Criminal Division
Vermont Attorney General's Office

Vermont Criminal Law Month

December 2011 – January 2012

Vermont Supreme Court Slip Opinions: Full Court Rulings

Includes three justice bail appeals

PCR COURT CAN ORDER REINSTATEMENT OF CHARGES DISMISSED AS A RESULT OF A PLEA AGREEMENT THAT HAS BEEN SET ASIDE BY THE PCR COURT

*In re Morin, 2011 VT 132. Full court published entry order. POST CONVICTION RELIEF PETITION: AUTHORITY OF CIVIL COURT TO REMAND TO CRIMINAL COURT AND TO REINSTATE CHARGES DISMISSED PURSUANT TO PLEA AGREEMENT.

Civil Division's remand of case following judgment for petitioner in post-conviction relief petition to Criminal Division and reinstatement of charges that were dismissed as part of a plea agreement affirmed. The petitioner entered into a plea agreement pursuant to which a domestic assault charge was dismissed, and he pled to DUI, operating with a suspended license, and violating conditions of release. The Civil Division granted a PCR petition alleging that the criminal court had failed to elicit an adequate factual basis for the guilty plea during the colloquy in violation of Rule 11, and ordered the case returned to its pre-plea status, including the reinstatement of the domestic assault charge. The petitioner argued on appeal that the PCR court lacked authority either to remand to the criminal court or to reinstate the dismissed charge, and that its only option was to vacate and set aside the judgment and to discharge him. 1) 13 V.S.A. § 7133 does grant a PCR court authority to remand a case. When a court vacates and sets aside a judgment, that eliminates the judgment and thereby returns the case to its status before the judgment was made. 2) Since there is no question that the State could reinitiate the dismissed charge, and the State has shown its intent to do so by opposing the petitioner's position, the mechanics by which the charge is reinitiated poses a purely academic question. If there was error, it was harmless. In re Morin (2010-426) (28-Nov-2011).

TOUCHING BOTH THE BREASTS AND THE VAGINA IN ONE EPISODE IS A SINGLE CRIME

State v. Carrolton, 2011 VT 131. Full court opinion. MULTIPLICITY: TOUCHING DIFFERENT INTIMATE BODY PARTS IN SINGLE EPISODE.

Interlocutory appeal from trial court order granting defense motion to merge into a single count two counts of lewd and lascivious conduct. The defendant was charged with rubbing the complainant's breasts and vaginal area. The trial court found that the acts were essentially continuous and done in a very short amount of time and in the same location. It was clearly not interrupted by any break in time or intervening event. The State asked that State v. Perillo be overruled because touching two distinct intimate body parts, the breasts and vaginal areas, should be considered separate crimes as a matter of law. The court declined the invitation. State v. Carrolton (2010-441) (02-Dec-2011).

IMMEDIATE NOTIFICATION OF PUBLIC DEFENDER NOT REQUIRED WHEN ARRESTED PERSON REQUESTS ATTORNEY

*State v. Robitaille, 2011 VT 135. Full court opinion. PUBLIC DEFENDER ACT: OBLIGATION TO NOTIFY PD UPON DETENTION OR REQUEST FOR ATTORNEY. WAIVER OF MIRANDA RIGHTS: VOLUNTARINESS.

Conditional guilty plea to assault and robbery affirmed. 1) The police did not violate the defendant's right to counsel under the Public Defender Act and the Vermont Constitution by failing to notify a public defender immediately upon the defendant's detention, or even when the defendant requests an attorney when given the Miranda warnings, as long as the police refrain from interrogating him where, as here, only fifteen minutes passed before the defendant himself decided to waive his rights and speak with the police. The Court also rejected the defendant's implied argument that he had the right to the advice of an attorney before making the voluntary decision to waive. 2) The trial court validly found that the defendant knowingly, voluntarily, and intelligently waived his right to counsel, in light of his repeatedly initiating a conversation with the officer. The court's observation that the defendant had produced no evidence to contradict the plain and unequivocal averments in his signed written waiver did not indicate that the court had shifted the burden of proof to the defendant. State v. Robitaille (2010-078) (15-Dec-2011).

CRIMINAL COURT CAN ORDER RETURN OF LAWFULLY SEIZED PROPERTY

State v. Voog, 2012 VT 1. Full court opinion. MOTION TO STRIKE SURPLUSAGE. MOTION FOR RETURN OF PROPERTY: CRIMINAL COURT JURISDICTION OVER LAWFULLY SEIZED PROPERTY.

Denial of motion to strike surplusage from the information and affidavit, and to return property, after defendant pled guilty to simple assault and reckless endangerment, affirmed in part and reversed and remanded in part. 1) The defendant claimed that the

Department of Corrections was using the information and affidavit to increase his incarcerative level, based upon facts supporting a subsequently dismissed charge of first degree aggravated domestic assault. Although Rule 7(c) gives the court authority to strike allegations from an information, it does not grant authority to strike material from the affidavit, and in this respect the court's ruling was correct. As for the information, the State had already amended it to reflect only those charges to which the defendant pled guilty, and therefore on its face nothing in the information was irrelevant or surplusage, and so the ruling was correct in this respect as well. 2) The trial court denied the motion for return of property on the grounds that Rule 41 only permits the return of property seized unlawfully, and there was no claim here that the property was seized unlawfully. The Court disagrees: a criminal court has quasi in rem jurisdiction over property seized in a criminal investigation of a matter before it, and may settle the rights to that property as between the State and the defendant. 3) The defendant's claim that the case should be dismissed because the date of the notarization of the affidavit predates the events described therein was not adequately preserved for appeal. New arguments may not be raised in pleadings subsequent to the principal brief. State v. Voog (2010-369) (06-Jan-2012).

PROBATION CONTRACT WAS AMBIGUOUS ON COUNSELING REQUIREMENT, AND PAROLE EVIDENCE TO CONSTRUE IT WAS INADMISSIBLE

State v. Blaise, 2012 VT 2. Full court entry order. VIOLATION OF PROBATION: SUFFICIENCY OF THE EVIDENCE.

Violation of probation reversed. 1) The court erred in finding that the defendant had failed to attend and complete counseling as required by his probation officer when he left a counseling program, because he had entered it voluntarily, and had never been required by his probation officer to attend it. Although the officer testified that she had orally directed the defendant to attend this program, the written contract is not ambiguous and therefore parole evidence may not be used to construe it. 2) The court erred in finding that the defendant violated a condition of probation that he pay his fine on a schedule determined by his probation officer where the contract contained no schedule for payment, and there was no testimony that a payment schedule had been established. 3) The court erred in finding that the defendant failed to meet a probation condition that he work 100 hours at a community service job to the satisfaction of his probation officer, where there was no evidence that the probation officer had required the defendant to do so, and there was no evidence that the defendant had not completed community service work, merely that the defendant had failed to provide written verification of its completion, which was not a requirement of the contract. 4) These errors were not rendered harmless by the defendant's admission to committing a more serious breach of probation conditions which alone would support revocation of probation, because it cannot be known what the sentence would have been absent a finding of the violations which have been reversed. The sentence imposed on all of the violations was a global resolution that took into account all of the violations. Burgess and Reiber dissenting: The evidence indicates that the probation officer made clear to the defendant that as long as he stayed enrolled in the program, she would be satisfied. January 6, 2012. http://info.libraries.vermont.gov/supct/current/eo2010-293.html.

DISTURBING PEACE BY TELEPHONE REQUIRES ACTUAL ANONYMITY

*State v. Wyrocki, 2012 VT 7. Full court opinion. DISTURBING PEACE BY TELEPHONE: ANONYMITY REQUIREMENT.

Disturbing the peace by telephone reversed. The statute requires that the charged telephone calls have been "anonymous." This requirement could not be met where the recipient testified that she recognized the caller's voice, even though the caller may have disabled the caller ID function. January 26, 2012. http://info.libraries.vermont.gov/supct/current/op2010-326.html

JURY'S INTERNET RESEARCH RESULTS IN REVERSAL OF CONVICTION

State v. Abdi, 2012 VT 4. Full court opinion. EXTRANEOUS INFLUENCE ON JURORS – CAPACITY TO AFFECT RESULT; STATE'S BURDEN TO SHOW NO PREJUDICE. JUROR ACCESS TO INTERNET SOURCES: INSTRUCTION.

Aggravated sexual assault on a child reversed. During deliberations a juror conducted on-line research into Somalian culture and religion, and shared some of it with the other jurors. In resolving claims of exposure to extraneous prejudicial information, the court must conduct a two part inquiry. First, the court must determine if an irregularity occurred that had the capacity to affect the jury's result. This was not disputed, as the defense relied heavily upon aspects of Somalian culture and religion to explain the defendant's admission to the offense. Once this burden is met, the State must demonstrate beyond a reasonable doubt that the irregularity did not in fact prejudice the jurors against the defendant. The inquiry is an objective one, and jurors may testify to the factual circumstances surrounding their exposure to extraneous information, but not to whether the information influenced their verdict. Here, the trial court mistakenly applied a preponderance-of-the-evidence standard. Its decision was error in any event. The fact that only one juror reported the incident is not relevant, because if the incident influenced only one juror, reversal is still required. The information related directly to a subject that pervaded the trial from start to finish, Somali Bantu culture and its impact on the behavior and testimony of the trial witnesses. Therefore, it is impossible to conclude that outside information used by at least one juror to interpret the testimony of the Somali witnesses and to determine the credibility of these witnesses could have had no impact on the verdict. The Court notes that the trial court erred when it explicitly inquired of the jurors whether the information influenced their verdict. The Court also notes the increasing problem of jurors consulting the internet, and suggests a standard instruction on the point. January 26, 2012. http://info.libraries.vermont.gov/supct/current/op2010-255.html.

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."

DISMISSAL WITH PREJUDICE NOT REQUIRED WHERE STATE COULD NOT LOCATE WITNESS DESPITE DILIGENT EFFORTS

State v. Berres, three justice entry order. DISMISSALS WITH PREJUDICE: COMPLAINANT CANNOT BE LOCATED.

Dismissal of information without prejudice due to State's inability to locate complaining witness affirmed. Although a court may dismiss an information if it concludes that such dismissal will serve the ends of justice and the effective administration of the court's business, such dismissals with prejudice are limited to those rare and unusual cases where compelling circumstances require such a result to assure fundamental fairness. Where, as here, there was no prejudice to the defendant, no evidence of prosecutorial bad faith, and considerable diligence in the State's efforts to locate the complainant, there is no basis to overturn the trial court's denial of a dismissal without prejudice. http://www.vermontjudiciary.org/d-upeo/Microsoft%20Word%20-%20eo11-091.pdf

EXPERT TESTIMONY USUALLY REQUIRED IN INEFFECTIVE ASSISTANCE CASES

In re Tester, three-justice entry order. INEFFECTIVE ASSISTANCE: NEED FOR EXPERT TESTIMONY.

Summary judgment denying post conviction relief affirmed. The petitioner argued that his trial attorney's performance was ineffective because counsel failed to consult an expert on child interview techniques for the purpose of undermining the credibility of the complaining witness by demonstrating that the interview techniques improperly influenced the child's testimony. The petitioner presented no evidence in the trial court with respect to this point. He did not include any opinion to the effect that counsel's representation was inadequate for failing to consult an expert. A lawyer's lack of care may be demonstrated without expert opinion in only "rare situations" where the performance was so deficient that a lay person could recognize it as such. The asserted failure in this case does not rise to this level. There was no obvious deficiency in the interview techniques used. http://www.vermontjudiciary.org/d-upeo/Microsoft%20Word%20-%20eo11-136.pdf.

POST-ARREST BEHAVIOR PROPERLY RELIED UPON IN SENTENCING

State v. Trudeau, three-justice entry order. SENTENCING: RELIANCE ON OTHER BAD ACTS.

DUI affirmed. The trial court did not abuse its discretion when it relied upon the defendant's behavior when he was served with a new citation, when he used profanity and refused to sign the citation, kicked it, just missing one officer's hand, and flicked a lit cigarette toward that officer. The court found that this behavior deserved some kind of sanction, and sentenced the defendant to fifteen days of jail time to be served on weekends. The sentence was well within the statutory limit, and there was no dispute that the information relied upon was factually reliable, and that the defendant had an opportunity to rebut the officer's account of his behavior. The court may consider the defendant's behavior after arrest insofar as it informs the court about the defendant's character. http://www.vermontjudiciary.org/d-upeo/Microsoft%20Word%20-%20eo11-148.pdf.

ACTUAL INTENT TO USE DEADLY WEAPON NOT REQUIRED FOR AGGRAVATED ASSAULT

State v. Kriskov, three justice entry order. AGGRAVATED ASSAULT: INTENT TO USE THE DEADLY WEAPON NOT REQUIRED. SELF-DEFENSE: SUFFICIENCY OF THE EVIDENCE.

Aggravated assault affirmed. 1) Although aggravated assault requires being armed with a deadly weapon, threatening to use that deadly weapon, and a specific intent to threaten, it does not require an actual intent to use the deadly weapon. The defendant verbally threatened to cut his neighbor with a knife, while brandishing the knife. His intention to threaten another with a deadly weapon is as inescapable as it was explicit. 2) The evidence was sufficient to prove beyond a reasonable doubt that the defendant did not act in self defense, where witnesses testified that the neighbor did not have the bat at the time of the threat and was not overtly aggressive toward the defendant. http://www.vermontjudiciary.org/d-upeo/Microsoft%20Word%20-%20eo11-150.pdf.

MERE PRESENCE OF MANY POLICE OFFICERS DID NOT MEAN DEFENDANT WAS COERCED

State v. Gilman, three justice entry order. CONSENT TO MEET WITH POLICE: COERCION.

Denial of motion to suppress affirmed. The defendant argued that his response to the police coming to his home and requesting to see him, as a result of which evidence of a DUI was obtained, was coerced based on the totality of the circumstances, including the presence of several police officers in and around his home and police cruisers in the driveway. He argued that he had no choice given this overwhelming show of force, but absent any overt physical force,

implied threats, intimidating verbal commands or other coercive tactics, the mere presence of multiple officers does not support a finding of forcible police action.

http://www.vermontjudiciary.org/d-upeo/Microsoft%20Word%20-%20eo11-194.pdf.

CONCURRENT SENTENCE NOT REQUIRED FOR CRIME COMMITTED WHILE ON PAROLE

State v. Bain, three justice entry order. CONCURRENT AND CONSECUTIVE SENTENCES: CRIMES COMMITTED WHILE ON PAROLE.

Denial of motion to correct allegedly illegal sentence affirmed. The defendant argued that he had to be given a concurrent sentence after he was convicted of a crime committed while he was on parole. He points to 28 VSA § 554, which states that the parole board may permit any parolee who commits a crime while on parole and who is convicted and sentenced therefore to serve the sentence concurrently with the term under which he or she is paroled. However, at the time the defendant was sentenced for the later crime, he was no longer a "parolee", because his parole had been revoked. He was therefore subject to 13 VSA § 7032, which permits the court to impose either a concurrent or a consecutive sentence. January Term, 2012. http://www.vermontjudiciary.org/d-upeo/Microsoft%20Word%20-%20eo11-288.pdf.

DEFENDANT STANDING IN HIS OWN DOORWAY WAS NOT IN CUSTODY

State v. Mogerley, three justice entry order. CUSTODIAL INTERROGATION.

Order denying motion to suppress statements affirmed. The trial court did not err in determining that the defendant was not in custody at the time of the statements he seeks to suppress. He was standing in the entry way of his home, with two police officers who had arrived with an arrest warrant for someone who was not present. Smelling marijuana, the officers asked him how much was present in the house, and he said, a small amount. (A later search revealed two pounds). Although the conversation lasted half an hour, the principle incriminating statement was made within the first five minutes, and so the analysis focuses on that period of time. At that point, the duration of the encounter was relatively brief and the defendant was in his own home and was never told that he could not leave. The defendant's statement that his best choice was not to say anything, did not require the Miranda warnings because the circumstances were otherwise noncustodial. January Term 2012. http://www.vermontjudiciary.org/d-upeo/Microsoft%20Word%20-%20eo11-202.pdf.

Vermont Supreme Court Slip Opinions: Single Justice Rulings

HEARSAY OKAY IN DETERMINING CONDITIONS OF RELEASE, AND CONDITIONS RELATED TO VICTIMS AND WITNESSES NEED NOT BE LEAST RESTRICTIVE POSSIBLE.

State v. Winston, single justice bail appeal. CONDITIONS OF RELEASE: HEARSAY; LEAST RESTRICTIVE CONDITIONS; CONTACT WITH DEFENDANT'S CHILDREN.

Defendants, parents charged with unlawful restraint and cruelty to children for acts committed against two of their three children, appeal a condition of release prohibiting contact with all three of their children. 1) The court properly considered hearsay evidence in determining conditions of release. Although a court may only consider admissible evidence in determining whether the evidence of guilt is great in order to deny bail, this limitation does not apply to setting conditions of release. 2) The order was not required to be the least restrictive condition of release, because it was based upon the statutory subsection permitting the imposition of conditions of release preventing harassment or contact with a victim or potential witness. 3) This order was not effectively a termination of parental rights; it is a temporary measure pending a trial on the criminal charges. Dooley, J. http://www.vermontjudiciary.org/d-upeo/Microsoft%20Word%20-%20eo11-410.bail.pdf.

EVIDENCE SUPPORTED DENIAL OF BAIL IN DOMESTIC ASSAULT CASE

State v. Gorman, single justice bail appeal. NO BAIL ORDER: SUFFICIENCY OF EVIDENCE.

Defendant is ordered to be held without bail. 1) The evidence of guilt is great, as the complainant testified credibly to the defendant's violent attack on her, which was supported by photographs showing the resulting marks. 2) The defendant's release would pose a substantial threat of physical violence to the complainant, who testified credibly to many past assaults by the defendant. 3) There is no condition or combination of conditions of release which will reasonably prevent the physical violence, as the defendant has previously violated conditions of release concerning contact with the complainant, and as his proposal that he live with his 80 year old grandmother does not present a living situation in which anyone could prevent the defendant from continuing contact with the complainant. Nor is withholding the complainant's address a strategy which will prevent future contact, as they have friends and acquaintances in common, and the complainant has previously recanted, and has returned in the past to the defendant, and in this case has expressed her desire that he not get in trouble. Crawford, specially assigned. http://www.vermontjudiciary.org/d-upeo/eo11-314.bail.pdf.

United States Supreme Court Cases Of Interest

Thanks to NAAG for these summaries

Perry v. New Hampshire, 10-8974. By an 8-1 vote, the Court held that the Due Process Clause does not require a trial judge to screen eyewitness evidence for reliability pretrial when suggestive circumstances surrounding the identification were not arranged by law enforcement officers. The Court distinguished earlier cases that required such a pretrial judicial screening when police had orchestrated the suggestive circumstances by, for example, using an improper lineup.
[http://www.supremecourt.gov/opinions/11pdf/10-8974.pdf]

Smith v. Cain, 10-8145. By an 8-1 vote, the Court held that prosecutors violated *Brady v. Maryland* by failing to provide defense counsel with statements by the single eyewitness who linked petitioner to the crime that called into question the reliability of that identification. Specifically, the lead detective's notes, made the night of the murder and five days later, contain statements by the eyewitness stating that he could not identify the perpetrators and did not see any faces. These "undisclosed statements were plainly material."
[http://www.supremecourt.gov/opinions/11pdf/10-8145.pdf]

United States v. Jones, 10-1259. Without dissent, the Court held that federal agents conducted a search, within the meaning of the Fourth Amendment, when they installed a global positioning system (GPS) tracking device on the undercarriage of respondent's car and then monitored the car's movements for 30 days. Through a 5-Justice majority opinion, the Court held that "[t]he Government physically occupied private property for the purpose of obtaining information" and "[w]e have no doubt that such a physical intrusion would have been considered a 'search' within the meaning of the Fourth Amendment when it was adopted." The Court ruled that the "reasonable expectation of privacy" test announced in *Katz v. United States* is "not the sole measure of Fourth Amendment violations." A four-Justice concurring opinion disagreed with that "trespass-based rule," but concluded that the long-term monitoring that took place here was a search because it "involved a degree of intrusion that a reasonable person would not have anticipated."
[http://www.supremecourt.gov/opinions/11pdf/10-1259.pdf]

Criminal And Appellate Rule Changes

Vermont Rule of Criminal Procedure 18 has been amended to provide for venue in either the county of the offense or in any contiguous county. Initial appearances and arraignments, preliminary hearings in revocation of probation proceedings, and hearings to review bail or conditions of release after arrest upon a warrant for failure to appear in another county, may be conducted in any county. Venue for prosecutions for violations of conditions of pretrial release is in the county in which the conditions of release were imposed, or, if the defendant has been charged with a new offense (other than violation of conditions of pretrial release), in the county in which the offense occurred or any contiguous county.

http://www.vermontjudiciary.org/LC/Statutes%20and%20Rules/PROMULGATEDEMERGENCYVRCrP18.pdf

The Court recently ordered that records of search warrant requests, whether granted or not, be preserved and stored by the courts.

http://www.vermontjudiciary.org/LC/Statutes%20and%20Rules/PROMULGATEDA.O.43PreservationandStorageofSearchWarrantRecords.pdf

The Court has proposed a number of amendments to the Rules of Criminal Procedure. V.R.Cr.P. 16.2 would be amended to allow discovery materials to be disclosed to third parties if in furtherance of the preparation of the defense, and to permit the State to request a protective order for good cause shown. V.R.Cr.P. 26 would be amended to require that notice of prior bad acts be given at least thirty days before trial, or such greater time as the court may order. The rule currently requires that notice be given seven days before trial. V.R.Cr.P. 30 would be amended to permit parties to object to preliminary instructions, and to require that a written copy of the instructions be provided to jurors before they retire. V.R.Cr.P. 41 would be amended to provide procedures for the issuance of search warrants for the use of tracking devices. The rule would limit the time that such a device can be used to 15 days unless extended for one or more 30 day periods for good cause and probable cause.

http://www.vermontjudiciary.org/LC/Statutes%20and%20Rules/PROPOSEDVRCrP16_18_26_30_41.pdf

Request from the State Department

The State Department has requested to be notified whenever anyone is subject to a court order, such as a pretrial condition of release, condition of probation, or condition of parole, that the person not apply for or maintain a U.S. passport. If provided with a copy of the court order, the State Department can place a “lookout” in its database and can notify you if the person applies for passport services. Note that even if the person surrenders his or her passport to law enforcement or to the court, this alone may not prevent him or her from later applying for and possibly obtaining another passport. However, providing the State Department with a copy of the order will do so.

The notification should include the person’s name (including aliases), date and place of birth, and last known address; a copy of the court order indicating that the

person is forbidden from possessing or applying for a U.S. passport; all passport numbers and date of issuance (if known); and a contact officer with phone, e-mail, and fax numbers. This information should be sent to the Department of State's Passport Services, Office of Legal Affairs, by one of the following methods:

Email: CA-PTT-CourtOrders@state.gov
Fax: (202) 663-2654
Mail: Passport Services, Office of Legal Affairs
2100 Pennsylvania Ave. NW
Suite 300
Washington, D.C. 20037

You should also notify the office when the travel restrictions are no longer in effect.

You call obtain more information by calling the Passport Services Office of Legal Affairs at (202) 663-2662.

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. Computer-searchable databases are available for Vermont Supreme Court slip opinions back to 1985, and for other information contained in this newsletter. For information contact David Tartter at (802) 828-5515 or dtartter@atg.state.vt.us.