Criminal Justice Division
Vermont Attorney General's Office

Vermont Criminal Law Month

April - May 2010

Vermont Supreme Court Slip Opinions: Full Court Rulings

Includes three justice bail appeals

FAILURE TO SIGNAL TURN 100 FEET BEFORE CORNER JUSTIFIED STOP

State v. Fletcher, 2010 VT 27. TRAFFIC STOP: FAILURE TO SIGNAL TURN FOR 100 FEET BEFORE CORNER.

Full court published entry order. Denial of motion to suppress evidence seized during a traffic stop, and to dismiss the charges, affirmed. The motor vehicle stop was justified on the grounds that the driver failed to signal her turns during not less than the last 100 feet before a stop sign. The statute's use of the term "when required" did not indicate that a signal is only required when traffic conditions make it appropriate, but rather that it is required when the car is making a turn. The defendant's claim that the officer did not have the reasonable and articulable suspicion necessary to expand the traffic stop into a drug investigation is not addressed because it was not preserved for appeal. The conditional plea agreement referred only to a suppression issue, in the exact words of the motion that attacked only the applicability of the signaling a turn statute. The Court also suggests that the Legislature amend the statute, as a motorist who does not know which way to turn until he is at the intersection must either break the law or drive straight ahead. Doc. 2008-420, April 1, 2010.

INFERENCES ON INFERENCES ARE PERMISSIBLE

*State v. Godfrey, 2009 VT 29. Full court opinion. AGGRAVATED MURDER: SUFFICIENCY OF THE EVIDENCE; CROSS-EXAMINATION CONCERNING ALTERNATIVE PERPETRATORS.

Aggravated murder affirmed. 1) The evidence was sufficient to support the jury's finding of guilty. The State presented unambiguous DNA evidence and a confession from the defendant that established that he penetrated the victim and deposited semen in her sometime near the time of her death. There was also evidence that the person who penetrated her was also the person who murdered her: evidence that the penetration was nonconsensual – injuries to the vagina;

stretched out underwear; injuries to the victim's head and neck; the proximity of the penetration in time to death; evidence that the victim never stood up after penetration; the absence of any evidence of motive for the murder other than to cover up the sexual assault (the victim had money and jewelry which was not taken); the defendant's initial denials of any contact with the victim; and the absence of any evidence of any pre-existing relationship between the two. Although the defendant argued that the State's case rested upon inferences from inferences, the Court abandons any previous holdings that such inferences are impermissible. The sole question is whether the evidence sufficiently and fairly supports a finding of guilt beyond a reasonable doubt. The only special tests for inferences is that they must be reasonable, and any inferences made here by the jury were reasonable. 2) The trial court did not violate the defendant's constitutional rights when it limited his cross-examination of the investigating officer concerning evidence against three other suspects. The defendant was permitted to elicit testimony that there were other suspects who were excluded solely because their DNA did not match that found in the victim's body, based upon the investigators' assumption that whoever deposited the DNA was the murderer, and that if this assumption was incorrect he had made a "terrible mistake." The court was not required to permit cross-examination about particular suspects in the absence of any evidence of motive, opportunity, and some direct connection to the crime. Those requirements were not met here, or, if met, were met through inadmissible hearsay. Doc. 2008-217, April 9, 2010.

HOLD WITHOUT BAIL ORDER JUSTIFIED

State v. Brillon, 2010 VT 48. Three justice bail appeal.

DENIAL OF BAIL. The defendant is awaiting retrial on a charge of aggravated domestic assault, and was ordered held without bail. The record supports the court's decision to hold without bail. First, the evidence of guilt is great, in view of the fact that the defendant was already convicted once for this crime. Since the crime carries a potential life sentence, the presumption of imprisonment under § 7553 applies. The court also had ample support for its conclusion that the defendant would not be compliant with any conditions of release and that, if released, he would pose a risk to the public. This was based upon a long history of disobeying court orders. Doc. 2010-157, May 5, 2010.

EMERGENCY SEARCH NOT JUSTIFIED BY REPORT OF ACCIDENT

State v. Ford, 2010 VT 39. Full court opinion. SEARCHES: EMERGENCY ASSISTANCE EXCEPTION.

Conditional plea to possession of marijuana and possession of narcotics reversed; denial of motion to suppress found to have been error. When a police officer walked around the defendant's house and peered into a lighted basement window, seeing marijuana plants which were used to obtain a search warrant, she invaded the curtilage of his home and effected a search without a warrant. The fact that a person living at that house had been reported to have been in a car accident, and that the officer was attempting to ensure that he was safe and uninjured after rescue personnel were unable to locate the accident, does not require a different result, as the search here

failed to meet two of the three prongs of the test for the emergency assistance exception to the search warrant requirement. 1) First, there was no showing of an immediate need for police assistance at the home, because the time of the call reporting the accident was never established, and it was not established that the caller had claimed any physical injuries. Nor was there any evidence presented as to why the police thought the motorist might be at the house in Williamstown, a prior address for the person reported to have been in the car accident, which was at least forty miles away from the site of the reported accident. The house was dark, with a snowed-in car in the driveway and no sign of inhabitants beyond footprints more recent than the last snowfall. There was no answer to the officer's repeated knocking on the most accessible door. Absent any evidence that the person reported to have been in the accident had arrived at the residence between the time of the call and the dispatch of the officer, there was no showing of an immediate need for police assistance. 2) The third prong of the test, requiring some reasonable basis, approximating probable cause, to associate the emergency with the area or place to be searched, was also not met. The State was unable to show a connection between the home and a purported accident scene many miles away. Reiber and Burgess dissent: The majority holds today that when a police officer is informed of a serious car accident and sent to the accident victim's last known address, the officer should sometimes risk leaving the victim dying in his home rather than investigating the situation further. The majority requires accident victims to leave visible signs, such as blood tracks or a wrecked vehicle, before a police officer, absent any evidence of pretense, can lawfully follow a path around a house and take a cursory look in a window for signs of a person thought to be injured. Doc. 2008-490, May 14, 2010.

DEFENDANT WAIVED OBJECTION TO FACTS IN PSI

State v. Allen, 2010 VT 47. Full court published entry order. OBJECTION TO FACTS IN PSI: WAIVER. SENTENCING FACTORS: SPECIFIC REFERENCE BY COURT NOT REQUIRED.

Sentence of eight to fifteen years following guilty plea to lewd and lascivious conduct with a child affirmed. 1) The prosecution explained to the court that it had agreed to amend the charge from aggravated sexual assault due to the uncertainty in proving penetration at trial based on the victim's testimony and the defendant's challenge to the admissibility of his own admission to penetration. However, the prosecution did not admit that it could not prove penetration, and both the victim and the defendant had stated that penetration had occurred, as indicated in the PSI, and the defendant's lengthy challenge to the PSI did not mention penetration. At sentencing the defendant did not raise any factual objections to the PSI. Thus, the defendant waived any objection on appeal to the court's consideration of the penetration evidence before it. 2) The court adequately considered all sentencing factors, including rehabilitation and treatment. The court was not obliged to specifically address each factor. 3) The State's motion to strike portions of the defendant's printed case that refer to data compiled by the Vermont Center for Justice Research, which were not part of the record below, is dismissed as moot. Doc. 2009-079, May 12, 2010.

COLLATERAL CHALLENGE TO PROBATION CONDITIONS PROHIBITED

State v. Amidon, 2010 VT 46. PROBATION VIOLATION: SUFFICIENCY OF THE EVIDENCE; WAIVER; COLLATERAL CHALLENGES TO CONDITIONS.

Full court published entry order. Revocation of probation and of suspended sentence for sexual assault affirmed. 1) The evidence was sufficient that the defendant had participated in a friendship with a person who had children under the age of 18, where the defendant told the probation officer that the woman in question had three children who lived with their father in New Hampshire. Even though he did not specify that the children were under 18, this was a reasonable inference, since there was no reason for the probation officer to have asked about children except for the probation condition, and in this context, the defendant's use of the term "children" can be interpreted to mean children under the age of 18. 2) In any event, this issue was waived for not having been raised below. Although this court has allowed sufficiency of the evidence arguments to be made for the first time on appeal where the evidence question is critical to the revocation, here the defendant violated three other conditions of his probation, and since one probation violation can be a sufficient ground for revocation, the defendant's lone challenge to one of four violations does not implicate the validity of the entire proceedings. 3) The defendant's challenges to the probation conditions as having no nexus to the underlying conviction, and unduly restricting his First Amendment right of association, are barred because a probationer may not raise a collateral challenge to a probation condition that he was charged with violating, where the challenge could have been raised on direct appeal from the sentencing order. However unlikely to prevail, given defendant's agreement to these conditions as part of his original plea bargain, these challenges should have been raised on direct appeal from his sentencing order. Doc. 2009-143, May 18, 2010.

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."

LETTERS SUPPORTING DEFENDANT DID NOT REQUIRE NEW SENTENCE

State v. Vargas, three-justice entry order. SENTENCE RECONSIDERATION.

Denial of sentence reconsideration affirmed. The court did not abuse its discretion in concluding that the letters offered by the defendant in support of his motion, by family

members attesting to his good character or innocence, did not warrant a change of sentence. Doc. 2009-298.

EVIDENCE OF OPERATION WAS SUFFICIENT

State v. Parizo, three-justice entry order. CIVIL SUSPENSION: EVIDENCE OF ACTUAL OPERATION.

Civil suspension affirmed. The trial court was entitled to believe the defendant's first statement to the police, that he drove his car to his girlfriend's house (while intoxicated), rather than his later claims, and the testimony of his brother, that he was driven there. Doc. 2009-099, April 1, 2010.

JUDGE PROPERLY FOUND JUVENILE HAD MOTIVE TO LIE

*In re D.H., three-justice entry order. PRESUMPTION OF INNOCENCE: JUVENILE'S MOTIVATION TO LIE. SUFFICIENCY OF THE EVIDENCE: SEXUAL ASSAULT.

Finding of delinquency affirmed. 1) The trial court did not violate the presumption of innocence when it stated that the juvenile had a greater motivation to lie than the complainant. This was not a blanket presumption that the juvenile was guilty and therefore that his protestation of innocence was false, but rather was a much more narrow finding – that as between the juvenile and the complainant, the complainant was more credible, based upon several considerations, including the motive each witness had to lie. 2) The juvenile's claim that the court's findings were not supported by the evidence was not demonstrated by the juvenile's retelling of the evidence and taking a different view of what it tended to prove. 3) The delinquency adjudication was supported by sufficient evidence. The complainant's testimony was sufficient to establish that D.H. assaulted her, since she testified to all of the elements of the offense. Doc. 2009-224, May 21, 2010.

DEFENDANT IN JAIL CAN CONSENT TO SEARCH

State v. Gauthier, three-justice entry order. SEARCHES: CONSENT. IMPEACHMENT OF DEFENDANT.

Grand larceny and burglary affirmed. 1) The trial court did not abuse its discretion in denying a motion to suppress evidence found in the defendant's home. The police testified that the defendant had consented to the search, and although the defendant denied this, the court was well within its discretion in finding the officer credible. The fact that the defendant was in jail at the time of the consent did not mean that the consent was involuntary, as there was no evidence or claim of any coercion. 2) The trial court did not abuse its discretion in admitting a telephone conversation between the defendant and his girlfriend, recorded while he was incarcerated. The defendant first raised the subject of witness manipulation, and therefore the prosecution was entitled to ask him about the conversation and, when he denied it, to play the tape recording. Doc. 2009-234, May 21, 2010.

Vermont Supreme Court Slip Opinions: Single Justice Rulings

CAR ON BLOCKS CAN BE CONDITION OF RELEASE

State v. Ashline, single justice bail appeal. CONDITION OF RELEASE: CAR ON BLOCKS.

Denial of motion to strike condition of release affirmed. The condition required the defendant to place her vehicle on cement blocks. The trial court's findings regarding the defendant's extremely high level of intoxication, her particularly dangerous driving, and the likelihood that she would drive given her rural address and job duties, adequately support the requirement. This is not a situation where an entire family relies on one car for transportation, or where compliance would be so onerous as to amount to an abuse of the trial court's wide discretion. Doc. 2010-108 (March 22, 2010, Johnson, J.).

CONTACT AND COUNSELING CONDITIONS OF RELEASE WERE PROPER

State v. Mahoney, single justice bail appeal. CONDITIONS OF RELEASE: CONTACT, COUNSELING.

Condition of release precluding in-person contact with sister, girlfriend, and seven-month-old daughter, affirmed, as well as requirement that defendant attend substance abuse counseling as a condition precedent to resuming such contact. Given the ability of the defendant to contact these persons through telephone, e-mail, written and third person means, the defendant's violence towards the sister and girlfriend in the presence of his daughter, and the information that the defendant's conduct was related to his substance abuse, the conditions of release are supported by the record. Doc. 2010-104 (March 25, 2010, Dooley, J.).

CAR ON BLOCKS CAN NOT BE CONDITION OF RELEASE

State v. Kurtz, single justice bail appeal. CONDITION OF RELEASE: CAR ON BLOCKS.

Condition of release that defendant's truck be placed on blocks is reversed. The statutes provide a specific procedure for the immobilization of a motor vehicle after a second or subsequent operation of a motor vehicle while under the influence. Had the Legislature intended immobilization to be available as a condition of release, surely they would have added that circumstance to their detailed crafting of the immobilization process after conviction. Further, the order relied upon two points which are not supported by the record: first, that the owner of the pickup truck "tolerated" the defendant's use of it, and second, that the owner knew of the defendant's use of the truck on the day in question, or that he was intoxicated at the time. Doc. 2010-113 (March 30, 2010, Skoglund, J.).

DENIAL OF STAY PENDING APPEAL OF 30 DAY SENTENCE WAS ABUSE OF DISCRETION

State v. Chandler, single justice bail appeal. STAY PENDING APPEAL.

Trial court's denial of stay of sentence pending appeal reversed. The defendant was sentenced to 29 to 30 days to serve. In denying the stay, the trial court failed to consider the length of the sentence, and the defendant's record of appearance. The short length of the sentence means that the defendant would have served his full prison term before his appeal is heard, unless granted a stay. All parties agreed that the defendant did not present a risk of flight. Under these circumstances, the denial of the stay would be reversed. Doc. 2010-135, April 12, 2010.

Legislative Update

13 V.S.A. § 4503 has been amended to permit a defendant to waive the statute of limitations, in response to In re Jones, 2009 VT 113, holding that the statute may not be waived even in connection with a plea agreement. The statute now reads:

> (a) If a prosecution for a felony or misdemeanor, other than arson and murder, is commenced after the time limited by section 4501 or 4502 of this title, such proceedings shall be void.
>
> (b) If a defendant knowingly and voluntarily waives the statute of limitations in writing and with the consent of the prosecution, the court shall have jurisdiction over the offense and the proceedings shall be valid.

23 V.S.A. § 1099 has been added to prohibit texting while operating a moving motor vehicle on a highway. A first violation carries a fine of $100, and second or subsequent violations carry a fine of $250.00 if within a two year period. Learner's permits will be suspended for 30 days for any violation. In addition, children under the age of 18, not just under the age of 16, must be properly restrained when in a motor vehicle, and persons 18 and over must also be properly restrained, but for the latter, enforcement is only permitted if the vehicle is stopped for a suspected violation of another traffic offense, and the operator is required to pay a penalty for another traffic offense. Persons under 18 may not use cell phones while operating a moving motor vehicle on a highway.

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