STATE OF CONNECTICUT *v.* DANIEL JAY GOLODNER
(SC 18826)

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

Argued February 7—officially released June 12, 2012

Jon L. Schoenhorn, with whom, on the brief, was *Mathew C. Sorokin*, for the appellant (defendant).

Mitchell S. Brody, senior assistant state's attorney, with whom, on the brief, were *Michael L. Regan*, state's attorney, and *Christa L. Baker*, deputy assistant state's attorney, for the appellee (state).

Opinion

EVELEIGH, J. The defendant, Daniel Jay Golodner, was convicted, following a jury trial, of two counts of interfering with an officer in violation of General Statutes § 53a-167a,[1] and two counts of reckless endangerment in the second degree in violation of General Statutes § 53a-64,[2] in connection with a dispute over a neighbor's attempt to have their common property boundary surveyed. The defendant was acquitted on the remaining charges of two counts of reckless endangerment in the first degree in violation of General Statutes § 53a-63, and one count of assault of public safety personnel in violation of General Statutes § 53a-167c (a) (1). The trial court imposed a total effective sentence of three years incarceration, suspended after six months, followed by three years probation. On appeal,[3] the defendant claims that the trial court improperly: (1) denied his motion to dismiss because that court improperly interpreted General Statutes § 52-557o as granting surveyors a right to trespass onto his property over his objection; (2) violated his constitutional right to present a defense by refusing to allow him to present evidence in support of his argument that the police officers were acting outside the scope of their duties when they escorted surveyors onto his property over his objection; (3) violated his constitutional right to present a defense by refusing his request to charge the jury on the defense of entrapment; and (4) denied his motion to dismiss the second charge of reckless endangerment for violation of the statute of limitations. Although we disagree with the first three claims, we conclude that the trial court improperly denied the defendant's motion to dismiss the second charge of reckless endangerment. Accordingly, we affirm the judgment in part and reverse the judgment in part with respect to the conviction on the second charge of reckless endangerment and remand the case to the trial court for resentencing.

The jury reasonably could have found the following facts. On the morning of August 22, 2008, Eric Brown and Justin Fisher, field surveyors, were employed by John Paul Mereen, a licensed surveyor, to take measurements for a property survey in New London on behalf of Eric Pellot. Pellot had hired Mereen to identify the boundaries of his property as a result of a dispute with the defendant regarding the fence line separating their respective properties. Brown went to the defendant's home to inform him of the land survey and the need to cross over onto his side of the fence in order to complete the survey. Initially, the defendant agreed to permit Brown and Fisher to enter the property on his side of the fence, but quickly reversed course and refused permission to enter. The defendant stated that he did not want Fisher and Brown on his property, and asked them to leave. Fisher and Brown continued with

their measurements by standing on Pellot's side of the fence and dangling a piece of their surveying equipment over the fence in order to locate the stone markers designating the corners of the defendant's property. The defendant continued to request that Fisher and Brown leave his property and threatened to call the police. Consequently, Brown and Fisher ceased taking measurements. Neither Brown nor Fisher were licensed surveyors, and Mereen did not go to the location himself.

Thereafter, the defendant telephoned the New London police. At approximately 9:10 a.m., police headquarters dispatched Sarah Starkey and Genaro Velez, New London police officers, to the scene. Sergeant Todd Bergeson, who was supervising street patrols at the time, also drove to the scene. Upon the officers' arrival, Brown and Fisher apprised the officers of the fence line dispute and described their job of taking measurements in connection with the dispute. The defendant informed the police that Brown and Fisher did not have permission to be on his property and he wanted them removed because they were trespassing. In response, Brown and Fisher showed the officers their identification and "surveyor's rights" cards displaying the text of § 52-557o regarding an action for trespass against a person entering onto land at the direction of a licensed surveyor.[4] Bergeson and Starkey examined the cards and concluded that Fisher and Brown were authorized under the statute to trespass in order to complete their measurements. Bergeson then informed the defendant that he was "escorting [Fisher and Brown] onto [the defendant's] property whether he like[d] it or not." The defendant informed Bergeson that he had no right to bring Fisher and Brown onto his property. Bergeson replied that the aforementioned statute gave them that right. The officers also ordered the defendant into his house, and he complied while threatening to telephone their shift commander and to sue Bergeson. Bergeson had received training on the rights of surveyors, and had learned that surveyors were permitted to trespass, and he and Starkey had relied upon this information in explaining to the defendant that the surveyors were entitled to be on his side of the fence.

While in his house, the defendant did telephone 911 for a second time, was given the direct telephone number of the shift commander, Sergeant Kevin McBride, and spoke to McBride. Starkey and Velez walked with Fisher down the defendant's driveway, following the disputed fence, to a rear corner boundary marker. The officers then walked back up the driveway. The defendant then came out of the back of his house and started yelling at Fisher, which prompted Bergeson to direct Starkey to return to Fisher's side. Starkey ran down the driveway and interposed herself between Fisher and the defendant. The defendant then entered his van, started the engine, put his foot on the gas and "floored"

it, then put the van into drive and drove the van with its tires squealing directly at Starkey and Fisher. The defendant then slowed the van down, but did not come to a complete stop, and resumed driving it at Fisher and Starkey. Fisher and Starkey took several steps backward and out of the way of the oncoming van, which stopped close to the fence.

After the defendant's van came to a stop, Bergeson ordered Starkey to arrest the defendant. Starkey opened the driver's side door of the van, informed the defendant that he was under arrest, reached inside and put the van in park. The defendant then kicked Starkey in the chest and closed the van door on her person. Starkey ordered the defendant to get out of the van and, when he refused, and reached inside the van and attempted to pull him out as he held on to the van's steering wheel. The defendant "cocked [his hand] back to swing" at Starkey, and she "took her swing" and hit him in the face. Bergeson told the defendant to stop resisting and that he was under arrest. Bergeson threatened to taser the defendant, who then exited the van and ran away in the direction of his home.

Bergeson chased after the defendant and caught him, put him in a bear hug and took him to the ground on the second attempt. Bergeson and Starkey continued to struggle with the defendant for "about a minute" before they were able to subdue him. Consequently, the defendant was arrested and transported to the police department. After a jury trial, the defendant was convicted of two counts of interfering with an officer in connection with his actions against Starkey and Bergeson, and two counts of reckless endangerment in the second degree in connection with his actions against Starkey and Fisher. Additional facts and procedural history will be set forth as necessary.

I

The defendant first claims that the trial court improperly denied his motion to dismiss pursuant to General Statutes § 54-56[5] and *State* v. *Kinchen*, 243 Conn. 690, 703–704, 707 A.2d 1255 (1998). Specifically, the defendant claims that the criminal charges are fundamentally unfair, and therefore constitute a violation of due process of law, because in his view the police acted well outside the scope of their duties by actively assisting an unlawful entry onto his property after he sought their assistance with removing trespassers. In response, the state argues that denial of the motion to dismiss was proper because the defendant does not have the right to commit a crime in resistance to a police entry, illegal or not, and therefore no cognizable claim under the principles of due process would warrant dismissing the prosecution against him. Additionally, the state contends that, even if the defendant had the right to commit a crime in resistance to an illegal entry by police, the defendant did not prove that an entry on his property

ever occurred, and that, even if the trial court found that a trespass had occurred, § 52-557o authorized the field surveyors' entry onto the defendant's land if necessary to conduct a survey for the adjacent property owner. We conclude that the trial court properly declined to dismiss the case on the ground of due process.

We begin by noting the standard that this court applies in reviewing a trial court's ruling on a motion to dismiss. "A motion to dismiss . . . properly attacks the jurisdiction of the court, essentially asserting that the plaintiff cannot as a matter of law and fact state a cause of action that should be heard by the court." (Internal quotation marks omitted.) *State* v. *Bonner*, 290 Conn. 468, 477–78, 964 A.2d 73 (2009). "[This court's] review of the trial court's ultimate legal conclusion and resulting [denial] of the motion to dismiss will be de novo." (Internal quotation marks omitted.) Id., 478. "Factual findings underlying the court's decision, however, will not be disturbed unless they are clearly erroneous. . . . The applicable legal standard of review for the denial of a motion to dismiss, therefore, generally turns on whether the appellant seeks to challenge the legal conclusions of the trial court or its factual determinations." (Citations omitted.) Id.

Under § 54-56, dismissal of an information may be predicated upon either insufficient evidence or insufficient cause, but "only in the most compelling of circumstances." *State* v. *Kinchen*, supra, 243 Conn. 703. The defendant argues that all of the criminal charges against him were fundamentally unfair because the New London police officers, summoned by him to remove trespassers, acted outside the law by ignoring him and actively assisting in a criminal trespass, in violation of his constitutional rights. The defendant claims that the trial court improperly denied his motion to dismiss because it could not give due consideration to the fairness of the charges in light of its improper interpretation of § 52-557o as granting the surveyors a right to trespass onto his property over his strong objection. The defendant argues that, because § 52-557o only provides immunity from suit, it does not create a privilege in surveyors to trespass on another's property. Therefore, the defendant contends that the officers' conduct in assisting the trespass was both outrageous and outside the scope of their duties, and it follows that the resulting criminal charges against the defendant were fundamentally unfair and therefore constituted a violation of due process of law.

Specifically, the defendant claims that the plain language § 52-557o to the effect that "[n]o action for trespass shall lie" clearly establishes an immunity from a civil action rather than a privilege to act. Thus, he argues that when Fisher and Brown entered his property over his express objections, they were still trespassing, even

if their personal liability for that tort was limited by § 52-557o. The defendant further claims that, because a trespass was occurring, the officers were clearly acting outside the scope of their duties by assisting that illegal entry. Accordingly, the trial court's considerations of principles of fundamental fairness, which must inform its discretionary ruling on the motion to dismiss pursuant to the "for cause" provision of § 54-56 and due process considerations; *State* v. *Corchado*, 200 Conn. 453, 459, 512 A.2d 183 (1986); were tainted by its improper construction of § 52-557o. In response, the state argues that, pursuant to the holding in the leading case of *State* v. *Brocuglio*, 264 Conn. 778, 826 A.2d 145 (2003), we would not recognize a dismissal, under the facts of this case, on the basis of the defendant's theory of unfairness. According to the state, even if there was a trespass, the defendant has raised no cognizable claim under the principles of "fundamental fairness" because he had no right to commit a crime to resist the trespass. In the alternative, the state argues, first, that the defendant has not shown that a trespass occurred, and second, that the mandates of the § 52-557o dictate a conclusion that there was no trespass. We agree with the state's construction of this court's holding in *Brocuglio*.

Brocuglio involved an incident in which the East Hartford police department was instructed by the mayor of East Hartford to ticket abandoned and unregistered vehicles at the address of the defendant, Anthony J. Brocuglio. Id., 781. "While they were issuing citations, the officers went to areas contiguous to the defendant's residence. The areas consisted of the rear yard, which was protected by a fence, and an unprotected area near the front of the defendant's residence. The ticketing was done pursuant to East Hartford's Code of Ordinances . . . . The officers had no search warrant either administrative or otherwise." (Citation omitted.) Id., 781–82. The officers began to ticket cars in the driveway of the defendant's house. Id., 782. First, the defendant's wife asked them to leave. Id. When the officers refused, the defendant ordered them off his property and then threatened to bring his dog outside. Id. The officers finished ticketing the vehicles in the front of the house and proceeded to the backyard to continue ticketing. Id., 783. The defendant subsequently came out his back door with his dog and threatened to release the dog if the officers did not leave. Id. At that point, according to one of the officers, the defendant took his dog down the back steps and moved toward the two officers, as he yelled profanities and threatened to let his dog go. Id. In response, one officer informed the defendant that he was under arrest. Id.

On these facts, this court in *Brocuglio* considered "whether the defendant's conduct in response to the police officers' illegal entry into the backyard of his residence dissipated the taint of the unlawful entry,

thereby precluding the defendant from invoking the exclusionary rule to suppress evidence derived from the unlawful entry." Id., 780–81. This court held that, "under the exception to the exclusionary rule that we herein adopt, the commission of a new crime dissipates the taint from evidence of that crime obtained as the result of an illegal entry into one's home." Id., 781. Accordingly, this court overruled, to the extent that it conflicted with the adopted new crime exception, the common-law right to resist an unlawful entry that this court had previously embraced in *State* v. *Gallagher*, 191 Conn. 433, 443, 465 A.2d 323 (1983). *State* v. *Brocuglio*, supra, 264 Conn. 793. Therefore, under *Brocuglio*, a defendant has no common-law right to commit a new crime in response to a police entry into a home or curtilage, even if that entry was unlawful. The court reasoned that the gains from excluding the new crimes evidence were small, and the costs to society inordinately high, due to the risk of "escalating violence" culminating in "tragic outcome[s]" when "citizens are permitted to use, or threaten to use, force to respond to" the unlawful conduct of the police, who "typically are equipped with firearms . . . ." Id., 789. This court in *Brocuglio* considered this reasoning all the more compelling because of the availability of "legal remedies . . . to victims of unlawful police action." Id. In light of its adoption of the "new crime exception to the exclusionary rule"; id., 790; the court in *Brocuglio* then modified the common-law right to resist an illegal police entry into the home, which previously had permitted resistance below the level of an assault, but never had been extended to resisting an accompanying unlawful arrest. See *State* v. *Gallagher*, supra, 437–45. This modification barred resistance to an illegal entry that amounted to the commission of a fresh crime, including interference with the police. *State* v. *Brocuglio*, supra, 791–95.[6]

Our careful review of the record in the present case leads us to conclude that the crimes with which the defendant was charged fall under the new crime exception to the exclusionary rule adopted by this court in *State* v. *Brocuglio*, supra, 264 Conn. 788. In *Brocuglio*, we stated: "Several rationales have been advanced for application of the new crime exception: (1) the defendant has a diminished expectation of privacy in the presence of police officers; (2) the defendant's intervening act is so separate and distinct from the illegal entry so as to break the causal chain; and (3) the limited objective of the exclusionary rule is to deter unlawful police conduct—not to provide citizens with a shield so as to afford an unfettered right to threaten or harm police officers in response to the illegality." Id. Affording the issue in the present case plenary review; id., 786; we conclude that these crimes, as they were alleged to have been committed, were sufficiently attenuated from the alleged illegal entry by the police that

they fall under the new crime exception. In support of our conclusion, we rely upon the evidence that the conduct underlying the commission of these crimes occurred well after the time of the police entry; indeed, by the time of their commission, the police had identified themselves, announced the purpose of their presence and their intent to escort the field surveyors while performing the survey of the disputed fence line. Before engaging in the criminal conduct at issue, the defendant already had spoken with the police and ordered them, as well as the field surveyors, from his residence. In fact, the defendant had initially invited the police on his property. The law does not afford a privilege to challenge, by means of criminal conduct directed toward the police, an unlawful entry into one's home or curtilage. See id., 793–94. Thus, we conclude that, even if the defendant could prevail on his claim of an illegal entry, the prosecution of the defendant for the crimes of assault of public safety personnel, interfering with an officer and reckless endangerment are not fundamentally unfair. Accordingly, the defendant's conduct in the present case in violating §§ 53a-167a and 53a-64 falls outside the remainder of the common-law privilege. For the foregoing reasons, we reject the defendant's claim that the trial court improperly denied his motion to dismiss the information.

The court in *Brocuglio* did not, however, foreclose the possibility that, under the fundamental protections against unfair treatment afforded by due process, the new crime exception to the exclusionary rule might not apply where the police, acting in bad faith, recklessly and illegally enter a home in the hopes of provoking a defendant to commit a new crime. Id., 790 n.11. Thus, unless there was some basis upon which to predicate a finding of bad faith in this case, the defendant's arguments must fail.

The record reveals that the police in the present case had a good faith basis to enter and remain on the defendant's property. First, the defendant initially invited them to enter his property to prevent Brown and Fisher from the claimed trespass. Second, once they were on the property, the presentation of the card with the language of § 52-557o printed on it provided the officers with a good faith basis to conclude that the field surveyors had the right to enter the defendant's property as a necessary element to complete their survey of Pellot's abutting property. The defendant's own words and actions provided the police with a good faith basis to conclude that they should remain at the property to ensure that the measurements were taken without incident. Third, Bergeson had received training on surveyors rights which, as a result thereof, led him to a good faith belief that Brown and Fisher could enter the defendant's property as a necessary means to complete the survey. Therefore, we conclude that the police did not act in bad faith and, accordingly, the defendant's argu-

ments fail due to this court's holding in *Brocuglio*.

The defendant attempts to distinguish *Brocuglio* on the ground that the case addressed a question concerning the suppression of evidence, and whether the exclusionary rule should bar evidence obtained by the police as a result of an illegal entry into the defendant's home. Therefore, he claims that the applicability of a discretionary dismissal under § 54-56 for "overriding equitable considerations" was not at issue on appeal in *Brocuglio*. Although we agree with the defendant's comparison of the two cases, we conclude that the reasoning in *Brocuglio* is equally compelling in the situation raised in the present case, and we see no reason to distinguish *Brocuglio*. As we stated in *Brocuglio*, "from a public policy standpoint, issues arising from illegal entries are best remedied in the courtroom. To be sure, there already exist legal remedies available to victims of unlawful police actions. First, a victim of such illegality may preclude the police from taking advantage of the illegally obtained evidence by invoking the protections of the exclusionary rule. . . . Second, a victim of an illegal entry properly may file a civil action seeking a declaratory judgment, injunctive relief or, in certain circumstances, damages against the officers in their official or individual capacity." (Citation omitted.) *State* v. *Brocuglio*, supra, 264 Conn. 789–90. Thus, we held that, "in light of the defendant's ability to obtain relief to protect his constitutional rights and the public policy concerns regarding escalating violence, we hereby adopt the new crime exception to the exclusionary rule." Id., 790. Certainly, the same considerations apply in the present case. Not only did the police have a good faith basis to both enter and stay on the property, but also the defendant's actions were not in response to any threat to his own personal safety. This is not a situation wherein the defendant was exercising his right to self-defense in response to a bad faith entry on the part of the police. Therefore, we reject the defendant's argument that the reasoning in *Brocuglio* does not apply to the present situation.

We likewise reject the defendant's second reason for distinguishing *Brocuglio*, on the basis that two of the persons who allegedly illegally entered the property, Brown and Fisher, were not police officers. The defendant argues that Brown and Fisher were not imbued with any authority, so the defendant had a lawful right to resist their entry, even if there were limitations on what he could do to prevent the officers' entry. The defendant points to the fact that count three of the substitute information alleged that he recklessly endangered Fisher. The defendant further contends that, even if *Brocuglio* limits the right of a homeowner to physically resist an illegal entry by police officers, its holding does not apply to nonofficers. This is true, the defendant claims, because a homeowner possesses the right to use reasonable physical force to expel trespassers. General

Statutes § 53a-20.[7] We reject these arguments for several reasons. First, although Brown and Fisher were present at the scene, the incident was being investigated by the police when the defendant's actions occurred. The case cannot be viewed in a vacuum as if the police were not present. The police were initially on the scene at the request of the defendant, and we previously have determined that they had a good faith basis to remain on the defendant's property. Second, in view of our discussion in part IV of this opinion, it is not necessary to further address the defendant's claims regarding the reckless endangerment charge involving Fisher, as all of the convictions involve the defendant and the police officers. Moreover, in light of our decision, it also is not necessary to reach the defendant's claim that § 52-557o does not create a privilege for surveyors to trespass on another's property. We leave that issue for another day. Even assuming, without deciding, that the defendant is correct, any error on the part of the trial court in its reasoning regarding § 52-557o was harmless because of the existence of a good faith basis on the part of the police that the surveyors had a right to enter the defendant's property as the necessary means to complete their survey. Therefore, we reject the defendant's claim that the trial court improperly denied the defendant's motion to dismiss the information pursuant to § 54-56 and the compelling circumstances standard under *State* v. *Kinchen*, supra, 243 Conn. 703–704.

II

The defendant next claims that the trial court violated his constitutional right to present a defense by precluding him from introducing testimony in support of his argument that § 52-557o does not provide a privilege to surveyors to enter private property over the landowner's objection. The defendant contends that he had a right to rebut the state's lay witnesses' opinion testimony regarding the legal rights of surveyors to trespass, and that this was relevant to the issue of whether the police officers were acting outside the scope of their duties when they escorted the surveyors onto the defendant's property over his objection. In response, the state claims that the proffered evidence was not relevant. We agree with the state.

The standard of review of an evidentiary challenge is well established. "Upon review of a trial court's decision, we will set aside an evidentiary ruling only when there has been a clear abuse of discretion. . . . The trial court has wide discretion in determining the relevancy of evidence . . . and [e]very reasonable presumption should be made in favor of the correctness of the court's ruling in determining whether there has been an abuse of discretion." (Internal quotation marks omitted.) *State* v. *DeJesus*, 260 Conn. 466, 481, 797 A.2d 1101 (2002).

The record reveals the following relevant facts.

Brown was permitted to testify, over objection from defense counsel, that § 52-557o gave him the right to enter private property over the objection of the property owner. Subsequently, Fisher and Bergeson were also permitted to testify to the same interpretation. The defendant sought to rebut this testimony by calling three witnesses—two surveyors who had attempted to perform a survey for another of the defendant's neighbors and a police officer who had previously responded to a request from the defendant for assistance in removing surveyors from the defendant's property—to testify that § 52-557o did not give a surveyor the right to enter private property over the objection of the property owner. The state objected on the ground of relevance to the charges against the defendant. The defendant argued that the evidence was relevant to the defendant's state of mind—"it explains his being upset . . . . He had a situation, previously, where the same thing occurred; and the police acted differently." The court sustained the state's objections and precluded the defense witnesses, noting, "we're getting into legal conclusion, legal arguments. And the substance of this is going to confuse the jury, and it's not relevant to the charges."

The defendant claims that the trial court's ruling deprived him of the right to present evidence that was both material and favorable to his defense. *Washington* v. *Texas*, 388 U.S. 14, 18–19, 87 S. Ct. 1920, 18 L. Ed. 2d 1019 (1963). We disagree. The defendant's right to present a defense under the sixth amendment to the United States constitution "does not compel the admission of any and all evidence offered in support thereof. . . . The trial court retains the discretion to rule on the admissibility, under the traditional rules of evidence, regarding the defense offered." (Citation omitted; internal quotation marks omitted.) *State* v. *DeJesus*, supra, 260 Conn. 481.

Many of the defendant's arguments are resolved by our preceding analysis of his right to resist a police trespass with force. In view of our determination in part I of this opinion that the police had a good faith basis to both enter and remain on the property, and because there is no question that the defendant's actions did not relate to any threat of force on the part of the police, we reject the defendant's claims. It must be remembered that, in the wake of *Brocuglio*, the propriety of the alleged police trespass is irrelevant. We are reviewing the defendant's actions with respect to the police and others on the property, after a determination that the police had a good faith basis to remain on the property. Thus, the proffered testimony—that a surveyor should not go on another's property without a court order, and that a surveyor had previously been removed from the defendant's property by the police and told to return with a court order—lacked relevance for the purposes of determining whether Bergeson,

Starkey and Velez had a good faith belief that they were acting within the scope of their duties in escorting the field surveyors onto the defendant's side of the fence for the purpose of completing their measurements. As the trial court correctly concluded, neither of these proposed witnesses were involved in the incident at issue and their proffer did not discuss police policy.

Likewise, the statement that the defendant claims the shift commander, McBride, made to him, namely, that he would get back to the defendant after inquiring if the surveyors had a court order, was correctly excluded as inadmissible hearsay, if offered for the truth of the matter asserted, and was irrelevant to the charges if offered to show the defendant's state of mind. Under *Brocuglio*, the defendant's state of mind is irrelevant because the "privilege to challenge an unlawful [police] entry into one's home still exists [but only] to the extent that a person's conduct does not rise to the level of a crime." *State* v. *Brocuglio*, supra, 264 Conn. 793–94. Even if the defendant were to show that the police entry was unlawful or that he had a good faith basis to so believe, it does not justify a criminal act when police officers trespass with a good faith belief that they were acting within the scope of their duties. Thus, with due deference to the wide latitude we afford trial courts in ruling on the admissibility of evidence, we cannot say that any of the court's rulings were an abuse of discretion. Therefore, we reject the defendant's claims on this issue.

III

We next turn to the third claim raised by the defendant, namely, that the trial court improperly refused his request to charge the jury on the defense of entrapment. In response, the state contends that: (1) there was insufficient evidence that the defendant was initially unwilling to commit a crime or that the actions of the officers actually implanted a criminal design in the defendant's mind so as to require the court to charge the jury on the defense of entrapment; and (2) the defendant denied committing any crime and therefore failed to adduce evidence sufficient for a rational juror to find that all of the elements of the entrapment defense were established by a preponderance of the evidence. We agree with the state.

The following facts are relevant to this claim. On or about October 8, 2009, the defendant filed a written request to charge on the defense of entrapment, which was argued the same day. Defense counsel claimed that the defendant had been induced to engage in alleged prohibited activity by the officers, who intended to anger him, first by failing to do what other New London police officers had done in the past—require the field surveyors to seek an administrative warrant—and second, by actively aiding in a trespass over the defendant's objections. The court denied the defense's request, stat-

ing: "I do not think that the entrapment, as a defense, pertains in this case. That is my ruling based on what the state has argued [with respect to *State* v. *Capozziello*, 21 Conn. App. 326, 329, 573 A.2d 344, cert. denied, 215 Conn. 816, 576 A.2d 545 (1990), which] seemed right on point. And also, the defendant has not admitted to any crime; [see *State* v. *Grant*, 8 Conn. App. 158, 164, 511 A.2d 369 (1986); *State* v. *Hawkins*, [173 Conn. 431, 435–37, 378 A.2d 534 (1977)]; also under [*State* v. *McNally*, 173 Conn. 197, 200–203, 377 A.2d 286 (1977)], the circumstances of this case, the defendant is not entitled to a charge of entrapment. So your application with regard to that is denied, and I'm not going to charge [on] entrapment."

We begin with the well established standard of review governing the defendant's challenge to the trial court's jury instruction. "Our review of the defendant's claim requires that we examine the [trial] court's entire charge to determine whether it is reasonably possible that the jury could have been misled by the omission of the requested instruction. . . . While a request to charge that is relevant to the issues in a case and that accurately states the applicable law must be honored, a [trial] court need not tailor its charge to the precise letter of such a request." (Internal quotation marks omitted.) *State* v. *Kitchens*, 299 Conn. 447, 454–55, 10 A.3d 942 (2011). The defendant's right as a matter of law to a theory of defense instruction exists, however, only when there is evidence adduced indicating the availability of the defense. "The court . . . has a duty not to submit to the jury, in its charge, any issue upon which the evidence would not reasonably support a finding." *State* v. *Diggs*, 219 Conn. 295, 299, 592 A.2d 949 (1991); see *State* v. *Williams*, 202 Conn. 349, 364, 521 A.2d 150 (1987).

Entrapment is a legally recognized defense in this state. *State* v. *Lee*, 229 Conn. 60, 78, 640 A.2d 553 (1994). See General Statutes § 53a-15. "Until something in the evidence indicates the contrary, the court may presume the defendant intended the prohibited bodily movements that constitute the offense and that he has acted under no duress, unlawful inducement in the nature of entrapment, or lack of requisite mental capacity." *State* v. *Pierson*, 201 Conn. 211, 218, 514 A.2d 724 (1986), cert. denied, 489 U.S. 1016, 109 S. Ct. 1131, 103 L. Ed. 2d 193 (1989). In reviewing the defendant's claim that he was entitled to instructions on an affirmative defense, we look at the evidence in a light most favorable to his claim. See *State* v. *Fuller*, 199 Conn. 273, 279, 506 A.2d 556 (1986). When a defendant has produced evidence supporting a legally recognized defense, the trial court's refusal to provide an instruction with respect to that defense constitutes a denial of due process. *State* v. *Fagan*, 92 Conn. App. 44, 55, 883 A.2d 8, cert. denied, 276 Conn. 924, 888 A.2d 91 (2005).

"When a defendant admits the commission of the crime charged but seeks to excuse or justify its commission so that legal responsibility for the act is avoided, a theory of defense charge is appropriate. . . . A claim of innocence or a denial of participation in the crime charged is not a legally recognized defense and does not entitle a defendant to a theory of defense charge." *State* v. *Rosado*, 178 Conn. 704, 707, 425 A.2d 108 (1979). "[O]nly when evidence indicating the availability of [a] legally recognized [defense] is placed before a jury is a defendant entitled as a matter of law to a theory of defense instruction." Id., 708. "[A] defendant is 'entitled to have instructions presented relating to any theory of defense for which there is any foundation in the evidence, no matter how weak or incredible . . . .' *United States* v. *Platt*, 435 F.2d 789, 792 (2d Cir. 1970), quoting *United States* v. *O'Connor*, 237 F.2d 466, 474 n.8 (2d Cir. 1956)." *United States* v. *Alfonso-Perez*, 535 F.2d 1362, 1365 (2d Cir. 1976). "A fundamental element of due process is the right of a defendant charged with a crime to establish a defense. *Washington* v. *Texas*, [supra, 388 U.S. 19]; *State* v. *Bethea*, 167 Conn. 80, 83, 355 A.2d 6 (1974)." *State* v. *Miller*, 186 Conn. 654, 660, 443 A.2d 906 (1982). Where the legislature has created a legally recognized defense, in this case entrapment, this fundamental constitutional right includes a proper jury instruction on the elements of the defense of entrapment so that the jury may ascertain whether the state has met its burden of disproving it beyond a reasonable doubt. See id., 660–61; *State* v. *Fuller*, supra, 199 Conn. 280.

General Statutes § 53a-15 provides in relevant part: "[i]t shall be a defense that the defendant engaged in the proscribed conduct because he was induced to do so by a public servant, or by a person acting in cooperation with a public servant, for the purpose of institution of criminal prosecution against the defendant, and that the defendant did not contemplate and would not otherwise have engaged in such conduct." "The subjective test of entrapment focuses on the disposition of the defendant to commit the crime for which he or she is accused." *State* v. *Lee*, supra, 229 Conn. 78. "Under [the alternative objective test] standard, entrapment exists if the government conduct was such that a reasonable person would have been induced to commit the crime." Id., 80. "The Connecticut legislature has chosen to adopt the subjective defense of entrapment. . . . This statute codifies prior Connecticut case law . . . ." (Citations omitted.) Id., 81. To warrant an instruction on entrapment, the defendant must produce evidence of both inducement and his own lack of criminal disposition. *State* v. *McNally*, supra, 173 Conn. 200. Where, as here, an accused requests an instruction on a defense such as entrapment, he may obtain such a charge by adducing "evidence . . . sufficient . . . for a rational juror to find that all the elements of the defense are established

by a preponderance of the evidence." (Internal quotation marks omitted.) *State* v. *Small*, 242 Conn. 93, 102, 700 A.2d 617 (1997).

In the present case, there was no evidence presented that the defendant was initially unwilling to commit a crime or that the actions of the officers actually implanted a criminal design in the defendant's mind. The defendant was not induced to leave his house and get in his vehicle. He was specifically instructed by the officer to stay in the house. Further, he was not induced to drive his van at a threatening speed in the direction of Fisher and Starkey. In addition, after being told to exit the car and placed under arrest, the defendant was not induced to kick Starkey in the chest. The defendant's entrapment theory satisfies only the objective test, which is not the law in Connecticut, in that it focuses only on what the officers did to put in motion the event that triggered his criminal response, without implanting the necessary criminal design in his innocent mind. See *State* v. *Lee*, supra, 229 Conn. 78–81. The defendant's notions concerning the illegality of the entry and his right to self help gave rise to his "unjustified and criminal in nature" and "free and independent action" against the police that responded to their entry. *People* v. *Townes*, 41 N.Y.2d 97, 102, 359 N.E.2d 402, 390 N.Y.S.2d 893 (1976).

Therefore, we conclude that the trial court was correct in its determination that entrapment did not exist in this case. The defendant did not meet the requirements of § 53a-15 in that there was no showing that he would not otherwise have engaged in this conduct. In view of our conclusion that the statutory requirements were not met for the trial court to have instructed the jury on entrapment, it is unnecessary for us to consider the apparent tension that exists in the law of entrapment between *State* v. *Avery*, 152 Conn. 582, 584, 211 A.2d 165 (1965) (entrapment instruction only to be given if accused "admitted the commission of a crime"), and *State* v. *Person*, 236 Conn. 342, 350, 673 A.2d 463 (1996) (accused could deny committing murder at trial, but still raise inconsistent affirmative defense that, if he did commit crime, he did so under influence of extreme emotional disturbance); see also *Mathews* v. *United States*, 485 U.S. 58, 62, 108 S. Ct. 883, 99 L. Ed. 2d 54 (1988) (under federal entrapment defense, accused could deny commission of one or more elements of charged offense and still be entitled, inconsistently, to instruction that if he committed crime, he was entrapped, provided that charge was supported by sufficient evidence). We leave this issue for another day. In the present case the trial court was correct in the first reason it offered for not giving the charge: entrapment did not exist in this case. Accordingly, we reject this claim.

IV

The defendant's final claim is that the trial court improperly denied his motion to dismiss the charge of reckless endangerment in the second degree as to Fisher on the ground that the statute of limitations had passed because the charge was brought in a substitute information more than one year after the date that the offense allegedly occurred. We agree with the defendant.

The defendant was charged by way of original information dated September 5, 2008. The state subsequently filed substitute informations on September 29, 2009, and October 6, 2009. Trial commenced on September 29, 2009. On or about October 13, 2009, the defendant filed a "Motion for Acquittal Upon Verdict of Guilty" and a "Motion for [a] New Trial." He submitted a memorandum in support thereof prior to sentencing on November 20, 2009. The motion sought dismissal of count three of the substitute information charging the defendant with reckless endangerment in the second degree because the substitute information was filed more than one year after the incident and, therefore, outside the applicable one year statute of limitations. See General Statutes (Rev. to 2007) § 54-193 (b). The trial court denied the defendant's motion in an oral ruling that same day stating that the defendant had failed to raise the statute of limitations defense in a timely manner, and the decision to charge the defendant fell within the prosecutor's "broad discretion in determining what crime or crimes to charge in any particular situation."

The state agrees that the applicable statute of limitations provision is contained in General Statutes (Rev. to 2007) § 54-193 (b) which provides in relevant part that "[n]o person may be prosecuted for any offense . . . except within one year next after the offense has been committed." The defendant contends that the reckless endangerment count as to Fisher was added as a count in the state's September 29, 2009 substitute information, more than one year after this misdemeanor was committed on August 22, 2008. The state responds, however, that the defendant's argument lacks merit because the state's original information, charging the defendant with reckless endangerment in driving his van at Starkey, tolled the statute of limitations with respect to the added reckless endangerment charge because the same act threatened both Starkey and Fisher. In addition, the state claims that the defendant waived an affirmative defense based on the statute of limitations by raising it for the first time after the conclusion of trial. The defendant claims that he has not waived the issue. Practice Book § 41-8 provides that, "if made prior to trial," a defense on the ground of the expiration of the statute of limitations shall be raised via a motion to dismiss. The defendant argues that the use of the phrase "if made prior to trial" suggests that

the motion does not have to be made before trial. We agree with the defendant.

The standard of review governing the defendant's claim that the trial court improperly failed to grant his motion to dismiss a charge on the ground that the statute of limitations had passed is well settled. Our review of the trial court's legal conclusions and resulting denial of the defendant's motion to dismiss is de novo. *State* v. *Jennings*, 101 Conn. App. 810, 815, 928 A.2d 541 (2007), citing *State* v. *Haight*, 279 Conn. 546, 550, 903 A.2d 217 (2006).

The general rule is that, although the prosecution has broad authority to file an amended or substitute information prior to trial; *State* v. *Ramos*, 176 Conn. 275, 277, 407 A.2d 952 (1978); General Statutes (Rev. to 2007) § 54-193 (b) provides that no person may be prosecuted except within one year next after the offense has been committed. *State* v. *Jennings*, supra, 101 Conn. App. 818. The issuance of an arrest warrant tolls the running of the statute of limitations, provided that it is executed without unreasonable delay and with due diligence. See, e.g., *State* v. *Ali*, 233 Conn. 403, 412, 416, 660 A.2d 337 (1995); *State* v. *Crawford*, 202 Conn. 443, 450–51, 521 A.2d 1034 (1987). When the state files an amended or substitute information after the limitations period has passed, however, a timely information will toll the statute of limitations only if the amended or substitute information does not broaden or substantially amend the charges made in the timely information. See *United States* v. *Grady*, 544 F.2d 598, 601–602 (2d Cir. 1976); see also *State* v. *Almeda*, 211 Conn. 441, 447–48, 560 A.2d 389 (1989) (prosecution on substitute information charging assault in first degree not time barred where factual allegations were identical to those underlying original information charging attempt to commit murder); *State* v. *Saraceno*, 15 Conn. App. 222, 238–40, 545 A.2d 1116, cert. denied, 209 Conn. 823, 552 A.2d 431 (1988). Although notice is the "touchstone" of the analysis in determining whether an amended or substitute information substantially broadens or amends the timely charges; *United States* v. *Gengo*, 808 F.2d 1, 4 (2d Cir. 1986); factors to assist in this determination are "whether the additional pleadings allege violations of a different statute, contain different elements, rely on different evidence, or expose the defendant to a potentially greater sentence." *United States* v. *Salmonese*, 352 F.3d 608, 622 (2d Cir. 2003).

The defendant, therefore, claims that count three should have been dismissed. He argues that the state filed an amended or substitute information after the limitations period had passed that broadened the charges made in the first information. Specifically, he claims that the additional count of reckless endangerment in the second degree charged in count three was barred by the statute of limitations because it was added

more than one year after the offense. Further, because the defendant was sentenced to six months consecutive time on this charge, this conviction improperly broadened the scope of the prosecution against him. We agree.

The state contends that the statute of limitations was tolled on the added count in the substitute information by virtue of the timely information supplying sufficient notice of the acts with which the defendant is charged, thereby permitting him to prepare an adequate defense against the added charge. *State* v. *Almeda*, supra, 211 Conn. 446. The state argues that since both counts alleged the same acts occurring at the same place and time, and they implicated the same evidence involving the defendant driving his van directly at Starkey and Fisher, they provided adequate notice. *Almeda* is distinguishable, however, on the ground that a new charge therein had been filed relating to the same victim. In the present case, a substitute information was filed relating to a *different victim*. While the reasoning in *Almeda* demonstrated that the defendant was on timely notice that the state had claimed that some criminal conduct—just a different charge—related to that victim, in the present case the defendant had no notice that he was accused of any criminal conduct related to the new victim, Fisher. Thus, the new charge did broaden and substantially alter the charges in the first information.

We further reject the state's contention that the defendant had waived his statute of limitations defense. As we stated in *State* v. *Littlejohn*, 199 Conn. 631, 641, 508 A.2d 1376 (1986), "[a]ny waiver of the statute [of limitations] must, of course, be voluntary and intelligent and a waiver presents a question of fact in each case." There is nothing to suggest a voluntary waiver on the part of the defendant in this case. His motion for acquittal based on the statute of limitations would suggest the contrary. Therefore, we reverse the reckless endangerment conviction related to Fisher and remand the case to the trial court with instructions to render a judgment of acquittal on the count relating to Fisher.

Our determination that the reckless endangerment conviction relating to Fisher must be reversed compels the conclusion that the matter must be remanded for resentencing. This court has adopted the "aggregate package" theory of sentencing. *State* v. *Miranda*, 260 Conn. 93, 128–30, 794 A.2d 506, cert. denied, 537 U.S. 902, 123 S. Ct. 224, 154 L. Ed. 2d 175 (2002). 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 [remaining counts] on which the defendant

stands convicted." (Citation omitted.) *State* v. *Miranda*, 274 Conn. 727, 735 n.5, 878 A.2d 1118 (2005).

The judgment is reversed only as to the reckless endangerment conviction relating to Fisher and the case is remanded with direction to render judgment of acquittal on that charge and for resentencing according to law. The judgment is affirmed in all other respects.

In this opinion the other justices concurred.

[1] General Statutes § 53a-167a provides: "(a) A person is guilty of interfering with an officer when such person obstructs, resists, hinders or endangers any peace officer, special policemen appointed under section 29-18b, motor vehicle inspector designated under section 14-8 and certified pursuant to section 7-294d or firefighter in the performance of such peace officer's, special policeman's, motor vehicle's inspector's or firefighter's duties.

"(b) Interfering with an officer is a class A misdemeanor."

[2] General Statutes § 53a-64 provides: "(a) A person is guilty of reckless endangerment in the second degree when he recklessly engages in conduct which creates a risk of physical injury to another person.

"(b) Reckless endangerment in the second degree is a class B misdemeanor."

[3] The defendant appealed from the judgment of the trial court to the Appellate Court, and we transferred the appeal to this court pursuant to Practice Book § 65-1 and General Statutes § 51-199 (c).

[4] General Statutes § 52-557o provides in relevant part that "[n]o action for trespass shall lie against any surveyor licensed under chapter 391 or person acting at the direction of any such licensed surveyor who enters upon land . . . in order to perform a survey . . . ."

[5] General Statutes § 54-56 provides in relevant part: "All courts having jurisdiction of criminal cases shall at all times have jurisdiction and control over informations . . . pending therein and may, at any time, upon motion by the defendant, dismiss any information and order such defendant discharged if, in the opinion of the court, there is not sufficient evidence or cause to justify the bringing or continuing of such information or the placing of the person accused therein on trial."

[6] The decision in *Brocuglio* did not affect the prerogative to defend oneself against an unprovoked and unlawful police assault accompanying the entry. See *State* v. *Davis*, 261 Conn. 553, 568, 804 A.2d 781 (2002).

[7] General Statutes § 53a-20 provides: "A person in possession or control of premises, or a person who is licensed or privileged to be in or upon such premises, is justified in using reasonable physical force upon another person when and to the extent that he reasonably believes such to be necessary to prevent or terminate the commission or attempted commission of a criminal trespass by such other person in or upon such premises; but he may use deadly physical force under such circumstances only (1) in defense of a person as prescribed in section 53a-19, or (2) when he reasonably believes such to be necessary to prevent an attempt by the trespasser to commit arson or any crime of violence, or (3) to the extent that he reasonably believes such to be necessary to prevent or terminate an unlawful entry by force into his dwelling as defined in section 53a-100, or place of work, and for the sole purpose of such prevention or termination."