STATE OF CONNECTICUT *v.* FREDERICK PAYNE
(AC 29828)

Gruendel, Harper and Robinson, Js.

Argued September 22, 2009—officially released May 25, 2010

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

Christopher Y. Duby, special public defender, for the appellant (defendant).

Robin S. Schwartz, assistant state's attorney, with whom, on the brief, were *Michael Dearington*, state's attorney, and *Brian K. Sibley, Sr.*, assistant state's attorney, for the appellee (state).

Opinion

HARPER, J. The defendant, Frederick Payne, appeals from the judgment of conviction, rendered after a jury trial, of burglary in the third degree as an accessory in violation of General Statutes §§ 53a-103 and 53a-8 (a), larceny in the fifth degree as an accessory in violation of General Statutes §§ 53a-125a and 53a-8 (a), engaging the police in a pursuit in violation of General Statutes § 14-223 (b) and interfering with an officer in violation of General Statutes § 53a-167a (a).[1] The defendant claims (1) that the court improperly denied his motion to suppress evidence seized by the police from an automobile he had been driving during the events at issue and (2) that the court's consciousness of guilt instruction likely misled the jury. We decline to review either claim and affirm the judgment of the trial court.

The jury reasonably could have found the following facts. At approximately 4:25 a.m. on May 20, 2006, the defendant broke into a New Haven package store. The defendant removed alcoholic beverages and boxes of cigarettes from the store and placed them in the passenger compartment of an automobile parked nearby. After the defendant's activities tripped the store's alarm system and a resident living near the store dialed 911 to report the break-in, police officers headed to the store to investigate. A police officer en route to the scene in his police cruiser observed the defendant driving from the store at a high rate of speed. The officer, who had activated the siren and police lights on his cruiser, pursued the defendant for a brief period of time along city streets before the defendant crashed the automobile that he was operating into the front of a residence. The automobile came to rest on the steps and front porch of the residence, causing significant property damage.

Following the crash, the defendant exited the automobile and fled on foot into the backyard of the residence. The officer who was pursuing the defendant ordered the defendant to stop, but the defendant did not obey this command. The officer pursued the defendant on foot, and, following a brief struggle during which the defendant pushed and struck the officer, the officer physically restrained him. After searching the automobile driven by the defendant at the crash site following the defendant's apprehension, police seized several unopened containers of alcoholic beverages and cigarettes, valued at $301.13, from the passenger compartment of the automobile. The defendant's arrest followed.

I

First, the defendant claims that the court improperly denied his motion to suppress the evidence, including the alcoholic beverages and cigarettes, seized by the police following their warrantless search of the automobile he was driving. We conclude that the record is not

adequate to review this claim.

The defendant filed the motion to suppress prior to the presentation of evidence, and, outside of the jury's presence, the court held an evidentiary hearing on the motion. The defendant claimed that the items seized were the fruits of an unlawful search under the federal and state constitutions.[2] At the conclusion of the hearing, the state argued that the police action was constitutionally permissible on a variety of grounds. In particular, the prosecutor asserted that the circumstances at issue, involving the defendant's flight from the crashed automobile, supported an "abandonment claim . . . ." In this regard, the prosecutor stated that, at the time of the search, the police did not have any information concerning the owner of the automobile, as "the [police check of the] registration did not come back to [the defendant]," and it was not until the suppression hearing that the defendant claimed ownership of the automobile.

In an oral ruling following the hearing, the court denied the motion to suppress. The record contains the unsigned transcript of that ruling. The transcript reflects the court's findings with regard to the circumstances surrounding the search and seizure generally, as well as the court's conclusion that four independent bases supported the legality of the search and seizure. The court referred to its reliance on the plain view exception to the warrant requirement, the automobile exception to the warrant requirement, the inevitable discovery doctrine and "abandonment . . . ." On appeal, the defendant challenges the court's conclusion that any of these four principles applied to the search and seizure at issue. To prevail, the defendant must demonstrate that none of the four legal bases on which the court relied supported the denial of his motion to suppress.

Under our rules of practice, the trial court is required to state its decision, either orally or in writing, in ruling on motions to suppress evidence. Practice Book § 64-1 (a) (4). The decision of the trial court "shall encompass its conclusion as to each claim of law raised by the parties and the factual basis therefor. . . ." Practice Book § 64-1 (a). "It is the responsibility of the appellant to provide an adequate record for review. The appellant shall determine whether the entire trial court record is complete, correct and otherwise perfected for presentation on appeal. . . ." Practice Book § 61-10.

As a preliminary matter, the form of the court's decision that appears in the record is not proper; the defendant has not presented this court with a memorandum of the court's oral decision that has been signed by the trial judge in accordance with Practice Book § 64-1 (a). The record does not reflect that the defendant attempted to remedy this defect in accordance with the procedure set forth in Practice Book § 64-1 (b). This

defect in the presentation of the appeal, however, does not hamper our review of the present claim because we are able to identify readily the court's decision, encompassing its findings, in the transcript before us. See, e.g., *State* v. *Muhammad*, 117 Conn. App. 181, 184 n.1, 979 A.2d 501 (2009).

With regard to its ultimate conclusion that "abandonment" was a ground on which to deny the motion to suppress, the court stated the following in its decision: "Counsel indicates for the state abandonment. Given the fact that the testimony reveals that upon attempting to elude the police and not responding to their call—to their stop, either in the automobile as well as on foot, that he, in fact, abandoned the property and therefore relinquished the knowing right to that property by his abandonment. Further testimony is that, at least he claims he purchased the vehicle . . . and it was not registered and the owner was unknown at the time. At any rate, to the extent that the motion to suppress the items seized in the search—there are a variety of bases to support the search, including the plain view, automobile exceptions, [that] support the police conduct in terms of the automobile, including if you will, abandonment as well as inevitable discovery and the plain view [exception to the warrant requirement] supporting the seizure by the patrol officer."

The defendant claims that the court improperly relied on the abandonment doctrine as such doctrine is applied in search and seizure law. The defendant argues that the court impermissibly concluded as a matter of law that, by virtue of his flight from the automobile, that he had relinquished a right to privacy in the items seized from the automobile. Essentially, the defendant argues that the court improperly concluded that his flight from the automobile "equate[d] to the abandonment of a privacy right for purposes of search and seizure analysis."

In reviewing the court's ultimate conclusion that the doctrine of abandonment legally justified the search and seizure, we first must ascertain the factual and legal basis of the court's decision. "Our standard of review of a trial court's findings and conclusions in connection with a motion to suppress is well defined. A finding of fact will not be disturbed unless it is clearly erroneous in view of the evidence and pleadings in the whole record . . . . [W]here the legal conclusions of the court are challenged, we must determine whether they are legally and logically correct and whether they find support in the facts set out in the memorandum of decision . . . ." (Internal quotation marks omitted.) *State* v. *Gonzalez*, 278 Conn. 341, 347–48, 898 A.2d 149 (2006).

After carefully reviewing the court's entire decision, we are unable to ascertain the factual or legal basis for the court's reliance on the abandonment doctrine. The

court concluded that the defendant had "relinquished the knowing right to [the] property by his abandonment." This statement, however, reasonably is susceptible to different interpretations. It is unclear whether the court's reference to "property" encompassed the automobile or the contents of the automobile. On a more fundamental level, it is unclear whether the court was referring to the defendant's *privacy* interest in the property or his *possessory* interest in the property. "[I]t is incumbent upon the [defendant] to take the necessary steps to sustain [his] burden of providing an adequate record for appellate review. . . . Our role is not to guess at possibilities . . . but to review claims based on a complete factual record developed by a trial court. . . . Without the necessary factual and legal conclusions furnished by the trial court . . . any decision made by [any appellate court] respecting [the defendant's claims] would be entirely speculative." (Internal quotation marks omitted.) *State* v. *Canales*, 281 Conn. 572, 583–84, 916 A.2d 767 (2007); see also *Narumanchi* v. *DeStefano*, 89 Conn. App. 807, 815, 875 A.2d 71 (2005) ("[s]peculation and conjecture have no place in appellate review"). A reviewing court does not presume error; if the party challenging the trial court's ruling has not satisfied its burden of demonstrating that the ruling was factually or legally untenable, a reviewing court must presume that the trial court properly reached its decision. See, e.g., *State* v. *Cooper*, 227 Conn. 417, 434, 630 A.2d 1043 (1993); *State* v. *Koslik*, 116 Conn. App. 693, 704–705, 977 A.2d 275, cert. denied, 293 Conn. 930, 980 A.2d 916 (2009); *State* v. *Mathis*, 59 Conn. App. 416, 422 n.3, 757 A.2d 55, cert. denied, 254 Conn. 941, 761 A.2d 764 (2000). Accordingly, we decline to review the defendant's claim and do not grant relief on the basis of this claim.[3]

II

Next, the defendant claims that the court's consciousness of guilt instruction likely misled the jury because the court failed to tailor the instruction to the specific charges at issue in this case. We decline to review this claim.

The record reflects that, during a charge conference, the prosecutor asked the court to deliver a consciousness of guilt instruction. The court agreed to deliver the instruction and read aloud the instruction that it intended to deliver. The defendant's attorney stated that he objected to the instruction and that he was unable to articulate at that time the ground of the objection. When the court raised the matter the following day, the defendant's attorney stated that he did not object to the instruction. Moments later, the defendant's attorney stated that he objected to the consciousness of guilt instruction but did not assert any ground for the objection. The court noted the defendant's objection.

During its charge, the court delivered a conscious-

ness of guilt instruction. Following the charge, the defendant's attorney took an exception to the court's consciousness of guilt instruction. He did not assert any ground for the exception, merely stating: "Consciousness of guilt, we take exception to that."

"An appellate court shall not be bound to consider error as to the giving of, or the failure to give, an instruction unless the matter is covered by a written request to charge or exception has been taken by the party appealing immediately after the charge is delivered. Counsel taking the exception shall state distinctly the matter objected to and the ground of the exception. The exception shall be taken out of the hearing of the jury." Practice Book § 42-16. "The purpose of the rule is to alert the court to any claims of error while there is still an opportunity for correction in order to avoid the economic waste and increased court congestion caused by unnecessary retrials." (Internal quotation marks omitted.) *State* v. *Miller*, 186 Conn. 654, 658, 443 A.2d 906 (1982).

The defendant did not submit a written request to charge that included a consciousness of guilt instruction. Prior to the charge, the defendant's attorney objected to the consciousness of guilt instruction. He also took an exception to that instruction following the charge. In neither instance, however, did the defendant's attorney state a ground for the objection. The exception cannot be said to have alerted the court to any claim of error and, thus, did not satisfy the requirement of Practice Book § 42-16. This court "shall not be bound to consider a claim unless it was *distinctly raised at the trial* or arose subsequent to the trial. . . ." (Emphasis added.) Practice Book § 60-5. We decline to review the defendant's unpreserved claim of instructional error.

The judgment is affirmed.

In this opinion GRUENDEL, J., concurred.

[1] Although § 53a-167 (a) was amended in 2008; see Public Acts 2008, No. 08-150, § 52; those amendments have no bearing on the merits of this appeal. In the interest of simplicity, we refer to the current revision of the statute.

The court also found that the defendant's criminal conduct violated a conditional discharge imposed following an unrelated criminal proceeding. The court imposed a total effective sentence of 126 months of incarceration.

[2] It does not appear that the court addressed a state constitutional claim in its ruling, and, on appeal, the defendant does not analyze his claim independently under our state constitution. Accordingly, we will confine our analysis to the right against unreasonable search and seizure guaranteed by the federal constitution. See, e.g., *State* v. *Dyson*, 238 Conn. 784, 794, 680 A.2d 1306 (1996) ("[b]ecause the defendant has failed to provide any independent analysis under the state constitution, we limit our analysis to the federal constitution").

[3] Apparently, the concurring opinion does not challenge our determination that the trial court's legal analysis as to the abandonment issue is patently unclear and susceptible to multiple interpretations. The concurring opinion, reasoning that a clearly stated explanation of the court's legal analysis is not a necessary predicate for appellate review of this constitutional issue, concludes that the record is adequate for this court to review the issue de novo. In so reasoning, the concurring opinion explicitly focuses on the objective reasonableness of the defendant's expectation of privacy, ultimately concluding that "any subjective expectation of privacy held by the

defendant was objectively unreasonable."

Respectfully, we disagree with this approach for several reasons. One of the consequences of the trial court's scant legal analysis of this claim is that the court failed to make factual findings consistent with a proper analysis of the abandonment issue. Thus, the trial court never set forth a finding concerning the issue that is central to our analysis—whether the defendant expected privacy in the automobile or its contents. A legally proper analysis of abandonment in the context of a fourth amendment claim requires a determination by the court as to whether a defendant who has claimed a fourth amendment privilege had abandoned a reasonable expectation of privacy in the invaded area. See *State* v. *Oquendo*, 223 Conn. 635, 658, 613 A.2d 1300 (1992); *State* v. *Mooney*, 218 Conn. 85, 108, 588 A.2d 145 (en banc), cert. denied, 502 U.S. 919, 112 S. Ct. 330, 116 L. Ed. 2d 270 (1991). If such a reasonable expectation of privacy is lacking, a defendant's fourth amendment challenge to a search of the invaded area necessarily must fail. See *State* v. *Morrill*, 197 Conn. 507, 540–42, 498 A.2d 76 (1985).

A proper resolution of the issue presented requires more than a factual determination of the circumstances surrounding the search generally. It requires that the court make a finding of fact concerning the defendant's subjective intent. Only after finding that a defendant expected privacy in the invaded area should the court determine as a matter of law whether such intent objectively was reasonable and, thus, worthy of fourth amendment protection. See *United States* v. *Lee*, 916 F.2d 814, 818 (2d Cir. 1990) ("In determining whether there has been an abandonment, the district court must focus on the intent of the person who is purported to have abandoned the property. . . . Since this inquiry is necessarily factual, we will uphold the district court's finding unless clearly erroneous." [Citations omitted; internal quotation marks omitted.]); *United States* v. *D'Avanzo*, 443 F.2d 1224, 1226 (2d Cir.) ("Whether there has been an abandonment presents a question of intent. Like other factual findings by a district court we may disturb [the district court's] finding that the defendants relinquished any interest they may otherwise have had in protecting the privacy of [the area invaded] only if the finding is clearly erroneous."), cert. denied, 404 U.S. 850, 92 S. Ct. 86, 30 L. Ed. 2d 89 (1971). The United States Court of Appeals for the Tenth Circuit aptly explained the relevant inquiry as follows: "[The] test of abandonment subsumes both a subjective and an objective component. . . . Findings of subjective intent are findings of fact, which we review only under a clearly erroneous standard. However, a determination of whether the defendant retained an objectively reasonable expectation of privacy in the property that society will recognize is a question of law that we review de novo." (Citation omitted.) *United States* v. *Garzon*, 119 F.3d 1446, 1449 (10th Cir. 1997); see also *United States* v. *Denny*, 441 F.3d 1220, 1227 (10th Cir.), cert. denied, 549 U.S. 914, 127 S. Ct. 256, 166 L. Ed. 2d 200 (2006). The issue of whether a defendant has abandoned a reasonable expectation of privacy in the area searched is conceptually indistinguishable from what our case law frequently has deemed "standing" to contest an illegal search. See *State* v. *Kalphat*, 285 Conn. 367, 374–75, 939 A.2d 1165 (2008); *State* v. *Hill*, 237 Conn. 81, 92–93, 675 A.2d 866 (1996).

In the present case, the court did not determine whether the defendant expected privacy in the invaded area. The concurring opinion reasons that this omission is inconsequential because "that line of inquiry need not be addressed if any such expectation held by the defendant is objectively unreasonable." Thus, the concurring opinion, reviewing a trial court decision that is devoid of a proper factual analysis of the claim, disposes of the claim on purely constitutional grounds. Even if we were to assume that the court's analysis of abandonment properly was rooted in fourth amendment principles, as opposed to property law, it is patently unclear whether the trial court applied the doctrine of abandonment because it found that the defendant did not expect privacy in the automobile or its contents at the time of the search *or* whether the court applied the doctrine because it concluded as a matter of law that the defendant's subjective expectation of privacy was not objectively reasonable.

"[W]e must be mindful that [t]his court has a basic judicial duty to avoid deciding a constitutional issue if a nonconstitutional ground exists that will dispose of the case." (Internal quotation marks omitted.) *State* v. *Cortes*, 276 Conn. 241, 253, 885 A.2d 153 (2005). Because there is no factual basis in the record that the defendant expected privacy in the invaded area, we question the propriety of the extensive constitutional analysis set forth in the concurring opinion. Such analysis supposes, absent any support in the record, that the defendant manifested an expectation of privacy in the invaded area. In light of the ambiguous record before us, it is consistent with this court's proper role to avoid such an analysis and to assume that, if the court properly analyzed the fourth amendment issue, it properly resolved the issue adverse to the defendant by finding that the defendant

merely did not expect privacy in the invaded area.

Thus, our resolution of the reviewability issue does not hinge solely on the lack of a coherent legal analysis by the trial court, but also on the lack of factual findings that are integral to a proper legal analysis. The claim may be resolved on a purely factual ground, and the defendant, who bears the burden of providing this court with a record adequate for review, has not demonstrated that the court's ruling was not factually proper. By failing to demonstrate error, the defendant has left unchallenged a factual ground that we must presume exists and on which the court's ruling may be affirmed. Thus, we disagree with the concurring opinion insofar as it states that our resolution of the reviewability issue cannot be harmonized with the doctrine set forth in *State* v. *Golding*, 213 Conn. 233, 239–40, 567 A.2d 823 (1989). It suffices to observe that *Golding* does not provide for de novo review of all constitutional claims; the very first condition of the *Golding* analysis requires that "the record is adequate to review the alleged claim of error . . . ." Id. As our analysis reflects, the record is not adequate to reach the constitutional issue presented because it is wholly dependent on a finding of fact that does not appear in the record before us.