Criminal Justice Division
Vermont Attorney General's Office

Vermont Criminal Law Month

April - May 2011

Vermont Supreme Court Slip Opinions: Full Court Rulings

Includes three justice bail appeals

INSTRUCTION ON HOME IMPROVEMENT FRAUD WAS FAULTY

*State v. Rounds, full court opinion. 2011 VT 39. HOME IMPROVEMENT FRAUD: SUFFICIENCY OF THE EVIDENCE. PERMISSIBLE INFERENCES: BURDEN OF PROOF OF BASIC FACT; SUFFICIENCY OF THE EVIDENCE.

Home improvement fraud conviction reversed. 1) The evidence was sufficient to support the jury's finding on the element that the defendant entered into the contract not intending to complete the project in whole or in part, where progress on the project was slow almost from the outset and the defendant demanded progress payments just a few weeks before he ceased work altogether and ceased communicating with the owners altogether. His claim that his "substantial performance" under the contract precluded such a finding was a question for the jury. In any event, the language of the statute suggests that substantial performance is not a complete defense to the offense. 2) The court erred in giving an instruction on the permissive inference found in the home improvement fraud statute. Where a permissive inference deals with a fact that is an element of the offense, it may be given to the jury only if a reasonable jury could find the basic fact beyond a reasonable doubt. That was not the case here, where the State's proffered evidence of the basic fact did not establish it beyond a reasonable doubt. Furthermore, the trial court read the instruction incorrectly, and as a result eliminated one of the statutory requirements of the inference. Although the giving of this instruction was not objected to, it was plain error. Doc. 2009-418, April 15, 2011.

SIMPLE ASSAULT NOT A LESSER INCLUDED OFFENSE OF AGGRAVATED ASSAULT – IMPEDING OFFICER

State v. Myers, full court opinion. PRIOR CONDUCT: PREJUDICIAL EFFECT OF RACIST COMMENT. FAILURE TO PRESERVE JURY INSTRUCTONS. LESSER INCLUDED OFFENSES: SIMPLE ASSAULT AND

AGGRAVATED ASSAULT – IMPEDING OFFICER. MANDATORY PRESUMPTIONS: INTENT TO CAUSE CONSEQUENCES OF ONE'S ACTS. DIMINISHED CAPACITY FROM INTOXICATION INSTRUCTION: HARMLESS ERROR. NECESSITY DEFENSE INSTRUCTION. SUFFICIENCY OF THE INFORMATION. SUFFICIENCY OF THE EVIDENCE: EVIDENCE OF PAIN.

Reckless endangerment, unlawful trespass, leaving the scene of an accident, property damage resulting, driving under the influence, third offense, two counts of aggravated assault, preventing a law enforcement officer from performing a lawful duty, and resisting arrest, affirmed. 1) The trial court did not err in refusing to exclude from evidence an incident earlier in the evening in which the defendant had gotten into an altercation at a bar and had used racial epithets. Although this evidence did have some prejudicial effect, the trial court did not abuse its discretion in finding that its probative value (the defendant's high level of intoxication and his aggressive behavior) outweighed that effect. The Court notes that it would have been better to defer a final ruling until trial, since it relied in part upon the State's argument that the defendant's racist beliefs provided a motive for the charged acts, but did not adopt this attenuated theory of the case at trial. Even if admission of this evidence was error, it was harmless in light of other evidence at the trial about the defendant's racist beliefs. Although the defendant claims that this other evidence was admitted as a tactical decision based upon the trial court's ruling, some of it – concerning his racist tattoos, which the complainant had refused to work on – was coming in anyway. 2) The defendant failed to make a detailed objection to the jury instructions after they were given and before the jury recessed, as required by Wheelock, but merely referred to the prior charge conference, and the trial court assured counsel that it was preserving all prior objections. Under these circumstances, the objections to the instructions would only be reviewed for plain error. 3) The defendant was not entitled to simple assault as a lesser included offense to aggravated assault, preventing a law enforcement officer from performing a lawful duty. The requisite mental state is different: simple assault requires a purposely, knowingly, or recklessly state of mind, whereas the aggravated assault requires an intent to prevent a law enforcement officer from performing a lawful duty. 4) The jury instruction that "the law presumes that unless there is some other reasonable explanation, a person may be presumed to have intended the consequences of his actions that might be normally expected," impermissibly created a mandatory inference, but was not plain error. Martell is overruled to the extent that it created a category of per se reversible error. Here, the question of why the defendant lashed out at the officers was never at issue. The defense raised only the issue of whether the officers were actually injured by him and the degree to which his actions delayed the arrest. There was no evidence to suggest that the defendant was struggling or kicking at the officers for some purpose other than to hinder the officers. 5) The court did not commit plain error in failing to instruct the jury on diminished capacity from intoxication. Any error was harmless, as the defendant never raised the matter of intoxication directly when addressing the assault charges, never testified about his own level of intoxication beyond repeatedly admitting that he was aware at the time that he was driving drunk. His defense to these charges in closing was to suggest that his actions did not delay his arrest or did not actually cause harm to the officers. 6) The trial court correctly denied the defendant a necessity instruction on the charge of leaving the scene of an accident, despite the defendant's argument that he was justified in leaving because the complainant was brandishing what he believed was a gun. The necessity instruction requires an

emergency that arose without fault on the part of the actor himself. The emergency here was caused by the defendant's own actions. 7) The reckless endangerment information was constitutionally sufficient to inform him of the crime being charged. His attorney clearly understood that the person placed in danger was the complainant's young child. 8) An officer's testimony that the defendant's kick caused him "some discomfort," was sufficient to sustain the conviction for aggravated assault, which requires "physical pain, illness or any impairment of physical condition." Doc. 2009-355, April 22, 2011.

SIMPLE ASSAULT NOT A LESSER INCLUDED OFFENSE OF AGGRAVATED ASSAULT WHERE NO EVIDENCE DEFENDANT ACTED OTHER THAN PURPOSEFULLY OR KNOWINGLY

State v. Russell, 2011 VT 36. RELEVANCE: DEFENDANT'S LETTERS OFFERED TO SHOW INTENT. AGGRAVATED ASSAULT: SUFFICIENCY OF THE EVIDENCE; SIMPLE ASSAULT AS LESSER INCLUDED OFFENSE.

Full court published entry order. Aggravated assault affirmed. 1) The court did not err in admitting several letters written earlier by the defendant in which he threatened the victim. The defendant claimed these were irrelevant because he did not recognize the victim the night of the assault, but this fact was disputed. Although prejudicial, the letters also had high probative value because they were the only evidence to show that the defendant intended to harm the victim before the incident. 2) The evidence of aggravated assault was sufficient where the jury could have found that the defendant stabbed the victim. 3) While simple assault is a lesser included offense of aggravated assault, the evidence here did not reasonably support an instruction on simple assault. The evidence did not support a finding that the defendant acted negligently rather than purposefully or knowingly. Doc. 2009-232, April 11, 2011.

WAIVER OF APPEAL IN LIFE SENTENCE CASE MUST BE DONE ON THE RECORD IN OPEN COURT

State v. Sheperd, 2011 VT 44. WAIVER OF APPEAL: LIFE SENTENCE CASES.

Full court published entry order. V.R.A.P. 3(b)(2) requires a waiver, on the record in open court, of the right to an automatic appeal of a life sentence. The parties stipulated to dismissal of the automatic appeal, but the Rule requires an actual waiver by the defendant on the record in open court. That requirement may be satisfied through a video or telephonic conference. Johnson, J., concurring: Where, as here, the defendant has entered into a plea agreement that forecloses challenges to the underlying conviction, there is little purpose in mandating a potentially time-consuming and costly requirement of a formal waiver following a court colloquy. The Criminal Rules Committee should take up the issue. Docs. 48-6-09 GiCr and 27-2-10 GiCr.

FINDING OF CONSPIRACY FOR PURPOSES OF HEARSAY EXCEPTION SHOULD BE DONE OUT OF JURY'S HEARING

State v. Lampman, 2011 VT 50. Full court published entry order. HEARSAY: CO-CONSPIRATOR EXCEPTION: COURT'S FINDING OF CONSPIRACY IN PRESENCE OF JURY. COURT QUESTIONING OF WITNESS: COERCION, COMMENT ON EVIDENCE. EVIDENCE: RELEVANCY. JURY INSTRUCTIONS: WAIVER.

Simple assault affirmed. 1) The trial court overruled a hearsay objection made on the grounds that the co-conspirator exception was not applicable because the court was required to find independent evidence of a conspiracy. The court replied, "I'm finding independently that there was a conspiracy, at least an implicit conspiracy to beat up [the victim]," thus overruling the objection. The defendant argues for the first time on appeal that this statement usurped the jury's role as trier of fact and amounted to a finding that she had committed an uncharged criminal act. This is not correct. The defendant's hearsay objection raised a preliminary question of fact which had to be resolved by the trial court in order to rule on the objection. While it would have been better practice to have made the ruling outside the hearing of the jury, the defendant failed to show that this comment affected her substantial rights or had an unfair prejudicial impact on the jury's deliberations. 2) The trial court's questioning of a witness did not impermissibly communicate to the jury its belief that the witness was committing perjury. The trial court's explicit statement to this effect was made outside the presence of the jury. Nor was the trial court's statement to the witness that he could cure any prior perjury by testifying truthfully unduly coercive. 3) The trial court did not abuse its discretion when it precluded questioning the victim about her romantic interest in the defendant's girlfriend five months after the incident. Whether she had a romantic interest in the defendant's girlfriend at the time of the incident would be relevant to motive, but not five months later. 4) The trial court did not err in precluding testimony from the defendant's current girlfriend that the defendant had received threatening text messages sometime the year before the incident, where the defendant herself testified to having received such messages. 5) The objections to the jury instructions were not made after the instructions were given and before the jury retired, and therefore were waived on appeal. Doc. 2009-304, May 2, 2011.

WAIVER FEE FOR TRAFFIC TICKETS NOT UNCONSTITUTIONAL BURDEN ON RIGHT TO TRIAL.

State v. Soares, full court published entry order. 2011 VT 56. SPEEDING TICKETS: CONSTITUTIONALITY OF WAIVER FEES; ADMISSION OF EVIDENCE; FILING FEE.

Speeding ticket affirmed. 1) The defendant claimed that the waiver provision, which permits imposition of a penalty within the penalty range when the defendant chooses to challenge the ticket, is unconstitutional. However, the cases he relies upon are criminal matters, and this is a civil proceeding. 2) The judicial bureau did not err in admitting evidence from the laser device used to detect his speed. In such proceedings, the rules of evidence do not apply, and evidence is admissible if it is of a type commonly relied upon by reasonably prudent persons in the conduct of their

affairs. In this case, the officer testified that he visually estimated the defendant's speed at eighty miles per hour, and that the laser device confirmed his estimate. This evidence was sufficient to be relied upon by the hearing officer. 3) The imposition of filing fees and the cost of a transcript for a litigant who goes to a hearing and takes an appeal, is not unconstitutional. Doc. 2010-241, May 17, 2011.

EVIDENCE OF VICTIM'S PRIOR DRUG USE NOT ADMISSIBLE WHERE NO PROFFER OF RELEVANCE TO THE CLAIM SHE FABRICATED THE SEXUAL ASSAULT.

State v. Faham, full court published entry order. 2010 VT 55. SUFFICIENCY OF THE EVIDENCE CLAIM: PRESERVATION. COMPLAINANT'S PRIOR USE OF DRUGS: PRESERVATION, PLAIN ERROR.

Attempted sexual assault affirmed. 1) The defendant's claim that the evidence was insufficient to show that he attempted to engage in a sexual act with the victim was not preserved because the defendant failed to renew his motion for judgment of acquittal at the close of the evidence. The defendant did file a post-verdict motion for judgment of acquittal, but on different grounds. 2) The defendant sought to use evidence of the victim's prior drug use in order to show her motive, plan and intent when she got into the car with him. At no time did the defendant proffer to the trial court, as he did on appeal, that evidence of the victim's prior drug use was relevant to a defense that the victim fabricated the sexual assault claim. Therefore, this theory of relevance was not preserved, and there was no plain error. Doc. 2009-290, May 18, 2011.

MOTION FOR CREDIT FOR TIME SERVED PREMATURE WHERE DOC HAS NOT YET CALCULATED SENTENCE

State v. Sommer, full court decision. 2011 VT 59. CREDIT FOR TIME SERVED: TIMELINESS OF MOTION. SENTENCE CALCULATION: CONSECUTIVE SENTENCES IMPOSED SERIATIM.

Denial of motion seeking presentence credit affirmed. The defendant's motion was premature, where the Department of Corrections had not yet provided the court and the defendant with a calculation of the sentence, taking into account any credits for time served, as required by 13 V.S.A. § 7044(a). The sentencing court can ensure that the defendant has received proper credit for any time served by calculating the time served itself, or by leaving the sentence calculation to the Department of Corrections, or by reviewing the sentence under V.R.Cr.P. 35(a). In any event, the defendant was not entitled to credit towards both his new, consecutive sentence, and a sentence which he was serving on another case before this conviction. Doc. 2009-417, May 27, 2011.

TRIAL COURT MUST ASSESS CREDIBILITY OF WITNESS IN MOTION FOR NEW TRIAL BASED ON NEWLY DISCOVERED EVIDENCE.

State v. Charbonneau, full court decision. 2011 VT 57. MOTION FOR NEW TRIAL BASED ON NEWLY DISCOVERED EVIDENCE: TRIAL COURT'S FINDING RE CREDIBILITY OF EVIDENCE.

Simple assault conviction. Denial of motion for new trial based on newly discovered evidence affirmed. The defendant produced an affidavit from the complainant's son more than two years after the incident, in which he stated that his father had verbally harassed and physically assaulted the defendant, who defended himself using as little physical force as necessary. He stated that he had not come forward earlier because of fear that his father would prevent him from seeing his own son, for whom his father was his only source of contact. The trial court found that the defendant had failed to show that the evidence could not have been discovered before trial with due diligence, or that the witness was credible or that his testimony would probably change the result of the trial.

1) The trial court properly assessed the credibility of the new witness, and by doing so did not intrude upon the province of the jury. The test for a new trial requires the trial court to find that a new result is probable, and this requires the trial court to evaluate the quality of the proffered new evidence. The circumstances from which the proffered evidence arose (the witness had a falling out with his father, the complainant, shortly before coming forward), and the inconsistencies between the new testimony and that of other witnesses, cuts against the credibility of the testimony, and the trial court was justified in considering them. Moreover, there was substantial evidence at trial supporting the jury verdict that did not hinge solely on the question of witness credibility. Because this finding was not an abuse of discretion, and precludes the grant of a new trial, the Court does not reach the trial court's other finding, concerning whether this evidence could have been discovered before trial with due diligence. Doc. 2010-061, May 27, 2011.

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."

TESTIMONY OF A PAINFUL PUNCH IN THE FACE WAS SUFFICIENT TO SUPPORT A SIMPLE ASSAULT CONVICTION.

*State v. Doe, three justice entry order. SIMPLE ASSAULT: SUFFICIENCY OF THE EVIDENCE; PRESERVATION; RELEVANCY.

Simple assault affirmed. 1) The evidence was sufficient to support a finding of guilt where the complainant testified that the defendant punched him in the face, which

caused him pain, and the trial court, sitting as the factfinder, found this testimony credible. 2) An objection to the trial court's exclusion of evidence that the defendant was a former boxer was not preserved. In any event, it was irrelevant to whether the defendant struck the complainant on this particular occasion. 3) The defendant's objection to the exclusion of evidence of the number of complaints filed against the complainant in their joint workplace was not preserved. In any event, the court reasonably concluded that the number of grievances filed was irrelevant to the issues at hand, and in addition the trial court was aware through other testimony that numerous grievances had been filed against the complainant during his tenure as supervisor. Doc. 2010-364, April 21, 2011.

COURT MAY REOPEN EVIDENCE BEFORE GRANT OF JUDGMENT OF ACQUITTAL.

*State v. Jimmo, three justice entry order. REOPENING EVIDENCE FOR IDENTIFICATION TESTIMONY. SENTENCING: PENALIZING APPEAL.

Driving with suspended license affirmed. 1) The trial court did not err in permitting the state to reopen the evidence in order to present testimony that the person in the courtroom was the person seen driving without a license. Such a decision is within the trial court's discretion if it has not already granted a judgment of acquittal. 2) The trial court did not penalize the defendant for appealing when it imposed a sentence of 6 to 12 months, all suspended except for 60 days on work crew, with completion of work crew as a condition of probation, and also indicated that the work crew portion of the sentence would be stayed if the defendant appealed and wanted to defer the work crew, and also that the probation would run for two years after the appeal or until the defendant completed the work crew sentence, whichever first occurred. This sentence was intended to permit the defendant avoid serving on the work crew in the event that the conviction was reversed, but also to permit the state to compel the service of the work crew in the event that the conviction was affirmed. Doc. 2010-318, April 21, 2011.

OBJECTION TO COURT'S IMPOSITION OF DEADLINE ON JURY DELIBERATION WAS WAIVED.

State v. O'Dell, three justice entry order. COURT'S IMPOSITION OF DEADLINE ON JURY DELIBERATIONS: WAIVER OF CLAIM OF ERROR. FAILURE TO PERMIT WITNESS TO TESTIFY OUT OF ORDER: WAIVER, PREJUDICE.

Aggravated assault with a deadly weapon affirmed. 1) The trial court's acknowledged statement to the jury regarding the need to complete the trial that day (because of the judge's personal travel plans), came close to precisely the sort of deadline that this and other courts have proscribed. However, the claim was waived, where the court informed counsel of its intent to complete the trial within two days, and counsel accepted that; where the court made it clear to counsel that it intended to keep the jury to deliberate on Friday night, reiterating that the trial could not continue into the weekend or beyond, and counsel agreed that the court could explain the plan to the jury off the record. 2) The court did not err in failing to

allow a medical witness to testify out of order at the end of the first day, where the defendant was free to subpoena the witness to appear the next day, failed to do so, and offers no explanation for the omission. In any event, the witness's testimony at the hearing on the motion for new trial refutes any possible finding of prejudice. Doc. 2010-172, April Term, 2011.

CLOSING ARGUMENT INFERRING FACT FROM EVIDENCE WAS NOT PLAIN ERROR.

State v. Nolen, three justice entry order. CLOSING ARGUMENT: PLAIN ERROR.

Careless and negligent operation affirmed. The prosecutor's claim in closing argument that the defendant lied about whether he had given the finger to the complainant was not plain error, since it was a single statement; there was factual support in the record for the inference the prosecutor was drawing; the statement did not go to the heart of the defense; and the court instructed the jury not to consider statement of counsel as evidence. Doc. 2010-319, April Term, 2011.

STOP BASED ON SPEEDING IMPROPER WHERE OFFICER'S TESTIMONY DID NOT SUPPORT SPEEDING CLAIM.

State v. Wood, three justice entry order. MOTOR VEHICLE STOP: NAKED ASSERTION THAT DEFENDANT WAS SPEEDING; ANONYMOUS TIP.

Civil suspension of driver's license reversed. The motor vehicle stop was not justified based upon the officer's testimony that she believed the defendant was speeding based upon her inability to catch up with him as quickly as she expected, where she did not reference her own speed, and there was no evidence, or any findings, upon which to gauge distance and time, leaving an essentially naked assertion, devoid of any described measurable manifestation, that the defendant appeared to be speeding. Nor did an anonymous tip justify the stop where the caller did not provide sufficiently particular information about the driver's vehicle to justify the stop. Doc. 2010-350, April Term 2011.

SENTENCE RECONSIDERATION OF LIMITED USEFULNESS WHENEVER THE SENTENCING PROCESS IF NOT THE RESULT OF A HEATED TRIAL.

State v. Brouillard, three justice entry order. SENTENCE RECONSIDERATION.

Denial of motion for sentence reconsideration affirmed. 1) The defendant had pled guilty pursuant to a plea agreement, but one without an agreed sentence. In denying sentence reconsideration, the trial court noted that a motion for sentence reconsideration has limited usefulness when the sentence is based on a plea agreement. The defendant argues on appeal that the trial court was mistaken, because this plea agreement did not contain an agreed sentence. However, sentence reconsideration is of limited usefulness in such cases, not only where there is a stipulated sentence, but also

because the sentencing process is not the product of a heated trial. 2) In any event, the court did not withhold its discretion in this case, but fully considered the defendant's arguments and properly weighed all relevant factors. The fact that this case involved the defendant's first assault against this victim was not a significant factor in light of his history of violence against women. Doc. 2010-358, April Term 2011.

SENTENCE RECONSIDERATION MOTION UNTIMELY

State v. Price, three justice entry order. SENTENCE RECONSIDERATION: TIMELINESS.

Denial of motion for sentence reconsideration affirmed. The defendant's pro se motion for sentence reconsideration, filed after entering into a plea agreement with a stipulated sentence, was filed beyond the 90 day jurisdictional deadline, and therefore the denial of the motion is affirmed. In any event, the trial court acted well within its discretion in denying the motion. Doc. 2010-363, April Term, 2011.

FAILURE TO PROVIDE LIST OF INDEPENDENT TESTING FACILITIES WAS NOT PREJUDICIAL

State v. Shorter, three justice entry order. BREATH TEST: FAILURE TO PROVIDE LIST OF INDEPENDENT TESTING FACILITIES.

DUI affirmed. The law enforcement officer failed to provide the defendant with a list of independent facilities for blood alcohol testing, as required by Section 1202(d). However, failure fully to inform a suspect of his rights prior to administering a breath test requires suppression of the result only if the omission is prejudicial to the defendant. The defendant here failed to demonstrate any prejudice, because he indicated to the officer that he did not wish to obtain additional testing. On appeal, he argues that if he had known there was a facility open and close to his home, he may have decided to seek additional testing or to refuse the test, but he offered no evidence at the suppression hearing to support this theory. Doc. 2010-379, April Term 2011.

ATTORNEY'S FAILURE TO TAKE DEPOSITIONS, FILE MOTIONS, OR PURSUE DIMINISHED CAPACITY WAS NOT INEFFECTIVE.

In re v. Beyor, three-justice entry order. POST CONVICTION RELIEF: EFFECTIVENESS OF ATTORNEY PREPARATION; VOLUNTARINESS OF PLEA.

Denial of post-conviction relief affirmed. 1) The trial court found that the petitioner's attorney did not fall below an objective standard of reasonable when he failed to take depositions, file motions to suppress or dismiss, or pursue a diminished capacity defense. Counsel considered all of these matters, but made a judgment, within the range of competence demanded of attorneys in a criminal case, not to pursue them. 2) Counsel's statement to the petitioner that there was a risk that the judge would be annoyed at the use of time

and expense of public resources on a two day trial where the evidence was so strong did not render the guilty plea involuntary as the result of coercion. Further, during the plea colloquy, he denied any threats or promises, and said he was entering into the agreement voluntarily. Doc. 2010-421, April Term 2011.

SENTENCE RECONSIDERATION DEADLINE RUNS FROM SENTENCING, NOT FROM REVOCATION OF PROBATION

State v. James, three-justice entry order. SENTENCE RECONSIDERATION: JURISDICTION; TIME LIMIT; RELIANCE ON EVENTS SUBSEQUENT TO SENTENCING.

Denial of motion for sentence reconsideration affirmed. The trial court properly denied the motion because it lacked jurisdiction. The motion was filed more than 90 days after the imposition of sentence. The motion was filed within 90 days of a revocation of probation and the imposition of the underlying sentence. The 90 days runs from the original sentencing, not from the revocation of probation and imposition of the underlying sentence. Even if the court had had jurisdiction, there was no abuse of discretion in denying the motion. The defendant had asked the court to alter his sentence so that he could get inpatient treatment for his worsening mental health issues. Sentence reconsideration is not a means to review circumstances that come about after the imposition of sentence, but to allow the trial court to reconsider the facts and circumstances existing at the time of the original sentence. Docs 2010-224 – 228, May Term, 2001.

EXCLUSION OF VICTIM'S USE OF MARIJUANA WAS PROPER

State v. Mertens, three justice entry order. COMPLAINANT'S USE OF MARIJUANA: RULE 403.

First degree aggravated domestic assault affirmed. The trial court did not err in excluding evidence of the complainant's use of marijuana, argued to be relevant because use of marijuana can impair a person's ability to recall, where she had not actually been seen consuming any. The trial court therefore found that the evidence was excludable under Rule 403, and this ruling was within its discretion. Doc. 2010-290, May Term 2011.

A PUNCH IN THE EYE WAS ENOUGH TO PUT SOMEONE IN FEAR OF SERIOUS BODILY INJURY

State v. Stone, three justice entry order. SUFFICIENCY OF THE EVIDENCE: PLACING ANOTHER IN FEAR OF SERIOUS BODILY INJURY. PRESERVATION.

Assault and robbery affirmed. The defendant argues that the State's evidence that she placed the complainant in fear of serious bodily injury was insufficient. Because this claim was not properly preserved, the issue on appeal is whether the trial court should have acquitted her on its own motion because the evidence on the challenged element was so tenuous as to

make her conviction for assault and robbery unconscionable. She argues that her acquittal on the greater charge of assault and robbery with a dangerous weapon means that the jury must have found that she was not armed with a gun and thus the evidence was necessarily insufficient to establish that she attempted, by physical menace, to place the complainant in fear of serious bodily injury. However, the gun was never found and there was some uncertainty at trial as to whether it was a real gun capable of inflicting serious bodily injury. The jury could have concluded that the State did not prove beyond a reasonable doubt that the defendant displayed a dangerous weapon capable of causing serious bodily injury, but that the State did prove that the defendant displayed what appeared to be a real gun which placed the complainant in fear of serious bodily injury. Moreover, the threat of physical menace was not limited to displaying a weapon, and the jury could have concluded that by striking the complainant in the eye, the defendant, attempted, by physical menace, to place the complainant in fear of serious bodily injury. In any case, the evidence of guilt was overwhelming. Doc. 2010-346, May Term 2011.

FAILURE TO INSTRUCT ON MISTAKEN BELIEF OF CONSENT WAS NOT PRESERVED.

*State v. Jadallah, three justice entry order. LEWD CONDUCT: REASONABLE BUT MISTAKEN BELIEF OF CONSENT; PRESERVATION.

Lewd and lascivious conduct affirmed. The defendant argued on appeal that the trial court should have given a jury instruction presenting his theory of defense, that he was getting mixed messages from the complainant and therefore reasonably believed that she was consenting to his conduct, irrespective of her actual subjective intent. This argument is being raised for the first time on appeal, and at trial the defense was not a misperception of consent, but that the complainant actually consented, though her actions. Doc. 2010-368, May Term 2011.

PETITIONER'S ARGUMENTS DENIED AS INCOMPREHENSIBLE.

Bedell v. State, three justice entry order. INCOMPREHENSIBLE ARGUMENTS.

Denial of petitioner's "motion for P.C.R. expunged" affirmed, as the petitioner has not set forth comprehensible arguments demonstrating error. Doc. 2010-474, May Term 2011.

Vermont Supreme Court Slip Opinions: Single Justice Rulings

COR LIMITING CONTACT WITH SON PROPER WHERE SON WAS POTENTIAL WITNESS

State v. Crowingshield, single justice COR order. CONDITION OF RELEASE: CONTACT WITH SON/WITNESS.

The trial court's condition of release that the defendant not have contact with his son unless he does so through Women's Safe, was within the trial court's authority. The defendant is charged with assaulting his wife, an assault which the son witnesses, and for which the child called 911. While the defendant may not necessarily be a danger to his son, this condition is supported by the proceedings below, which indicate that the son is a potential witness for the State and may be influenced by his father. Doc. 2011-174, May Term, 2011.

United States Supreme Court Cases Of Interest

Thanks to NAAG for these summaries.

*Kentucky v. King***,** 09-1272. By an 8-1 vote, the Court rejected the "police-created exigency" doctrine that many lower courts had adopted to limit the scope of the exigent circumstances exception to the Fourth Amendment's warrant requirement. In this case, police officers smelled marijuana emanating from an apartment, knocked on the door, and then entered the apartment after they heard noises which indicated that physical evidence was being destroyed. The Kentucky Supreme Court held that the large quantity of drugs the officers found had to be suppressed because the officers created the exigency by knocking on the door. Reversing, the Court held "that the exigent circumstances rule justifies a warrantless search when the conduct of the police preceding the exigency is reasonable" within the meaning of the Fourth Amendment. [http://www.supremecourt.gov/opinions/10pdf/09-1272.pdf]

J.D.B. v. North Carolina, 09-11121. By a 5-4 vote, the Court held that a child's age is relevant to the *Miranda* custody analysis. The Court reasoned that "[i]t is beyond dispute that children will often feel bound to submit to police questioning when an adult in the same circumstances would feel free to leave," and saw "no reason for police officers or courts to blind themselves to that commonsense reality." The Court therefore reversed a North Carolina Supreme Court decision that did not take age into account when it held that a 13-year-old student taken from his class to a school conference room and questioned about a crime by a police officer and school officials was not in custody.
[http://www.supremecourt.gov/opinions/10pdf/09-11121.pdf]

Bullcoming v. New Mexico, No. 09-10876. The Confrontation Clause of the Sixth

Amendment, applicable in criminal trials, permits the introduction of testimony statements of witnesses absent from the trial only where the declarant is unavailable, and only where the defendant has had a prior opportunity to cross-examine the declarant. In *Bullcoming*, the Court by a 5-4 vote held that the Confrontation Clause does not permit the prosecution to introduce a forensic laboratory report, containing a testimonial certification of the results of lab tests, in order to prove a fact at a criminal trial, through the in-court testimony of an analyst who neither signed the certification nor personally performed or observed the performance of the test reported in it. http://www.supremecourt.gov/opinions/10pdf/09-10876.pdf

Cert Grants:

1. *Williams v. Illinois*, 10-8505. At issue is whether ─ in light of *Melendez-Diaz v. Massachusetts* and *Bullcoming v. New Mexico* ─ a defendant's Confrontation Clause rights are violated when an expert witness, relying on the DNA testing performed (and lab report prepared) by another DNA analyst, gave her expert opinion that there was a DNA match.

4. *United States v. Jones*, 10-1259. In this case, federal agents installed a global positioning system (GPS) tracking device on respondent's car, and then monitored the car's movements for 30 days. At issue are (1) whether, as the D.C. Circuit held, "the warrantless use of a tracking device on respondent's vehicle to monitor its movement on public streets violated the Fourth Amendment"; and (2) "[w]hether the government violated respondent's Fourth Amendment rights by installing the GPS tracking device on his vehicle without a valid warrant and without his consent."

Legislative Summaries, 2011 Session

Provided by the Legislative Council

Corrections

Act No. 41 (S.108). Crimes and criminal procedure; corrections; sentencing; furlough; arraignments

This act is also known as "The War on Recidivism Act" and addresses a number of issues related to criminal justice and corrections policy.

- Clarifies that a sentence is not considered "fixed" and thereby prohibited by Vermont's indeterminate sentencing structure, provided the minimum and maximum terms of the sentence are not identical
- Permits the department of corrections to place an offender who was convicted for an eligible misdemeanor on reintegration furlough, treatment furlough, or home confinement furlough without prior approval of the court, provided that the department has made a determination based upon a risk assessment that the offender poses a low risk to public safety or victim safety and that

employing an alternative to incarceration to hold the offender accountable is likely to reduce the risk of recidivism. At the time of sentencing, the court may make written findings that such release is not appropriate, and thus block the department from taking such action. The court veto provision will expire March 31, 2013

- Establishes the nonviolent misdemeanor review committee for the purpose of proposing alternatives to incarceration for nonviolent, low-risk misdemeanors. The committee will report its findings to the general assembly no later than December 1, 2011

- Establishes a standard measure of recidivism and requires the joint committee on corrections oversight to establish a goal for reducing the number of recidivists over a one- to two-year period
- Directs the department of corrections to work with various law enforcement agencies to develop place-based strategies to enhance public safety
- Requires various government stakeholders to work cooperatively to develop a statewide plan for screening all persons who are charged with a violent misdemeanor or any felony as early as possible and report their efforts to the general assembly no later than October 15, 2011
- Suspends the use of video arraignments until the general assembly determines that there is evidence to support that it can be done in a manner that is cost-effective and efficient and ensures defendants' due process rights, and requires various government stakeholders to study and propose alternatives to video arraignments, including the use of conference calls and the existing telephone system used by attorneys to reach their clients in correctional facilities
- Requests the administrative judge, the commissioner of the department of corrections, the executive director of the department of state's attorneys and sheriffs, and the defender general to work individually and cooperatively to increase awareness among attorneys, judges, and probation officers of the option of home confinement as an alternative to incarceration in a correctional facility
- Requires the agency of administration in conjunction with the joint fiscal office to conduct a study which draws on resources across state agencies on how the state can best provide quality health care services to people incarcerated in Vermont at a cost savings to the state. The agency shall report its progress to the house committee on corrections and institutions and the house and senate committees on judiciary on or before January 15, 2012
- Appropriates money to the Vermont center for justice research for the purpose of conducting two studies. One will be to evaluate innovative programs and initiatives, including local programs and prison-based

initiatives, best practices, and contemporary research regarding assessments of programmatic alternatives and pilot projects relating to reducing recidivism in the criminal justice system. The second will be to conduct an outcome assessment of Vermont's two work camps

- Directs the department of corrections to undertake a review of the administrative burden placed on field officers and reduce paperwork handled by these officers by 50 percent as of July 1, 2012

Multiple effective dates, beginning May 20, 2011

Crimes and Criminal Procedures

Act No. 6 (11.236). Crimes and criminal procedures

This act extends the statute of limitations for a prosecution for sexual abuse of a vulnerable adult from 3 to 6 years.
Effective Date: July 1, 2011

Act No. 16 (S.58). Crimes and criminal procedure; judiciary; human services

This act permits the state, under certain circumstances and for serious offenses, to institute criminal proceedings against a person 18 years of age or older for a crime that the person committed before turning 18.
Effective Date: May 9, 2011

Act No. 26 (S.30). Crimes and criminal procedure; assault of a health care worker

This act establishes a criminal penalty enhancement for assaulting a health care worker. A person convicted of a simple or aggravated assault may face from 1 to 10 years imprisonment in addition to the penalty for the underlying crime if the victim was a health care worker performing his or her lawful duty.

For purposes of this act, the terms "health care facility" and "health care worker" are defined. Finally, this act directs the law enforcement advisory board to adopt a model policy to address enforcement of the criminal code as it related to an assault of a health care worker while he or she is engaged in his or her official duties providing patient care.
Effective Date: May 12, 2011

Act No. 31 (S.2). Crimes and criminal procedures; public safety

This act makes several technical corrections to the statutory provisions pertaining to the Internet sex offender registry.
Effective Date: May 17, 2011

Act No. 42 (S.73). Crimes and criminal procedures; motor vehicles

This act enhances the penalties for the crime of attempting to elude a police officer.
Effective Date: July 1, 2011

Act No. 55 (11.153). Crimes and criminal procedures

This act establishes a comprehensive system of criminal penalties and prevention programs for human trafficking, and a program of services for human trafficking victims. It enacts four new substantive human trafficking-related crimes in Vermont law: human trafficking for commercial sex or forced labor; aggravated human trafficking with an enhanced penalty; facilitating or promoting human trafficking; and solicitation. The act's comprehensive approach to human trafficking prosecutions requires assistance to human

trafficking victims and a public education program about the crime. The act also amends a number of crime victim restitution procedures, including prohibiting the disclosure of a crime victim's name in response to a public records request and establishing a pilot project to allow a crime victim to submit, and the restitution unit to verify, a request for restitution prior to sentencing.
Effective Date: Jul Y 1, 2011

Act No. 56 (11.264). Crimes and criminal procedures; motor vehicles; judiciary; labor

This act contains the following provisions related to operating a motor vehicle while under the influence of alcohol or drugs:

(1) The act prohibits a person from letting another person operate the person's car if the person knows that the operator is under the influence of alcohol or other drugs. The prosecution is required to show that the unlicensed person did not obtain permission from the defendant to operate the motor vehicle by placing the defendant under duress or subjecting the defendant to coercion.

(2) The act creates enhanced penalties for multiple DUI offenders. A person with a prior DUI conviction who is convicted of a second or subsequent DUI with a blood alcohol content of 0.16 or greater, which is twice the legal limit, is prohibited from driving with a BAC of 0.02 or greater for the next three years. The act establishes presumptive minimum prison terms for multiple DUI offenders which must be served unless the court makes written findings that such a sentence will not serve the interests of justice and public safety.

(3) The act transfers authority and supervision over blood and breath alcohol testing and alcohol screening devices from the department of health to the department of public safety.

The act also includes the following other provisions:

(1) The act grants immunity from liability to an employer who discloses information in good faith about an employee's job performance to a prospective employer if the prospective employer employs persons who work with minors or vulnerable adults. The act requires the legislative council to report by January 15, 2013 on the impact of this grant of immunity on employment and hiring practices in Vermont.

(2) The act creates a committee to study issues related to probate and family division jurisdiction over proceedings involving guardianship of minors.

(3) The act designates the information and affidavit as confidential once a case is accepted by the court diversion project unless the diversion board declines to accept the case or the offender declines to participate or fails to complete diversion successfully.

(4) The act enacts the Uniform Adult Guardianship and Protective Proceedings Jurisdiction Act.
Multiple effective dates, beginning May 31, 2011

Act No. 65 (S.17). Health; use of marijuana for symptom relief; dispensaries

This act makes a few changes to the underlying law that regulates the use of marijuana for symptom relief, and establishes a framework for registering up to four nonprofit marijuana dispensaries in the state.

The act restricts registered patients to Vermont residents, but expands the list of people who may certify the medical condition of a patient to include physician's assistants and advanced practice registered nurses.

A dispensary will be permitted to acquire, possess, cultivate, manufacture, transfer, transport, supply, sell, and dispense marijuana, marijuana-infused products, and marijuana-related supplies and educational materials for or to a registered patient who has designated it as his or her dispensary and to his or her registered caregiver for the registered patient's use for symptom relief. A dispensary will be permitted to cultivate and possess at any one time up to 28 mature marijuana plants, 98 immature marijuana plants, and 28 ounces of usable marijuana. However, if a dispensary is designated by more than 14 registered patients, the dispensary may cultivate and possess at any one time two mature marijuana plants, seven immature plants, and two ounces of usable marijuana for every registered patient for whom it serves as the designated dispensary.

A patient or his or her registered caregiver may obtain up to two ounces of usable marijuana a month from the patient's designated dispensary and may obtain marijuana from the dispensary by appointment only. Once a patient designates a dispensary, he or she is not permitted to cultivate marijuana. A patient may not consume marijuana at the dispensary.

The department of public safety will be responsible for regulating dispensaries, and adopting rules for the implementation of the act. By June 2, 2012, the department shall grant registration certificates to four dispensaries, provided at least four applicants apply and meet the requirements of the act. The application fee is $2,500.00, and is not refundable. Annual registration fees are $20,000.00 for the first year, and $30,000.00 for subsequent years. No more than four dispensaries may hold valid registration certificates at one time, and the total statewide number of registered patients who have designated a dispensary shall not exceed 1,000 at any one time.

A dispensary shall implement appropriate security measures to deter and prevent the unauthorized entrance into areas containing marijuana and the theft of marijuana and shall ensure that each location has an operational security alarm system. All cultivation of marijuana is required to take place in an enclosed, locked facility which is either indoors or otherwise not visible to the public and which can only be accessed by principal officers and employees of the dispensary who have valid registry identification cards. The department of public safety must perform an annual on-site assessment of each dispensary and may perform on-site assessments of a dispensary without limitation.

A principal officer, a board member, and an employee of a dispensary must receive an identification card from the department of public safety and must submit to a criminal background check prior to working with a dispensary. A person with a pending charge or a conviction for a drug-related offense or a violent felony may not serve as a principal officer or board member or work as an employee of a dispensary. The department of

public safety may use discretion in deciding to issue an identification card to applicants with other types of pending charges or convictions.

The governor is granted the authority to suspend the implementation and enforcement of the dispensary laws if the governor determines that it is in the interest of justice and public safety; however, this authority sunsets January 31, 2012.

The act establishes a marijuana for symptom relief oversight committee for the purpose of considering a number of issues related to the use of marijuana for symptom relief and the regulation of dispensaries. The committee is asked to report to the general assembly annually.

The act requires the department of public safety to report to the general assembly no later than January 1, 2012 on the actual and projected income and costs for administering the dispensary program; recommendations for how dispensaries could deliver marijuana to registered patients and their caregivers in a safe manner; and whether prohibiting growing marijuana for symptom relief by patients and their caregivers if the patient designates a dispensary interferes with patient access to marijuana for symptom relief and, if so, recommendations for regulating the ability of a patient and a caregiver to grow marijuana at the same time the patient has designated a dispensary.
Multiple effective dates, beginning June 2, 2011

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. Computer-searchable databases are available for Vermont Supreme Court slip opinions back to 1985, and for other information contained in this newsletter. For information contact David Tartter at (802) 828-5515 or dtartter@atg.state.vt.us.