Criminal Division
Vermont Attorney General's Office

Vermont Criminal Law Month

April - May 2014

Vermont Supreme Court Slip Opinions: Full Court Rulings

Includes three justice bail appeals

HOME DETENTION AVAILABLE TO THOSE DENIED BAIL

State v. Whiteway, 2014 VT 34. HOME DETENTION: APPLICATION TO THOSE DENIED BAIL; ABUSE OF DISCRETION IN DENYING HOME DETENTION.

Three justice bail published appeal. Denial of motion for pretrial home detention reversed. The defendant was charged with second-degree murder, and ordered held without bail. The defendant sought pretrial home detention pursuant to 13 V.S.A. sec. 7554b. 1) The home detention statute, applying to persons held for "lack of bail," applies not only to detainees for whom bail has been set but not met, but also to those who have no right to bail under section 7553. Although the factors set out in Section 7554b limit the court's discretion, the defendant still has the burden to show that home detention should be ordered. 2) The trial court's denial of home detention was an abuse of discretion. First, the court improperly considered the nature of the offense multiple times, both as the first factor (nature of offense), and in the second (inter alia, whether there is a risk of flight). Second, the court erred in relying upon what it perceived as weaknesses in the manner in which the Department of Corrections administered the home detention program. The court should not ground its decision, when considering the factor of public safety, on the way that DOC has chosen to discharge its responsibilities under the program. Doc. 2014-085, April 7, 2014. http://info.libraries.vermont.gov/supct/current/eo2014-085.html

SECOND DEGREE MURDER INSTRUCTION WAS PLAIN ERROR

*State v. Bolaski, 2014 VT 36. SECOND DEGREE MURDER INSTRUCTION: NECESSITY OF DISPROVING PASSION OR PROVOCATION; PLAIN ERROR. EVIDENCE OF VICTIM'S MENTAL STATE; RELEVANCE; MENTAL ILLNESS AS CHARACTER EVIDENCE.

Second degree murder reversed. 1) The trial court's instruction on second degree murder failed to apprise the jury that they must find the absence of passion or provocation in order to convict. This was not objected to below, but was plain error. The fact that the defense did not argue the existence of passion and provocation does

not mean that he was not prejudiced by the error. Whether the absence of passion or provocation becomes an element of second-degree murder depends on whether there is evidence of passion or provocation, not on the arguments of the two parties to the jury. The evidence did make out passion or provocation, despite the State's argument that the victim's actions were in response to a threat from the defendant and others, and that the provocation – damage to the defendant's truck – was insufficient to mitigate murder. The victim was not merely acting defensively – he acted offensively by bringing a dangerous weapon into the dispute. And the jury could conclude that the victim was trying to do more than just damage the defendant's truck. The defendant's fear – which he relied upon for his self-defense claim – could also support a finding of provocation, justifying a manslaughter verdict. 2) The State argued that this error was not plain error because the defense relied entirely on self-defense. Although defendant's position at trial was that he acted in self-defense and committed no crime, this does not mean that if the jury rejected his self-defense theory he otherwise admitted to committing murder. It would be entirely consistent for the jury to find that he acted under extreme provocation despite his testimony that he acted in self-defense. 3) The trial court excluded the victim's medical records, offered to prove that the victim was advancing on the defendant, and not retreating as some witnesses claimed, with a splitting maul at the time he was shot. The relevancy of this evidence did not depend upon the defendant's knowledge of the evidence at the time of the killing, and language suggesting otherwise in State v. Boglioli is reversed. If the victim's state of mind is relevant to his conduct at the time of the shooting, then evidence relating to his state of mind is relevant. The court notes that the defense description of this evidence as evidence of the defendant's motive is not correct. 4) Character evidence of a victim is only admissible in the form of reputation testimony. However, medical conditions, including mental health conditions, are not character traits for purposes of this rule. To the extent that the proffered evidence was evidence of a diagnosed mental condition, for which the victim as receiving medical treat, VRE 404 and 405 do not govern admissibility. The evidence is still governed by VRE 403, however. In addition, some of the evidence involved communications, and not acts. Statements by the victim that do not reveal any prior misconduct are not governed by VRE 404. Other excluded evidence related to prescribed medications and the reasons for those prescriptions. Evidence was admitted of the presence of drugs in the victim's system at the time of his death. If the presence of drugs in the victim's system is admitted, evidence of how the presence or absence of those drugs affected the victim's conduct may also be admissible. 5) The trial court's Rule 403 ruling that the evidence would result in a significant danger of confusion and waste of time, and misleading as suggesting that the trial is about the victim's state of mind, do not fully address all of the evidence. On the other hand, there were limits to the probative value of the proffered evidence, in view of the fact that the victim's irrational and out of control actions at the time of the shooting were obvious. Furthermore, the line between a character trait and mental illness is blurry in many instances. Given the complexity of the decision, the court should conduct a more thorough review of the proffer on remand. 6) The issue of dismissal of a juror midtrial is not reached, as unlikely to recur on remand. Doc. 2012-036, April 25, 2014.
http://info.libraries.vermont.gov/supct/current/op2012-036.html

PCR PETITIONER NOT ENTITLED TO PUBLIC DEFENDER FOR FRIVOLOUS APPEAL

*In re Bruyette, 2014 VT 30. PCR PETITION APPEALS: DENIAL OF PUBLICLY FUNDED ATTORNEY FOR FRIVOLOUS APPEALS.

PCR petitioner's motion for leave to withdraw on the grounds that the appeal is frivolous is granted, and new state-funded counsel will not be appointed. The decision here is governed by 13 VSA 5233 as amended in 2004, which provides that state-funded counsel for PCR appeals will not be provided if the appeal is determined by the Defender General to be frivolous. The fact that the petitioner filed earlier PCRs before the 2004 amendment does not affect this, since the current PCR was filed in 2012. The Defender General did not merely state that the appeal was without merit; he indicated that such representation would violate Rule of Professional Conduct 3.1 and Civil Rule 11(b)(2), which is the same standard as that set out in Section 5233. Conflict counsel assigned by the Defender General does not have a conflict merely because the Defender General has a conflict. Dooley dissent: Agrees that attorney should be allowed to withdraw, but would provide state-funded replacement counsel, as the statutory standard has not been demonstrated to have been met. Doc. 2012-471, April 25, 2014. http://info.libraries.vermont.gov/supct/current/op2012-471.html

TRIAL COURT NEED NOT EXPRESSLY QUESTION DEFENDANT CONCERNING THREATS AND PROMISES

In re Hemingway, full court opinion. RULE 11 PROCEEDING: FINDING OF VOLUNTARINESS; ACTUAL PREJUDICE REQUIRED.

Summary judgment for petitioner in post-conviction relief proceeding reversed. The petitioner pleaded guilty to aggravated domestic assault and five violations of conditions of release. The petitioner later filed a PCR petition, claiming that because the court did not expressly ask him whether any threats or promises had been made beyond the written agreement, the plea colloquy was inadequate as a matter of law. The trial court erred in finding that the original court's failure to engage petitioner expressly on the topic of voluntariness was fundamental error, requiring reversal regardless of a showing of actual prejudice. The trial court's overbroad application of the ruling in In re Parks, which involved a complete failure to comply with Rule 11, precluded its due consideration of surrounding circumstances which could support the criminal court's finding of a voluntary change of plea even without the formality of a particular script. These include the petitioner's affirmative responses during the colloquy, his acquiescence to the court's expressed finding of voluntariness, his representation by counsel throughout the proceedings, counsel's confirmation of petitioner's negotiation with the prosecution, and petitioner's own subsequent effort to enforce the plea agreement. Since the petitioner has made no claim of actual prejudice, his claim should have been denied. Although the dissent claims that promises were made to the petitioner to induce his guilty plea, this issue is a question of fact, which should not be decided on a motion for summary judgment. Dooley, with Robinson, dissenting: The failure was not a technicality, and there is clear indication of prejudice. Doc. 2012-376, May 2, 2014. http://info.libraries.vermont.gov/supct/curren

t/op2012-376.html

DENIAL OF HOME DETENTION SUPPORTED BY EVIDENCE THAT DEFENDANT POSED A RISK TO ANOTHER

State v. Whiteway, 2014 VT 49. HOME DETENTION: SUFFICIENCY OF EVIDENCE TO SUPPORT DENIAL.

Three-justice bail appeal. Denial of motion for pretrial home detention, on remand from the Vermont Supreme Court, affirmed. The trial court again denied home detention. On appeal, the defendant argues that the trial court's finding that she poses a risk to another woman at the scene of the charged murder, and that home detention would not provide adequate security and supervision, were not supported by the evidence. Contrary to the defendant's contentions, there was ample evidence to support the court's finding that she poses a risk to the woman present at the scene of the crime. The killing is alleged to be related to the breakup of the defendant's romantic relationship with the victim. The other woman had recently begun living with the victim. The defendant is alleged to have physically assaulted the woman at the scene of the crime, and had to be pulled away from her. As to the second argument, the court did not merely engage in speculation and second-guessing of the DOC's ability to administer the home detention program. Doc. 2014-128, May 6, 2014.
http://info.libraries.vermont.gov/supct/current/eo2014-128.html

FAILURE TO PROVIDE WRITTEN CONDITIONS PRECLUDED VIOLATION OF PROBATION

State v. Hemingway, 2014 VT 48. VIOLATION OF PROBATION: FAILURE TO PROVIDE CERTIFICATE OF CONDITIONS.

Full court published entry order. Revocation of probation reversed. 28 V.S.A. § 252(c) provides that a defendant who is placed on probation shall be given a certificate explicitly setting forth the conditions upon which he or she is being released. It is undisputed that in this case, the defendant did not receive the certificate. When this statutory requirement is not met, proof of the defendant being on actual notice of the probation condition is not sufficient to support a violation. Reiber, with Burgess, dissenting: There is no question that he had actual notice of the plea condition that he refrain from abusing and harassing his wife. Because the defendant had actual notice of the condition, the failure to provide a certificate was harmless and the condition can be enforced.
http://info.libraries.vermont.gov/supct/current/op2011-233.html

PCR DENIED WHERE PETITIONER FAILED TO SHOW LIKELY EFFECT ON HIS SENTENCE FROM ALLEGED ATTORNEY ERROR

In re Allen, 2014 VT 53. POST-CONVICTION RELIEF: SUMMARY JUDGMENT.

Summary judgment to the State in petitioner for post-conviction relief proceeding affirmed. The defendant pleaded guilty to

lewd and lascivious conduct with a child. In his petition, he argued that his trial counsel was ineffective for failing to object to the allegation of penetration in the PSI, and that, but for this error, a reasonable probability existed that he would have received a lesser sentence. The PCR court granted the State summary judgment, holding that the petitioner could not show a reasonable probability that he would have received a lesser sentence had defense counsel made that objection. To the extent that the sentencing court imposed a harsh sentence, its stated reasons for doing so had nothing to do with penetration, and the sentence was less than the State was permitted to seek under the plea agreement. 1) The court at one point stated that the petitioner could not show, by a preponderance of the evidence, that the court would have imposed a lesser sentence if it had not considered statements about penetration. This appears to have been a mere misstatement, and harmless error, as the court cited the correct standard numerous times in its decision. 2) The Court concluded, as a matter of law, that there was no reasonable probability, absent counsel's alleged unprofessional errors, the result of the sentencing proceeding would have been different. The issue of penetration did not form the basis of the sentencing recommendation found in the PSI, the State did not rely on penetration to argue for a stricter sentence than that recommended in the PSI, and the court did not cite penetration as a basis for the sentence it imposed. The court adopted the recommendation in the PSI, and expressed similar reasons for the sentence as those advanced by the probation officer. This undisputed evidence stands in stark contrast to the slight facts identified and relied upon by the petitioner. It is not reasonable to infer, given the evidence in the record, that simply because the court mentioned penetration in its recitation of the facts, it must have imposed a harsher sentence based on such finding. Nor is it reasonable to infer on this record that the court was so angry with petitioner based on the fact of penetration that he ordered him into custody prior to the conclusion of the hearing. The reasonable construction of the record is that the sentencing court simply ordered petition to begin his sentence forthwith. The claim that the judge was upset while pronouncing sentence is based on speculation, as is the claim that he was upset because of the penetration, and that he therefore imposed a harsher sentence. Dooley, dissenting: Judgment should not have been entered on a motion for summary judgement, because viewed in the light most favorable to the petitioner, the court could conclude that there is a reasonable probability of a different sentence. Doc. 2012-474, May 23, 2014. http://info.libraries.vermont.gov/supct/current/op2012-474.html

DEFENDANT RECEIVED INADEQUATE NOTICE OF BAIL HEARING

State v. Bolaski, 3 justice bail appeal. DENIAL OF BAIL: INADEQUATE NOTICE OF BAIL HEARING.

Order holding defendant without bail is reversed and remanded. Following reversal and remand of the defendant's murder conviction, the trial court scheduled and held a status conference, at the conclusion of which the court ordered the defendant held without bail pending retrial. The defendant did not have adequate, clear notice that the status conference would include a bail hearing, and therefore did not have an adequate opportunity to present his argument and relevant evidence. Doc. 2014-158, May Term, 2014. https://www.vermontjudiciary.org/UPEO2011Present/eo14-158.bail.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 SEXUAL CONTACT WAS SUFFICIENT

State v. Cerutti, three-justice entry order. PLAIN ERROR STANDARD: APPLICABILITY IN AUTOMATIC APPEAL CASES. SEXUAL ASSAULT: SUFFICIENCY OF THE EVIDENCE.

Sexual assault affirmed. 1) The court declined to decide whether V.R.A.P. 3, requiring the court to review the record in the interests of justice in automatic appeal cases, affects the standard of review where, as here, the error argued was not objected to below, and therefore would normally be subject to the plain error standard. In this case, the defendant challenged the sufficiency of the evidence, and the court found that the evidence fairly and reasonably supported the verdict beyond a reasonable doubt, so it was not necessary to rely upon the plain error standard. 2) Viewed in the light most favorable to the State, there was sufficient evidence to establish contact between the defendant's penis and the victim's vulva, where she testified that the defendant "put his penis inside me." Doc. 2013, 177, April Term, 2014. https://www.vermontjudiciary.org/UPEO2011Present/eo13-177.pdf

SUMMARY JUDGMENT IN PCR WHERE PETITIONER FAILED TO PRESENT EXPERT TESTIMONY

In re Goodwin, three justice entry order. PCR: NECESSITY OF EXPERT TESTIMONY; SUFFICIENCY OF PLEA PROCEEDING.

Summary judgment for State in post-conviction relief proceeding affirmed. The petitioner had pleaded guilty to one count of first-degree aggravated domestic assault pursuant to a plea agreement. The court granted the State summary judgment on the grounds that the petitioner was obligated, and had failed, to present expert testimony to show that conduct of his lawyers fell below the applicable standard of care for criminal defense lawyers. This ruling was correct as to all but two of the petitioner's claims. The remaining two claims fail as a matter of law: the claim that the trial court erred in denying bail must be raised on direct appeal, and not in a PCR proceeding. The petitioner's claim that the trial court violated Rule 11 in conducting the plea colloquy, although overlooked by the PCR court, is also without merit. The record shows that the court complied with Rule 11(f). The court was not required, as the petitioner argues, to ask him to explain what happened in his own words. The records shows that the petitioner admitted to the

facts advanced by the State, when he agreed that the facts outlined by the prosecutor were correct, despite having immediately before indicated that he didn't do it. Doc. 2013-236, April Term, 2014. https://www.vermontjudiciary.org/UPEO2011Present/eo13-236.pdf

DENIAL OF SENTENCING CONTINUANCE NOT AN ABUSE OF DISCRETION

State v. Taylor, three justice entry order. MOTION TO CONTINUE: DISCRETION OF COURT.

Appeal from denial of motion to continue sentencing hearing denied. The defendant failed to show that there was "no reasonable basis" for denying the motion. The defense sought the continuance in order to have a psychological evaluation completed so that he could potentially obtain mitigating testimony concerning the unlikelihood that defendant would reoffend. The PSI indicated that the defendant was at low risk of reoffending, and the court explicitly based its sentencing decision on the nature and scope of the crimes and their impact on the victims. Given the three previous delays, the defendant's opportunity to obtain a psychological evaluation earlier, the acknowledgment in the PSI report that defendant was unlikely to reoffend, and the court's reasoning in imposing the sentence, the court acted within its broad discretion in denying the motion for a further continuance. Doc. 2013-322, April Term, 2014. https://www.vermontjudiciary.org/UPEO2011Present/eo13-322.pdf

Vermont Supreme Court Slip Opinions: Single Justice Rulings

TRIAL COURT'S ASSUMPTION ABOUT EFFICACY OF HOME MONITORING PROGRAM UNSUPPORTED BY EVIDENCE

State v. Dunn, single justice bail appeal. DENIAL OF HOME MONITORING PENDING TRIAL BASED ON IMPERMISSIBLE FACTORS. BAIL AMOUNT UPHELD.

Denial of motion for home detention remanded, decision not to reduce bail affirmed. The defendant was charged with grand larceny and assault and robbery with a dangerous weapon. 1) The fact that the home detention program is likely somewhat less secure than incarcerative detention is obvious, and a court can properly weigh the higher risks of a home-based pretrial detention, as opposed to incarcerative detention, against the specific circumstances in an individual case suggesting risk of flight or danger to the public. However, the court's assumption about the efficacy of the Department of Correction's monitoring of individuals in home detention was unsupported by any evidence in the record. Therefore, the matter is reversed and remanded for consideration by the trial court of the remaining relevant factors. 2) The trial court did not err in concluding that the defendant's risk of flight can be managed

through a $150,000 bond with 10% cash down, but not through the arguably more rigorous measure of detention in a home setting under DOC supervision, with electronic monitoring. Some might argue that home detention is more rigorous than release on bond. In addition, it cannot be said that cash bail is always more effective than home detention, or vice versa. The trial court has broad discretion, and could find that under the circumstances, either method is the most appropriate in terms of being the least restrictive necessary to secure the defendant's appearance. 3) The trial court properly considered the defendant's criminal record, failures-to-appear, and violations of probation, even though they occurred when he was a minor. 4) The amount of bail was supported by the proceedings below, where the defendant is facing serious charges that carry a potential collective sentence of twenty-five years, which involve the use of a dangerous weapon, and where the defendant has two failures-to-appear and two violations of probation, uses a Maine address, and allegedly went to Maine directly after the charged crimes. The fact that the defendant cannot afford the bail does not alone make it excessive. Doc. 2014-113, May 5, 2014. Robinson, J.
https://www.vermontjudiciary.org/UPEO2011Present/eo14-113.pdf

24 HOUR CURFEW HELD EXCESSIVE

State v. Theriault, single justice bail appeal. 24 HOUR CURFEW HELD EXCESSIVE.

The record did not support the imposition of a twenty-four hour curfew as the least restrictive condition that would assure protection of the public, where the defendant's previous disregard of court orders occurred over a decade ago, he is facing only misdemeanor charges, and he has surrendered his firearms to law enforcement. The curfew is therefore amended to be in place from 8 p.m. to 6 a.m. Doc. 2014-169, May Term, Skoglund, J.
https://www.vermontjudiciary.org/UPEO2011Present/eo14-169.bail.pdf

United States Supreme Court Case Of Interest

Thanks to NAAG for this summary

Prado Navarette v. California, 12-9490. By a 5-4 vote, the Court held that an anonymous 911 report that a person in a particular vehicle had run the caller off the road provided "reasonable suspicion" to justify a traffic stop of that car. The Humboldt County 911 dispatch team received an anonymous tip stating that the caller had been run off the road by a "Silver Ford 150 pickup." The anonymous tip provided the license plate number of the truck and the location where she (the caller) had been run off the road. This information was passed on to the neighboring Mendocino County 911 dispatch team, which broadcast the information to California Highway Patrol (CHP) officers. Believing that the report of the truck's reckless driving might indicate that the driver was intoxicated, a CHP officer located the truck and conducted a traffic stop. Petitioner Lorenzo Prado Navarette was driving the truck, and petitioner Jose Prado Navarette was a passenger. Another officer arrived, and as the two officers approached the truck they smelled marijuana. A search of the truck uncovered 30 pounds of marijuana in the bed. Both Navarettes were arrested. The trial court denied their motion to suppress, and the California Court of Appeal affirmed. The California Supreme Court denied review. In an opinion by Justice Thomas, the Court affirmed.

The Court began by surveying the relevant precedents. In Alabama v. White, 496 U.S. 325 (1990), the Court ruled that "an anonymous tip alone seldom demonstrates the informant's basis of knowledge or veracity," but that in appropriate circumstances such a tip can demonstrate "sufficient indicia of reliability to provide reasonable suspicion to make [an] investigatory stop." White involved just such a circumstance because the police were able to verify actions by the suspect that the tipster had predicted, which demonstrated "a special familiarity with [the suspect's] affairs." By contrast, in Florida v. J.L., 529 U.S. 266 (2000), the Court held "that no reasonable suspicion arose from a bare-bones tip that a young black male in a plaid shirt standing at a bus stop was carrying a gun." That tip provided no basis for believing the tipster "ha[d] knowledge of concealed criminal activity" and did not predict future behavior.

The Court then turned to the 911 call here, asking whether it "was sufficiently reliable to credit the allegation that petitioners' truck 'ran the [caller] off the roadway.'" The Court held that it was because the call "bore adequate indicia of reliability for the officer to credit the caller's account." First, the caller stated that she was an eyewitness to the truck's dangerous driving, which suggested the account was reliable. Second, the police confirmed the truck's location close in time and space to where the caller had said she was forced off the road, which (as the hearsay laws recognize with respect to "present sense impressions" and "excited utterances") suggests the caller was telling the truth. And third, the caller's use of the 911 system indicated that the call was reliable because 911 calls are recorded, which might mean "a false tipster would think twice before using such a system."

Having found the tip reliable, the Court considered whether the tip provided "reasonable suspicion that 'criminal activity may be afoot.'" The Court held that it did, noting that under a "commonsense approach, we can appropriately recognize certain driving behaviors as sound indicia of drunk driving." Although there may be innocent reasons why the driver of the truck ran the caller off the road, the caller's tip pointed to conduct that "bears too great a resemblance to paradigmatic manifestations of drunk driving to be dismissed as an isolated example of recklessness." Nor, found the Court, was the suspicion of drunk driving dispelled by "the absence of additional suspicious conduct[ ] after the vehicle was first spotted by an officer. . . . [T]he appearance of a marked police car would inspire more careful driving for a time." The Court concluded that, although this was a "close case," under the totality of the circumstances the officer had reasonable suspicion that the truck driver had engaged in criminal activity.

Justice Scalia filed a dissenting opinion that Justices Ginsburg, Sotomayor, and Kagan joined. Justice Scalia stated that the Court adopted a "new rule" that "[s]o long as the caller identifies where the car is, anonymous claims of a single instance of possibly careless or reckless driving, called in to 911, will support a traffic stop." In his view, that "would not be the Framers' [concept] of a people secure from unreasonable searches and seizures." Justice Scalia minimized the import of the indicia upon which the Court relied. The tipster's statement that the truck "was traveling south on Highway 1 somewhere near mile marker 88" was available to "everyone in the world who saw the car"; it did not indicate that the caller's claim of being run off the road was true. The anonymous caller's claim of eyewitness knowledge does not support the claim's "veracity." And hearsay law would not recognize the call as "especially trustworthy." Justice Scalia further disagreed with the Court's conclusion that the caller's use of the 911 system showed her veracity because there was no indication the caller was aware that she could be identified through the 911 system. Finally, Justice Scalia contended that the caller did not provide any information indicating that the driver of the truck was drunk: "[t]he truck might have swerved to avoid an animal, a pothole, or a jaywalking pedestrian" when it ran the caller off the road. Indeed, he noted, the officer had good reason to believe the driver was not drunk because the officer followed the truck for five minutes before the stop and did not observe any evidence of reckless driving.

Cases marked with an asterisk were handled by the AGO.

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