Criminal Justice Division
Vermont Attorney General's Office

Vermont Criminal Law Month

December 2010 – January 2011

Vermont Supreme Court Slip Opinions: Full Court Rulings

Includes three justice bail appeals

EXCLUSION OF EVIDENCE AS UNDULY PREJUDICIAL TO DEFENDANT, OVER DEFENDANT'S OBJECTION, WAS ERROR.

State v. Herring, 2010 VT 106. RIGHT TO CONFRONTATION: EXCLUSION OF IMPEACHMENT EVIDENCE.

Full court published opinion. Aggravated sexual assault, sexual assault on a minor, and lewd or lascivious conduct with a child reversed. The complainant testified that she had vomited when the defendant had her drink Alka-Seltzer after forcing her to perform oral sex. The defense attempted to impeach the complainant by presenting a videotape interview in which she described this incident as having occurred on a different occasion and in a different location. The court excluded the interview on the grounds that it was unduly prejudicial to the defendant – the proffering party – as it indicated that another assault had occurred in addition to the assault that was charged. Evidence of that earlier assault had been excluded on motion of the defendant, but when he offered the interview at trial, the defendant stated that he had no objection to the jury hearing about the entire episode. Without a finding that defense counsel's offer of proof was incompetent, the trial court should have respected the defendant's tactical decision and his assumption of the risk by waiver on this point, and allowed him to proceed with this evidence. The impact of excluding impeachment evidence was particularly critical where there was no independently incriminating proof beyond a reasonable doubt, and the trial was largely a credibility contest between the complainant and the defendant. Doc. 2009-188, December 3, 2010.

RESTITUTION ORDER INVALID WHERE NOT CONNECTED TO CRIME OF CONVICTION AND NO WAIVER OF THIS REQUIREMENT

*State v. Baker, 2010 VT 109. Full court entry order, published. RESTITUTION: ABSENCE OF CONVICTION; LOCK REPLACEMENT.

Order requiring restitution to Fletcher Free Library for replacement of locks is reversed. The defendant pled to three counts of prescription fraud in exchange for dismissal of nine other charges, including a charge of burglary of the library. The restitution order

was in error because the defendant was not convicted of the burglary, and the fact that the plea agreement provided for "restitution for uninsured losses" did not waive the conviction requirement. Without a specification of what losses were covered, there was no knowing and intelligent waiver. Furthermore, expenses incurred to change locks to prevent future crime, and not to repair property damage, cannot be covered by a restitution order. Doc. 2009-314, December 8, 2010.

RESTITUTION FOR ATTEMPT TO CAUSE INJURY CAN BE VALID

State v. Thomas, 2010 VT 107. RESTITUTION: CONVICTION OF ATTEMPT CRIME; FAILURE TO INCLUDE RESTITUTION PROVISION IN PLEA AGREEMENT; AWARD TO HOSPITAL WHICH TREATED VICTIM; AWARD TO VICTIM COMPENSATION.

Full court opinion. Restitution order affirmed in part, and in part stricken and remanded. The defendant pled guilty to aggravated assault by attempting to cause serious bodily injury. The plea agreement made no mention of restitution, but at the sentencing the State asked for, and the court imposed, an order of restitution to the Victims' Compensation Program (which had made $10,000 of the victim's medical expenses) and to Dartmouth Hitchcock Medical Center (which was owed $8,000 for treatment of the victim). 1) A plea to attempt to cause serious bodily injury can serve as the basis for restitution. A conviction for an attempted crime can be the basis of a restitution order if the State proves causation between the crime of conviction and the victim's loss. Here, the victim incurred injuries in the course of the defendant's attempt to cause him serious bodily injury. 2) The defendant was not entitled to withdraw his plea when the State sought restitution and restitution had not been mentioned in the plea agreement. Restitution, by statute, is considered in every case in which a victim of a crime has suffered a material loss. The defendant could have no reasonable expectation that restitution would not be ordered simply because the plea agreement was silent on the issue. 3) The victims' compensation program was rightfully awarded restitution, because the statute specifically permits such an order to the extent that the program has made payments to or on behalf of the victim. The hospital, on the other hand, was not entitled to the award because it was not a direct victim of the defendant's conduct. The matter is remanded to the trial court for an entry of an order of restitution to the victim himself. Doc. 2009-325, December 10, 2010.

DETENTION FOR CIVIL TRAFFIC VIOLATION WAS LEGAL

State v. Santaw, 2010 VT 111. TRAFFIC STOP: CIVIL TRAFFIC VIOLATION.

Full court published entry order. Grant of motion to suppress and judgment for defendant in civil suspension matter reversed. The officer's detention of the defendant occurred after the officer had observed the defendant cross the center line. At the same time, the officer also had reasonable grounds to stop a second driver, and both drivers had pulled into the same driveway. In speaking with both drivers, the officer smelled intoxicants, and instructed the defendant to return to his car for his license and registration. At this time, the officer had a reasonable and articulable suspicion that each driver had committed traffic violations. The command that the first driver retrieve his documents was justified. When the driver returned, the officer

detected the smell of alcohol emanating from his person, and observed that his eyes were bloodshot and watery. Dooley and Skoglund concurrence: Notes that requesting a license and registration does not constitute a seizure unless the officer does not return these documents. Docs. 2009-396 and 471, December 13, 2010.

OBSTRUCTION OF JUSTICE ADMISSIBLE TO IMPEACH

*State v. Brewer, 2010 VT 110. Full court published entry order. PRIOR CONVICTIONS TO IMPEACH.

First degree aggravated domestic assault affirmed. The trial court did not err in ruling that the State could use the defendant's prior conviction for obstruction of justice in order to impeach the defendant if he were to testify. The trial court's weighing of the Gardner factors was within its discretion. The offense of obstruction of justice goes to credibility because the essence of it is preventing the court from engaging in a search for the truth without being impeded, and the offense had nothing to do with the charged offense. The court also considered the length of the defendant's prior criminal record, and excluded several other prior convictions. The court did not directly address the age of the conviction beyond noting that it fell within the requisite fifteen years, but this was not error under the circumstances. Finally, the court did not err in weighing the relative importance of the defendant's testimony and the need for impeachment by prior convictions. The defendant did not testify and made no offer of proof as to what his testimony might have been nor how admission of his prior conviction would have hurt that testimony. In such cases, the court cannot determine the potential prejudice of such evidence. Further, the defendant told the court at sentencing that he did not recall the events of the evening due to his consumption of alcohol, so it is hard to imagine how he would have managed to testify credibly at all, even absent evidence of his prior convictions. Because the court ruled that the evidentiary ruling was correct, it did not reach the issue of whether defendant waived his objection to the ruling by failing to testify. Doc. 2009-390, December 14, 2010.

RESTITUTION MAY BE BASED ON A NOLO PLEA

State v. Plante, 2010 VT 116. Full court published entry order. RESTITUTION: MAY BE BASED ON NOLO PLEA.

Restitution order entered after nolo plea to grand larceny affirmed. The entry of a nolo, rather than a guilty, plea does not preclude the court from entering a restitution order. Doc. 2010-071, December 22, 2010.

CONVICTIONS FOR FALSE INFORMATION TO POLICE OFFICER AND IMPEDING OFFICER VIOLATED DOUBLE JEOPARDY

State v. Neisner, 2010 VT 112. Full court opinion. DOUBLE JEOPARDY: ALL ELEMENTS OF ONE OFFENSE INCLUDED IN ANOTHER. SUFFICIENCY OF THE EVIDENCE: HINDERING AN OFFICER; GROSSLY NEGLIGENT OPERATION OF A VEHICLE. SUFFICIENCY OF CHARGE: OMISSION OF ELEMENT.

Impeding a public officer, leaving the scene of an accident, and grossly negligent operation of a motor vehicle, affirmed. 1)

The defendant's double jeopardy rights were violated by a conviction for both false information to a police officer and impeding an officer, and therefore the false information charge is vacated. The false information charge requires the giving of any false information with intent to implicate another. The impeding charge requires an unlawful act that actually hinders the officer in an investigation; and here, the hindering act was the giving of false information. While impeding and false information may be independent statutory crimes, as specifically charged here all the elements of the false information charge were contained in the impeding charge. Thus, both crimes punished the same offense. 2) The evidence was sufficient to support a finding that the defendant's actions hindered the trooper's investigation. The defendant hindered the investigation by telling the investigating officer that it had been his wife who had been driving. Even if the officer had believed that the defendant was lying to him, he did not believe he had enough direct evidence to charge the defendant and could act only upon the evidence he did have, an eyewitness statement incriminating the defendant's wife. The false accusation also prevented the officer from investigating the defendant's possible drunken driving. 3) There was sufficient evidence to support a finding that the defendant's operation of his vehicle was grossly negligent, where he slammed on his brakes after pulling immediately in front of a motorcycle. The motorcyclist was not at fault for following too closely, as he did not have time to slow down after the defendant pulled in front of him. 4) The defendant's rights were not violated by the failure of the information explicitly to charge him with failing to stop "immediately" after the accident. In context the charge was not ambiguous, and in any event the defendant did not show any disadvantage to his case based on the allegedly faulty information. Doc. 2009-395, December 30, 2010.

EVIDENCE OF STABBING JUSTIFIED NO BAIL ORDER

State v. Devac, three-justice bail appeal. NO BAIL ORDER: STABBING WAS SUFFICIENT EVIDENCE TO INTENT TO KILL.

The trial court did not err in finding that evidence of guilt was great, thus justifying its order that the defendant be held without bail for attempted second degree murder. The State produced sufficient evidence to show that the defendant stabbed the victim. The act of stabbing is sufficient to persuade a jury that the defendant had the intention to kill the victim; and the stabling constitutes an overt act designed to carry out that intent. Thus, the evidence taken in the light most favorable to the State, and disregarding modifying evidence, fairly and reasonably showed that the defendant was guilty beyond a reasonable doubt of attempted murder. Doc. 2010-458, December Term, 2010.

RESTITUTION TO STATE AGENCIES PERMISSIBLE

*State v. Quist, 2011 VT 5. RESTITUTION: STATE AGENCIES.

Restitution order to the Vermont Department of Taxes affirmed. The defendant was ordered to pay back taxes to the Department in a restitution order following his conviction for failure to pay taxes or to file a tax return. He argued on appeal that the Department is not a "victim" for purposes of the restitution statute. The statutory language indicates that, although only natural persons may receive an advance payment of restitution, the legislature did intend to include governmental agencies and subdivisions as permissible recipients of restitution. A

contrary argument contained in a concurrence in State v. Bohannon, is withdrawn. Doc. 2009-414 and 415, January 14, 2011.

VIDEOTAPED STATEMENTS CAN BE ADMISSIBLE UNDER RULE 804a

State v. Hoch, 2011 VT 4. RULE 804a STATEMENTS: ADMISSIBILITY; SIXTH AMENDMENT. L&L: SUFFICIENCY OF THE EVIDENCE OF LEWD INTENT AND IDENTITY OF PERPETRATOR.

Lewd and lascivious conduct with a child affirmed. 1) There was no error, and thus no plain error, in the admission of a videotaped interview with the victim under V.R.E. 804a. The defendant argued that admission of the statements in the interview were hearsay, and did not fit within the exception for prior consistent statements. However, the defendant did not explain why the statements do not fit within the exception found at Rule 804a. The fact that the statements were shown on a videotape rather than through the testimony of a witness to whom the victim made the statements makes no difference in the analysis under Rule 804a. 2) The defendant also argued that admission of the videotape after the victim testified violated his Sixth Amendment right to confrontation. However, after the videotape had been played, the defense was free to recall her to the stand for cross-examination. 3) The evidence was sufficient to establish that he touched the victim's buttocks with an intent to gratify sexual desires, and to prove the identity of the perpetrator. The victim identified him by his first name, and others established that he was present with her unsupervised. No one else with his name was said to have visited the house. The evidence that the touching was done with a sexual intent was established by the victim's testimony that he told her not to tell her mother about the touching, that he gave her gifts of money, and that he showed up at the apartment at times when he knew her mother was napping in an obvious effort to find her unsupervised. Doc. 2009-186, January 14, 2011.

INSUFFICIENT EVIDENCE OF THREATENING BEHAVIOR WHERE DEFENDANT WAS DELUSIONAL

State v. Miles, 2011 VT 6. VIOLATION OF PROBATION: SUFFICIENCY OF THE EVIDENCE – DELUSIONAL DEFENDANT.

Published entry order. Violation of probation reversed (underlying offenses were aggravated domestic assault, retail theft, and petit larceny). The trial court's finding that the defendant engaged in threatening behavior was not supported by the record when the record more than suggests that the defendant was delusional when making the purported threats, and where the record is devoid of evidence about whether the putative target of the threat existed or whether the threat was otherwise real. Without a stated reason by the trial court to disregard, discount, or distinguish defendant's stated delusions – a preoccupation with the target of the threat inserted by his television and the imprimatur from the earth goddess of his plan to kill – it cannot be preponderantly evidence that he was culpable in the sense that his declared intent to harm another was deliberate rather than a product of mental illness. Left unanswered by this case is whether verbal threats alone constitute threatening behavior in the context of probation conditions. Docs. 2009-435 and 2010-005, January 20, 2011.

CRIMINAL COURT HAS JURISDICTION OVER COMMITMENT PROCEEDINGS FOR MENTALLY RETARDED PERSONS

In re M.A., 2011 VT 9. DANGEROUSNESS HEARINGS: JURISDICTION; SUFFICIENCY OF THE EVIDENCE.

Full court opinion. Order placing the defendant in custody of Commissioner of Disability, Aging and Independent Living affirmed. 1) Jurisdiction over commitment proceedings for persons with mental retardation is in the family court, except when the issue arises as a result of a finding of incompetency to stand criminal trial, in which case the commitment proceeding is held in the same court that determined the person incompetent. 2) The defendant disputed the trial court's reliance upon his statements in an interrogation in which he admitted to sexual abuse of a child, claiming that the interview was unreliable because of the methods used by the questioner. However, the victim of the abuse also testified concerning the assaults, and the trial court found that testimony credible. Furthermore, the trial court had previously found the defendant's statements to have been voluntary. Concurrency by Johnson: Would uphold the finding that the defendant is a danger to others on the basis of the victim's testimony, but notes that the defendant's statements were coerced. Doc. 2009-081, January 28, 2011.

LATER CONFESSION WAS NOT FRUIT OF THE POISONOUS TREE

State v. Barron, 2011 VT 2. MIRANDA: INTERROGATION ON ISSUE INSEPARABLE FROM INCRIMINATING MATTERS; CUSTODY; FRUIT OF THE POISONOUS TREE; SIXTH AMENDMENT: INTERROGATION OF CHARGED DEFENDANT; FRUIT OF THE POISONOUS TREE; HABITUAL OFFENDER: RELIANCE ON CONVICTION FOR CONDUCT SINCE DECRIMINALIZED.

Full court opinion. Sexual assault on a minor and habitual offender affirmed. 1) While in custody for violation of probation and disorderly conduct, the defendant claimed that his wife had invented the allegations so that she could have him out of the house in order to carry on sexual activity with a minor living there. When a detective went to the correctional center to interview the defendant about this claim, the defendant was in custody and under interrogation, thus requiring a Miranda waiver. Although the State argued that the interview concerned a separate matter, the defendant's allegations about his wife, these are inseparable because the interview necessarily included specific questions and answers about the defendant's conduct which resulted in his being charged. 2) After the defendant's release from custody, he called the detective and said he had more information. The detective came to his house and the defendant voluntarily entered his vehicle and took part in an interview which was secretly recorded. During the interview the defendant made incriminating statements. The defendant was not in custody during this interview and no Miranda warnings were required. 3) The defendant's incriminating statements in this interview were not the fruit of the poisonous tree of the original interview. Even if the defendant had not spoken to the detective when he was in custody, the investigation into his allegations would have continued, since he had made a written statement alleging that his wife was having sexual relations with a minor. Thus, the minor's statement during that investigation

that she had had sex with the defendant himself was not a fruit of the first interview, but rather of his original accusation. In any event, the two statements at issue were sufficiently separated in time and circumstances as to attenuate any taint. 4) The defendant next argues that the first interview should not have occurred without notification of the defendant's court appointed attorney, and that it therefore violated his Sixth Amendment right to counsel. This is correct, since counsel had been appointed in connection with the charges of disorder conduct and violation of probation, and the questioning related to these events. However, the later interview was not the fruit of the poisonous tree of this interview, and therefore this violation does not require suppression of his later statements. 5) The defendant makes the same argument as to the second interview. However, that interview concerned allegations that the defendant had sexually assaulted a minor, and he had not been assigned counsel for that offense, nor been charged with that offense as of the date of the interview. The Sixth Amendment right to counsel is offense specific. 6) The defendant was found to be a habitual offender based in part upon a conviction for sexual assault for conduct which has now been decriminalized. Vermont's saving clause statute, 1 VSA 241(c), requires that the defendant's argument that reliance upon this conviction is improper be rejected. Under this statue, the statutory rights and penalties are determined by the statute in effect at the time of the occurrence of the facts and may be enforced after repeal if the underlying facts are proved. Doc. 2009-225, January 28, 2011.

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."

COURT'S CONCLUSION THAT PROBATION HAD FAILED UPHELD

*State v. Rheaume, three-justice entry order. REVOCATION OF PROBATION: IMPOSITION OF UNDERLYING SENTENCE; CREDIBILITY ISSUE. Revocation of probation and imposition of underlying sentence affirmed. 1) The trial court did not abuse its discretion when it required the original sentence to be served. The evidence supported the court's conclusion that probation had failed and was no longer a viable option. 2) The defendant's claim that the probation officer was not credible was not raised at trial and was within the province of the trial court. Doc. 2010-156, December 8, 2010.

INELIGIBILITY FOR PROGRAMMING DID NOT REQUIRE SENTENCE RECONSIDERATION

State v. Snow, three-justice entry order. SENTENCE RECONSIDERATION: INELIGIBILITY FOR PROGRAMMING.

Denial of motion for sentence consideration affirmed. The defendant sought reconsideration of sentence, alleging that he had been found ineligible for the Discovery Program because of a then-unknown heart condition. The state had sought a sentence of the length that was imposed so that the defendant could participate in that program. 1) The trial court found, based on the evidence presented at the hearing, that the defendant was found ineligible for the Discovery program not because of his heart condition, but because of his violent outburst at sentencing. The defendant's proffer, on appeal, of evidence not presented to the trial court would not be accepted. 2) The defendant argued that the trial court erred in considering his outburst because it was post-sentencing conduct. While it is true that post-sentencing behavior is not a ground for sentence reconsideration, the court did not rely upon this conduct in denying sentence reconsideration. The issue before the court was whether the defendant had been denied participation in the Discovery program because of a then-unknown, but existent, condition. This was shown not to be the case because he was denied participation because of his violent outburst. The court did not use his post-sentencing behavior to alter his sentence, but to rebut his proffered argument for reconsideration. 3) In any event, the defendant's ability to participate in the Discovery program was not promised at sentencing, and therefore his inability to participate did not require that the original sentence be altered. Doc. 2010-273, December Term 2010.

VOUCHING AND PRIOR BAD ACTS OBJECTIONS NOT PRESERVED FOR APPEAL.

State v. O'Brien, three-justice entry order. PRIOR BAD ACTS: PRESERVATION. VOUCHING: PRESERVATION.

Second degree aggravated domestic assault affirmed. 1) The defendant argued that the trial court erred in admitting evidence of prior instances of domestic abuse in order to show the context of the relationship, and thus to explain the defendant's seeming overreaction to a trivial incident, where the defendant was charged with acting recklessly, rather than intentionally. This claim was not made below, and therefore would not be considered on appeal. 2) A police officer testified that another officer had told him that he had observed some injuries to the victim, and based on her story he believed that the defendant had committed the domestic assault. On appeal the defendant claimed that this was improper vouching. However, no contemporaneous objection was made. Although the trial court did make a broad pretrial ruling excluding any vouching, that was not sufficient to preserve the objection to specific testimony adduced at trial where the testimony as not clearly offered to vouch for the complainant, and a specific objection was required to alert the trial court that the defendant believed that the testimony fell within the court's pretrial ruling. Doc. 2009-289, December Term, 2010.

FALSE TESTIMONY JUSTIFIED ENHANCED SENTENCE

State v. Myers, three-justice entry order. POSSESSION OF HEROIN: SUFFICIENCY OF THE EVIDENCE. SENTENCING: RELIANCE UPON DEFENDANT'S PERJURY AT TRIAL.

Possession of heroin affirmed. 1) The evidence of possession was sufficient to support the conviction where a correctional officer observed the defendant throw an object into a closet, and a search revealed two packets containing heroin. The fact that the officer only saw one object thrown does not require a different result, as he may not have noticed that it was two objects being thrown together rather than one object. 2) Notwithstanding the sentencing court's statements that it was considering whether defendant's false testimony should enhance his sentence, neither defendant nor his attorney objected so as to trigger the requirement that the sentencing court make explicit findings that the false testimony satisfied the elements of perjury. Nor was it an abuse of discretion for the trial court to enhance the sentence because of the defendant's false testimony. Doc. 2010-004, December Term, 2010.

PROBATION CONDITIONS UPHELD AS CONCEIVABLY JUSTIFIED

State v. Marsh, three-justice entry order. VALIDITY OF SPECIAL PROBATION CONDITIONS.

Second degree murder – special probation conditions affirmed. After pleading guilty to second degree murder by disregarding a high risk of death by pointing a loaded gun at someone's head and pulling the trigger, defendant agreed to special conditions of probation, including that his probation officer may restrict his associates, and may restrict his internet usage. Because the defendant entered a plea and waived the PSI, there is no factual record from which the validity of the conditions in relation to the specific conduct of the crime can be judged. Therefore, the conditions will be stricken only if they could not be justified by any set of circumstances. They are therefore upheld, as there are a conceivable set of facts that would make it reasonable for the defendant's probation officer to be able to restrict those individuals with whom defendant associates and the internet sites that defendant accesses. Doc. 2010-014, December Term 2010.

LONGER SENTENCE AFTER DEFENDANT REJECTED PLEA OFFER NOT VINDICTIVE

State v. LaFlam, three-justice entry order. VINDICTIVENESS IN SENTENCING: REJECTED PLEA AGREEMENT.

Sentence of two to six months to serve for driving with suspended license, third offense, affirmed. There was no presumption of vindictiveness when a sentence imposed following trial exceeds that declined by the defendant in a plea offer. This is true even where, as here, some of the factors that result in more favorable treatment beforehand, such as sparing the victim a trial, do not apply. The court here relied upon a number of factors, including the defendant's extensive criminal record and poor performance on earlier probations, as well as the need to send a clear message to the community in light of that record. Doc. 2010-132, December Term 2010.

NO REASON TO THINK PLEA WAS INVOLUNTARY

*State v. Smith, three justice entry order. MOTION TO WITHDRAW PLEA: ABSENCE OF OBJECTIVELY REASONABLE BASIS TO CONCLUDE PLEA WAS INVOLUNTARY.

Denial of motion to withdraw guilty plea affirmed. The defendant testified that his guilty plea was involuntary because it was induced by his attorney's promise to assist the defendant in establishing contact with his children in family court if he accepted a plea. The attorney testified that he had promised to find out what was happening in family court, but denied that the offer of assistance was a condition precedent to the plea. The trial court found counsel's testimony to be credible. Thus, there was no objectively reasonable basis to conclude that the plea was induced by his attorney's offer of assistance, and no basis to disturb the trial court's denial of the motion. Doc. 2010-033, January 27, 2011.

INFORMATION NEED NOT CONTAIN IMPLICIT MENTAL ELEMENT

State v. Chandler, three-justice entry order. IMPEDING A PUBLIC OFFICER: OMISSION OF MENTAL ELEMENT IN INFORMATION; LEGAL RIGHT DEFENSE – FIRES WITHOUT PERMITS; DEFINITION OF PUBLIC OFFICERS. EXCUSAL OF JUROR. SELF-DEFENSE INSTRUCTION.

Impeding a public officer affirmed. 1) No plain error occurred where the information did not include a mental element which was not explicitly stated in the statute. Nor was there plain error in the omission from the information of the element that the defendant must have acted without a legal right to do so, since at trial he strongly challenged the notion that the public officers had a legal right to be on his property. Plainly, he understood the charge and was able to present an intelligent and complete defense to the charge. 2) The trial court did not err when it excused a juror after the jury was sworn, when the juror stated that one of the witnesses in the case was the driver of her daughter's school bus, and she was unable to assure the court that she would be able to decide the case impartially based solely on the evidence. 3) The defendant was charged with impeding after firefighters entered his property to extinguish a fire. He argues that he was entitled to have the fire without a permit under the relevant statute because snow was on the ground. However, this was a disputed factual issue, and in any event firefighters are authorized to enter property to investigate and extinguish fires which threaten public safety, irrespective of whether the landowner is required under the circumstances to obtain a permit to burn brush. 4) The jury was adequately informed by the instructions that the law permits a fire without a permit when there is snow at the site, despite the fact that this instruction was given immediately following the court's instruction on the five elements of the offense, rather than as a part of the fifth element (no legal right to act as he did). 5) Any error in the omission of a self-defense instruction was not prejudicial to the defendant because the jury necessarily concluded that the firefighters were acting within their lawful authority, thereby precluding the availability of a claim of self-defense. 6) The trial court's instruction referring to "public officers" in place of executive or civil officers was not error. There was no objection to this language, and the defense itself used the same phrase in its requests to charge the jury. The trial court defined the term to include the categories designated in the statute and essentially required the jury to agree that the firefighters were civil officers. Doc. 2010-135, January 27, 2011.

DEFENDANT'S TESTIMONY DID NOT REQUIRE NEW TRIAL IN INTERESTS OF JUSTICE

State v. Hunter, three justice entry order. NEW TRIAL MOTION: WEIGHT OF EVIDENCE; COMPROMISE VERDICT.

Simple assault on a police officer and resisting arrest affirmed. 1) There was sufficient evidence to support the defendant's convictions on both counts, despite his own testimony that the assault and resistance did not occur. The fact that the defendant testified contrary to the other witnesses does not mean that the weight of the evidence preponderates against the verdict, thus requiring a new trial in the interests of justice. 2) The record belies the defendant's claim that the jury reached a compromise verdict. Doc. 2010-159, January Term 2011.

COROBORATING EVIDENCE OVERCAME CORPUS DELICTI RULE

State v. Todd, three-justice entry order. CONSPIRACY TO DISPENSE COCAINE: SUFFICIENCY OF THE EVIDENCE; PRESERVATION; CORPUS DELICITI.

Conspiracy to dispense cocaine affirmed. By failing to renew his motion for judgment of acquittal at the close of all of the evidence, and by failing to file a post-verdict motion for acquittal within ten days of the jury's guilty verdict, the defendant waived any argument on appeal regarding the sufficiency of the evidence. Nor was there plain error. There was sufficient evidence to corroborate the defendant's admissions to the police that he took an overt step in furtherance of the conspiracy, and therefore the corpus delicti rule was complied with. Doc. 2010-173, January Term 2011.

PROBATION CONDITION WAS NOT VAGUE

State v. Maddox, three-justice entry order. VIOLATION OF PROBATION: VAGUENESS; IMPOSITION OF UNDERLYING SENTENCE.

Violation of probation affirmed. A probation condition that the defendant notify his probation officer of any intent to enter into a romantic or dating relationship was not unconstitutionally vague. Even if it were unclear, the defendant clearly understood that it applied to the relationship at issue, as he requested the other person not to say anything about his contact with her. Further, the trial court also found that the defendant had violated a further order not to contact this person at all, a finding which has not been challenged on appeal. Therefore, there was no error in the court's decision to revoke probation and to impose the underlying sentence, in light of the court's view of the threatening nature of the underlying criminal behavior, the defendant's demonstrated history of noncompliance with court orders, and the need for institutional programming. Docs. 201-194, 195, and 196, January Term 2011.

COURT'S FACTUAL FINDING ON MOTION TO SUPPRESS WAS CLEARLY ERRONEOUS

State v. Gilman, three-justice entry order. MOTION TO SUPPRESS: CLEARLY ERRONEOUS FACTUAL FINDING.

DUI reversed and remanded. The trial court denied a motion to suppress, finding that, although the defendant's mother stated that the police threatened to go upstairs and get the defendant himself, there was no evidence that this threat was communicated to the defendant, and therefore that the defendant's appearance downstairs was involuntary. However, the record indicates that the defendant's mother and girlfriend both testified that this threat was directly communicated to the defendant, and therefore the court's factual findings are clearly erroneous. It may be that the trial court would ultimately find that the officers' testimony specifically denying any threat of force to be more credible than the testimony of the defendant's mother and girlfriend, but it made no such finding and therefore the matter must be remanded to the trial court to address the issue. Doc. 2010-210, January Term 2011.

DEFENDANT'S DWI APPEAL CLAIMS NOT PRESERVED

State v. Witter, three-justice entry order. PRESERVATION OF ERROR FOR APPEAL.

DWI third or subsequent offense affirmed. The defendant argues that the trial court committed plain error by allowing the jury to decide a DLS charge in the absence of any evidence on the notification element. The fact that the DLS charge was later dismissed did not cure the error, because the jury learned during the joint DWI/DLS trial that the defendant had a lifetime suspension, from which they could infer that the reason for the suspension was a prior DUI, which would prejudice the jury concerning the present DUI. However, the defendant never objected to the admission of evidence of the lifetime suspension, and the defense also acquiesced to the suggestion that the notice issue be decided in the second part of the bifurcated trial. Thus, none of the claims of error was preserved. Doc. 2010-232, January Term 2011.

Vermont Supreme Court Slip Opinions: Single Justice Rulings

NO CONTACT CONDITION OF RELEASE UPHELD

State v. Gay, single justice bail appeal. CONDITIONS OF RELEASE: NO-CONTACT ORDER.

The defendant appealed from a pre-trial condition of release that he not have contact with the alleged victim of the charged domestic assault. At the hearing, the alleged victim testified that she wanted contact with the defendant, and sought to minimize a history of domestic violence. The defendant's mother testified that she could supervise contact. Both witnesses

suggested that the defendant's violence was due to his diabetes, and that he involuntarily assaults people when his blood sugar drops precipitously. The defendant has a long criminal history, including violations of conditions of release and of probation, drug offenses, and assaultive behavior. It was well within the court's discretion to deny the motion, given the potential hazard the defendant poses to the alleged victim, particularly now when she is pregnant, and the defendant is charged with hitting her in the stomach. Doc. 2010-429, November Term 2010 (Johnson, J.).

Proposed Rule Change

Proposed Order Promulgating Amendments to
Rules for Mandatory Continuing Legal Education

After continuing difficulties with the administration of the professionalism requirement, the Mandatory Continuing Legal Education Board has unanimously decided to recommend an amendment to Rule § 3(b), striking the two-hour professionalism credit requirement. This proposed amendment, if promulgated, would become effective on July 1, 2011. The Board notes that Rule 3(b) would continue to allow for general CLE credit for courses related to professionalism. Rule 3(c) would be eliminated as it is no longer applicable.

Comments on this proposed amendment should be sent by **March 4, 2011**, to the Chair of the Mandatory Continuing Legal Education Board

Hon. Karen Carroll
Board of Continuing Legal Education
2418 Airport Road, Suite 2
Barre, VT 05641

The amendment can be found at:

http://www.vermontjudiciary.org/LC/Statutes%20and%20Rules/PROPOSEDAmendmentMCLE3Repealingprofessionalism.pdf

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