Criminal Division
Vermont Attorney General's Office

Vermont Criminal Law Month

April - May 2015

Vermont Supreme Court Slip Opinions: Full Court Rulings

Includes three justice bail appeals

RESTITUTION FOR PURCHASE PRICE OF DAMAGED COLLECTOR'S ITEMS AFFIRMED

State v. Vezina, 2015 VT 56. RESTITUTION: VALUE OF COLLECTOR'S ITEMS; NEED TO ESTABLISH ABILITY TO PAY.

Full court published opinion. Restitution order reversed in part. The defendant pled guilty to larceny for theft of seven pieces of musical equipment. 1) The court did not err in awarding the full purchase price of used-but-returned items. Although some of these items were still functional, their primary value did not lie in their percussive qualities (they are cymbals), but as collector's items, and the defendant's treatment of them greatly diminished their value as such. Furthermore, the trial court found that the value of the instruments at the time of the theft likely exceeded their purchase price. 2) The court's findings did not indicate that it relied upon the subjective value of the instruments to their owner. It did acknowledge the owner's personal sense of loss, but that did not change the character of the court's actual analysis of the value of the instruments. 3) The trial court erred in ordering restitution without finding that the defendant has the ability to pay. The matter is remanded for further proceedings on this point. Morris, concurring, responds to Dooley's dissent. Dooley, dissenting: The defendant never claimed an inability to pay restitution, and therefore this issue should be treated as having been waived, and the order affirmed. He would overrule State v. Sausville, 151 Vt. 120, which did not require preservation in order to raise this claim on appeal, and which places the burden of proof on this point on the State. Skoglund, dissenting: Would affirm based upon the trial court's statement that there was no evidence presented showing that he did not have the ability to pay restitution, and thereafter finding that the defendant does have the current ability to make the payments. Doc. 2014-021, April 10, 2015. http://info.libraries.vermont.gov/supct/current/op2014-021.html

DEFENDANT'S HISTORY JUSTIFIED HOLD WITHOUT BAIL

State v. Baker, 2015 VT 62. HOLD WITHOUT BAIL: TRIAL COURT'S DISCRETION.

Three justice published bail appeal. Order holding defendant without bail in second-degree felony aggravated assault charge affirmed. The trial court did not abuse its

discretion in light of the defendant's prior violations of abuse prevention orders, his additional prior convictions and violations of probation, his sending of repeated threatening and demeaning text messages to his wife; and the current high emotional state of the defendant's relationship with his wife in the midst of a separation and divorce. Doc. 2015-119, April 3, 2015. http://info.libraries.vermont.gov/supct/current/eo2015-119.html

CROSS-EXAMINATION OF COMPLAINANT ATTACKING HER MOTIVE FOR TESTIFYING WAS NOT ATTACK ON HER CHARACTER FOR TRUTHFULNESS

State v. Madigan, 2015 VT 59. EVIDENCE OF WITNESS'S CHARACTER FOR TRUTHFULNESS. HEARSAY: STATE OF MIND, FRESH COMPLAINT. IMPROPER CLOSING ARGUMENT. PREJUDICE.

Three counts of lewd and lascivious behavior with a child reversed. 1) The defense cross-examination of the complainant, suggesting that she was jealous and made the accusations to get attention, and exposing inconsistencies in her testimony, was not a general attack on her character for truthfulness. The court therefore erred in allowed character witnesses to testify concerning the complainant's character for truthfulness. 2) The complainant's hearsay statement that she was moving out of the house because the defendant had sexually abused her was not admissible under the exception for a statement concerning present state of mind, because it was offered to prove the underlying fact, not her state of mind at the time she made the statement. The court declined to adopt the "fresh complaint" exception because the doctrine has been largely supplanted by rules of evidence. 3) The prosecutor's statements in closing argument, exhorting the jury to imagine what it would be like to be the complainant, poor, maybe hungry, exceeded the bounds of fair and temperate discussion, circumscribed by the evidence and inferences properly drawn therefrom. 4) It cannot be said beyond a reasonable doubt that these errors were harmless. The complainant was the State's star witness and only witness to the offenses, and the jury's belief in her credibility must have been pivotal. Doc. 2013-242, April 17, 2015. http://info.libraries.vermont.gov/supct/current/op2013-242.html

HEARSAY STATEMENTS, EVEN IF EXCITED UTTERANCES, VIOLATED CONFRONTATION CLAUSE

State v. Alers, 2015 VT 74. HEARSAY: CONFRONTATION CLAUSE, TESTIMONIAL STATEMENTS. SUFFICIENCY OF THE EVIDENCE: CIRCUMSTANTIAL EVIDENCE OF BODILY HARM.

Simple assault reversed. 1) Testimony by a police officer concerning statements made to him by the victim that she had been assaulted by her ex-boyfriend, and describing the assault, although possibly fitting within the hearsay exception for excited utterances, nonetheless violated the Confrontation Clause. The statements were testimonial because the conversation was focused on getting a statement rather than addressing an ongoing emergency. 2) The error was clearly not harmless because, although there were witnesses to the assault, the victim's out-of-court statement that she felt pain, as relayed by the officer, was the most direct evidence presented by the State on the question of bodily injury. However, only reversal and not acquittal is required because there was other, sufficient

evidence of bodily injury, even assuming that this issue was properly preserved for appeal. There was eyewitness testimony that the defendant dragged the victim backwards with his arms around her neck, that she was in a chokehold, that he jostled her like a rag doll, and that she was screaming. A reasonable jury could infer from this evidence that the victim did experience pain. Doc. 2014-145, May 22, 2015. http://info.libraries.vermont.gov/supct/current/op2014-145.html

SENTENCING COURT'S USE OF EVIDENCE FROM CO-DEFENDANT'S TRIAL VIOLATED DEFENDANT'S RIGHT TO NOTICE AND TO RESPOND

State v. Delisle, 2015 VT 76. Full court published opinion. SENTENCING: RIGHT TO NOTICE OF INFORMATION TO BE RELIED UPON.

Aggravated assault and burglary remanded for resentencing before a different judge. The trial court improperly relied on evidence from his co-defendant's trial without providing him with notice and an opportunity to respond, to conclude that the defendant was the "leader" of the criminal enterprise and took advantage of his co-defendant's limited cognitive ability. Nothing in any of the materials submitted in advance of the sentencing hearing put the defendant on notice that the court would rely upon this evidence. The fact that Rule 32(c) only explicitly requires advance notice for information "submitted to the court" does not permit a different result. The rule gives the defendant the right to challenge any factual information submitted to the court or "otherwise taken into account by the court in connection with sentencing." The right to challenge such information would be meaningless without the right to timely notice of the court's intent to rely on such information. The error was prejudicial, even under the heightened standard required by the defendant's failure to object below. The record leaves no doubt that evidence from the co-defendant's trial played a material part in the court's sentencing decision. Doc. 2014-112, March Term, 2015. http://info.libraries.vermont.gov/supct/current/op2014-112.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."

EVIDENCE SUPPORTED VOP FOR FAILURE TO ENGAGE IN ANGER MANAGEMENT COUNSELING

State v. Manfredi, unpublished entry order. VOP: SUFFICIENCY OF EVIDENCE.

Revocation of probation affirmed. The defendant admitted that he was aware of the probation condition requiring anger management counseling and failed to enroll

in the program offered by DOC. His admission that he had intended to enroll but was stymied by his subsequent arrest undermines his claim that he believed that discussing "how things were going" in his life with a psychiatrist fulfilled the probation requirement. His assertion that his probation officer did not set a "schedule" for his compliance during the ten month period from his release to his reincarceration does not show that his non-compliance was through no fault of his own. Doc. 2014-167, May Term, 2015.
https://www.vermontjudiciary.org/UPEO2011Present/eo14-167.pdf

DENIAL OF MOTION FOR SENTENCE RECONSIDERATION FAILED TO SHOW BASIS FOR DENIAL

State v. Morali, three-justice entry order. SENTENCE RECONSIDERATION: FAILURE TO PROVIDE BASIS FOR EXERCISE OF DISCRETION.

Denial of motion for sentence reconsideration reversed and remanded. The defendant filed a pro se motion for sentence reconsideration, and the trial court denied the motion by checking the line next to "denied" on the form. No explanation or statement of reasons for the ruling was provided in the order. A trial court ruling must provide at least some basis for a reviewing court to determine that the trial court exercised its discretion and how it was exercised. The trial court's order here does not meet this minimal standard, and therefore must be remanded for reconsideration. Doc. 2014-302, May Term, 2015.
https://www.vermontjudiciary.org/UPEO2011Present/eo14-302.pdf

ACTUALLY HARMFUL BEHAVIOR WAS SUFFICIENT TO PROVE COMMUNICATION OF INTENT TO HARM

State v. Rudd, three-justice entry order. DISORDERLY CONDUCT: SUFFICIENCY OF THE EVIDENCE. ADMINISTRATIVE VERSUS STANDARD PROBATION.

Disorderly conduct affirmed. 1) The evidence was sufficient to prove that the defendant engaged in threatening behavior where it shows that she had walked towards the victim and shoved a camera into her face, breaking the camera and the victim's glasses. The defendant communicated through this behavior her intent to harm both the victim and her property. The State did not need to prove that she intended to harm the victim further to meet its burden of proof. 2) The defendant's claim that the law required that she be put on administrative probation rather than standard probation is not addressed because her probationary term has already expired. Doc. 2014-308, May Term, 2015.
https://www.vermontjudiciary.org/UPEO2011Present/eo14-308.pdf

CLAIMS OF ATTORNEY ERROR WERE NOT SO OBVIOUS THAT EXPERT WITNESS WAS UNNECESSARY

Chandler v. State, three-justice entry order. POST-CONVICTION RELIEF: NECESSITY OF EXPERT TESTIMONY.

Denial of petitioner's motion for summary judgment, and grant of summary judgment to the state, in post-conviction relief proceeding, affirmed. The trial court granted the State summary judgment because the petitioner's claims of attorney error and prejudice required expert testimony, which the petitioner failed to provide. On appeal, the petitioner argues that his attorney's ineffectiveness was so obvious that it could be understood by lay persons without the benefit of expert testimony. Although the voice mail that the petitioner's attorney left him was outrageous, it does not demonstrate, per se, that his trial performance was deficient or, if so, that the outcome of the trial was probably different as a result. Nor does the prosecutor's rebuttal argument characterizing defense counsel's argument as "utterly ridiculous" demonstrate that the defense theory of the case was in fact ridiculous or that counsel's representation was deficient under the circumstances. The prosecutor's statement cannot substitute for an expert opinion on ineffectiveness. Doc. 2014-375, May Term, 2015. https://www.vermontjudiciary.org/UPEO2011Present/eo14-375.pdf

BLOOD IN MOUTH DID NOT INVALIDATE BREATH TEST

State v. Lumbra, three-justice entry order. BREATH TEST VALIDITY: BLOOD IN MOUTH.

Civil suspension of driver's license affirmed. The defendant's claim that the breath test was unreliable because she had blood in her mouth at the time of the breath test was insufficient to overcome the presumption of accuracy established by the State. The protocols state that the subject should not have food, gum, tobacco, or any other foreign matter in his or her mouth, but no evidence was adduced to show that one's own blood is considered to be foreign matter. Doc. 2014-454, May Term, 2015. https://www.vermontjudiciary.org/UPEO2011Present/eo14-454.pdf

Vermont Supreme Court Slip Opinions: Single Justice Rulings

NO CONTACT ORDER DID NOT INFRINGE CONSTITUTIONAL RIGHT OF FREE ASSOCIATION

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

Denial of motion to amend condition of release affirmed. The defendant was charged with domestic assault, and sought to modify the condition prohibiting him from having contact with his wife, the alleged victim. The defendant argued that the condition impermissibly infringed on his constitutional right of free association, but conditions of release that restrict constitutional rights are permissible so long as they do not infringe on that right more than necessary, as the court here found. April Term, 2015. Doc. 2015-101. https://www.vermontjudiciary.org/UPEO2011Present/eo14-176.bail.pdf

COURT ERRED IN REQUIRING CASH BOND OR SURETY BOND BUT NOT PERMITTING SECURED APPEARANCE BOND

State v. Sullivan, single justice bail appeal. POST-CONVICTION BAIL. REQUIREMENT OF CASH OR SECURED APPEARANCE BOND.

1) The trial court's requirement of $500,000 bail following the defendant's conviction on charges of DUI, fatal and LSA, fatal, is affirmed. The trial court weighed all of the evidence before it, including the Sec. 7554(b) factors and the fact of conviction, in setting bail in this amount. 2) The trial court's requirement that the bail be posted either in cash or by a secured appearance bond is reversed. The trial court's only reason for refusing to permit the defendant to post a ten per cent secured appearance bond, rather than posting the full cash amount or purchasing a surety bond for $50,000, was concern over ensuring payment of the full $500,000 if the defendant failed to appear. The purpose of bail, however, is to assure the defendant's appearance at trial, not to ensure payment to the court in the event of nonappearance. The defendant, if anything, would have a greater incentive to appear were he to post a secured appearance bond of ten percent, because if he appeared he would receive the $50,000 back; whereas if he paid a bail bondsman $50,000 in order to post a surety bond, the $50,000 would be lost to him, and would provide no incentive to appear. Doc. 2015-149, May Term, 2015. https://www.vermontjudiciary.org/UPEO2011Present/eo15-149.bail.pdf

Appellate Rule Changes

Proposed Changes to the Vermont Rules of Criminal Procedure

New subdivision 5(e) would be added in response to the passage of Act No. 195 of 2013 (Adj. Sess.), establishing a system of pretrial risk assessments and needs screenings that may be voluntarily engaged in by defendants in: (a) felony cases excepting listed crimes; (b) felony or misdemeanor drug offenses; (c) cases in which showing is made that a defendant has a substantial substance-abuse or mental-health issue, and (d) all other cases, with limited exceptions, where the defendant has been held, unable to make bail, for over 24 hours after lodging, or (e) in more limited circumstances, ordered by the Court (and not voluntarily) as a condition of release under 13 V.S.A. § 7554. See 2013, No. 195 (Adj. Sess.), § 2, codified at 13 V.S.A. § 7554c. It is anticipated that the system will be phased in over a period of approximately ten months, beginning with defendants referenced in category (a).

The proposed amendment to Rule 16(d)(3) adds a new subdivision which provides that the prosecuting attorney is not required to disclose to the defendant information as to the residential address or place of employment of the victim, unless the court finds, based upon a preponderance of the evidence, that nondisclosure of the information will prejudice the defendant. The amendment serves to implement the provisions of 13 V.S.A. § 5310, while expressly reserving the court's authority to order that the state disclose the information where necessary to preserve a defendant's Due Process and Confrontation guarantees.

The proposed amendment to Rule 30 reorganizes the rule into three separate paragraphs, and adds subsection (c) to clarify the circumstances under which an objection to a jury instruction is sufficiently preserved.

The proposed amendments to Rule 41(e)(4), (5) and (6) authorize the filing of search warrant returns and accompanying documents by reliable electronic means to facilitate prompt filing where great distances, or particular circumstances of completion of the return, would otherwise impede timely submission of search

warrant returns as contemplated by Rule 41, consistent with the warrant "accountability" procedures adopted in 2013. Subdivision 41(d)(4) already provides for the electronic application for and issuance of search warrants, and at this juncture there is general understanding of and experience with the process of issuing search warrants by reliable electronic means. The present amendment adds the filing of returns to this established process of transmission of warrant documents by reliable electronic means. The amendment adds the requirement that, in event of electronic submission, the original return and accompanying documents that were prepared by the executing officers must be subsequently filed with the court no later than 15 days following electronic submission to avert any dispute as to which are the original, and operative, return, inventory and other accompanying documents.

https://www.vermontjudiciary.org/LC/Statutes%20and%20Rules/PROPOSEDVRCrP5_16_30_41.pdf

The proposed amendment to Rule 32 adds subdivision (g) in response to the Court's decision in State v. Morse, 2014 VT 84, to provide specific procedures for the conduct of, and evidentiary standards in, restitution hearings convened pursuant to 13 V.S.A. § 7043. The subdivision also specifies written pre-hearing disclosures that are required to be made to the defendant by the prosecuting attorney, who has the burden of proof in establishing restitution claims payable to a victim of crime.

https://www.vermontjudiciary.org/LC/Statutes%20and%20Rules/PROPOSEDVRCrP32(g)Restitution%20Procedures.pdf

United States Supreme Court Case Of Interest

Thanks to NAAG for this summary

Rodriguez v. United States, 13-9927. The Court held by a 6-3 vote that "a dog sniff conducted after completion of a traffic stop" violates the Fourth Amendment. More generally, "a police stop exceeding the time needed to handle the matter for which the stop was made violates the Constitution's shield against unreasonable seizures." Police officer Dennis Struble stopped petitioner Dennys Rodriguez on a highway in Nebraska after Struble observed Rodriguez's Mercury Mountaineer veer briefly onto the shoulder. Struble, a K-9 officer, had his dog in his patrol car. Struble approached the Mountaineer, collected Rodriguez's documents, and then returned to his patrol car to run a records check. After completing the records check, Struble returned to the Mountaineer and collected identification from Rodriguez's passenger, Scott Pollman. Struble again returned to his patrol car to check Pollman's record. While in his patrol car, Struble called for a second officer and began writing a warning ticket for Rodriguez for driving on the shoulder. Struble then approached the Mountaineer for a third time, issued the written warning, and returned Rodriguez's and Pollman's documents. At that point, about 21 to 22 minutes into the stop, Struble had (as he testified) gotten "all the reason[s] for the stop out of the way." Struble nonetheless asked Rodriguez for permission to scan the Mountaineer with his dog. Rodriguez refused, so Struble instructed him to exit the Mountaineer and stand in front of the patrol car until the second officer arrived. When the second officer arrived, Struble circled the Mountaineer twice with his dog. On the second pass, about seven to eight minutes after the warning had been issued, the dog alerted to the presence of drugs. An ensuing search of the Mountaineer uncovered a large bag of methamphetamine. Indicted on federal drug charges, Rodriguez moved to suppress the evidence seized from his car. Applying circuit precedent, the district court concluded that the seven- to eight-minute extension

of the stop was only a “de minimis” intrusion that did not violate Rodriguez’s Fourth Amendment rights. Rodriguez entered a conditional guilty plea and appealed to the Eight Circuit, which affirmed. In an opinion by Justice Ginsburg, the Court vacated and remanded.

http://www.supremecourt.gov/opinions/14pdf/13-9972_p8k0.pdf

Cases marked with an asterisk were handled by the AGO.

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