual offender registration requirement after the defendant had begun serving his sentence constituted an alteration in that sentence. *Id.*, 497-98. More importantly, the case on which *Waterman* relied for this statement, *State v. Seravalli*, 189 Conn. 201, 205, 455 A.2d 852, cert. dismissed, 461 U.S. 920, 103 S. Ct. 2076, 77 L. Ed. 2d 291 (1983), specifically considered what act by the court in a criminal case constituted a final judgment for purposes of appeal. The *Seravalli* court concluded that the imposition of the sentence, which would conclude the trial court proceedings in any given case, served as the judgment of conviction, and thereby the final judgment, for appeal purposes. This does not translate, however, into the theory that every challenge to a criminal sentence also is a challenge to the underlying conviction. A perfect example is *State v. Barksdale*, 79 Conn. App. 126, 829 A.2d 911 (2003), in which the defendant was convicted of sexual assault in the second degree in violation of General Statutes (Rev. 1997) § 53a-71 (a) (1). Both at the time he committed the crime *and at the time he was sentenced*, in April, 2001; see *State v. Barksdale*, Conn. Appellate Court Records & Briefs, April Term, 2003, Record pp. 82a-82b; sexual assault in the second degree was classified as a class C felony, for which the court could impose a maximum sentence of ten years. The court had sentenced the defendant to twenty years imprisonment. While the defendant's appeal was pending, the legislature amended the statute and made sexual assault in the second degree a class B felony, punishable by a maximum sentence of twenty years imprisonment. See Public Acts 2002, No. 02-138, § 7, and General Statutes § 53a-35a (5). On appeal, the defendant argued, and the state agreed, that because the court had sentenced him to twenty years imprisonment, which exceeded the maximum sentence permitted for a class C felony, his sentence was illegal. *State v. Barksdale*, *supra*, 138. In order for the defendant to make this claim, and for this court to review it, it was not necessary for him to challenge his conviction on any ground; his only challenge, in this regard, was to the legality of his sentence, and this court needed to focus its review solely on the sentencing proceeding.

⁷ Connecticut law most closely resembles the version of rule 35 (a) of the Federal Rules of Criminal Procedure that was in existence between 1966 and 1984. That rule provided: "Correction of sentence. The court may correct an illegal sentence at any time and may correct a sentence imposed in an illegal manner within the time provided herein for the reduction of sentence." Fed. R. Crim. P. 35 (a) (1984). That rule was amended in 1984 to limit to seven days the time in which a federal court may refashion a sentence, and the court may do so only when there is arithmetical, technical or other clear error. Any other sentence that might have been considered illegal and reparable under the previous rule may be remedied only through a direct appeal or a collateral attack. See National Institute for Trial Advocacy, commentary on rule 35 of the Federal Rules of Criminal Procedure (2004).

⁸ Unlike the federal rules, which have been amended pursuant to congressional action; see *United States v. Cook*, 890 F.2d 672, 674-75 (4th Cir. 1989); our rules of practice are promulgated by the Superior Court of this state and, as such, cannot abridge, enlarge or modify any substantive right. See General Statutes § 51-14 (a).

⁹ "Practice Book rules do not ordinarily define subject matter jurisdiction. General Statutes § 51-14 (a) authorizes the judges of the Superior Court to promulgate rules regulating pleading, practice and procedure in judicial proceedings *Such rules shall not abridge, enlarge or modify any substantive right nor the jurisdiction of any of the courts.*" (Emphasis added; internal quotation marks omitted.) *State v. Carey*, *supra*, 222

Conn. 307.

¹⁰ The original language of rule 35 of the Federal Rules of Criminal Procedure, enacted in 1943, referred only to illegal sentences, not sentences imposed in an illegal manner. The United States Supreme Court interpreted that rule in *Hill v. United States*, supra, 368 U.S. 424, and foreclosed relief for claims of sentences imposed in an illegal manner. The rule then was amended in 1966 to provide that relief, at least for a specified period of time. Connecticut law can be understood to follow either the version of rule 35 as it existed between 1966 and 1984 or the position of the dissent in *Hill*, which stated: “I would have thought that a sentence imposed in an illegal manner—whether the amount or form of the punishment meted out constitutes an additional violation of law or not—would be recognized as an illegal sentence under any normal reading of the English language. And precisely this sort of common-sense understanding of the language of Rule 35 has prevailed generally among the lower federal courts that deal with questions of the proper interpretation and application of these Rules as an everyday matter. Those courts have expressed their belief that, even where the punishment imposed upon a defendant is entirely within the limits prescribed for the crime of which he was convicted, a sentence imposed in a prohibited manner . . . is an illegal sentence subject to correction under Rule 35.” (Internal quotation marks omitted.) *Id.*, 432 (*Black, J.*, dissenting).

We recognize that there is a conflict regarding the extent to which a court has jurisdiction to entertain a motion to correct a sentence imposed in an illegal manner. Compare *State v. Francis*, 69 Conn. App. 378, 793 A.2d 1224, cert. denied, 260 Conn. 935, 802 A.2d 88, cert. denied, 537 U.S. 1056, 123 S. Ct. 630, 154 L. Ed. 2d 536 (2002), with *State v. Pagan*, 75 Conn. App. 423, 816 A.2d 635, cert. denied, 265 Conn. 901, 829 A.2d 420 (2003). That question is not before us today, and we therefore decline to decide it. We merely note that even if we were to take the more expansive view of *Pagan*, the defendant’s claim still does not fall within the confines of a sentence imposed in an illegal manner.

¹¹ In his brief and at oral argument, the defendant claimed that, regardless of whether relief was granted, our Supreme Court’s decision in *Cobham v. Commissioner of Correction*, 258 Conn. 30, 779 A.2d 80 (2001), required him to bring a motion to correct an illegal sentence prior to petitioning the court for a writ of habeas corpus. Although it is true that *Cobham* requires a defendant challenging the legality of his sentence to bring a motion to correct that sentence prior to petitioning the court for a writ of habeas corpus, it does not place that requirement on an individual who, like the defendant, is challenging the legality of his conviction.