Vermont Department of State's Attorneys

Vermont Criminal Law Month

April - May 2017

Vermont Supreme Court Slip Opinions: Full Court Rulings

Includes three-justice bail appeals

STRENGTH OF EVIDENCE WASN'T DOUBLE COUNTED IN DENIAL OF BAIL DECISION

CONSIDERATION OF STRENGTH OF THE EVIDENCE BOTH IN DETERMINING WHETHER THE EVIDENCE OF GUILT IS GREAT, AND IN DETERMINING WHETHER BAIL SHOULD BE GRANTED IN THE DISCRETION OF THE COURT.

State v. Henault, 2017 VT 19. DENIAL OF BAIL: STRENGTH OF EVIDENCE AS FACTOR; NATURE OF CHARGES AS RELATING TO DEFENDANT'S CHARACTER AND MENTAL CONDITION; WEIGHT GIVEN TO TESTIMONY. Three justice published bail appeal. Order holding defendant without bail is affirmed. The defendant is charged with promoting a recording of sexual conduct, sexual assault, sexual assault of a child, and contributing to the delinquency of a minor. The court was entitled to consider the "great" evidence of guilt not only to determine that the defendant did not have a constitutional right to bail, but also as a factor weighing against the discretionary grant of bail. The factor was not thus "triple counted." The trial court did not err in considering the nature of the charges as bearing on the defendant's character and mental condition. Nor did the trial court give inadequate weight to a witness's testimony in favor of the defendant's character and mental condition, as her testimony focused almost entirely on her willingness to help the defendant with errands, not on his character and mental condition. Doc. 2017-077, March 30, 2017. https://www.vermontjudiciary.org/sites/default/files/documents/eo17-077.bail_.pdf

REFERENCE TO DEFENDANT'S SILENCE AFTER MIRANDA WARNING WAS NOT ERROR WHERE HE HAD INITIALLY WAIVED HIS RIGHT AND SPOKEN WITH POLICE

State v. Ladue, 2017 VT 20. DUI affirmed. REFERENCE TO HGN TEST: HARMLESSNESS. REFERENCE TO DEFENDANT'S POST-MIRANDA SILENCE. IMPROPER CLOSING ARGUMENTS.

1) There was no reversible error when the police officer made a reference to the horizontal gaze nystagmus test, which had been excluded by agreement, because the offending evidence had virtually no strength at all, while the State's evidence of the defendant's impairment was very strong. 2) The defense claim was that he had not been operating the car that evening; that it had been his cousin. The officer was asked on redirect examination if at any time during the period after the arrest the defendant had made this claim. This did not violate the US Supreme Court case of Doyle v. Ohio, 426 U.S. 610 (1976), because, although the defendant had been given his Miranda rights, he did not invoke his right to remain silent, but explicitly waived them and spoke to the police about the same facts that the defendant now asserts he had a right to silence on. Here, the State was responding to the defendant's eleventh hour denial at trial that he was driving his car that night, which was wholly inconsistent with statements the defendant made after being given his Miranda rights on the night of his arrest. 3) In any event, any error was harmless beyond a reasonable doubt. The defendant's claim that he was not driving, in light of the officer's observation of him getting out of the driver's side of the car a few seconds after operation, and no one else being around, was not reasonably plausible, as suggested by the twelve minutes it took the jury to reach a guilty verdict. 4) There was no plain error where the prosecutor referred to the absence of any claim, before the trial, that the defendant had not been driving. Various other comments in closing are considered, and found not to be plain error. 5) Describing reasonable doubt as having great certainty, as opposed to utmost certainty, was not plain error. Skoglund, with Robinson, dissenting. It was improper to use the defendant's post-Miranda silence. Doc. 2014-281, April 7, 2017. https://www.vermontjudiciary.org/sites/default/files/documents/op14-281_0.pdf

STATE'S INSTRUCTION ON CAUSATION IN DUI FATAL CASE ADEQUATELY CONVEYED REQUIREMENT THAT DEFENDANT'S INTOXICATION, NOT JUST HIS DRIVING, RESULTED IN THE DEATH

State v. Sullivan, 2017 VT 24. DUI, DEATH RESULTING: INSTRUCTION CONCERNING CAUSATION; QUALIFICATION OF EXPERT WITNESS; AREAS OF EXPERT TESTIMONY. DENIAL OF CONTINUANCE TO OBTAIN MITIGATION EXPERT FOR SENTENCING: ABUSE OF DISCRETION.

Full court published opinion. Convictions for DUI, death resulting, and leaving the scene of a fatal accident, affirmed. The matter is remanded for resentencing. 1) The trial court's causation instruction on DUI, death resulting, stated that the State must have proven that the defendant's acts produced the victim's death in a natural and continuous sequence, unbroken by an efficient intervening cause. This sufficiently conveyed that the victim's death had to have resulted from the defendant's intoxication itself, and not merely from operating a motor vehicle while he happened to be intoxicated. While the State must show direct causation between the defendant's intoxication and the victim's death, the instruction did convey this, although it could have been more clearly articulated. 2) The State's expert, an experienced clinical pharmacologist and toxicologist, was qualified to testify that the most likely cause of an accident under the circumstances of this case was the defendant's driving while intoxicated. His alleged lack of familiarity with leading

experts in the field did not preclude him from testifying as an expert on this topic. Nor was his testimony as to causation outside the scope of his expertise. He was not required to be an accident reconstructionist in order to offer his opinion concerning the role of intoxication in the accident. 3) The trial court abused its discretion in denying a continuance of the sentencing hearing to permit the defendant to obtain expert testimony, where that was the defendant's best chance of mounting a potentially viable case in mitigation at sentencing, and he was facing the possibility of consecutive sentences totaling thirty years for his convictions. The defendant did not engage in the kind of undue delay that would warrant such a hard line on the sentencing date in a case such as this. Moreover, the trial court expressed skepticism about the potential value of the mitigation expert in denying the motion to continue, but at sentencing relied on exactly the sort of factors that the expert would have discussed (the defendant's seemingly inexplicable behavior after he hit the victim). Doc. 2015-292, April 14, 2007. https://www.vermontjudiciary.org/sites/default/files/documents/op15-292_0.pdf

FINDING IN HOLD WITHOUT BAIL CASE THAT EVIDENCE OF GUILT IS GREAT WAS SUPPORTED BY THE EVIDENCE, DESPITE FLAWS POINTED OUT BY THE DEFENSE

State v. Shores, 2017 VT 37. HOLD WITHOUT BAIL ORDER: FINDING THAT EVIDENCE IS GREAT; DECISION TO DENY BAIL.

Three justice bail appeal. Denial of bail affirmed. The defendant is charged with second degree murder. 1) The trial court's finding that the State's evidence of guilt was great was supported by the evidence below, despite flaws pointed out by defense counsel in the State's case. 2) The court's decision to hold the defendant without bail was not an abuse of discretion. It considered, among other factors, the unavailability of an appropriate custodian for the defendant should she be released, which was relevant to the determination of likelihood of complying with court orders and conforming to the law. The finding that the proffered custodians were not appropriate was based on the evidence. Doc. 2017-108, May 4, 2017. https://www.vermontjudiciary.org/sites/default/files/documents/eo17-108.bail_.pdf

ISSUE PRECLUSION DID NOT PREVENT CRIMINAL PROSECUTION FOR CONDUCT THAT HAD BEEN FOUND NOT TO MERIT CHINS DETERMINATION.

State v. Nutbrown-Covey, 2017 VT 26. ISSUE PRECLUSION: DENIAL OF CHINS FINDING FOLLOWED BY CRIMINAL PROSECUTION.

Denial of motion to dismiss charges of first degree aggravated domestic assault and two counts of child cruelty affirmed. The State was not prevented by the doctrine of issue preclusion from prosecuting the defendant for child abuse of two of her children, despite the fact that the family court had declined to find a third child to be in need of care and supervision due to neglect because of the same underlying factual issues alleged in the criminal case. The family court proceeding and the criminal proceeding involve different rules of law, and the family court never made a specific finding about child abuse. In

addition, the State did not have a full and fair opportunity to litigate the same issues in the earlier action, because of the timelines for CHINS actions, the State's interest in a jury determination in the criminal proceeding, and the different incentives for the State in litigating a CHINS proceeding and a criminal case (the child's best interests vs. the behavior of the custodial parent). Doc. 2016-248, April 21, 2017. https://www.vermontjudiciary.org/sites/default/files/documents/op16-248.pdf

DOMESTIC ASSAULT IS LESSER INCLUDED OFFENSE OF AGGRAVATED DOMESTIC ASSAULT BASED UPON CHOKING, WHERE STATE DOES NOT RELY ON SPECIFIC STRANGULATION PROVISION

State v. Carter, 2017 VT 32. LESSER INCLUDED OFFENSES: DOMESTIC ASSAULT AS A LESSER INCLUDED OFFENSE OF AGGRAVATED DOMESTIC ASSAULT WHEN THE ACT ALLEGED IS CHOKING OR STRANGLING.

Domestic assault affirmed. The defendant was charged with first degree aggravated domestic assault, in which the assault consisted of choking the victim. The trial court instructed the jury on the definition of serious bodily injury, which is bodily injury which creates a substantial risk of death or which causes substantial loss or impairment of the function of any bodily member or organ, or substantial impairment of health, or substantial disfigurement. The court also instructed the jury on the specific provision providing that strangulation by intentionally impeding normal breathing or circulation of the blood by applying pressure on the throat or neck or by blocking the nose or mouth of another person constitutes serious bodily injury. The court then gave the jury an instruction on the lesser-included offense of domestic assault by causing bodily injury, which is physical pain, illness, or any impairment of physical condition. The jury returned a verdict on this lesser-included offense. On appeal, the defendant argues that domestic assault by causing bodily injury is not a lesser-included offense of aggravated domestic assault by strangulation, because bodily injury is not part of the definition of strangulation. There was no plain error for the following reasons: 1) When the act alleged is choking or strangling, the State can still charge the offense as causing serious bodily injury other than pursuant to the specific provision for strangulation. Here, the State did not charge it specifically as strangulation. 2) The court did not instruct the jury that it had to find strangulation, but did instruct the jury that it had to find one of the other methods of causing serious bodily injury. 3) The specific strangulation provision requires that the defendant act intentionally; the charged offense merely required recklessness. Doc. 2016-017, May 5, 2017. https://www.vermontjudiciary.org/sites/default/files/documents/op16-017.pdf

ELECTRONIC MONITORING AS CONDITION OF PROBATION DID NOT VIOLATE CONSTITUTION

State v. Kane, 2017 VT 36. CONDITIONS OF PROBATION: ELECTRONIC MONITORING; COLLATERAL ATTACKS; ADEQUATE NOTICE; FACIAL UNCONSTITUTIONALITY; VIOLATION OF RIGHT TO TRAVEL; VIOLATION OF FOURTH AMENDMENT AND ARTICLE 11.

Full court published opinion. Violation of probation based upon failure to abide by electronic monitoring, affirmed. 1) The defendant's claim that the condition of probation that she take part in electronic monitoring as required by her probation officer is an improper delegation of authority, would not be heard on this appeal, as it is a collateral attack on the condition which could have been raised on direct appeal. 2) The defendant's claim on appeal that she did not receive adequate notice of what conduct constitutes a violation of the condition is not a collateral attack, but because it was not raised below, would be reviewed only for plain error. Although the condition did not specifically require her to keep the GPS unit charged or to keep the unit plugged into her landline, these precise requirements were not only implied by the condition's focus on electronic monitoring, but explicitly conveyed to the defendant on numerous occasions by her probation officers, prior to the filing of VOP charges. 3) The defendant's claim that the probation condition is facially unconstitutional would not be considered because this claim could have been raised on direct appeal, and it is therefore also a collateral attack on the conditions of probation. 4) The monitoring condition as applied does not violate the defendant's constitutional right to travel. The condition is not a restriction on travel, but a requirement that she abide by electronic monitoring. Any difficulties with travel would arise only from concerns about keeping the GPS unit charged and within cell range or attached to a land line. 5) The condition does not violate the defendant's Fourth Amendment rights. Although placing a GPS device on a person's body to track the person's movements constitutes a search under the Fourth Amendment, the defendant is a probationer with diminished privacy expectations. The purpose of the monitoring was to ensure that the defendant did not violate the special conditions prohibiting contact with her son (she had been convicted of custodial interference for taking her son from his legal custodian and crossing state lines). Under these circumstances, the condition is reasonable under the Fourth Amendment. 6) Nor does Article 11 of the Vermont Constitution mandate a different result. Under Article 11, the State must establish a "special need" that justifies departing from the warrant and probable cause requirement. If such a special need exists, then the Court will apply a balancing test to identify a standard of reasonableness, other than the traditional one, suitable for the circumstances. Probation supervision is a special need that allows the State to depart from the warrant and probable cause requirements. The remainder of the analysis involves balancing the defendant's rehabilitative needs, concerns for protection of the community, and the defendant's Article 11 interests. The condition does not authorize warrantless searches of the defendant's home or possessions. Nor is it a particularly intrusive technological search. The unit does not continually report the defendant's physical position in her home, record her conversations, or examine her possessions for contraband. The defendant's privacy expectations as a probationer are not equivalent to that of a person at liberty. Furthermore, she was put on notice concerning the monitoring and it reasonably relates to the State's special need based on her underlying offense. Finally, the State's interest in monitoring the defendant is strong. Other methods to ensure the defendant's compliance with probation conditions would be more intrusive. 7) The trial court continued the defendant on the same probation conditions. This was not a reimposition, so the defendant's challenge to the conditions are collateral attacks on the original sentence and therefore are barred. Doc. 2016-137, May 12, 2017. https://www.vermontjudiciary.org/sites/default/files/documents/op16-137.pdf

BREATH TESTING EQUIPMENT WAS NOT REASONABLY AVAILABLE WHERE DEFENDANT AND OFFICER WERE IN HOSPITAL IN NEW HAMPSHIRE

State v. Giguere, 2017 VT 40. REQUEST FOR BLOOD TEST: REASONABLE AVAILABILITY OF BREATH TESTING EQUIPMENT.

Full court published opinion. Trial court's ruling which suppressed the defendant's refusal to provide a blood sample reversed. Drivers are presumed to have consented to the taking of a blood sample where breath testing equipment is "not reasonably available." Here, the defendant was taken to a hospital in New Hampshire after an accident in Vermont. The State Trooper asked her to give a blood sample, but not a breath sample, on the grounds that the breath testing equipment was not reasonably available to him under these circumstances – late at night, in a neighboring state, with no legal grounds for compelling the defendant to accompany him back to Vermont, no reasonably nearby equipment in Vermont, and no authority to use equipment in New Hampshire. There was also a question whether the officer would have been able to conduct the test within the two hour window from operation. The nearest police station in Vermont was locked and the person who had the key was out of state, and the State police barracks nearest were an hour to an hour and a half away. Given these difficult circumstances, it cannot be said that breath testing equipment was reasonably available. Doc. 2016-297, May 12, 2017. https://www.vermontjudiciary.org/sites/default/files/documents/op16-297.pdf

FALSE INFORMATION TO POLICE OFFICER CONVICTION WAS NOT SUPPORTED BY SPECIFICATION OF STATEMENTS SAID TO BE FALSE, NOR WAS THE JURY REQUIRED TO BE UNANIMOUS AS TO WHICH STATEMENTS WERE FALSE, NOR WERE THE STATEMENTS DEMONSTRATIVE OF AN INTENT TO DEFLECT AN INVESTIGATION FROM ONESELF

State v. Reed, 2017 VT 28. FALSE INFORMATION TO A LAW ENFORCEMENT OFFICER TO DEFLECT AN INVESTIGATION FROM ONESELF: SPECIFICATION OF STATEMENTS; NEED FOR UNANIMITY; SUFFICIENCY OF EVIDENCE OF INTENT TO DEFLECT.

Conviction for knowingly giving false information to a law enforcement officer with the intention of deflecting an investigation from oneself reversed. Neither the information nor the affidavit specified which statements given by the defendant were false. Nor did the game warden's testimony provide any specific identification of what the State claimed was false. The State's closing argument enumerated five subject areas of inconsistency, and identified all of the defendant's statements concerning the deer's antlers as "false information." The jury instructions gave no explanation about how the jury was to determine whether the defendant gave false information – for example, whether the jury could find that any of the statements given to the warden would meet the element; or that the statement must relate to the antlers; or specify which of the statements with respect to the antlers the jury must find was false. Inconsistent statements do not violate the statute. Such statements may not necessarily be knowingly false, as required by the statute. There was no unanimity instruction, so it is not known if the jury unanimously found any one statement to be

knowingly false. Because the court did not know what statement any particular juror found to be knowingly false, the court could affirm only if it could conclude that the deflection element is met with respect to all of the statements. The record here does not allow such a conclusion. One of the statements appears to have been made to deflect guilt onto another person, but this type of deflection was not charged. The remaining statements are insufficient to meet the requirement of deflecting an investigation from oneself. One of the statements was, in effect, a statement that the defendant did not know what happened to the antler. This is in effect an exculpatory "no," which does not deflect an investigation. The last statement is the defendant's statement that he removed the antler nub with a knife. The statement is both unbelievable and inconsequential. If anything, it was evidence of his guilt, and could not have been a basis for deflecting the investigation. Reiber and Eaton dissenting: Agree that the term "deflect" indicates that the statute criminalizes not merely a knowing lie that affects an investigation, but a knowing lie affecting an investigation that was intended to turn the investigation away from the person making the statement. Disagree that a false denial cannot be a deflection. Here, the facts show that the defendant must have necessarily given false information to the game warden given the many inconsistencies. There was also tremendous evidence that the defendant was attempting to deflect the investigation. Doc. 2015-184, May 12, 2017. https://www.vermontjudiciary.org/sites/default/files/documents/op15-184.pdf

DEFENDANT BEARS BURDEN OF PROOF TO SHOW SEARCH WARRANT NOT SUPPORTED BY PROBABLE CAUSE

State v. Sheperd, 2017 VT 39. Full court published opinion. SEARCH WARRANTS: PARTICULARITY; BURDEN OF PROOF AS TO PROBABLE CAUSE; SUPPRESSION FOR VIOLATION OF STATUTORY REQUIREMENT. VETERINARY CARE COSTS IN ANIMAL CRUELTY CASE: REASONABLENESS REQUIREMENT.

Denial of motion to suppress affirmed. 1) The language of a search warrant permitting the search and seizure of two specific pit bulls, and "any additional pit bull mix dogs," was sufficiently particular. The animal control officer had observed an emaciated and weak dog on the defendant's porch during an exceptionally cold day, and had seen two additional dogs inside the home and heard barking coming from additional, unseen dogs inside, thus providing evidence that the apparently neglected dog on the porch was only one of several dogs at the defendant's home. The exceptionally neglected condition of the dog on the porch reasonably supported a probable cause finding to support a search for and seizure of not only that dog, but also the others reasonably believed to be at the home. Common sense suggests that evidence of mistreatment of some animals suggests the owners are likely mistreating all their animals. 2) The statute requires that the search warrant be executed in the presence of a veterinarian, which did not happen here. The violation of this provision does not require suppression, because the purpose of the veterinarian is to provide emergency care for the animals, not to protect the privacy interests of those suspected of animal cruelty. 3) The trial court correctly ruled that it was the defendant who bore the burden at the suppression hearing of showing that the warrant was not supported by probable cause. 4) The trial court declined to reduce the cost of caring for the dogs, which was placed on the defendant pursuant to the forfeiture order, despite the length of time it took for the matter to come

to a hearing, because the trial court found that it had no discretion to do so. However, the statute calls for reasonable costs incurred by the caregiver to be imposed on the owner, and the court should have considered whether the costs incurred as a result of the lengthy delay were reasonable. Doc. 2016-145, June 2, 2017. https://www.vermontjudiciary.org/sites/default/files/documents/op16-145.pdf

NO CREDIT FOR TIME SERVED ON HOME RELEASE WITH CURFEW

State v. Byam, 2017 VT 47. CREDIT FOR TIME SERVED: HOME DETENTION.

Full court published opinion. Denial of motion seeking credit against sentence for time spent under pretrial conditions of release affirmed. The rule set out in State v. Kenven, that a defendant may be entitled to credit for time spent on pretrial release when those conditions are sufficiently onerous to be akin to incarceration in an institutional setting, is so vague and amorphous that its practical impact is disparite treatment for similarly situated defendants, and entitles a defendant to credit for time served even for periods when the defendant may not have been compliant with his or her restrictive conditions of release. Therefore, Kenvin is overruled to the extent that it permitted credit for home detention outside the statutory program for home confinement and electronic monitoring pursuant to 13 V.S.A. §§ 7554b and 7554d. In its place is adopted a bright line rule: a defendant who is released pretrial under a curfew established by conditions of release and who is later sentenced to jail time is not entitled to credit for the time spent on curfew under conditions of release. A defendant is entitled to credit when the court orders the defendant released pursuant to the statutory home detention program or the electronic monitoring program. This decision does not affect court-ordered placement in a treatment facility. In other words, to be "in custody" for purposes of credit for time served, the defendant must be subject to the physical control of the DOC or of a court-ordered treatment facility. Doc. 2015-409, June 9, 2017. https://www.vermontjudiciary.org/sites/default/files/documents/op15-409.pdf

STIPULATION TO PRIOR DUI WITHOUT COLLOQUY OR FACTUAL FINDINGS WAS NOT PLAIN ERROR

State v. Bangoura, 2017 VT 53. STIPULATION TO PRIOR CONVICTION: NO PLAIN ERROR.

Full court opinion. DUI, second offense, affirmed. The defendant's arguments on appeal that the trial court should not have accepted as sufficient his lawyer's stipulation to a prior DUI conviction, without obtaining the defendant's on-the-record agreement, and that the trial court did not make sufficient factual findings to establish that the defendant had a prior DUI conviction, were not preserved below, and are not plain error. On appeal the defendant does not contest the existence of the prior conviction, so in effect he is asking for a new trial in order to relitigate an issue that he does not contest. A certified copy of the prior conviction was received in evidence without objection and as such, there is no reasonable chance that a jury at a new trial would find that the defendant did not have a prior conviction for DUI. Thus, the error here, if any, did not prejudice the defendant. Doc. 2016-172, June 9, 2017. https://www.vermontjudiciary.org/sites/default/files/documents/op16-172.pdf

CUTTING TIMBER STATUTE DID NOT IMPLIEDLY REPEAL TAKING PARCEL OF REALTY STATUTE

State v. Joseph, 2017 VT 52.
STEALING TREES: IMPLIED REPEAL.

Full court opinion. Trial court's order dismissing charge of trespass with intent to steal and taking away anything of value which is parcel of the realty (13 V.S.A. § 2504) on the grounds that it was impliedly repealed, insofar as § 2504 includes trees and timber, by the enactment of 13 V.S.A. § 3606a (cutting down or removing timber), reversed. There is no evidence of legislative intent to repeal § 2504, which covers more than trees and timber, and there is no precedent for a partial repeal by implication. Further, the new statute does not cover the same mental element required by § 2504. The old statute requires a trespass with intent to steal, and the new statute requires only that the defendant have acted knowingly or recklessly. The statutes can be construed harmoniously, and so there is no repeal by implication. Doc. 2016-331. June 9, 2017.
https://www.vermontjudiciary.org/sites/default/files/documents/op16-331.pdf

CONSCIOUS FLIGHT NOT REQUIRED FOR FUGITIVE STATUS

In re Perron, 2017 VT 50.
EXTRADITION: CONSCIOUS FLIGHT NOT REQUIRED FOR FUGITIVE STATUS.

Full court opinion. Denial of petition for habeas corpus challenging extradition warrant affirmed. 1) The underlying documents are not insufficient for failing to demonstrate that the petitioner has a remaining sentence to serve in the requesting state. Nothing in the record indicates that the petitioner's New York sentence was to be served concurrently with the federal sentence which he had completed before being served the extradition warrant. 2) The petitioner can be considered a "fugitive from justice" even though he did not leave the state of New York voluntarily. First, he does not need to have escaped from confinement because he is also extraditable as a person "lawfully charged," even though he has already pleaded guilty and been sentenced for the offense for which he is being sought. A person is "lawfully charged" until he has completed the sentence imposed for the commission of that crime. In any event, neither the Extradition Clause, the federal extradition act, nor the state extradition statute, require an intentional flight from the charging jurisdiction. The person need not have consciously fled from justice. Doc. 2017-110, June 9, 2017.
https://www.vermontjudiciary.org/sites/default/files/documents/op17-110.pdf

Vermont Supreme Court Slip Opinions: 3 Justice Panel Rulings

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."

COURT'S EXPLANATION OF PLEA AGREEMENT AT RULE 11 PROCEEDING WAS ACCURATE

State v. Miranda, three-justice entry order. VOLUNTARINESS OF GUILTY PLEA: EXPLANATION OF TERMS. SENTENCE: WITHIN COURT'S DISCRETION.

Guilty plea to sexual assault, aggravated domestic assault, and voyeurism, affirmed. The defendant was clearly aware that the State could argue for a minimum sentence greater than three years, and that he could not argue for less than a three-year minimum, despite the trial court's statement that "the State is free to argue for their sentence within the three years to life," and the defendant's attorney "can argue for a lesser sentence." The written agreement clearly explained the plea deal, which the court spelled out at the beginning of the hearing, and in this context the trial court's later statement obviously referenced the earlier summary of the agreement. Nor did the trial court abuse its discretion in imposing a ten year minimum for sexual assault and a four year minimum for aggravated sexual assault. The court based its decision on legitimate considerations and did not abuse its discretion. Doc. 2016-275, April 24, 2017. https://www.vermontjudiciary.org/sites/default/files/documents/eo16-275.pdf

RULE 11 COLLOQUY ADEQUATE TO WAIVE COUNSEL AND ENTER PLEA

State v. Washburn, three-justice entry order. WRIT OF CORAM NOBIS; ADEQUACY OF WAIVER OF COUNSEL AND PLEA PROCEEDING.

Denial of motion to vacate 1994 conviction for DUI affirmed. 1) The Court declined to decide whether the writ of coram nobis was an appropriate remedy in this matter, because the claim is rejected on the merits. 2) The colloquy evidences an adequate determination that the defendant knowingly and intelligently waived counsel and entered in to the plea. The court also advised the defendant of possible, though not all, collateral consequences of the plea, even though it was not required to do so at the time. Doc. 2016-325, April 24, 2017. https://www.vermontjudiciary.org/sites/default/files/documents/eo16-325.pdf

COURT WASN'T REQUIRED TO MAKE SPECIFIC FINDINGS BEFORE ORDERING INDEFINITE PROBATION, AS STATUTE HAD NOT YET BEEN ENACTED

State v. Wiley, three-justice entry order. PROBATION: TIME OF EXPIRY; REQUIRED FINDINGS FOR INDEFINITE PROBATION.

Denial of motion to reconsider sentence affirmed. The defendant argues on appeal that the trial court erred when it found a violation of probation, because he had not been placed on probation until further order of the court, and that his period of probation had expired at the time of the violations. This argument was not raised below, and therefore would not be addressed on appeal, although the Court notes that the probation order plainly states that probation is "until further order of the court." The defendant did argue below that the trial court failed to make specific findings that were required in order to place him on indefinite probation, but he relies upon a statute that was adopted a year after he was sentenced. Doc. 2017-025, May 30, 2017. https://www.vermontjudiciary.org/sites/default/files/documents/eo17-025.pdf

NO INEFFECTIVE ASSISTANCE WHERE TRIAL COUNSEL NEGOTIATED PLEA THAT MET DEFENDANT'S TWO CRITERIA, ASSUMING HE COULD AVOID VIOLATING PROBATION

State v. Nichols, three-justice entry order. AMENDMENT OF PETITION FOR POST-CONVICTION RELIEF: DISCRETION. DENIAL OF PETITION: SUFFICIENCY OF EVIDENCE. COMPLETE FAILURE OF ADVERSARIAL TESTING.

Denial of petition for post-conviction relief affirmed. 1) The trial court did not abuse its discretion when it declined to permit the petitioner to amend his petition during the hearing, while his expert was on the stand, or after the hearing had concluded. He gave no reason why the new claim could not have been discovered earlier, and it was based on the transcript of the Rule 11 proceeding, which was readily available to the petitioner. 2) The trial court's determination that the petitioner did not meet either prong of the Strickland test is supported by credible evidence. The court relied upon the State's expert testimony to conclude that what were allegedly errors by trial attorney were in fact strategic decisions which were reasonable in light of the facts of the case, his experience with the local prosecutor, and his client's stated preferences. 3) The petitioner's trial attorney did not "entirely fail to subject the prosecution's case to meaningful adversarial testing," pursuant to the Cronic decision, which would have meant that no determination of prejudice would have been necessary. The attorney met with the petitioner on at least three occasions, learned the petitioner's primary goals, discussed the case with the petitioner, reviewed the evidence, deposed six witnesses, and negotiated a favorable plea agreement which would have met both of the petitioner's goals if he had complied with his probation conditions. Doc. 2016-320, May 30, 2017. https://www.vermontjudiciary.org/sites/default/files/documents/eo16-320.pdf

THROWING CRUMPLED PAPER WAS THREATENING ACTIVITY

State v. Cavett, three-justice entry order. VIOLATION OF PROBATION – REVIEW OF DOC FINDING OF THREATENING BEHAVIOR, RESULTING IN SUSPENSION FROM PROGRAM, WHICH VIOLATED PROBATION.

Finding of violation of probation and imposition of entire original sentence affirmed. The defendant's probation was violated for failure to complete the Vermont Treatment Program for Sexual Abusers. He was removed from that program because of a disciplinary violation for engaging in threatening behavior. The trial court originally declined to review the DOC's underlying disciplinary decision that the defendant had engaged in threatening behavior, and the matter was remanded for such consideration. On remand, the trial court affirmed the DOC's disciplinary action, and thus the removal from the treatment program and the violation of probation. On appeal, the Court finds that the trial court's finding that the defendant did engage in threatening behavior is supported by a videotape of the incident, which shows that the defendant crumpled up a piece of paper and threw it at a correctional officer with whom he was meeting. Although the video does not make it clear whether the paper hit the officer, the officer testified that it did, and the trial court was entitled to credit this testimony. This record also supports the trial court's determination that the defendant's behavior was objectively threatening in light of the circumstances as a whole, including the setting in which this occurred and the defendant's manner. The Court also held that the trial court had the authority to revoke probation and to require the probationer to serve the entire underlying sentence. Doc. 2016-243, May 30, 2017. https://www.vermontjudiciary.org/sites/default/files/documents/eo16-243.pdf

Vermont Supreme Court Slip Opinions: Single Justice Rulings

RELOCATION WAS NOT LEAST RESTRICTIVE CONDITION OF RELEASE NECESSARY TO PROTECT THE PUBLIC

State v. Rodriguez, single justice bail appeal. CONDITION OF RELEASE: NOT SUPPORTED BY EVIDENCE AS LEAST RESTRICTIVE CONDITION.

Condition of pretrial release requiring defendant to find an alternate residence by April 1, 2017, is vacated as not supported by the evidence. The defendant was charged with lewd and lascivious conduct for looking into a neighbor's window at two young girls while his hand was in his pants. The defendant subsequently moved to a new residence, which happened to be behind the elementary school. The record does not show that relocation is the least restrictive condition necessary. The trial court's decision is based almost entirely on the possibility that the defendant may come

into contact with young girls while traveling to and from work. But nothing in the record supports the assumption that afterschool activities will be in session or that unattended children will regularly contact the defendant as a result. More important, the defendant is already subject to a twenty-four-seven curfew, which significantly limits any contact he may have with the public. Given that the allegations do not suggest that the defendant sought out children away from his home or that the defendant physically touched young girls, the twenty-four-seven curfew is the least restrictive means necessary to protect the public. Doc. 2017-088, April 6, 2017. (Skoglund, J.). https://www.vermontjudiciary.org/sites/default/files/documents/eo17-088.bail_.pdf

ALL CONDITIONS OF RELEASE VACATED WHERE STATE'S CHARGES STRAIN CREDULITY

State v. Cornelius, single justice bail appeal. CONDITIONS OF RELEASE: NOT SUPPORTED BY THE EVIDENCE.

The defendant is charged with accessory in aiding in the commission of a felony, his brother's escape by failing to return from furlough, by maintaining the house where the two of them allegedly live. All of the conditions of release are vacated and the defendant is released on personal recognizance. The defendant has no history of nonappearance, no history of violence, no prior convictions, and has significant, familial ties to the community. The substance and nature of the State's allegations are not serious. The record contains negligible evidence that the actions the defendant took were part of a common plan or specifically intended to aid his brother's escape. Most critically, the statute exempts family members from the charge of aiding an escaped prisoner. Although the State is attempting to smoke out the defendant's brother by using its prosecutorial powers to cut off all necessary aid from the defendant, even a cursory reading of the statute suggests that the Legislature declined to attach criminal liability to the defendant's acts. Because the State's charges strain credulity, and every other factor weighs in favor of the least restrictive conditions possible, all of the defendant's conditions are vacated and he shall be released on personal recognizance. Doc. 2017-055, April 6, 2017. https://www.vermontjudiciary.org/sites/default/files/documents/eo17-055.bail_.pdf

COURT'S REFUSAL TO REDUCE BAIL SUPPORTED BY EVIDENCE

State v. Farnham, single justice bail appeal. BAIL SUPPORTED BY THE EVIDENCE.

The trial court's refusal to reduce bail from $25,000 to $10,000 was supported by the proceedings below, where the court considered the statutory facts including his history of noncompliance with court orders and his lengthy criminal record. Doc. 2017-137, May 31, 2017. https://www.vermontjudiciary.org/sites/default/files/documents/eo17-137.Bail_.pdf

Proposed Rule Amendments

Reporters Notes to Proposed Amendment to V.R.Cr.P. 5, APPEARANCE BEFORE A JUDICIAL OFFICER

Rule 5(e) was originally added in response to the passage of Act No. 195 of 2013 (Adj. Sess.), which established a system of pretrial risk assessments and needs screenings, codified in pertinent part at 13 V.S.A. § 7554c. The statute was again amended in enactment of Act No. 140 of 2015 (Adj. Sess.) to alter former language for court-ordered participation in pretrial risk assessment and needs screenings, and to prescribe that the results of pretrial assessments or screenings are to be provided directly to the defendant and his or her attorney, the prosecutor, and the court. Formerly, the statute and the rule provided that the prosecutor would receive the results, and thereafter provide them to the defendant, his or her attorney, and the court in the event that criminal charges were filed. The statute was amended yet again in Act No.____ of 2017 (S. 134) to specify that the advisements are provided to "eligible" defendants (defined by amended subsection 13 V.S.A. § 7554c(b)(2) as defendants charged with any offense other than one for which a conviction requires registration as a sex offender, or subjects the defendant to potential life imprisonment). The referenced statutory revisions also delete reference to the term pretrial "monitor," substituting pretrial "services coordinator," consistent with amendments vesting the pretrial services program, formerly under auspices of the Department of Corrections, in the Office of the Attorney General.

The 2017 enactment clarifies that while the court may order a defendant to meet with a pretrial services coordinator and participate in a needs screening, to participate in a clinical assessment by a substance abuse or mental health treatment provider and follow the recommendations of the provider, and to otherwise participate in pretrial services, such orders are deemed to be in addition to conditions of release authorized by law, and do not serve to limit the discretion of the court to impose conditions of release authorized under 13 V.S.A. § 7554. However, a defendant's failure to comply with such orders shall not constitute a violation of 13 V.S.A. § 7559 (criminal offense of violation of conditions of release). 3 Proposed Amendment to V.R.Cr.P. 5(e)

The 2017 enactment amends subsection 7554c(e)(1) to provide further specificity as to the limitations upon the information secured in the course of a risk assessment or needs screening that may be divulged by a pretrial services coordinator. Finally, the amended statute, at § 7554c(e)(1) generally recasts the use and derivative use immunity grant as extending to "Information related to the present offense directly or indirectly derived from the risk assessment, needs screening, or other conversation with the pretrial services coordinator." The statute retains the existing provision that "The immunity provisions of this subsection apply only to the use and derivative use of information gained as a proximate result of the risk assessment, [or] needs screening" and adds "other conversation with the pretrial services coordinator." The provisions of V.R.Cr.P. 5(e) are thus amended as indicated to comport with the referenced revisions of 13 V.S.A. § 7554c.

Reporter's Notes to Proposed Amendment to RULE 11.1. PLEAS; ADDITIONAL REMEDIES FOR FAILURE TO PROVIDE ADVISEMENT REGARDING COLLATERAL CONSEQUENCES OF CHARGES UNDER 18 V.S.A. § 4230(a)

General revisions are made to Rule 11.1 to reflect changes necessitated by enactment of Act 133 of 2015 (Adj. Sess.), which expressly prescribes the consequences resulting from the

court's failure to provide the defendant with notice of collateral consequences. The amendment also serves to clarify that the Rule is of application only to convictions for violation of 18 V.S.A. § 4230(a) and not for all offenses prescribed by § 4230.

Reporters Notes to Proposed Amendment to Rule 44.2. RULE 44.2 APPEARANCE AND WITHDRAWAL OF ATTORNEYS

Rule 44.2(b) is amended to comport with general revisions of Administrative Order No. 41, governing Licensing of Attorneys, effective May 15, 2017. In the revision and restyling of A.O. 41, former § 13, Admission Pro Hac Vice, is now designated as § 16 of A.O. 41.

Rule 44.2(b)(2), which formerly governed admission and practice of nonresident attorneys pending completion of law office study, or after such completion pending admission to the bar, is deleted as no longer necessary in view of A.O. 41's abolition of the requirement of law office study as a condition of admission of attorneys to the Vermont bar.

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