Criminal Division
Vermont Attorney General's Office

Vermont Criminal Law Month

August - September 2014

Vermont Supreme Court Slip Opinions: Full Court Rulings

Includes three justice bail appeals

UNRESPONSIVE, PREJUDICIAL ANSWER BY WITNESS DID NOT REQUIRE MISTRIAL

*State v. Pettitt, 2014 VT 98. MISTRIAL: COURT'S DISCRETION, UNRESPONSIVE ANSWERS BY WITNESS. PROBATION CONDITIONS: RESIDENCE REQUIREMENT.

Convictions for violation of temporary relief from abuse order and violation of condition of release affirmed; remanded for trial court to consider the parties' stipulation as to the defendant's sentence. 1) The trial court did not abuse its discretion in denying a mistrial after the victim answered questions on cross-examination in an unresponsive manner, referring to the defendant trying to shoot her and cheating on her and abusing her. The comments were not sufficiently prejudicial to warrant a new trial, since the jury had before it the RFA findings, stating that the defendant had abused the victim, caused physical harm, placed her in fear of imminent serious physical harm, and that there was an immediate danger of further abuse, and including a requirement that the defendant not possess any weapons or firearms. While the victim's statements were more specific than the general abuse findings in the RFA, the testimony was entirely consistent with those findings. Nor did the defendant seek a remedy for the prejudicial testimony, either an order to strike the testimony or a special curative instruction, or both. It was defense counsel's obligation to request that instruction. 2) A probation condition that the defendant reside at his parents' home absent approval from his probation officer was not overly broad. The condition is not plain error. The court had found that the defendant functioned best while supervised and working. The requirement was therefore related to the rehabilitative purpose of keeping the defendant near the supervision of his family and his employer. 3) Another sentencing issue raised on appeal was settled by a stipulation of the parties, and the Court therefore remands the case for the trial court to consider the stipulation. Docs. 2012-442, 2013-115, August 8, 2014. http://info.libraries.vermont.gov/supct/current/op2012-442.html

GENERAL CLAIM OF HONESTY BY WITNESS IS INSUFFICIENT TO ESTABLISH PRIOR RECORDED STATEMENT AS RELIABLE.

State v. Spaulding, 2014 VT 91. SUFFICIENCY OF THE EVIDENCE: DOMESTIC ASSAULT. HEARSAY AS BASIS FOR SUFFICIENCY OF THE EVIDENCE. PRIOR RECORDED STATEMENTS: SUFFICIENCY OF EVIDENCE THAT STATEMENT WAS MADE BY DECLARANT; SUFFICIENCY OF EVIDENCE THAT STATEMENT ACCURATELY REFLECTS DECLARANTS KNOWLEDGE WHEN MATTER WAS FRESH; NECESSITY OF TESTIMONY BY DECLARANT RE STATEMENT. CLOSING STATEMENTS: PLACE YOURSELF IN SHOES ARGUMENT.

Domestic assault reversed. At trial the victim testified that she was extremely intoxicated at the time, and remembered nothing of the incident. Shown a statement written at the time, she agreed that the signature was hers, and that she would not sign a statement if she did not believe it to be true, and would not lie to a police officer. The officer testified that he helped the complainant as she wrote the statement. The statement indicates that the defendant dragged the victim, punched her in the mouth, and threatened to kill her. The statement was admitted as a past recollection recorded under V.R.E. 803(5). 1) There was sufficient evidence to support the conviction even without the prior statement, including the victim's call to 911 stating that the defendant had her around the neck, she was bleeding, and she lost consciousness; the responding officer's testimony that the victim was sobbing and visibly upset when he responded to the 911 call, and that she was bleeding from a cut on her lip, blood was spattered on her shirt, and there were reddish marks on her throat. 2) The requirement of specific standards of reliability before a prior inconsistent statement or a past recollection recorded can serve, standing alone, to meet the State's burden of proof, does not extend to evidence admitted under other hearsay exceptions, such as excited utterances. 3) In order to be admissible, the prior recorded statement must concern an event that the declarant once had knowledge of, but no longer has sufficient recollection to testify fully or accurately about the events, and the statement must be shown to have been made by the declarant, or if made by one other than the declarant, to have been examined by the declarant and shown to accurately reflect the declarant's knowledge when the matters were fresh in his memory. The evidence here was sufficient to establish that the statement was made or adopted by the witness, where the complainant testified that the signature was likely hers, and the officer testified that he assisted the complainant in writing the statement, reviewed it with her, and had her swear to it. 4) The State did not show that the statement accurately reflected the witness's knowledge at the time she made it. Although the Court has indicated that this element may be shown without the declarant testifying to the accuracy of his own statement, and instead can be shown by other factors indicating trustworthiness, the Court now holds that a specific avowal of the reliability of the recorded recollection from the declarant herself is necessary for admissibility. A claim of general honesty (she would not lie to the police) is not sufficient. Specific evidence of reliability from the declarant is required, such as testimony from the declarant that she is confident that she was telling the truth on that particular occasion. 5) Admission of the prior statement was not harmless beyond a reasonable doubt, as the other evidence was not strong, and the erroneously admitted statement was central to the State's case. 6) The prosecutor's exhortation to the jury in closing argument to place themselves in the shoes of the

complainant was improper, but it was not the subject of an objection. The court did not consider whether it met the criteria for reversal on plain error grounds. Tomasi, specially assigned, concurring: Agrees that the declarant's testimony that he is generally honest is insufficient, but would allow the statement to be introduced where the witness can apply his character or trait to the circumstances of the recorded recollection, and proceed to testify as to his belief that the statement itself is truthful and accurate. The key is the witness's ability to testify that, under the circumstances in which the statement was made, she would have been truthful in making it. In this case, although the complainant vouched for her truthfulness in making the statement, she also gave cause for serious doubt as to the statement's accuracy (testifying that she was extremely drunk, trashed, and a train wreck). Therefore, it cannot be said that the trial court would have reached the same conclusion using this standard, and the matter should be remanded for consideration under the correct standard. Doc. 2013-208, August 8, 2014. http://info.libraries.vermont.gov/supct/current/op2013-208.html

RULE 11 PROCEEDING WAS FLAWED; REVERSAL REQUIRED DESPITE EXECUTION OF VALID RULE 11 WAIVER FORM BECAUSE DEFENDANT WAS PRESENT IN COURT

In re Manosh, 2014 VT 95. POST-CONVICTION RELIEF: SUFFICIENCY OF RULE 11 PROCEEDING; EFFECT OF WRITTEN WAIVER OF RIGHTS.

Grant of post-conviction relief affirmed. The petitioner was charged with DUI in 1992, and pleaded no contest. He executed a waiver of rights document. At the change of plea, the trial court asked the petitioner if he understood what had been said and what was in the documents, and if he had any questions. This colloquy completely failed to comply with Rule 11's requirement of an open dialogue with the court discussing all of the Rule 11(c) and (d) elements. The petitioner's execution of the waiver form did not suffice, because the waiver form is only sufficient where the defendant has waived his presence under V.R.Cr.P. 43, and here, the petitioner was present in court. Skoglund, dissenting: the majority has held that the waiver form contemplated by Rule 43 is sufficient only if the defendant stays away from the courtroom; if he enters the courtroom, the form is worthless. Doc. 2013-280, August 14, 2014. http://info.libraries.vermont.gov/supct/current/op2013-280.html

AMENDMENT OF SENTENCING STATUTE REQUIRES CREDIT FOR TIME SERVED FOR TIME SPENT IN CUSTODY ON EARLIER CHARGE, IF MINIMUM TIME ON FIRST CHARGE HAS ELAPSED AND SECOND CHARGE IS PENDING.

State v. Perry, 2014 VT 102. CREDIT FOR TIME SERVED: TIME SERVED ON UNRELATED OFFENSE WHILE CURRENT OFFENSE IS PENDING.

Burglary sentence reversed, for amendment of mittimus. The defendant pleaded guilty to two counts of burglary in exchange for dismissal of a grand larceny charge, and agreed to concurrent sentences of three to fifteen years, split to serve up to six months. In the meantime, the defendant had been serving a sentence of confinement for unrelated drug offenses. At the sentencing,

the defendant was sentenced to three to fifteen years to serve, all suspended except six months, consecutive to the sentence the defendant was already serving on the unrelated charges. The court ordered that the defendant be given credit for time served according to the law. The Department of Corrections credited the defendant with 228 days for time served on the unrelated drug conviction towards the burglary sentence. Upon receiving this computation, the State filed a motion to modify or correct the sentence, arguing that the effect of DOC's computation was that the defendant was incarcerated for only eight days of his six months to serve sentence. The court amended the mittimus to direct that the defendant receive no credit for time served on other dockets. The defendant argued on appeal that this violated the recently amended consecutive sentencing statute. 1) The State's argument that the appeal is moot because the defendant has completed the six-month-to-serve requirement is rejected. If the sentence is in fact illegal, the Court need not ignore the illegality on direct appeal and then wait for a future probation violation so the mittimus can be corrected in a collateral proceeding. 2) The recent amendments to the sentencing statute indicate that the defendant is entitled to credit for time served, after the minimum term, on one charge towards another charge, while the new charge was pending and the defendant is in custody on the first charge. This is a departure from the prior regime that awarded credit for time served only in connection with the sentence being imposed. Doc. 2013-337, August 29, 2014.

DENIAL OF PRETRIAL HOME DETENTION UPHELD WHERE EVIDENCE SHOWED DEFENDANT'S MENTAL HEALTH NEEDS POSED A RISK OF NONAPPEARANCE

*State v. Pelletier, 2014 VT 110. PRETRIAL HOME DETENTION: REVIEW FOR ABUSE OF DISCRETION.

Three justice bail appeal. Denial of motion for pretrial home detention affirmed. The court did not abuse its discretion in weighing the statutory factors. The court reasonably concluded that the defendant's mental health needs posed a risk of nonappearance, based upon testimony regarding his mental state on May 20th, and the defendant provided no evidence to suggest his mental state since had improved. The court did consider factors that supported the defendant's release, but ultimately found his mental health needs and the risk of nonappearance outweighed these other factors. The defendant's motion to submit a transcript of the defendant's interview with law enforcement on May 20 is denied, as the scope of review on appeal is limited to the record. The defendant's proposal that he be released to his home but not allowed to work on the farm would not be considered on appeal, as it was not presented to the trial court. Both of these requests, however, can be presented to the trial court in connection with a new motion for home detention. Doc. 2014-291, September 9, 2014. http://info.libraries.vermont.gov/supct/current/eo2014-291.html

DENIAL OF BAIL WAS SUPPORTED BY "GREAT" EVIDENCE OF GUILT DESPITE CREDIBILITY ISSUES RAISED BY DEFENDANT

State v. Monatukwa, three-justice bail appeal. DENIAL OF BAIL SUPPORTED BY EVIDENCE OF GUILT.

Denial of bail on charges of aggravated sexual assault, sexual assault, lewd and lascivious conduct, unlawful restraint, second degree, and simple assault, affirmed. The defendant argued on appeal that the evidence of guilt was not "great." To meet this standard, the State must present substantial, admissible evidence to support each element of the crime, and on appeal the Supreme Court determines whether the court's decision is supported by the proceedings and decides whether the State has met its burden of presenting substantial, admissible evidence of guilt. Notwithstanding the alleged weaknesses in complainant's statement, the State has met its burden. The complainant specifically described the assault, and her account was corroborated by the presence of blood at the scene after the fact. The defendant raises issues that could be used to impeach the complainant at a trial on the merits, but credibility questions are not properly resolved by judges at bail hearings. Doc. 2014-254, August Term, 2014. https://www.vermontjudiciary.org/UPEO2011Present/eo14-254.bail.pdf

Vermont Supreme Court Slip Opinions: 3 Justice Panel Rulings

Note: The precedential value of decisions of three-justice panels of the Vermont Supreme Court is governed by V.R.A.P. 33.1(c), which states that such decisions "may be cited as persuasive authority but shall not be considered as controlling precedent." Such decisions are controlling "with respect to issues of claim preclusion, issue preclusion, law of the case, and similar issues involving the parties or facts of the case in which the decision was issued."

NO MISTRAIL REQUIRED FOR REPEATED ATTEMPTS TO INTRODUCE INADMISSIBLE EVIDENCE

State v. King, three-justice entry order. MISTRIAL: CLAIM OF PREJUDICE FROM REPEATED ATTEMPTS BY STATE TO INTRODUCE INADMISSIBLE EVIDENCE.

Lewd and lascivious conduct affirmed. The trial court did not err in denying a motion for mistrial, which claimed that the defendant was prejudiced by the prosecution's repeated attempts to admit evidence concerning either the complainant's demeanor after the incident, or her reputation for truthfulness. The court sustained all of the defendant's objections to this questioning, so no testimony was actually given on this point. In view of the totality of the entire proceeding, the trial court acted within its discretion in determining that these questions did not require a mistrial because no prejudice resulted. Doc. 2013-380, September Term, 2014. https://www.vermontjudiciary.org/UPEO2011Present/eo13-380.pdf

DEFENDANT'S PULLING HIS HANDS AWAY WAS AN OVERT PHYSICAL ACT OF RESISTANCE SUPPORTING A RESISTING ARREST CHARGE

State v. Perley, three-justice entry order. RESISTING ARREST: SUFFICIENCY OF EVIDENCE. CLOSING ARGUMENT: PLAIN ERROR.

Resisting arrest affirmed. 1) The defendant's actions of pulling away from the trooper and pulling his hands away to prevent the trooper from handcuffing him, after the trooper told him he was under arrest and directed him to put his hands behind his back, was sufficient to satisfy the elements of the crime and support the jury's verdict. The court did not determine that an overt physical act of resistance was not required. 2) There was no plain error when the prosecutor stating in opening and closing statements that the defendant had stated, "you're not taking me," even though the defendant denied ever making such a statement, and the arresting officer never stated that he made such a statement. The jury heard the video recording of the events, and the defendant can be heard saying "you're not going to ___ me," with the missing word not sufficiently audible to establish it with any certainty. He may have said, "fight me," or he may have said, "take me." The defense closing reminded the jury that the prosecutor's interpretation of what was said was not evidence and that the jury must go back and determine for itself what was actually said. The video was in evidence, and the court had instructed the jury that arguments of counsel were not to be considered evidence. Therefore, there was no plain error. Doc. 2013-356, September Term, 2014. https://www.vermontjudiciary.org/UPEO2011Present/eo13-356.pdf

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 david.tartter@state.vt.us.