328 Conn. 610
Supreme Court of Connecticut.

Alison BARLOW
v.
COMMISSIONER OF CORRECTION

(SC 19774)
|
Argued December 12, 2017
|
Officially released April 24, 2018

Synopsis

Background: Defendant, whose convictions for attempt to commit murder, conspiracy to commit murder, alteration of a firearm identification number, and two counts of assault had been affirmed, 70 Conn.App. 232, 797 A.2d 605, petitioned for habeas corpus relief. The Superior Court, Judicial District of Tolland, Sferrazza, S.J., 2012 WL 3176363, denied petition. Defendant appealed. The Appellate Court, 150 Conn.App. 781, 93 A.3d 165, reversed and remanded. On remand, the Superior Court, Judicial District of Tolland, Sferrazza, S.J., 2014 WL 7462417, denied petition. Defendant appealed. The Appellate Court, 166 Conn.App. 408, 142 A.3d 290, reversed and remanded. Commissioner of Correction petitioned for certification, which was granted.

[Holding:] The Supreme Court held that certification was improvidently granted.

Appeal dismissed.

West Headnotes (2)

[1] Habeas Corpus Certificate of probable cause

Certification was improvidently granted by the Supreme Court following the Appellate Court's reversal of trial court's decision to deny defendant's petition for habeas corpus relief, where resolution of one of the certified issues depended on whether the Appellate Court's remand order was a reversal and order of a new trial that would have triggered the recusal obligation of the habeas judge. Conn. Gen. Stat. Ann. § 51-183c.

4 Cases that cite this headnote

[2] Appeal and Error Particular Issues
Appeal and Error Proceedings After Remand

One way a reviewing court may remand a case to the original trial judge for additional proceedings without either triggering mandatory recusal or a dispute over application of statute on mandatory recusal is by not disturbing the original judgment in any way and making clear that the remand is for the purpose of further factual findings. Conn. Gen. Stat. Ann. § 51-183c; Conn. Practice Book § 60-2(8).

3 Cases that cite this headnote

Attorneys and Law Firms

****79** Mitchell S. Brody, senior assistant state's attorney, with whom, on the brief, were Maureen Platt, state's attorney, and Eva Lenczewski, supervisory assistant state's attorney, for the appellant (respondent).

Naomi T. Fetterman, with whom, on the brief, was Aaron J. Romano, Bloomfield, for the appellee (petitioner).

Palmer, McDonald, Robinson, D'Auria, Mullins, Kahn and Vertefeuille, Js.

Opinion

PER CURIAM.

***611** The respondent, the Commissioner of Correction (commissioner), appeals, upon our grant of his petition for certification, from the judgment of the Appellate Court reversing the judgment of the habeas court, which was rendered on remand following the Appellate Court's previous decision in *Barlow* v. *Commissioner of Correction*, 150 Conn. App. 781, 93 A.3d 165 (2014) (*Barlow I*), denying the petition for a writ of habeas corpus filed by the petitioner, Alison Barlow. [1] See *Barlow* v. *Commissioner of Correction*, 166 Conn. App. 408, 426–27, 142 A.3d 290 (2016) (****80**

Barlow II). On appeal, the commissioner contends that the Appellate Court improperly concluded in *Barlow II* that (1) ***612** General Statutes § 51–183c [2] required that a different habeas judge preside over the proceedings directed by *Barlow I* to determine whether deficient performance by the petitioner's attorney during the plea bargaining process was prejudicial under *Strickland* v. *Washington*, 466 U.S. 668, 687, 104 S.Ct. 2052, 80 L.Ed.2d 674 (1984), and (2) the *Barlow I* remand order allowed for the introduction of new evidence on the question of whether counsel's deficient performance had prejudiced the petitioner, rather than requiring the habeas court to make that determination based solely on evidence already in the record.

[1] After examining the entire record on appeal and considering the briefs and oral arguments of the parties, we have determined that the appeal in this case should be dismissed on the ground that certification was improvidently granted. See, e.g., *State* v. *Carter*, 320 Conn. 564, 566–68, 132 A.3d 729 (2016). Specifically, the issues presented by this case are relatively case specific and discrete, given its factual and procedural posture arising from the Appellate Court's remand in *Barlow I*. We do, however, make two additional observations about this case.

First, resolution of the first certified issue depends on whether the Appellate Court's remand order in *Barlow I* was a reversal *and* order of a new trial that would trigger the recusal obligation under § 51–183c. See, e.g., *Gagne* v. *Vaccaro*, 133 Conn. App. 431, 439, 35 A.3d 380 (2012) (holding that § 51–183c plainly and unambiguously required new trial judge at hearing on motions for attorney's fees on remand from Appellate Court judgment reversing in part prior fee award), rev'd on ***613** other grounds, 311 Conn. 649, 90 A.3d 196 (2014). Although the interpretation of judgments is a question of law subject to plenary review; see, e.g., *State* v. *Brundage*, 320 Conn. 740, 747–48, 135 A.3d 697 (2016); given the posture of this case, we are reluctant to usurp the Appellate Court's authority to interpret its own rescript in *Barlow I*, which the habeas court properly determined was ambiguous on this point. See *Barlow II*, supra, 166 Conn. App. at 419, 142 A.3d 290. Accordingly, in the interest of intercourt comity, we defer to the Appellate Court's construction of its own ambiguous judgment allowing the admission of new evidence with respect to prejudice at the proceedings on remand as, in essence, a remand for a new trial requiring a new habeas judge to try the case under § 51–183c. [3] ****81** See, e.g., *State* v. *Carter*, supra, 320 Conn. at 567, 132 A.3d 729 ("[i]n dismissing this appeal, we take no position as to the correctness of the Appellate Court's opinion").

[2] Second, and more significantly, this case highlights the need for our appellate courts, in crafting remand orders, to be cognizant of disputes that might arise over the application of § 51–183c, in particular the need for clarity and consistency between the opinion and the ***614** rescript. [4] As the Appellate Court recognized; see *Barlow II*, supra, 166 Conn. App. at 424–25, 142 A.3d 290; one way a reviewing court may remand a case to the original trial judge for additional proceedings without either triggering § 51–183c or a dispute over its application is by not disturbing the original judgment in any way and making clear that the remand is for the purpose of further factual findings. [5] See *State* v. *Gonzales*, 186 Conn. 426, 436 n.7, 441 A.2d 852 (1982) ("[a]lthough ... § 51–183c ordinarily requires that, upon a retrial, a different judge shall preside, that statute is inapplicable ... where the purpose of the remand is not to correct error but to determine whether error has occurred"); see also *State* v. *Jarzbek*, 204 Conn. 683, 708, 529 A.2d 1245 (1987) (following *Gonzales* to remand case "for further proceedings in accordance with this opinion" for "evidentiary hearing to determine whether there was a compelling need to videotape the testimony of the minor victim ... outside the presence of the defendant"), cert. denied, 484 U.S. 1061, 108 S.Ct. 1017, 98 L.Ed.2d 982 (1988); *Holland* v. *Holland*, 188 Conn. 354, 363–64 and n.6, 449 A.2d 1010 (1982) (This court remanded the case to the trial court for the submission of additional evidence—namely, a court-ordered blood test to determine paternity—and a "fully articulated memorandum of decision," concluding that "we do not believe that our remand is precluded by ... § 51–183c. We have not found that the trial court's judgment was erroneous; instead we are ordering further proceedings ***615** to determine whether error has occurred."); *State* v. *Gonzales*, supra, at 435–36, 441 A.2d 852 (remanding case for judge who presided at trial to conduct in camera inspection of witness statement, determine whether it contained disclosable material, and whether any failure to disclose was harmless); cf. *Rosato* v. *Rosato*, 255 Conn. 412, 413, 425 n.18, 766 A.2d 429 (2001) (in case in which "the interests of justice require no less than a redetermination of the entire 'mosaic' that constitutes the complete financial order package," court noted that "[t]he remand for a new hearing on the financial orders necessarily will be before a different trial court than that which issued both the original order and the clarification"). Accordingly, should additional findings be necessary from an existing record in order to enable the expeditious resolution of a case, even subsequent to the

publication of an opinion, the reviewing court may retain jurisdiction over the appeal by means of a rescript that does not disturb the underlying judgment pending ****82** the remand and subsequent appellate proceedings.

The appeal is dismissed.

All Citations

328 Conn. 610, 182 A.3d 78

Footnotes

1 We granted the commissioner's petition for certification to appeal, limited to the following issues:
"1. Did the Appellate Court properly determine that General Statutes § 51–183c required the habeas court to grant the petitioner's motion for recusal?
"2. If the answer to the first question is in the affirmative, did the Appellate Court properly conclude that the habeas court improperly barred the petitioner from presenting new evidence on remand for purposes of proving prejudice?" *Barlow* v. *Commissioner of Correction*, 323 Conn. 906, 906–907, 150 A.3d 680 (2016).

2 General Statutes § 51–183c provides: "No judge of any court who tried a case without a jury in which a new trial is granted, or in which the judgment is reversed by the Supreme Court, may again try the case. No judge of any court who presided over any jury trial, either in a civil or criminal case, in which a new trial is granted, may again preside at the trial of the case."

3 Specifically, we take no position on whether the Appellate Court's conclusion that "recusal was warranted under § 51–183c and Practice Book § 1–22" would be necessary if an appellate court's remand could be construed as something other than a remand for a new trial. *Barlow II*, supra, 166 Conn. App. at 425, 142 A.3d 290. Nor do we express any opinion on whether a remand to a different trial judge for further proceedings would be necessary or prudent in a circumstance such as the present case, in which the trial judge heard all of the evidence in the first instance but disposed of the case based on findings on one prong of a two-pronged analysis and not the other. See, e.g., *Carraway* v. *Commissioner of Correction*, 317 Conn. 594, 597 n.2, 119 A.3d 1153 (2015) ("[a] court deciding an ineffective assistance of counsel claim need not address the question of counsel's performance, if it is easier to dispose of the claim on the ground of insufficient prejudice" [internal quotation marks omitted]).

4 Judicial Branch initiatives increasing the individual calendaring of cases, such as the Complex Litigation and Land Use Dockets, render it all the more important that our appellate courts craft rescripts mindful of the effect of § 51–183c.

5 It is well established that an appellate court may "remand any pending matter to the trial court for the resolution of factual issues where necessary ...." Practice Book § 60–2(8); see also *National Elevator Industry Pension, Welfare & Educational Funds* v. *Scrivani*, 229 Conn. 817, 820 and n.3, 644 A.2d 327 (1994) (discussing retention of appellate jurisdiction pending additional trial court proceedings to resolve factual issues under what is now Practice Book § 60–2[8]).