CONNECTICUT SUPREME COURT

SC 20305

JOE MARKLEY, ET AL v. STATE ELECTIONS ENFORCEMENT COMMISSION

OPPOSITION TO SEEC MOTION FOR PERMISSION TO FILE TRANSCRIPT EXCERPT AND FOR THE COURT TO CONSIDER IT IN THE COURT'S RESOLUTION OF THIS APPEAL

The Commission's motion is two-fold. First, it attempts to supplement the Superior Court record with new evidence, on appeal and after oral argument. Second, it uses that opportunity to smuggle in several pages of post-argument, supplemental briefing. Both efforts should be rejected.

A. The Commission has presented no basis for supplementing the Superior Court's record.

The Commission fails to mention a highly relevant fact: the transcript it seeks to admit was created after November 1 of this year—more than a week *after* oral argument in this case. It did not even exist when this Court considered the SEEC's actions, much less when the Superior Court made the decision being reviewed.

Nor is the transcript a public document—it was created, privately by the Commission, expressly for the purpose of supplemental briefing after oral argument on appeal. Accordingly, for the reasons below, the Commission improperly urges the Court to include in its deliberations a transcript that cannot be part of the record on appeal and that cannot qualify under the requirements for judicial notice.

1. The document submitted by the Commission is not a record from the proceeding below.

The only "proceeding" in question here is the Superior Court's decision to dismiss this case on procedural grounds. But the Commission does not submit a transcript of the Superior Court's decision. Nor did the Superior Court consider the SEEC's transcript in making its decision—the transcript was never before the Superior Court and could not have been, because it did not exist.

The Commission fails to muster any authority, other than a vague and out of context reference to the Court's supervisory powers in the Practice Book, to support reviewing the Superior Court's decision based on a document that was not and could not have been presented to that court. To the contrary, as this Court has repeatedly reminded parties, "[i]t is axiomatic that this court does not find facts." *State v. Rizzo*, 303 Conn. 71, 96 n.16 (2011). Rather, appellate courts review only issues "decided by the trial court," as "limited to matters in the record." *Alexander v. Comm'r of Corr.*, 103 Conn. App. 629, 640 (2007) (internal quotation marks omitted); *see also Rizzo*, 303 Conn. at 96 n.16 (citing E. Margolis, "Beyond Brandeis: Exploring the Uses of Non-Legal Materials in Appellate Briefs," 34 U.S.F. L. Rev. 197, 216 (2000), that "it is clear that non-legal information introduced for the purpose of assessing adjudicative facts should be presented to the trial court, and not on appeal"); *Prescott v. City of Meriden*, 80 Conn. App. 697, 700 (2003) ("[W]e must decide whether [the trial court's] conclusions are legally and logically correct and find support in the facts that appear in the record . . . ." (second alteration in original) (internal quotation marks omitted)).

Fundamentally, "[t]he record for appellate review must be made in the trial court." *State v. Hawkins*, 162 Conn. 514, 516 (1972); *accord Morgillo v. Evergreen Cemetery Asso.*, 152 Conn. 169, 176 (1964); *see also Bank of Am. v. Thomas*, 151 Conn. App. 790, 797 n.4

(2014) (denying consideration of supplemental "documents[, as they] were not reviewed by the trial court in [making its decision], and they are not part of the trial court record"); *Piersa v. Phx. Ins. Co.*, 82 Conn. App. 752, 756 n.4 (2004) (denying consideration of documents that "were not before the trial court for its consideration," "as they are not part of the record"), *rev'd on other grounds*, *Piersa v. Phoenix Ins. Co.*, 273 Conn. 519, 521 (2005).

Nevertheless, the state cites to § 60-2 of the Practice Book, which notes this Court's power to "consider any matter in the record of the proceedings below necessary for the review of the issues presented by any appeal, regardless of whether the matter has been included in the appendix of any party." § 60-2(2); *see* Mot. at 5. But that power, as the Practice Book states, extends to matters "in the record of the proceedings below." § 60-2(2). And the Practice Book further defines the "Record" in an appeal from an administrative agency, not as everything that occurred before the agency, but as "the record *returned to the trial court* by the administrative agency." § 60-4 (emphasis added). Thus, only what the Commission submitted to the Superior Court is now before this Court as part of the record, and that does not include the transcript the Commission created after oral argument. The Practice Book therefore provides no support for considering the transcript.[1]

Similarly, it is well established that parties cannot supplement the record, even before oral argument. In *State v. Kuritz*, 3 Conn. App. 459 (1985), for example, the court denied consideration of "a prison record" included in the appendix because it "should have been[] presented to the court during trial." *Id*. at 460 n.4. And in *State v. Evans*, 9 Conn. App. 349 (1986), the court refused to consider a letter included in the appendix, holding that the "record

[1] Moreover, it is worth noting that, even under § 60-2(2), it falls to the Superior Court, not an appellate court, to "perfect the record for the [Supreme Court's] review." *In re Nevaeh W.*, 317 Conn. 723, 738 (2015).

must be made in the trial court" and that a "court cannot resort to matters extraneous to the formal record, to facts which have not been found and which are not admitted in the pleadings, or to documents or exhibits which are not part of the record. *Id* at 353-54.[2] Here, the transcript at issue was solely within the Commission's power to create and introduce, and it did not attempt to include it in any appendix on appeal, much less before the Superior Court.[3]

Accordingly, the SEEC has failed to provide authority justifying its belated effort to supplement the record with a document that did not even exist before oral argument, and consequently could not have been considered by the Superior Court whose decision is being reviewed.

2. The transcript is not a proper subject of judicial notice on appeal.

Perhaps recognizing that the transcript is not part of the record before the Superior Court, and thus not part of "the record of the proceedings below" that this court may consider, Practice Book § 60-2(2), the Commission invokes judicial notice to support its consideration, Mot. at 7. But none of the exceptions for judicial notice apply here.

The purpose of judicial notice is to refresh the fact finder's memory of things already "so notorious[ly]" known that production of evidence is unnecessary. *Considine v. City of*

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[2] Furthermore, even assuming that this court were a factfinder, the state's proffered evidence would be too late. *See Nelson v. Dettmer*, No. X07CV075012152S, 2009 Conn. Super. LEXIS 479, at *2 & n.2 (Super. Ct. Feb. 11, 2009) (denying motion to reargue summary judgment because evidence was "previously available or . . . could have been made available" (collecting cases)), *rev'd on other grounds*, *Nelson v. Dettmer*, No. CV075012152S, 2009 Conn. Super. LEXIS 3574, at *27 (Super. Ct. Dec. 10, 2009).

[3] The Commission's attempts to fault *Appellants* for failing to introduce the transcript. *See* Mot. at 4. This is nonsense, as Mr. Markley and Mr. Sampson could not have produced a nonexistent transcript of a recording that no one but the Commission knew to exist.

Waterbury, 279 Conn. 830, 871 n.23 (2006). Thus, judicial notice is permitted only for things that "come to the knowledge of men generally in the course of the ordinary experience of life or those matters which are generally accepted by mankind as true." *State v. Tomanelli*, 153 Conn. 365, 368-69 (1966); *see also State v. Zayas*, 195 Conn. 611, 614 (1985) (purpose of judicial notice is to refresh). A transcript that was prepared after oral argument on appeal is not something that has come into general knowledge through the course of everyday experience.

And the Commission cannot take refuge under the specific exception for Superior Court files. *See*, *e.g.*, *Ajadi v. Comm'r of Corr.*, 280 Conn. 514, 522 n.13 (2006) (noting exception for Superior Court files). The Commission is not asking that this Court take notice of a Superior Court file, but of a transcript made long after the Superior Court was done with the case.

Further, the transcript is not a public record of which judicial notice may be taken. The courts have repeatedly applied the public record exception to statistics and things created in the regular course of business. *See*, *e.g.*, *Gould v. Freedom of Info. Comm'n*, 314 Conn. 802, 827 n.4 (2014); *Luurtsema v. Comm'r of Corr.*, 299 Conn. 740, 769 n.28 (2011). The Commission did not create the transcript in the regular course of business, however, but after oral argument, and in order to supplement its evidentiary deficiencies. Documents created in such circumstances hardly carry with them the evidentiary certainty necessary to qualify for judicial notice. *See Tomanelli*, 153 Conn. at 368-69 (stating that judicial notice applies to "notorious" facts that are capable of "instant and unquestionable demonstration"). And while the Commission might argue that witness affidavits ameliorate that uncertainty, those witnesses are beyond the Court's or the parties' ability to evaluate. Indeed, courts have held

that even readily determined facts, like the distance between two streets, fall short of the high standard required for judicial notice. *See State v. Marshall*, 11 Conn. App. 632, 634 (1987). And they have also rejected agency records, like the prison file at issue in *Kuritz*—which included an affidavit from a records supervisor. 3 Conn. App. at 460 n.4.

The decisions the Commission cites are not to the contrary. There was nothing in *Vendrella v. Astriab Family Ltd. P'ship*, 311 Conn. 301 (2014), about the propriety of taking judicial notice of a document created for the purposes of litigation and after trial. *See id*. at 331 n.24.[4] And the dissent in *State v. Ellis*, 224 Conn. 711 (1993), simply argued the non-controversial position that courts may take judicial notice of *Superior Court* records. *See id*. at 727-28. As noted above, that exception does not apply to a transcript of an agency hearing that was created after oral argument on appeal—that is, a document that never entered the trial record.

B. The Commission has submitted improper, post-argument supplemental briefing.

The Commission devotes more of its motion to arguments about § 4-181a(a)(3) and (4) than it does to supporting its ability to supplement the record on appeal. Those arguments constitute improper, post-argument supplemental briefing.

That there would be questions about § 4-181a(a)(3) and (4) is hardly unexpected. Mr. Markley and Mr. Sampson's brief argued that the Commission's actions implicated both § 4-181a(a)(1) and (2). *See* Opening Br. at 4-6, 9, and Reply Br. at 4-5, 9-10. And the

[4] Indeed, beyond doubting the Court's past decision to take judicial notice of cats' docile and kindly nature, the majority decision in *Vendrella* gave little guidance about how the judicial notice exception is to be used. *Vendrella*, 311 Conn. at 331 n.24.

Commission's actions under § 4-181a(a)(1) and (2) necessarily raise issues under (a)(3) and (a)(4).

Nevertheless, even if questions about § 4-181a(a)(3) and (4) had not been anticipated in any way by the briefing, "this court is not limited in its disposition of a case to claims raised by the parties and has frequently acted sua sponte upon grounds of which the parties were not previously apprised." *Greenwood v. Greenwood*, 191 Conn. 309, 315 (1983). Furthermore, this Court has noted that even when it does address claims sua sponte, it only "permit[s] additional argument" "where there is good reason." *Id*. Where the Court does not sua sponte order briefing, parties must demonstrate that good reason in a request to the Court. *Cf*. *State v. Lopez*, 235 Conn. 487, 492 n.5 (1995) (noting permission to file supplemental briefing denied); *State v. Vaugh*, 171 Conn. 738, 738 (1976) (denying permission).

While Mr. Markley and Mr. Sampson would be happy to provide additional briefing, if the Court thinks there is good reason and requests it, the Court has not done so. Nor has the Commission properly requested and received permission to file additional arguments. Accordingly, the Commission's improper supplemental briefing should not be considered in the Court's decision.

Dated December 2, 2019

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CERTIFICATION

Pursuant to the Connecticut Practice Book Rules of Appellate Procedure § 62-7, I hereby certify the following:

1) Copies of the foregoing document were sent via email to counsel of record, in compliance with § 62-7, as listed below;
2) The foregoing document has been redacted or does not contain any names or other personal identifying information that is prohibited from disclosure by rule, statute, court order, or case law;
3) The foregoing document complies with all applicable Rules of Appellate Procedure.

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