Criminal Division
Vermont Attorney General's Office

Vermont Criminal Law Month

April - May 2013

Vermont Supreme Court Slip Opinions: Full Court Rulings

Includes three justice bail appeals

TRIAL DELAYS ATTRIBUTED TO DEFENDANT

*State v. Turner, full court opinion. 2013 VT 26. SPEEDY TRIAL DELAYS ATTRIBUTED TO DEFENDANT.

Unlawful restraint affirmed. A delay of twelve months from the date of arraignment to the date of the speedy trial complaint, and six months before the conclusion of the first trial, was sufficiently lengthy to require consideration of the additional factors used in determining whether a speedy-trial violation exists. The reasons for the delay do not weigh in favor of the defendant, as they involved the completion of pretrial hearings and the discovery process, not the commencement of hearings. These delays were attributable either to the defendant directly or through his attorney. The defendant did not aggressively assert his right to a speedy trial. He never demanded an immediate trial, did not oppose extensive discovery, did not oppose original counsel's motion to withdraw, and understood that replacing counsel would delay his trial. Finally, the defendant's failed to demonstrate any prejudice from the delay. Burgess, with Reiber, concurring: Would consider the facts of the case in determining whether the initial delay was presumptively prejudicial, rather than just looking at the passage of time. Here, there is no basis to conclude that the State failed in any respect to prosecute this case with its customary promptness, and thus no grounds to conclude that the delay was presumptively prejudicial necessitating any further inquiry. Doc. 2011-140, April 12, 2013. http://info.libraries.vermont.gov/supct/current/op2011-140.html

HIGHER MINIMUM SENTENCE THAN STATUTORY MAXIMUM, IMPOSED UNDER HABITUAL OFFENDER ACT, WAS NOT PLAIN ERROR.

State v. Carpenter, full court opinion. 2013 VT 28. HABITUAL OFFENDER ACT: IMPOSITION OF HIGHER MINIMUM THAN STATUTORY MAXIMUM FOR UNDERLYING OFFENSE; PLAIN ERROR.

Violation of an abuse-prevention order, five misdemeanors, and sentencing under habitual offender act, affirmed. The defendant argues that the imposition of a

five year minimum on the habitual-offender VAPO count is unlawful because it exceeds the three year statutory maximum for VAPO. He argues that the habitual offender act authorizes the imposition of a maximum sentence up to life, but not the enhancement of a minimum sentence beyond the statutory maximum otherwise provided for by the underlying offense. The defendant failed to raise this issue at sentencing. Therefore it is reviewed only for plain error, which does not appear here. Assuming that the trial court's application of the habitual offender act was erroneous, it does not appear patently so from the language of the statute. Further, both the plea agreement here and the offenses pled to permitted a potential minimum sentence of more than three years. Robinson, concurring: If the trial court had sentenced the defendant to two years more minimum time than actually authorized by law, it would have been plain error. Agrees that there is no plain error for a different reason: there was no error at all. The habitual offender statute replaces the statutory term for the fourth and subsequent felony convictions. Docs. 2011-254 and 255, April 12, 2013.
http://info.libraries.vermont.gov/supct/current/op2011-254.html

USE OF PRIOR CONVICTIONS IN BAIL DECISION DID NOT RESULT IN BEING "IN CUSTODY UNDER SENTENCE" IN ORDER TO CHALLENGE THOSE CONVICTIONS IN A PCR

In re Russo, 2013 VT 35. Full court opinion. POST-CONVICTION RELIEF: IN-CUSTODY REQUIREMENT.

Dismissal of post-conviction relief petition for lack of jurisdiction affirmed. The petitioner is being held without bail on a charge of aggravated assault. He alleges that the trial court "used" his previous convictions for DUI and violation of conditions of relief in deciding to hold him without bail, and therefore that he is "in custody under sentence" for those convictions, as required by 13 V.S.A. sec. 7131, and can bring a PCR petition challenging them, even though he has fully served the sentences on those charges. A person is considered to be in custody under sentence if he suffers a significant restraint on personal liberty as a direct result of the challenged conviction. But not every collateral consequence associated with a conviction will trigger jurisdiction in a PCR proceeding. Here, the convictions that the petitioner attacks played a minimal, if any, role, in the court's decision to hold petitioner without bail. Nor does the fact that the challenged convictions appeared in the same criminal docket as the current offense for which he is being held without bail change the outcome. Robinson, with Dooley, dissenting: Does not doubt that petitioner faces a steep uphill battle in showing the necessary causal relationship between the convictions he challenges and his hold-without-bail status, but would not dismiss the case on the pleadings; would leave the issue for determination on a motion for summary judgment. Doc. 2011-004, May 24, 2013.
http://info.libraries.vermont.gov/supct/current/op2011-004.html

PETITIONER RECEIVED ALL DUE PROCESS REQUIRED WHEN PUBLIC DEFENDER WITHDREW FROM PCR

*In re Kimmick, 2013 VT 43. Full court opinion. PCR: WITHDRAWAL OF COUNSEL: DUE PROCESS CONCERNS. INEFFECTIVE ASSISTANCE OF COUNSEL: LACK OF PREJUDICE.

Denial of petition for post-conviction relief affirmed. 1) The petitioner argued that the court should not have permitted his attorney to withdraw from the PCR petition on the grounds that it lacked merit, where counsel had expended considerable time, effort, and resources investigating the claims before moving to withdraw, and therefore the petitioner had acquired a property interest that afforded protection from arbitrary action. The Court did not need to decide the merits of this argument, as the record showed that the court's decision to grant counsel's motion to withdraw was not arbitrary or uniformed, and fully satisfied whatever minimal due process protections against unreasoned action a petitioner in these circumstances might enjoy. Counsel regularly apprised the court of his efforts and litigation strategies on behalf of the petitioner, explained that he could not locate an expert to support the claims of ineffective assistance, and indicated that he would depose trial counsel as an alternative means of attempting to establish a basis for the claims. Following the deposition, counsel further informed the court that he could find no colorable claims and that this conclusion was shared by a second, experienced attorney who had reviewed the record and by the Defender General's Office. Other actions taken by counsel are detailed in the opinion. 2) There is no inconsistency between permitting counsel to withdraw and finding that the petitioner had made a sufficient showing for the payment of an expert witness, as occurred here. The assignment of counsel and the provision of services are treated separately, so that waiver or denial of one does not preclude entitlement to the other. 3) The petitioner argued that he was denied effective assistance of counsel when his attorney threatened to withdraw if the petitioner or other witnesses testified at sentencing about the victim's alcohol abuse and violent propensities. There was no showing of prejudice where substantial information on this topic was presented to the sentencing court. Any additional testimony on the subject by petitioner or others would have been cumulative and of little additional effect. Dooley, concurring: Believes that appointed counsel should always take the steps taken in this case before being permitted to withdraw. Believes that the delays in the representation decision for PCRs remains unacceptable for any justice system. Burgess, with Bent, concurring: Would hold that the petitioner's rejection of an offer for resentencing – all of the relief available to him- rendered continued litigation of his claim frivolous and wasteful, if not moot. Doc. 2011-378, June 21, 2013.

http://info.libraries.vermont.gov/supct/current/op2011-378.html

STATE HAD NO RIGHT TO APPEAL FROM DISMISSAL OF HABITUAL OFFENDER ENHANCEMENT

State v. Durham, full court entry order. JURISDICTION: APPEAL FROM DISMISSAL OF HABITUAL OFFENDER ENHANCEMENT.

Defendant's motion to dismiss State's appeal for lack of jurisdiction is granted. The trial court dismissed an habitual offender penalty enhancement, and the State sought to appeal that dismissal pursuant to 13 V.S.A. sec. 7403(b), which permits the State to appeal from an order dismissing an indictment or information as to one or more counts. The habitual offender enhancement is not a separate offense; rather it provides defendant notice of a potential penalty enhancement. Doc. 2013-096, May Term 2013.
http://www.vermontjudiciary.org/d-upeo/eo13-096.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."

EVIDENCE OF POSSESSION OF CHILD PORNOGRAPHY WAS SUFFICIENT

*State v. Brandt, three-justice entry order. JUDGMENT OF ACQUITTAL: FAILURE TO PRESERVE CLAIM FOR APPEAL. POSSESSION OF CHILD PORNOGRAPHY: SUFFICIENCY OF THE EVIDENCE OF POSSESSION.

Possession of child pornography affirmed. 1) The defendant moved for judgment of acquittal at the close of the State's case, but failed to reassert the claim at the end of the trial or in a post-verdict motion, and therefore failed to preserve the claim for review on appeal. 2) The defendant's motion for a new trial on the ground that the verdict was against the weight of the evidence was insufficient to preserve the claim made on appeal that the court erred in denying his motion for judgment of acquittal. 3) Denial of the motion was not plain error. There was evidence that the video was located within a folder bearing the defendant's nickname, on a laptop computer belonging to the defendant. There was evidence that the defendant acknowledged having downloaded and viewed child pornography on the computer in question into the folder labeled Slim. The defendant was the only person, apart from his wife, identified as having access to the computer on the date that the video was placed in the folder, and the jury was entitled to credit the wife's testimony that she was unaware of the video until she found it there. This was more than sufficient to prove that the defendant possessed the video. The defendant's claims, that someone else may have accessed the computer or altered the date that the video was placed in the folder, does not undermine the judgment. Doc. 2012-175, April 10, 2013. http://www.vermontjudiciary.org/d-upeo/eo12-175.pdf

COUNSEL'S FAILURE TO OBJECT TO ADMISSION OF ADMISSIBLE EVIDENCE WAS NOT INEFFECTIVE ASSISTANCE

In re Rheaume, three-justice entry order. INEFFECTIVE ASSISANCE OF COUNSEL: FAILURE TO OBJECT TO ADMISSIBLE EVIDENCE.

Summary judgment denying petition for post-conviction relief affirmed. The petitioner argued that his attorney was constitutionally ineffective for failing to object to the admission of certain evidence

at the hearing on his charge of violation of probation. Because the evidence was admissible as a matter of law, the petitioner failed to present a prima facie case that his counsel's performance fell below the prevailing standard. Doc. 2012-354, April Term 2013.
http://www.vermontjudiciary.org/d-upeo/eo12-354.pdf

RELEASE CONDITION LIMITING CONVERSATIONS WITH WIFE WAS JUSTIFIED

State v. Muldowney, three-justice entry order. RELEASE CONDITION: INTERFERENCE WITH MARITAL RELATIONSHIP.

Condition of release prohibiting defendant from discussing with his wife the pending case and two of their children, is affirmed. The condition is justified because the wife is a witness in the case, and the purported acts took place during the pendency of the marriage and while she was physically present in the household. One of the children is the putative victim, the other of is in foster care stemming from an earlier complaint, and neither is so young as to render them unlikely as potential witnesses. The condition does not unduly interfere with the marital relationship. Doc. 2013-138, April Term 2013.
http://www.vermontjudiciary.org/d-upeo/eo13-138.pdf

EVIDENCE SUPPORTED CONVICTION FOR SALE OF COCAINE

*State v. Richardson, three-justice entry order. SALE OF COCAINE: SUFFICIENCY OF THE EVIDENCE.

Two counts of sale of cocaine affirmed. The evidence was sufficient to support the judgment of conviction. Although the defendant argued that the informant was inherently untrustworthy, assessing the witness' credibility was an issue solely for the jury's determination. And the evidence was sufficient for the jury to find that it was the defendant, and not another man sitting with him, who placed the cocaine under a napkin while the informant was briefly away from the table. The circumstantial evidence included that the informant arranged the meeting with the defendant; the cocaine was under a napkin in front of the defendant, and the defendant took the money which the informant placed under the same napkin. Doc. 2012-238, May Term, 2013.
http://www.vermontjudiciary.org/d-upeo/eo12-238.pdf

COURT DID NOT RELY SOLELY UPON AN ELEMENT OF THE OFFENSE IN IMPOSING MAXIMUM SENTENCE

State v. Whitney, three-justice entry order. SENTENCING: DISCRETION OF COURT.

One count of conspiracy to murder and one count of accessory after the fact affirmed following guilty plea. The defendant argues that the only reason the trial court gave for imposing the maximum sentence – that the defendant could have backed out of the murder plan at any time – cannot be an aggravating factor for the crime of

conspiracy, because if he had done so, there would have been no conspiracy at all. In other words, the defendant argues, the court imposed the maximum sentence simply because he committed that crime. However, the sentencing court plainly relied upon more than that fact, including that the defendant's conduct was calculated, done solely out of greed, and not in the heat of passion. The sentence was therefore well within the trial court's broad discretion. Doc. 2012-282, May Term, 2013. http://www.vermontjudiciary.org/d-upeo/eo12-282.pdf

COURT'S ERRONEOUS STATEMENT OF STANDARD OF PROOF IN PCR WAS HARMLESS

In re Combs, three-justice entry order. PETITIONER FOR POST-CONVICTION RELIEF: STANDARD OF PROOF.

Denial of petition for post-conviction relief affirmed. The petitioner argued that his attorney was deficient in failing to seek a stipulation from the prosecution that he was legally insane at the time of the offense. His expert testified that such a stipulation was reasonably likely, but the state's expert testified that such an agreement was unlikely. The trial court found the state's expert more persuasive, as well as other evidence indicating that the prosecutor remained focused on an eventual prosecution during the period of the petitioner's hospitalization for mental illness. On appeal, the petitioner argues that the trial court used an incorrect standard proof, stating that a "reasonable probability," the standard required by Strickland, suggests "something better, or more than a 1-in3 chance, but less than a 50.1% probability." The Supreme Court agrees that this observation by the trial court was "unnecessary, unsupported, and unprecedented." There is no reason, however, to conclude that it was anything other than harmless, given the trial court's otherwise clear and faithful application of the Strickland standard. The trial court found a less than 1-in 10 chance that the prosecutor would have stipulated to insanity. The petitioner also argued that the state's expert relied on the incorrect preponderance standard, but the trial court relied upon the expert's reasoning, not his underlying burden of proof standard. Doc. 2012-440, May Term, 2013. http://www.vermontjudiciary.org/d-upeo/eo12-440.pdf

PETITIONER FAILED TO SHOW CAUSE FOR SUCCESSIVE PCR PETITION

*In re Laws, three-justice entry order. POST-CONVICTION RELIEF: SUCCESSIVE PETITIONS.

Dismissal of third post-conviction relief petition affirmed. The trial court did not err in ruling that the petitioner failed to show cause why he could not have raised his claim in an earlier petition. Further, the evidence the petitioner relies upon fails to demonstrate actual, rather than possible, prejudice, insofar as it was neither exculpatory nor relevant. Doc. 2013-022, June Term, 2013. http://www.vermontjudiciary.org/d-upeo/eo13-022.pdf

EVIDENCE OF VIOLATION OF NO STALKING ORDER WAS SUFFICIENT

State v. Amidon, three-justice entry order. SUFFICIENCY OF THE EVIDENCE: STALKING.

Conviction for violation of order against stalking affirmed. There was no error in the denial of the defendant's motion for judgment of acquittal. The evidence was sufficient for a jury to find that the defendant had contact with the subject of the order. Furthermore, the grant of a new trial based on the weight of the evidence is an exceptional remedy that should be granted only where the evidence preponderates heavily against the verdict and a serious miscarriage of justice would otherwise result. That is not the case here. Doc. 2012-291, June Term, 2013. http://www.vermontjudiciary.org/d-upeo/eo12-291.pdf

EVIDENCE OF INTENT IN LEWD AND LASCIVIOUS CASE WAS SUFFICIENT

State v. Berard, three-justice entry order. LEWD AND LASCIVIOUS CONDUCT: SUFFICIENCY OF EVIDENCE OF INTENT. PRIOR BAD ACTS ADMISSIBLE TO REBUT CLAIM OF NO INTENT: WAIVED BY FAILURE TO MAKE ARGUMENT RE INTENT.

Conviction of lewd and lascivious conduct affirmed. 1) The evidence was sufficient to show that the defendant acted with the intent of gratifying his sexual passion or desires when he engaged in unusually lengthy and repetitive kisses preceding the inherently suggestive "French kiss" that served as the basis for the charge; used a game as a cover for his behavior; and initially denied the allegation, then accused the child of inserting her tongue in his mouth, and finally threatened to subject her to the stress and embarrassment of trial if her mother pursued the allegation. 2) The defendant argues that the court erred in ruling that the State would be allowed to reopen the evidence to adduce certain prior-bad-act evidence if the defendant disputed his intent in closing argument. This argument was waived because the defendant did not make the argument that would trigger introduction of the bad act evidence, and the evidence was not admitted. Doc. 2012-232, June Term, 2013. http://www.vermontjudiciary.org/d-upeo/eo12-232.pdf

United States Supreme Court Cases Of Interest

Thanks to NAAG for these summaries

Missouri v. McNeely, 11-1425. The Court held "that in drunk-driving investigations, the natural dissipation of alcohol in the bloodstream does not constitute an exigency in every case sufficient to justify conducting a blood test without a warrant." Instead, the Court will continue to look at the totality of the circumstances to determine whether the facts of the case merit an exception to the warrant requirement, although the "metabolization of alcohol in the bloodstream and ensuing loss of evidence are among the factors" that should be considered.
http://www.supremecourt.gov/opinions/12pdf/11-1425_cb8e.pdf

Maryland v. King, 12-1207. By a 5-4 vote, the Court held that the Fourth Amendment allows a state to collect and analyze DNA from people arrested and charged with

serious crimes. The Court ruled that because arrestees are already in valid police custody and charged with serious crimes, the proper inquiry is the reasonableness of the intrusion. And the Court concluded that intrusion is reasonable because the governmental interests ─ in processing and identifying persons in their custody, ensuring the safety of jail staff, ensuring that the accused show up at trial, and assessing the danger to the public when making bail determinations ─ outweigh the minimal intrusion of taking a cheek swab to obtain the DNA.
http://www.supremecourt.gov/opinions/12pdf/12-207_d18e.pdf

Salinas v. Texas, 12-246. During a voluntary interview with a police officer regarding a murder, petitioner answered many questions but declined to answer a specific accusatory question; the prosecution argued at trial that petitioner's failure to answer suggested he was guilty. The Court held that the Fifth Amendment's Self-Incrimination Clause did not bar the prosecution from using petitioner's silence against him. A three-Justice plurality reasoned that, as a general matter, a person who wishes to rely on the privilege against self-incrimination must expressly invoke it; and neither of the exceptions to that general rule applied here. Two Justices (Scalia and Thomas) concurred in the judgment based on their view that Griffin v. California, 380 U.S. 609 (1965), was wrongly decided and that prosecutors and judges are entitled to comment on defendants' exercise of their Fifth Amendment privilege.
http://www.law.cornell.edu/supremecourt/text/12-246

Alleyne v. United States, 11-9335. By a 5-4 vote, the Court overruled Harris v. United States, 536 U.S. 545 (2002), and held that a jury must find beyond a reasonable doubt any fact that increases the mandatory minimum sentence for a crime. In Apprendi v. New Jersey, 530 U.S. 466 (2000), the Court held that "[o]ther than the fact of prior conviction, any fact that increases the penalty for a crime beyond the statutory maximum must be submitted to a jury and proved beyond a reasonable doubt." The Court here concluded that mandatory minimums increase the penalty for a crime and are therefore subject to the Apprendi rule.
http://www.supremecourt.gov/opinions/12pdf/11-9335_b8cf.pdf

Criminal And Appellate Rule Changes

a. *Order Promulgating Emergency Amendments to Rule 30 of the V.R.A.P.*

The Court has promulgated amendments to the rules of appellate procedure. The major change, effective July 1, is to the printed case, Rule 30. The court is once again requiring paper copies. Eight paper copies should be filed in addition to the electronic (PDF) version. No printed case is required for cases with an electronic case file.

The rule also addresses a common problem with PDFs: the electronic pagination does not

match the paper pages. For example, if an electronic reader wants to view page "30" of the printed case, and enters "30" in the PDF page search box, the search function will take the reader to the 30th consecutive page of the PDF, which, because of the cover and table of contents, may be page "25." It makes it difficult for judges and clerks who are reading the briefs and printed case in electronic form.

This problem can be fixed by adjusting the pagination of the PDF. This is sometimes called logical page numbering, and it is already required for federal ECF filings. With logical page numbering, the page search function will properly recognize "30" or "ii" or "cover." PDFs prepared with logical page numbering, which makes the "electronic and paper page numbers consistent," will satisfy the new Rule 30.

For now, the Court is also permitting a lo-tech fix as an alternative: numbering the printed case pages starting with the **cover** as page "1." A supplemental printed case must be prepared the same way.

The other rule changes are largely stylistic, with a few other minor changes described below. Those changes take effect September 3 but **the new PC rule takes effect July 1.**

http://www.vermontjudiciary.org/LC/Statutes%20and%20Rules/PROMULGATEDEMERGENCYVRAP30_June11%202013%20with%20dissent.pdf

b. *Order Promulgating Restyled V.R.A.P.*

The restyled Vermont Rules of Appellate Procedure adopt the format and approach of the restyled Federal Rules of Appellate Procedure adopted in 1998. The restyling is not intended to change the meaning of any rule but is intended to provide a more accessible format for the rules and to simplify them by eliminating ambiguous or archaic language and adopting a more straightforward style. A few substantive changes in connection with the restyling are delineated below:

The docketing statement previously incorporated in Rule 3 is no longer part of the rule. It will be available on the Vermont Judiciary website.

Rule 5(b)(5) eliminates language that is redundant to Rule 5(b)(1)-(4), which contains the requirements for filing an interlocutory appeal in different types of cases. A statement was eliminated in Rule 5(b)(8)(A) as originally restyled that was not necessary since the Court has discretion to dismiss an interlocutory appeal that was improvidently granted.

Rule 6 provides a procedure for appeals from final judgments where permission to appeal must be obtained from the trial court or the Supreme Court.

A phrase was deleted in Rule 10(b)(5) which was unnecessary because Rule 33(a) already contains a procedure for prehearing conferences, which the parties are free to adapt.

Rule 12(a) specifies that the Supreme Court docket clerk must receive a copy of the certified docket entries from the trial court before docketing an appeal. Rule sections 12(b)(1) and 12(c) remove the requirement that the Supreme Court clerk receive the record before notifying the parties that record is complete in cases where no transcript is ordered.

Rule 28(j) requires parties to file eight copies of any supplemental authority for conformity with the number of briefs required to be filed by Rule 31(b).

Rule 33(a)(1) reflects the reality that self-represented parties may also be directed to appear for a prehearing conference.

Rule 34(b) requires a request for additional time to be made by motion rather than in a letter addressed to the clerk.

Rule 39(c)(4) was deleted because Rule 31(b) no longer requires the filing of an original brief, just eight copies, and the price per folio is a term no longer used.

Rule 40(a) provides a time limit for filing a request to extend the period for filing a motion to reargue. In addition, because the prior page limit in Rule 40(b)(2) was changed to a word-count limit, the parties must now certify compliance with the word-count limit similar to the existing requirement in Rule 32(a)(7)(D).

Rule 45.1 recognizes that self-represented parties will not necessarily have an e-mail address, but requires attorneys to provide an e-mail address.

Rule 46 no longer refers to an appendix of forms. The forms will be available on the Judiciary website.

This Order, promulgated on **June 11, 2013**, and effective **September 3, 2013**, can be found on our website at the following address:

http://www.vermontjudiciary.org/LC/Statutes%20and%20Rules/PROMULGATED%20Final%20Pure%20Restyled%20Appellate%20Rules.pdf

Cases marked with an asterisk were handled by the AGO.

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