Criminal Division
Vermont Attorney General's Office

Vermont Criminal Law Month

April - May 2016

Vermont Supreme Court Slip Opinions: Full Court Rulings

Includes three-justice bail appeals

DETECTIVE'S IMPLIED PROMISES OF LENIENCY RENDERED CONFESSION INVOLUNTARY

State v. Reynolds, 2016 VT 43.
CONFESSIONS: VOLUNTARINESS.

Full court opinion. Trial court's order suppressing defendant's confession to police as involuntary affirmed. The totality of the circumstances shows that coercive governmental conduct played a significant role in inducing the defendant's confession. This conclusion is based on the detective's inappropriate promises of leniency, coupled with the detective's misrepresentation of his authority. The other techniques employed by the detective would not necessarily be problematic but they become significant here because they enhanced the effectiveness of these two key factors. The detective did more than make predictions about the possible effect of a statement, he made statements implying that the defendant's cooperation would result in leniency, such as "We can solve a mistake … I can help you with a mistake." The detective implied that the defendant would face treatment or complete absolution if he confirmed the "mistake" theory while signaling that harsher consequences would follow a determination that he intentionally touched the child. The detective implied that if he admitted to a mistake, he might not be arrested, and suggested that the officer had the power to make such a decision. The effect of these promises was enhanced by the other techniques used by the detective that standing alone are not necessarily problematic: portraying himself as the defendant's ally; pandering to the defendant's good reputation in the community; and reminding the defendant that they were in his home and not the police station. The coercive atmosphere was further enhanced because the detective refused to disclose the reason for the interrogation before it began; he did not remind the defendant of his right to terminate the interview at any time; and he led the defendant to believe that this was his last opportunity to strike a deal. The defendant's admission at the suppression hearing that his confession was the truth did not mean that he was not coerced. Whether true or false, a confession given involuntarily is inadmissible. The State was not prejudiced by the court's refusal to allow a mental examination of the defendant, even assuming it was error, as the trial court's analysis was an objective assessment of voluntariness, not dependent on the defendant's special vulnerabilities. Doc. 2015-146, April 8, 2016.
https://www.vermontjudiciary.org/LC/Supreme%20Court%20Published%20Decisions/op15-146.pdf

FAILURE TO COMPLETE SEX OFFENDER TREATMENT NOT EXCUSED BY SHORT TIME REMAINING IN PRISON

State v. Anderson, 2016 VT 40. VIOLATION OF PROBATION: FAILURE TO COMPLETE SEX OFFENDER TREATMENT.

Full court opinion. Violation of probation affirmed. The defendant argued that compliance with the probation condition that he attend and complete sex offender treatment before his release was impossible because there was insufficient time remaining before his release to complete the program. However, this argument ignores the remainder of the condition – to the satisfaction of his probation officer. He could have completed the treatment to the satisfaction of his probation officer without actually having completed the program entirely, but enough to satisfy his probation officer. In any event, the defendant failed to show that his failure to complete the program was due to factors there were no fault of his own. He offered no testimony that he attempted to work with his probation officer to formulate a plan to satisfy the conditions, or that he began the steps necessary to re-enter the program. Doc. 2015-020, April 22, 2016. https://www.vermontjudiciary.org/LC/Supreme%20Court%20Published%20Decisions/op15-020.pdf

VARIOUS PROBATION CONDITIONS REVIEWED

State v. Cornell, 2016 VT 47. PROBATION CONDITIONS: VALIDITY.

Full court opinion. Appeal from imposition of six probation conditions in sex offense case. 1) The condition that the defendant reside and work where his probation officer approves, without any findings indicating the necessity of such a broad condition in this particular case, was error, despite the probation officer's testimony that he wanted to make sure that the defendant was not living near a school or a daycare center, or working in a place like a video store. 2) The condition that the defendant attend any counseling or training program ordered by the probation officer is also remanded as an overbroad delegation of authority not supported by findings. 3) The condition prohibiting any violent or threatening behavior is affirmed, although it should be narrowly interpreted in order to ensure that the probationer had fair warning of its meaning. In general this condition should be clarified by incorporating language that anticipates the interpretation difficulties and defines more specifically the coverage of the condition. 4) The condition that the defendant may not access or loiter or go to places where children are known to congregate, unless approved in advance by the probation officer, is affirmed. The phrase "where children are known to congregate" is not overly vague. 5) The condition requiring him to allow his probation officer to search without a warrant and confiscate if necessary, drugs, pornography, or erotica of minor children, and digital media, is impermissible in the absence of any requirement of reasonable suspicion. This level of suspicion is required by the Fourth Amendment and, because it is narrowly tailored, authorizing a search only for contraband, is permissible under Article 11. 6) A condition prohibiting the defendant from possessing a computer and accessing the Internet goes too far, since the defendant did not actually employ a computer in the commission of the offense, and no other evidence supports a restriction on the defendant's access to the internet. Upon reasonable suspicion the probation officer may monitor the defendant's computer and internet usage. Finally, the condition should not indicate that searches are based on a waiver by the

defendant. Doc. 2015-100, April 22, 2016. https://www.vermontjudiciary.org/LC/Supreme%20Court%20Published%20Decisions/op15-100.pdf

OFFENSE OF LEWDNESS LIMITED TO PROSTITUTION-RELATED CRIMES

In re K.A., 2016 VT 52. LEWDNESS: APPLIES ONLY TO ACTS OF PROSTITUTION.

Full court opinion. Adjudication of delinquency based on lewd act reversed. The juvenile was found to have attempted to engage in a prohibited act, lewdness, pursuant to 13 VSA 2632(a)(8), based upon his having attempted to put his hands down a girl's pants against her will. The act charged does not constitute a crime under Section 2632(a)(8) because it was not an attempt to engage in a lewd act of prostitution, and its use here was plain error. The statutory section at issue is located in a subchapter of Chapter 59 of Title 13, containing statutes relating to "Prostitution." It provides that a person shall not "engage in prostitution, lewdness or assignation." "Lewdness" is defined in section 2631(2) as "open and gross lewdness," meaning lewdness that is neither disguised nor concealed. The meaning of the term "lewd" in Section 2632 is murky at best. The legislative history, reviewed in detail in the opinion, indicates that this subchapter is intended solely to proscribe acts associated with prostitution. Thus, Section 2632(a)(8) prohibits procuring or soliciting a person for lewd acts relating to prostitution. Therefore it was plain error to charge obnoxious and unwelcome touching on the playground as an act of prostitution. The charge was an example of prosecutorial discretion gone awry. Doc. 2015-007, April 29, 2016. https://www.vermontjudiciary.org/LC/Supreme%20Court%20Published%20Decisions/op15-007.pdf

POSSIBILITY OF DEFENSE TO TRAFFIC VIOLATION DID NOT OBVIATE REASONABLE SUSPICION FOR STOP

State v. Howard, 2016 VT 49. MOTOR VEHICLE STOP: BRIEF CROSS OF CENTER LINE.

Full court opinion. Motion to suppress results of traffic stop in DUI case reversed. The police officer observed the defendant make an abrupt maneuver over the center line with this vehicle, as a result of which he made a stop. The defendant explained that he had made the maneuver because the driver immediately behind him was blinding him with his headlights. The trial court found that the defendant did move to the center line and did slightly move over the center line, but that this was not a reasonable and articulable suspicion that he had committed a motor vehicle infraction. These two observations do not align. Because the court found that the defendant moved over the center line, it necessarily must have determined that there was a reasonable suspicion of a traffic violation and therefore a reasonable basis for the stop. The court's subsequent observations that the traffic violation was "very subtle" and "very slight" do not alter the conclusion. The crossing need not be prolonged or extreme to constitute a traffic violation; any crossing – no matter how slight – is sufficient. The glare of headlights arguably would justify the defendant's action and thereby give him a defense to a traffic law violation charge, but the inquiry is merely whether the officer had a reasonable suspicion of a wrongdoing, not whether the

defendant actually committed a wrongdoing. Doc. 2015-044, April 29, 2016. https://www.vermontjudiciary.org/LC/Supreme%20Court%20Published%20Decisions/op15-044.pdf

SEXUAL ASSAULT OF A MINOR BY EXPLOITATION OF POSITION OF AUTHORITY REQUIRES CONTEMPORANEITY OF POSITION OF AUTHORITY AND SEX ACT

*State v. Graham, 2016 VT 48. SEXUAL EXPLOITATION OF A MINOR: POSITION OF AUTHORITY MUST BE CONTEMPORANEOUS WITH ACTS.

Full court opinion. Dismissal of three counts of sexual exploitation of a minor affirmed. The trial court's finding that the defendant was not an employee of the school system at the time of the offense, because she was a school year employee and not a full year employee, and the offenses occurred over the summer, was correct. The State argued that the defendant's employment need not have been contemporaneous with the acts, as long as the defendant's authority over the student resulting from that employment was contemporaneous with the acts. The use of the phrase, "by virtue of the actor's undertaking the responsibility" indicates that both the position of authority and the specified undertaking must occur at the same time as the act. Doc. 2015-296, April 29, 2016. https://www.vermontjudiciary.org/LC/Supreme%20Court%20Published%20Decisions/op15-296.pdf

STATE NEED NOT PROVE THAT HOME IMPROVEMENT FRAUD DEFENDANT WAS AWARE OF REQUIREMENT TO FILE SURETY BOND

*State v. Witham, 2016 VT 51. HOME IMPROVEMENT FRAUD, FAILURE TO FILE SURETY BOND: SCIENTER REQUIREMENT.

Full court opinion. A person convicted of home improvement fraud may thereafter engage in home improvement activities for compensation only if he notifies the Attorney General's Office of the intent to do so, and files a surety bond or an irrevocable letter of credit with the Office. Engaging in home improvement activities for compensation without having done so is a violation of the statute, carrying a possible penalty of up to two years and a fine of up to $1,000 or both. The defendant was convicted of this statute, but argued that he was unaware of his statutory obligation, and that the State was required to prove that he was aware of the requirement. The Court disagreed, after first finding no scienter element in the plain language of the statute; noting that another section of the same statute contains a "knowingly" element, suggesting that the Legislation intended to omit such an element for this section; noting that the crime does not have its origins in the common law, which carries a presumption of an intent element; and analyzing the issue under the four factors set forth in State v. Roy, 151 Vt. 17 (1989). Robinson, with Dooley, concurring: agrees with the outcome, but would review the issue under the "ignorance of the law is no excuse" analysis rather than the Roy framework. Doc. 2015-233, May 6, 2016. https://www.vermontjudiciary.org/LC/Supreme%20Court%20Published%20Decisions/op15-233.pdf

RULE 11 PROCEEDING LACKED FACTUAL BASIS; REMEDY WAS TO STRIKE ENHANCED SENTENCE

In re Manning, 2016 VT 53. RULE 11: SUFFICIENCY OF FACTUAL BASIS FOR PLEA.

Full court opinion. Plea of guilty to DUI-4 vacated due to Rule 11 deficiency. 1) In this case, at the defendant's change of plea to his DUI-3, neither the court nor the State stated on the record the elements of the crime to which the petitioner pled guilty and the factual allegations on which the State's charges were based. The court never asked the petitioner if he admitted to the charges. The court asked the petitioner about the location of the road on which he was allegedly driving that night, but the petitioner's answer to that question was not an implicit admission that he had been driving on that road on the night in question. The court never asked the petitioner whether he admitted that he was under the influence when he drove. The petitioner's admission that he had a drinking problem on and off since high school did not support the inference that he admitted that he was intoxicated at the time of the accident giving rise to the DUI charge. 2) The remedy for this violation, an order vacating the DUI-3 conviction, is not warranted. The sentence has expired on the DUI-3 conviction, and therefore no post-conviction relief is available for it. The appropriate relief is to strike any enhanced sentence currently in effect, which was enhanced as a result of the earlier conviction. Therefore, the DUI-4 sentence is stricken and the matter remanded for resentencing. Dooley, concurring and dissenting: Would overrule the case which precludes a challenge to the earlier conviction. Doc. 2015-085, May 6, 2016. https://www.vermontjudiciary.org/LC/Supreme%20Court%20Published%20Decisions/op15-085.pdf

911 RECORDING WAS AUTHENTICATED, AN EXCITED UTTERANCE, AND NOT IN VIOLATION OF THE CONFRONTATION CLAUSE.

State v. Kelley, 2016 VT 58. AUTHENTICATION: 911 CALL. HEARSAY: EXCITED UTTERANCE. CONFRONTATION: DECLARANT AVAILABILITY. PRIOR INCONSISTENT STATEMENTS TO IMPEACH. CLOSING ARGUMENT.

Full court opinion. Domestic assault affirmed. 1) The 911 call entered into evidence at trial was properly authenticated where a police officer who had spoken with the complainant once, and had heard her voice on the telephone on another occasion, identified the voice on the 911 recording as hers. 2) There was no plain error in the trial court's admission of the 911 call as an excited utterance. The call itself provides direct evidence that the complainant was in an excited condition, distraught and crying. Although the declarant did not specifically avow the reliability of the statement, as required for a past recollection recorded, this is not required for an excited utterance. 3) The defendant's confrontation rights were not violated by the admission of the 911 call because the declarant appeared at trial and was available for cross-examination. The fact that she testified that she did not remember portions of the night, nor making the 911 call, does not change the outcome, as this did not make her constitutionally unavailable. 4) A police officer's testimony concerning statements made to him that night by the complainant, that the defendant struck her, were not hearsay because they were admitted to impeach her trial testimony that he did not hit her. When prior inconsistent statements are offered to impeach, the statements must first be brought to the attention of the

witness and an opportunity for explanation or denial provided. VRE 613(b). In addition, the trial court must determine that the witness is adverse to the impeaching party. 12 VSA 1642. Neither of these requirements were strictly complied with here. However, these arguments were not properly preserved and there was no plain error. 5) There was sufficient evidence that the defendant struck the complainant above the eye, and that he acted recklessly, to justify the denial of the defendant's motion for judgment of acquittal. During the 911 call, the complainant identified the defendant and stated that she was "beaten" with his "fists." The complainant had a cut above her eye. 6) During closing arguments, the prosecutor properly pointed to the complainant's prior inconsistent statements, and did not thereby tell the jury to treat them as substantive evidence. May 20, 2016. Doc. 2014-440. https://www.vermontjudiciary.org/LC/Supreme%20Court%20Published%20Decisions/op14-440.pdf

EXTRAORDINARY RELIEF PETITION WAS ACTUALLY SUCCESSIVE PCR PETITION

Chandler v. State of Vermont, 2016 VT 62. EXTRAORDINARY RELIEF: OVERLAP WITH PCR. PCR: SUCCESSIVE PETITIONS. RECUSAL.

Full court opinion. Dismissal of petition for extraordinary relief affirmed, as a successive PCR petition. The complaint is based upon the alleged action or inaction of his lawyer before and during trial, which the petitioner had formerly labeled as ineffective assistance of counsel, and on which the court had previously granted the State summary judgment. Relabeling the actions and inactions as breaches of the lawyer's ethical responsibilities, and renaming the filing does not avoid the bar against successive petitioners for post-conviction relief. The Court also affirmed the denial of a motion to recuse the trial judge, because the petitioner, by his own admission, had no way of confirming or defending the allegations; had made no showing of any prejudice; and could not achieve recusal simply by listing the judge as a witness. May 27, 2016, Doc. 2015-386. https://www.vermontjudiciary.org/LC/Supreme%20Court%20Published%20Decisions/op15-386.pdf

EVIDENCE INSUFFICIENT TO SUPPORT SELF-DEFENSE OR DEFENSE OF OTHERS INSTRUCTIONS

State v. Buckley, 2016 VT 59. JURY INSTRUCTIONS: SELF-DEFENSE, DEFENSE OF OTHERS, DEFENSE OF PROPERTY.

Full court opinion. Aggravated assault with a deadly weapon, and disorderly conduct, affirmed. 1) There was no plain error in the trial court's failure to instruct the jury as to self-defense and defense of others. The defendant steadfastly denied pointing his gun and threatening to shoot the men, in self-defense or in defense of another, or otherwise. He did not admit the elements of the charged crimes, but instead claimed innocence. Moreover, the failure to request these instructions was likely a trial strategy on counsel's part. Nor does the evidence support an argument that the defendant committed the acts because he reasonably believed that he and his brother were in immediate danger of unlawful bodily harm. The others were unarmed and at least twenty feet away when the defendant arrived on the scene, brandishing a

shotgun. 2) There was no plain error in the court's failure to instruct on the defense of defense of property. The defendant did not argue that he committed the crimes in defense of his property; he claimed to be innocent. Moreover, the defendant's use of a gun to ward off what was, at best, a mere trespass to his driveway was inherently unreasonable. Doc. 2015-407, Ma7 27, 2016.
https://www.vermontjudiciary.org/LC/Supreme%20Court%20Published%20Decisions/op15-407.pdf

MORE PROBATION CONDITIONS REVIEWED

State v. Levitt, 2016 VT 60. Simple assault affirmed, conditions of probation affirmed in part and remanded in part, and stricken in part. JURY INSTRUCTIONS: DEFINITION OF REASONABLE DOUBT; USE OF "GREAT CERTAINTY." PROBATION CONDITIONS: IMPOSITION OF "STANDARD CONDITIONS;" NOTICE TO PO OF JOB CHANGES; PERMISSION TO TRAVEL OUT OF STATE; PO VISIT TO HOME; USE OF REGULATED DRUGS.

Full court opinion. The conviction arose from an incident at a protest at Vermont Gas headquarters. 1) The State concedes that certain probation conditions may be stricken, as overboard, or vague, or impermissibly delegating authority to the probation office, or unrelated to the conduct for which the defendant was convicted, or not related to legitimate goals of sentencing, or not supported by factual findings. Thus, provisions relating to working or looking for work, supporting dependents and meeting family obligations, counseling or training programs to the satisfaction of the probation officer, random urinalysis, and use of alcohol, are stricken. 2) The trial court did not commit plain error, or any error, when it defined "beyond a reasonable doubt" as meaning convinced with "great certainty," instead of "with utmost certainty," as referred to in In re Winship, 397 U.S. 358 (1970). 3) The fact that the trial court stated that it was imposing the "standard conditions" of probation does not mean that it understood those conditions to be mandatory, and therefore failed to exercise its discretion. Nor is the court required to make particularized findings as to each condition. 4) The conditions of probation that the defendant notify his probation officer within two days if he changes or loses his job, and that he not leave Vermont without written permission from his probation officer, are permissible. The first condition is a mere notification requirement, and allows the probation officer to assist the defendant in leading a law-abiding life. The second condition is valid on its face, and not an unconstitutional restriction on the defendant's right to travel interstate. However, this condition does not give the probation officer any standard for exercising his discretion. The condition is remanded for the trial court to add standards to the condition. 5) The condition requiring the defendant, upon request, and without delay, to allow his probation officer to visit him where he is staying, is a legitimate tool of probation administration. 6) The condition of probation providing that the defendant must not buy, have, or use any regulated drugs unless prescribed by a doctor, is valid despite the fact that there is no relationship between the conviction and the conduct prohibited by the condition. A condition that forbids criminal conduct is valid. Doc. 2015-164, May 27, 2016.
https://www.vermontjudiciary.org/LC/Supreme%20Court%20Published%20Decisions/op15-164.pdf

TROOPER REASONABLY BELIEVED HE WAS USING NORMAL POINT OF ACCESS TO RESIDENCE

State v. Koenig, 2016 VT 65. SEARCH: CURTILAGE; NORMAL ENTRYWAY TO HOME.

Full court opinion. Denial of motion to suppress evidence in DUI case affirmed. Responding to a report of erratic driving, a Vermont State Police trooper drove to the address of the person to whom the car was registered. He entered a structure attached to the building, with walls on three sides and openings like garage doors on the street side, only without any doors. Entering the structure, he noticed damage to the vehicle, which was parked in the structure. He knocked on a door which led from inside the structure to the building, and the defendant answered the door. 1) There was no significance in the fact that the trial court referred to the structure as a carport. Whether it was called a carport or a garage was immaterial to the Fourth Amendment issue. 2) The evidence was sufficient to establish a reasonable, objective basis for the trooper's belief that the entryway to the building from the sidewalk was a business entrance, and that the remaining visible entryway was a normal point of public access to the residence. Therefore, his entry into the structure and knocking on the door to the building was reasonable. Doc. 2015-269, June 3, 2016. https://www.vermontjudiciary.org/LC/Supreme%20Court%20Published%20Decisions/op15-269.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 THAT VICTIM SOUGHT RFA ORDER PROPER WHERE NECESSARY TO CORRECT MISIMPRESSION ON CROSS-EXAMINATION

State v. Grant, three-justice entry order. EVIDENCE THAT VICTIM SOUGHT A RFA. ARGUMENT CONCERNING JURY'S DUTY TO ACCEPT THE LAW.

Domestic assault affirmed. 1) The court did not err in permitting the victim to testify that her first statement concerning the incident was made in connection with an application for a relief from abuse order, where necessary to clarify why certain information in that statement was not included in her second statement, made to the police, after she was cross-examined on this point. 2) There was no error in the statement by the prosecutor in closing that the jury was bound to accept the law as instructed by the court whether they agreed with it or not. Although it is true that jurors cannot be called to account for failure to do so, that does not mean that they have a right to disregard the judge's instructions on the law. Doc. 2015-200, April Term, 2016. https://www.vermontjudiciary.org/UPEO2011Present/eo15-200.pdf

SENTENCING STATUTES REQUIRING CONSIDERATION OF CERTAIN FACTORS NOT APPLICABLE TO SENTENCES AGREED TO BY DEFENDANT IN PLEA AGREEMENT

In re Walker, three-justice entry order. SENTENCING STATUTES: APPLICABILITY TO PLEA AGREEMENTS.

Dismissal of petition for post-conviction relief affirmed. 1) 13 VSA 7030(a), which requires the court to consider certain factors in determining whether to impose a deferred sentence, a supervised community sentence, a sentence of imprisonment, probation, or referral to a community reparative board, is inapplicable where the defendant enters into a plea agreement and the court imposes the sentence to which the defendant agreed. 2) 13 VSA 7032, which concerns the decision whether sentences are imposed consecutively or concurrently, is not violated where the court imposes sentences concurrently or consecutively based upon a voluntary plea agreement. Doc. 2015-312, April Term, 2016. https://www.vermontjudiciary.org/UPEO2011Present/eo15-312.pdf

POSSIBILITY THAT ODOR OF INTOXICATION MAY HAVE COME FROM PASSENGERS DID NOT INVALIDATE EXIT ORDER

State v. Purich, three-justice entry order. EXIT ORDER: ODOR OF INTOXICATION.

Driving under the influence affirmed. The police officer's exit order was supported by the fact that the defendant rolled through a stop sign, and where there was a strong odor of alcohol emanating from the vehicle. The officer was not required to rely upon additional signs of intoxication in order to justify the exit order, despite the fact that there were passengers in the car who could have been source of the odor. Doc. 2015-343, April Term, 2016. https://www.vermontjudiciary.org/UPEO2011Present/eo15-343.pdf

PCR VENUE IS IN COUNTY OF SENTENCING, REGARDLESS OF WHERE TRIAL WAS HELD

In re Bruyette, three-justice entry order. POST-CONVICTION RELIEF: VENUE.

Dismissal of petitioner for post-conviction relief due to improper venue affirmed. The petitioner was arraigned on criminal charges in Rutland, and at his request venue was transferred to Windham for trial. After his conviction, venue was returned to Rutland for sentencing. Venue rests exclusively in Rutland because that was where the petitioner's sentencing occurred. Pursuant to 13 VSA 7131, venue is proper in the county where the sentence was imposed. This is true even if, as the petitioner argued, the trial court lacked authority to transfer venue back to Rutland for sentencing. Doc. 2015-141, May Term, 2016. https://www.vermontjudiciary.org/UPEO2011Present/eo15-141.pdf

SMASHING CAR WINDOWS SUPPORTED UNLAWFUL MISCHIEF CONVICTION

State v. Spencer, three-justice entry order. UNLAWFUL MISCHIEF: SUFFICIENCY OF THE EVIDENCE.

Unlawful mischief affirmed. The defendant smashed out the windows of a car which had been left on his property for longer than he had given permission. He told the police that he did so to prove a point that the vehicle needed to be removed. The defendant testified that he believed that the vehicle was abandoned. However, he also testified that he smashed the windows of the vehicle to find out who owned it, and only considered it abandoned after not finding any registration in the glove compartment. On this record, the evidence was sufficient for the jury to reasonably conclude that the defendant damaged the vehicle without any right to do so or any reasonable ground to believe that he had such a right. The trial court did not err in failing to enter a judgment of acquittal on its own motion based upon a conclusion that the defendant's conviction was unconscionable. Doc. 2015-223, May Term, 2016.
https://www.vermontjudiciary.org/UPEO2011Present/eo15-223.pdf

Vermont Supreme Court Slip Opinions: Single Justice Rulings

CONDITION OF RELEASE RELATING TO CONTACT WITH POTENTIAL WITNESSES DOES NOT REQUIRE LEAST RESTRICTIVE CONDITION

State v. Cook, single justice appeal from conditions of release. NO CONTACT CONDITION OF RELEASE: LEAST RESTRICTIVE CONDITION NOT NECESSARY.

The defendant argued that the trial court erred when it imposed a condition of release which prohibited contact with his ex-girlfriend, and from coming within 300 feet of her home, employment, or car, because the court did not consider whether this was the least restrictive measure to prevent contact with the victim. However, 13 VSA 7554(a)(3), the provision under which the restriction was imposed, does not require the least restrictive means. Since the ex-girlfriend could be a potential witness, that is sufficient under 13 VSA 7554 to allow a condition which orders that the defendant not harass or contact or cause to be harassed or contacted a victim or potential witness. Skoglund, J. Doc. 2016-065, April Term, 2016.
https://www.vermontjudiciary.org/UPEO2011Present/eo16-065.bail.pdf

Criminal And Appellate Rule Changes

I. PROMULGATED RULE AMENDMENTS

a. Order Promulgating Amendment to Rule 5 of the Vermont Rules of Criminal Procedure

The amendments to Rule 5 add a new subdivision 5(e), and former subdivisions (e), (f), (g), and (h) are now designated as (f), (g), (h), and (i) respectively. New subdivision 5(e) is 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).

This Order, promulgated on May 10, 2016, **effective July 11, 2016**, can be found at:

Order Promulgating Amendment to Rule 5 of the Vermont Rules of Criminal Procedure

b. Order Promulgating Amendments to Rule 16(d) of the Vermont Rules of Criminal Procedure

The amendment adds a new subdivision (d)(3), 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.

This Order, promulgated on May 10, 2016, **effective July 11, 2016**, can be found at:

Order Promulgating Amendments to Rule 16(d) of the Vermont Rules of Criminal Procedure

c. Order Promulgating Amendments to Rule 41(e) of the Vermont Rules of Criminal Procedure

The 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 the 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.

This Order, promulgated on May 10, 2016, **effective August 15, 2016**, can be found at:

Order Promulgating Amendments to Rule 41(e) of the Vermont Rules of Criminal Procedure

II. PROPOSED RULE AMENDMENTS

(NOTE: THE FOLLOWING AMENDMENTS HAVE BEEN PROPOSED BY THE RULES COMMITTEE AND HAVE NOT BEEN REVIEWED BY THE SUPREME COURT.)

a. Proposed Amendment to Rule 3(c)(16) of the Vermont Rules of Criminal Procedure

The proposed amendment Rule 3(c)(16) prescribes those nonwitnessed misdemeanor offenses for which a law enforcement officer, having probable cause, is authorized to arrest a person. This proposed amendment is made to conform the nomenclature describing the offense of cruelty to a child to a legislative enactment amending 13 V.S.A. § 1304. Per Act No. 60 of 2015, § 25, the Legislature amended the statute to create a felony offense of cruelty to a child, but retained codification of a misdemeanor offense in § 1304(a), which is the subject of V.R.Cr.P. 3(c)(16), recaptioning the section title as "Cruelty to a Child," and deleting former reference in the section title to age of either the child or the defendant. The proposed amendment makes a nonsubstantive change to the title of the offense specified.

Comments on this proposed amendment should be sent by **July 15, 2016** to Hon. Walter Morris, Reporter for the Criminal Rules Committee, at the following address:

Hon. Walter Morris, Chair
Criminal Rules Committee
Vermont Supreme Court
109 State Street
Montpelier, VT 05609-0801
Walter.morris@vermont.gov

This proposed amendment can be found at:

Proposed Amendment to Rule 3(c)(16) of the Vermont Rules of Criminal Procedure

**Cases marked with an asterisk were handled by the AGO.*

Vermont Criminal Law Month is published bi-monthly by the Vermont Attorney General's Office, Criminal Justice Division. For information contact David Tartter at david.tartter@vermont.gov.