Criminal Division
Vermont Attorney General's Office

Vermont Criminal Law Month

October - November 2016

Vermont Supreme Court Slip Opinions: Full Court Rulings

Includes three-justice bail appeals

QUESTIONING OF FURLOUGHEE DID NOT REQUIRE MIRANDA WARNINGS

State v. Powers, 2016 VT 110. MIRANDA: APPLICATION TO INTERVIEWS WITH PROBATION OFFICERS. VALIDITY OF WAIVER: EFFECT OF REFUSAL TO WAIVE ON FURLOUGH STATUS; CIRCUMSTANCES RELATING TO CUSTODY.

Trial court's order suppressing defendant's statements to his probation officer reversed. 1) Interviews with probation officers are analyzed under traditional factors to determine whether a custodial interrogation as defined in Miranda has occurred. The degree of post-conviction, post-incarceration restraint, and a defendant's knowledge of that restraint, have little if anything to do with whether the defendant is in custody for purposes of Miranda, unless the defendant was actually under arrest. 2) There is no evidence here that the State would penalize an exercise of a defendant's self-incrimination privilege by revoking his furlough status, and any such belief on the part of the defendant would have been unreasonable. 3) The circumstances here – the appearance of the probation officers at the defendant's apartment, the "order" for him to sit on his sofa, the search of the apartment, and the nature of the questions – do not support a finding of custody. The questioning took place in the defendant's own living room, with an officer he knew well and had worked with over several years. The officer's initial questions were entirely open-ended (he was asked if there was something he should tell them). 4) In a second interview, the defendant was physically restrained in a DOC facility. The record contains no information regarding the number, kind, or tone of the questions the probation officer posed to the defendant, whether the defendant was wearing restraints at the time, or whether the questioning was done in a coercive environment comparable to the station house atmosphere in Miranda. The matter is remanded for additional findings on the issue of custody at the time of the second interview. Skoglund, with Robinson, dissenting: As this was not a typical, routine interview of a parolee or furloughee, but a special visit in response to an allegation that the defendant had committed a crime, and because the totality of the circumstances show that the defendant was in custody when he made involuntary, incriminatory statements to his supervising DOC officer, his statements should be suppressed. Doc. 2015-076, October 14, 2016. https://www.vermontjudiciary.org/LC/Supreme%20Court%20Published%20Decisions/op15-076.pdf

TOTALITY OF THE CIRCUMSTANCES DID NOT DEMONSTRATE THAT WAIVER OF RIGHT TO CONTEST PROBATION VIOLATION WAS KNOWING AND VOLUNTARY.

In re Jankowski, 2016 VT 112. PROBATION REVOCATION SENTENCING PROCEEDING: NECESSITY OF KNOWING AND VOLUNTARY WAIVER OF DUE PROCESS RIGHTS.

Denial of petition for post-conviction relief from probation revocation reversed and remanded for a new determination whether probation should be revoked and a new sentencing hearing if it is revoked. 1) There is insufficient evidence in this case to support the conclusion that the defendant made a knowing and voluntary waiver of his right to contest the revocation of his probation, the imposition of the sentence, and the right to take an appeal. The court neglected to address the defendant personally and inquire as to whether he consented to the agreement proposed by the attorneys. It does not make a difference to the case that the defendant here waived only the right to contest revocation, and not whether there had been a violation of a probation condition. The court does not hold that Rule 11 applies, or that any kind of specific, formal procedure must occur, but the totality of the circumstances must nonetheless demonstrate that the wavier was knowing and voluntary. 2) Following a revocation of probation, the court has no authority to impose a different sentence. The fact that the parties agreed to the sentence is irrelevant. Bent, with Skoglund, concurring and dissenting: Concur that the Court looks to the totality of the circumstances to determine whether a defendant's waiver of due process rights in a probation revocation proceeding was knowing and voluntary, but notes that the majority opinion could be read to suggest that a personal in-court waiver is required, which is not addressed in this decision. Nor must the court address the defendant personally and inquire as to whether he consented to the agreement, as this contradicts the Court's reservation of the question whether the defendant must personally agree to a waiver on the record. Although sparse, the record here is sufficient to demonstrate that the defendant's waiver of a contested sentencing hearing was knowing and voluntary. Doc. 2015-194, October 14, 2016. https://www.vermontjudiciary.org/LC/Supreme%20Court%20Published%20Decisions/op15-194.pdf

DENIAL OF BAIL ON LIFE SENTENCE CHARGE JUSTIFIED DESPITE CLAIM OF EVIDENCE OF INNOCENCE

State v. Breer, 2016 VT 120. Three-justice bail appeal. DENIAL OF BAIL: PROBATION CHARGES; MODIFYING EVIDENCE.

Denial of motion to review hold without bail order affirmed. The defendant was ordered to be held without bail both because he was charged with violations of probation, for which there is no right to bail and in which the trial court exercised its discretion to deny bail, and because he is charged with offenses carrying a possible sentence of life imprisonment. The defendant argued that the trial court erred in holding him because of the probation violation charges because he was denied his rights to confront witnesses and to present evidence to refute the State's allegations of probation violations. However, a three-day bail hearing was conducted in this matter, during which the defendant presented voluminous

testimony, and cross-examined witnesses. He also argues that new exculpatory evidence has come to light since the prior hearing, and undermining the finding that evidence of guilt was great. The new evidence advanced by the defendant was modifying evidence that should be excluded from the trial court's bail analysis. The fact that the new evidence is scientific and nontestimonial does not change this result, because the State would be free to present evidence to counter the defendant's expert testimony, and in any event even if the validity of the proffered evidence were undisputed, it would not necessarily be exculpatory. Doc. 2016-338, November 17, 2016. https://www.vermontjudiciary.org/LC/Supreme%20Court%20Published%20Decisions/eo16-338.bail.pdf

INTERLOCUTORY APPEAL FROM DENIAL OF SUPPRESSION MOTION WAS IMPROVIDENTLY GRANTED

State v. Lyford, 2016 VT 118. INTERLOCUTORY APPEAL OF DENIAL OF SUPPRESSION MOTION: IMPROVIDENT GRANT.

Appeal from trial court's decision denying the defendant's pretrial motion to suppress the results of an allegedly illegal canine search is dismissed as improvidently granted. The Court generally does not accept interlocutory appeals of decisions denying motions to suppress in criminal cases unless a conditional plea is not available or practicable under the circumstances and the criteria in V.R.A.P. 5(b) have been met. Neither is the case here, and therefore the appeal is not accepted. Doc. 2016-350, November 15, 2016. https://www.vermontjudiciary.org/LC/Supreme%20Court%20Published%20Decisions/eo16-350.motion.pdf

DEFENDANT HAD RIGHT TO BAIL IN NONVIOLENT OFFENSE PROBATION REVOCATION CASE

State v. Kane, 2016 VT 121. BAIL IN PROBATION VIOLATION CASES: NONVIOLENT OFFENSES.

Order holding defendant without bail pending a probation revocation hearing is reversed and remanded. Although persons accused of violation of probation have no right to appeal, since 2010 this is no longer the case if the person is on probation for a nonviolent misdemeanor or nonviolent felony, and the probation violation did not constitute a new crime. The defendant here was convicted of a nonviolent felony, and the probation violations do not constitute a new crime. Therefore, the defendant did have a right to bail, and the conditions of release should be determined by a consideration of the factors in 13 V.S.A. 7554. On remand, the trial court is directed to hold a hearing forthwith to determine the conditions of release for the defendant pending the probation-violation hearing. Reiber dissents without opinion. Doc. 2016-289, November 22, 2016. https://www.vermontjudiciary.org/LC/Supreme%20Court%20Published%20Decisions/eo16-289.bail.pdf

DEFENDANT HAS CONSTITUTIONAL RIGHT TO BE PRESENT FOR SUPPRESSION HEARING

State v. Grace, 2016 VT 113. SUPPRESSION MOTION: CRITICAL STAGE OF PROSECUTION.

Denial of motion to suppress is reversed, and matter remanded for a new suppression hearing with defendant present unless he voluntarily waives that right. The judgment of conviction remains in effect unless and until the court on remand should decide to grant the motion to suppress, in which case the judgment is reversed and a new trial ordered. The defendant was charged with DUI and filed a motion to suppress all evidence resulting from the stop and detention. At the start of the hearing, defense counsel informed the court that his office had failed to inform the defendant that he should be present in person for the hearing. Both attorneys agreed to proceed, and the court noted that V.R.Cr.P. 43 did not require the defendant's absence at a conference or argument on a question of law. The hearing proceeding, the motion was denied, and the case went to trial and resulted in a conviction. The conduct of the suppression hearing in the absence of the defendant was plain error. The hearing was a critical stage of the proceeding at which the defendant had a constitutional right to appear. This is not a case where the only issue was one of law and the outcome could not have been affected by the defendant's absence. The trial court's reliance on V.R.Cr.P. 43 was therefore misplaced. Nor does the record support a finding that the defendant voluntarily waived his right to be present. The general written waiver of appearance signed by the defendant merely waived appearance at status conferences and arguments on questions of law. Defense counsel's statements made it clear that the defendant's absence was not based on a knowing and voluntary waiver by the defendant of his right to be present. The court cannot conclude that the defendant's absence did not prejudice the outcome of the hearing, as at trial his testimony differed markedly from, and in several respects directly contradicted, that of the State's only witness at the suppression hearing. He also could have assisted counsel in the cross-examination of that witness. Doc. 2015-113, November 18, 2016. https://www.vermontjudiciary.org/LC/Supreme%20Court%20Published%20Decisions/op15-307.pdf

COURT MAY NOT AMEND INFORMATION AFTER VERDICT WHERE STATE CHARGED SUPERSEDED STATUTE

State v. Rondeau, 2016 VT 117. EX POST FACTO VIOLATION; POST-VERDICT AMENDMENT OF INFORMATION.

Convictions for two counts of aggravated sexual assault vacated. The defendant was convicted of committing a sexual assault where the complainant was under thirteen years old and the defendant was at least eighteen years old; and as part of a common scheme, when the defendant was at least eighteen and the complainant was under sixteen. At sentencing, the trial court noted that the charged conduct had occurred approximately a decade before the statutes cited had been adopted. The court vacated the convictions under those statutes, but then found that the defendant's conduct did violate other statutes in effect at the time of the conduct and amended the informations accordingly. 1) Although the defendant failed to object at trial that the information was legally insufficient to support a conviction, under V.R.Cr.P. 12 a motion alleging a defect in the information may be made at any time. 2) The original

convictions violated the Ex Post Facto Clause by retrospectively applying a statute that increased the punishment the defendant faced. For Count One, under the statutes in effect at the time, the defendant would have faced a maximum of twenty-five years for the alleged conduct that occurred prior to 1989, and for the conduct that occurred between 1990 and 1997, life in prison with no mandatory minimum. Instead, under the current version of the aggravated sexual assault statute, the defendant faced a mandatory minimum of ten years in prison and a maximum of life imprisonment. For Count Two, the statutory reference was incorrect, and therefore the information contained unnecessary facts regarding the age of the victim and the defendant, and listed a mandatory minimum that was inapplicable to the defendant. Everything in the information and its accompanying affidavit suggested that the defendant was exposed to a mandatory minimum of twenty-five years and a maximum of life, a fact that likely informed all aspects of his defense, including whether to attempt to negotiate a plea deal or not. While it is true that the defendant did not actually face the mandatory minimum, no reasonable defendant could ascertain this fact from the charge or adequately prepare a defense with this certainty in mind. 3) V.R.Cr.P. 7 does not allow a trial court to sua sponte amend an information post-verdict. The plain language of Rule 7 indicates that it cannot be invoked post-verdict. In addition, the amendments prejudiced the defendant. Modifying the dates and the age of the victim ensured the State would not have to prove "serious bodily injury" as required by the pre-1990 version of the aggravated sexual assault. Changing the age of the victim to under ten increased the defendant's sentencing exposure from a maximum twenty-five year imprisonment to a maximum of life imprisonment. Further, the sua sponte nature of the alteration implicated separation of powers and usurped the jury's role in determining the defendant's guilt. 3) The counts as originally charged did not provide sufficient notice to sustain the defendant's conviction under either the pre-1990 or post-1990 version of aggravated sexual assault. The pre-1990 version required serious bodily injury, which was not alleged; and the post-1990 version requires the victim to be under ten years old. It is true that Count One and the accompanying affidavit include factual allegations that could support a charge under the post-1990 version of the statute, but that does not mean that the defendant had notice of the essential elements of the charge or that the jury actually found the essential facts beyond a reasonable doubt. 4) The conviction would not be remanded for judgment on the lesser-included offense of sexual assault, based on sexual acts with a person under the age of sixteen unless the person are married to each other. There is no inherent authority for a trial court to infer from a jury's verdict that the jury also found the elements of a lesser-included charge that was not submitted to the jury. Reiber dissent: Although the information as to Count Two cited the incorrect statute and contained superfluous information, it provided the defendant with notice of all elements of the correct charge. There was no prejudice from the incorrect penalty reference, because the defendant was sentenced under the correct statute. The possible impact on plea negotiations is not part of the prejudice determination. Even if it were, there is no such allegation or demonstration in this case. Doc. 2014-048, November 18, 2016. https://www.vermontjudiciary.org/LC/Supreme%20Court%20Published%20Decisions/op14-048.pdf

DEFENDANT WAS NOT ENTITLED TO SELF-DEFENSE INSTRUCTION

State v. Albarelli, 2016 VT 119. SELF-DEFENSE: NECESSITY OF INSTRUCTION. DISORDERLY CONDUCT: SUFFICIENCY OF THE EVIDENCE; UNANIMITY AND PLAIN ERROR; FALSE INFORMATION TO A POLICE OFFICER: FIRST AMENDMENT; SUFFICIENCY OF THE EVIDENCE. PROBATION CONDITIONS: SUPPORT IN THE RECORD.

Simple assault, disorderly conduct, and providing false information to a police officer affirmed; several probation conditions are stricken. 1) The defendant was not entitled to a self-defense instruction, given the dearth of evidence that he reasonably believed he was in peril of imminent bodily harm. The defendant cites only the disparity in size between the defendant and the victim, and the fact that the victim kept moving forward. This was insufficient, given the evidence that the defendant continued hitting the victim even after it was apparent that the victim was not striking back. 2) The evidence of disorderly conduct was sufficient even in the absence of evidence as to exactly how the fight started. The State does not need to prove that the defendant started the fight, but only that he was part of it. The evidence that the behavior took place in a public place; there was a loud, heated exchange of words between the two groups; and at least one member of the public was drawn to the incident, is sufficient to support a finding that the defendant was aware of the risk of public inconvenience but consciously disregarded it. 3) There was no plain error in the trial court's failure to specify the conduct the jury should examine to convict the defendant of disorderly conduct. The court gave a general instruction on unanimity; and in both the State's opening and closing argument the disorderly conduct charge was specifically tied to the defendant's altercation with the victim's brother. The defendant's closing argument recognized that the charge was based on this conduct. It is reasonable to conclude that that is how the jury understood it. 4) The false information to a police officer statute, as applied here, does not criminalize protected speech because it is limited to false statements that are intended to deflect an investigation. 5) The evidence was sufficient to support the false information charge. The court declined to hold that the giving of a false name alone is never sufficient to sustain a conviction; each case must be based on its own facts and circumstances. Here, the defendant had fled the scene of an altercation after expressing anger that someone had called the police; the defendant denied to the police that he had been on that street or in a fight, but then stated that he was outnumbered and had fled; when asked for his name, he provided his first and middle name and correct birth month and day, but incorrect birth year; and when confronted by the police with providing false information, provided his true full name and birth date. The only issue for the jury was whether the defendant provided false information to the police officers with the intent to deflect the investigation away from himself; not whether he knew he was already under investigation, or whether he thought the false information would successfully deflect the investigation, or whether he chose a good method to attempt to deflect the investigation or actually succeeded in doing so, or other questions. This evidence was sufficient. 6) Probation conditions concerning working and supporting dependents are stricken as not supported by the record; counseling conditions are stricken as erroneously giving the probation officer open-ended authority; a urinalysis condition is stricken as not supported by the record; a condition that the defendant not operate a motor vehicle unless in possession of a valid Vermont operator's

license, is stricken as there is no nexus with the offense, as are conditions related to restitution, which was not ordered; a condition prohibiting use of alcohol and requiring submission to alcosensor checks is stricken as treating alcohol abuse as a crime rather than a health and social problem. Other conditions are affirmed. Doc. 2015-165, November 18, 2016.

https://www.vermontjudiciary.org/LC/Supreme%20Court%20Published%20Decisions/op15-165.pdf

Vermont Supreme Court Slip Opinions: 3 Justice Panel Rulings

Note: The precedential value of decisions of three-justice panels of the Vermont Supreme Court is governed by V.R.A.P. 33.1(c), which states that such decisions "may be cited as persuasive authority but shall not be considered as controlling precedent." Such decisions are controlling "with respect to issues of claim preclusion, issue preclusion, law of the case, and similar issues involving the parties or facts of the case in which the decision was issued."

GRAND LARCENY REQUIRES ACTUAL KNOWLEDGE

In re Earle, three-justice entry order. RULE 11: ELEMENTS OF GRAND LARCENY.

Denial of motion for summary judgment reversed; remanded to allow petitioner to withdraw his guilty plea. The petitioner pled guilty to grand larceny, which requires an intent to steal. During the plea colloquy, the trial court asked the petitioner if he agreed that he "had the knowledge or should have had the knowledge" that he was taking trees that he did not have a right to take. The petitioner responded that he "guessed" he "should have known." The colloquy gave the petitioner the clear impression that he could be convicted of grand larceny as long as he should have known the logging was wrongful. This is not an accurate statement of the mens rea element of grand larceny. Doc. 2016-180, October Term 2016. https://www.vermontjudiciary.org/UPEO2011Present/eo16-180.pdf

SUBSEQUENT ROLL-OVER WAS RELEVANT TO NEGLIGENT OPERATION CHARGE

State v. Ward, three-justice entry order. NEGLIGENT OPERATION: ADMISSIBILITY OF SUBSEQUENT CRASH AND SUSCEPTIBILITY OF VEHICLE TO ROLLOVERS; JURY INSTRUCTION; SUFFICIENCY OF THE EVIDENCE; NEW TRIAL FOR QUICK VERDICT AND SLEEPING JUROR; RETALIATORY SENTENCE.

Conviction of negligent operation affirmed. The defendant was convicted of passing a vehicle towing a boat, crossing a double yellow line at the crest of a hill. As a result of quickly returning to his own lane in order to avoid an oncoming car, the defendant's vehicle rolled over. 1) The trial court did not err in refusing to exclude evidence of the rollover. The defendant argued that the rollover was irrelevant to whether he had operated negligently prior to the rollover.

The court found that the rollover was an undisputed fact that occurred as part of a sequence of events alleged to be negligent, and was not confusing or misleading to the jury. 2) The trial court did not err in refusing to admit a government report in order to show that the rollover was due to a defective design of the vehicle. Even assuming that there was a pertinent hearsay exception, the defendant proffered no expert witness to interpret the content of the report. 3) The trial court was not bound to accept the defendant's proposed instruction which told the jury that it could not infer negligence from the accident alone but must base its decision on the totality of the evidence. The court did instruct the jury that it was not bound to find the defendant guilty simply because there was an accident, and this was sufficient. 4) The trial court correctly denied the defendant's motion for judgment of acquittal. The evidence showed the defendant decided to pass a Jeep towing a boat and trailer on a hill where there was a solid double yellow line, at a speed of sixty miles per hour, where there was an unsafe to pass sign, and where the left side of the road was not clearly visible and free of oncoming traffic for a sufficient distance ahead. He narrowly avoided a head-on collision, narrowly avoided colliding with the Jeep, and then rolled over several times off the side of the highway. 5) The court did not err in denying a motion for a new trial on the grounds that the jury reached its verdict quickly and that a juror was observed sleeping during portions of the trial. If the defendant had observed a juror sleeping, he should have brought it to the court's attention during the trial. The brevity of the deliberations reflected the strength of the State's case and the fact that there was but one issue to decide, which was simple and uncomplicated and readily capable of resolution. 6) The record does not support the defendant's assertion that he was punished at the sentencing because he took the case to trial and filed an appeal. The court properly relied upon the defendant's failure to take responsibility for his actions, which could have killed or seriously injured two or more people that day. Doc. 2016-048, October Term 2016. https://www.vermontjudiciary.org/UPEO2011Present/eo16-180.pdf

FILING OF MOTION TO RECONSIDER DID NOT STAY TIME FOR FILING APPEAL FROM DENIAL OF SENTENCE RECONSIDERATION MOTION.

State v. Raymond, three-justice entry order. TIME FOR FILING APPEAL: EFFECT OF MOTION TO RECONSIDER RULING.

Appeal from denial of motion for reconsideration of an order denying a request for reduction of sentence denied as untimely filed. Following a plea of guilty pursuant to a plea agreement to grossly negligent operation of a motor vehicle, the defendant was sentenced to the agreed upon sentence of eighteen months to five years with credit for time served. He subsequently filed a pro se motion for reconsideration and reduction of sentence which was denied. Three months he filed a pro se motion for reconsideration of the order denying the motion for reduction of sentence. This motion was denied, and the defendant appealed. The appeal was untimely. The motion for sentence reconsideration was denied on January 12, 2016, and any appeal from that order was required to be filed within thirty days. Although motions for reconsideration are occasionally addressed by trial courts, nothing in the rules authorizes such motions, which would otherwise effectively expand the time for seeking a reduction of sentence well beyond the ninety days allowed from imposition of sentence or judgment on appeal. Doc. 2016-187, November Term, 2016. https://www.vermontjudiciary.org/UPEO2011Present/eo16-187.pdf

LEWD CONDUCT NEED NOT BE IN PUBLIC TO BE "OPEN"

In re Allen Rheaume, three-justice entry order. LEWD AND LASCIVIOUS CONDUCT: "OPEN" REQUIREMENT.

Appeal from grant of summary judgment to the State in a post-conviction relief proceeding affirmed. The defendant was properly convicted of lewd and lascivious conduct, despite the fact that the conduct occurred in a private home and not in a public place. The law does not require that the conduct occur in a public place in order to be "open." Conduct violates the statute when it is neither disguised nor concealed and is witnessed by at least one person. This issue of whether the term "open" as used in the statute means "in public" was not a disputed question of material fact for which a hearing was required, but a legal dispute. Doc. 2016-220, November Term, 2016. https://www.vermontjudiciary.org/UPEO2011Present/eo16-220.pdf

NEW SUPREME COURT FORMS

The Vermont Supreme Court recently published new forms, including a new docketing statement form and a motion form. The forms are here: https://www.vermontjudiciary.org/MasterPages/Court-Forms-Supreme.aspx

You should **start using the new docketing statement**, because the docketing statement form is a required form. See VRAP 3 (parties must file docketing statements "using a form prescribed by the clerk"). The new form is shorter and easier to use. You may continue to attach additional sheets if needed. Note one significant change: the appellant is no longer required to list the hearings held in the case. As appellee, you need to make sure you were copied on the transcript order form and use that form to evaluate whether the appellant has ordered the necessary transcripts. Along with the new forms, the Court has posted new instructions for ordering transcripts using the vendor website.

Use of the other forms is generally not mandatory. See VRAP 46 ("Forms approved by the Supreme Court suffice under the rules and illustrate the simplicity and brevity that these rules contemplate."). One of the new forms is a suggested cover sheet for briefs and printed cases.

Using the motion form is optional. The form is not required, as long as motion filings contain the same information. It may be easier to use the form for some short, simple motions (although note that the form does not accommodate signatures of both parties, as required for stipulated extensions of time). Any substantive motion, however, will require additional pages and using the form would probably not save any time.

The form notice of appeal is also not required (VRAP 46; VRAP 3(d)(5)). It does, however, "suffice" under the rules and may be appropriate to use.

**Cases marked with an asterisk were handled by the AGO.*

Vermont Criminal Law Month is published bi-monthly by the Vermont Attorney General's Office, Criminal Justice Division. For information contact David Tartter at david.tartter@vermont.gov.