Vermont Department of State's Attorneys

# Vermont Criminal Law Month

August - September 2017

## Vermont Supreme Court Slip Opinions: Full Court Rulings

*Includes three-justice bail appeals*

### CIVIL SETTLEMENT DOES NOT BAR RESTITUTION ORDER

State v. Blake, 2017 VT 68. RESTITUTION: EFFECT OF SETTLEMENT OF CIVIL CASE BETWEEN VICTIM AND DEFENDANT.

Full court published opinion. Restitution order remanded for determination of defendant's ability to pay, but otherwise affirmed. The defendant was ordered to pay $115,994.74 in restitution to an insurance company, which had insured a house which the defendant had burned. The insurance company had initially declined to pay on the policy, and the defendant filed a lawsuit against it. The insurance company counterclaimed, and the lawsuit was eventually settled by mutual releases, in which each party released the other from any claims arising out of the policy. The defendant then argued that the court could not order him to pay restitution because the insurance company had waived its right to restitution. The Court disagreed, holding that a general release of civil claims does not bind the trial court in carrying out its statutory duty to "consider" restitution in every criminal matter. Neither the victim nor the defendant has the power to displace the court's exercise of discretion in deciding whether to impose restitution. The State conceded that the trial court had failed to consider the defendant's ability to pay, and the matter was therefore remanded for this purpose. Doc. 2016-376, August 11, 2017. https://www.vermontjudiciary.org/sites/default/files/documents/op16-376.pdf

### TIME LIMITS FOR SECOND AND SUBSEQUENT HEARINGS ON LICENSE SUSPENSION ARE MANDATORY

State v. Love, 2017 VT 75. CIVIL SUSPENSIONS: TIME LIMITS FOR SECOND AND SUBSEQUENT LICENSE SUSPENSION HEARINGS ARE MANDATORY AND JURISDICTIONAL.

Full court published opinion. Civil suspension reversed. The civil suspension statutes set out time limits within which the preliminary hearing and the final hearing on suspension shall be held. The preliminary hearing shall be held within 21 days of the alleged offense, and the final hearing shall

be held within 21 days after the date of the preliminary hearing, and in no event more than 42 days after the date of the alleged offense without the consent of the defendant or for good cause shown. For first offenses, in which the suspension does not take effect until after the final hearing, assuming the person requests a suspension hearing, the time limits are directive only, and are not mandatory or jurisdictional. For second and subsequent offenses, in which the person's license is automatically suspended within eleven days of notice, the time limits are mandatory and jurisdictional, and must be adhered to or, absent consent or good cause, the civil suspension hearing must be dismissed for lack of jurisdiction. Dooley and Reiber dissent: this Court has held that time limits are mandatory only if they contain both an express requirement that an action be undertaken within a particular amount of time and a specified consequence for failure to comply with the time limit. Furthermore, the decision will reduce the court's flexibility in dealing with caseload demands due to opioid-related child protection cases, in which Franklin County is ground zero. Doc. 2016-192, August 18, 2017. https://www.vermontjudiciary.org/sites/default/files/documents/op16-192.pdf

## SUBSTANTIAL COMPLIANCE NOT APPLICABLE TO RULE 11(f) CHALLENGES: DEFENDANT MUST EXPLICITLY ADMIT TO FACTS

In re Bridger, 2017 VT 79. POST-CONVICTION RELIEF: RULE 11(f) CHALLENGES: SUBSTANTIAL COMPLIANCE; NEED FOR RECITATION OF FACTS AND DEFENDANT'S ADMISSION TO THOSE FACTS.

Full court published opinion. Grant of summary judgment to the State in a post-conviction relief proceeding reversed. At the Rule 11 COP proceeding, the court asked the defendant if he agreed that the troopers' affidavits provide a factual basis to establish each of the essential elements of each of the sixteen charges of burglary, and the defendant replied yes. 1) Rule 11(f) challenges will not be reviewed under the "substantial compliance" standard. Collateral attacks for defects under Rule 11(f) require no showing of prejudice, and the Court does not analyze the totality of the circumstances. 2) An adequate factual basis requires some recitation on the record of the facts underlying the charge and some admission by the defendant to those facts. No particular party need perform this recitation, nor does a particular source need to support the factual basis. But the Court does require the defendant's admission to the facts as they relate to the law for all elements of the charges. Dooley concurs. Eaton, with Reiber, dissenting: The test adopted by the majority is unduly rigid, and should only be applied prospectively. Rule 11(f) does not require the court to address a defendant personally in open court, merely not to enter a judgment without satisfying itself that there is a factual basis for the plea. Doc. 2016-142, August 25, 2017. https://www.vermontjudiciary.org/sites/default/files/documents/op16-142.pdf

## COURT MAY NOT COMPEL COMPETENCY EXAMINATION BY STATE-RETAINED EXPERT

State v. Sharrow, 2016 VT 25. COMPETENCY EXAMINATIONS: EXAMINATION BY STATE-RETAINED EXPERT.

Full court published opinion. Trial court order compelling the defendant to submit to a competency expert chosen by the State is reversed. A court-appointed expert concluded that the defendant was not mentally competent to stand trial. The State subsequently retained its own expert, and requested that he be given access to the defendant in order to conduct an additional competency examination. This motion was granted, and the defendant appealed. The applicable statute, 13 V.S.A. § 4814, provides that the court may order the defendant to be examined by a psychiatrist to determine if he is competent to stand trial. The statute does not grant the court the authority to require a defendant to submit to a competency evaluation by any other doctor. The rules of criminal procedure specifically allow the prosecution to conduct a reasonable mental health examination when a defendant raises an insanity defense or otherwise wishes to offer expert testimony relating to a mental condition bearing on guilt, but no such provision exists with respect to competency determinations. The defendant has a due process right to a state-funded defense-retained mental health expert to assist in guarding against the possibility of an erroneous determination of competency, but the State has no comparable right, particularly since a determination that the defendant is not competent is subject to later review. The State remains free to retain an expert to assist in the presentation of the State's position in other ways short of conducting another competency evaluation. Doc. 2016-261, August 25, 2017. https://www.vermontjudiciary.org/sites/default/files/documents/op17-020.pdf

## EVIDENCE OF FELONY MURDER WAS SUFFICIENT TO WITHSTAND 12(d) CHALLENGE

State v. Baird, 2017 VT 78. FELONY-MURDER: SUFFICIENCY OF THE EVIDENCE.

Dismissal of first-degree murder charge pursuant to V.R.Cr.P. 12(d) reversed. The defendant is charged with felony-murder, based upon a theory that the defendant had the intent to commit an enumerated felony, a burglary, that a murder occurred during the commission of the felony, and that the defendant had at the time the requisite mental intent for second-degree murder, a wanton disregard for human life. The evidence was sufficient to support this theory where the defendant engaged in a burglary, knowing that a co-defendant was bringing a gun and ammunition for the gun; after using drugs; knowing that the victim was elderly and targeting her home with that in mind; entering the home and seeing a co-defendant had the victim on the floor holding a gun to her head, thus knowing or should have known of the peril facing the victim; knowing that the victim could identify them; and did nothing to deescalate the risk of harm to the victim and instead leaving the room to ransack the second floor. Dooley, dissenting: The defendant agreed to rob the victim, but did not agree that she be harmed and understood that any guns present during the robbery were not to be loaded; he did not actually harm the victim and was not present when she was killed. He had no reason to know that the gun being pointed at the victim's head was loaded. Doc. 2016-190, August 25, 2017. https://www.vermontjudiciary.org/sites/default/files/documents/op16-190.pdf

## FAILURE TO REQUEST ATTEMPTED VOLUNTARY MANSLAUGHTER UNDERMINED CONFIDENCE IN OUTCOME OF TRIAL

In re Sharrow, 2017 VT 69. POST-CONVICTION RELIEF: FAILURE TO REQUEST ATTEMPTED VOLUNTARY MANSLAUGHTER INSTRUCTION. TEST OF PREJUDICE IN INEFFECTIVE ASSISTANCE MATTERS. PREJUDICE RESULTING FROM ABSENCE OF INSTRUCTION.

Grant of relief to petitioner in post-conviction relief proceeding affirmed. 1) The test of prejudice is whether the error undermined confidence in the outcome of the criminal trial. The Court rejects an outcome-determinative standard, such as a more probabilistic analysis, akin to a more-likely-than-not standard. 2) The trial court did not err in finding a reasonable probability of a different result absent the error in this case – trial counsel's failure to request an instruction on attempted voluntary manslaughter. Although some physical evidence corroborated much of the complainant's testimony and undermined petitioner's, and even though the jury clearly disbelieved the petitioner's claim of self-defense and concluded that he intentionally attempted to kill the complainant by stabbing her; and even though the omitted jury instruction would not have affected the jury's conclusion on these points; and even though the volume of evidence corroborating the complainant's broader narrative calls into doubt whether the jury would have believed the petitioner with respect to the evidence of provocation in the face of the complainant's contrary testimony; three reasons support the trial court's finding. First, the error removed from the jury's consideration an essential element of the second-degree murder charge, absence of provocation. Second, the existence of that element was supported by substantial evidence (the petitioner's own testimony); and third, the State's burden of proof on this element was high. Doc. 2017-020, August 25, 2017. https://www.vermontjudiciary.org/sites/default/files/documents/op17-020.pdf

## BANK WAS ENTITLED TO RESTITUTION ORDER AFTER IT MADE GOOD ON FORGED CHECK

State v. Stewart, 2017 VT 82. RESTITUTION: BANK MAKING GOOD PAYMENT ON A FORGED CHECK.

Restitution order affirmed. The defendant worked for a law firm. She made out law firm checks to herself and forged the signature of an authorized signor. The bank paid the checks. Upon discovery of the embezzlement, the bank reimbursed the law firm. The bank had no insurance to cover its loss. The defendant pleaded guilty to one count of embezzlement. The court awarded restitution of $5000 to the bank. The defendant argued that the bank is not a direct victim of the crime because it only incurred harm due to its relationship with the defendant's employer. The Court concludes that the bank was a direct victim of the defendant's crime. The bank was obliged to reimburse the account after it paid out a forged check. Thus, the defendant effectively stole from the bank and not the employer. The bank is not an insurer – it does not accept a premium in exchange for assuming the risk of fraudulent withdrawals. Even if it were an insurer, it still would have lost the money as a direct result of the defendant's crime. The fact that alternative civil remedies may be available to the bank is irrelevant to this question. Doc. 2016-162, September 11, 2017. https://www.vermontjudiciary.org/sites/default/files/documents/op16-162.pdf

## PLEA REVERSED PURSUANT TO BRIDGER; CONCURRENCE SUGGESTS OVERRULING BRIDGER

In re Gabree, 2017 VT 84. BRIDGER APPLIED TO REVERSE PLEA; EATON AND REIBER EXPRESS HOPE THAT BRIDGER WILL BE REVERSED.

Dismissal of petition for post-conviction relief reversed and remanded to allow withdrawal of plea. Underlying offense is two counts of grossly negligent operation of a vehicle, death resulting. The petitioner agreed to plead guilty to both counts in exchange for a sentence of six to fifteen years to serve. The petitioner did not personally admit to the factual basis on the record. Eaton, with Reiber, concurring: Concurs because of the ruling in Bridger, but notes that the factual basis for the charges was overwhelmingly established on the record and stipulated to twice by counsel in petitioner's presence, and finding the absence of a factual basis here elevates form over substance with no discernible benefit to the criminal justice process. Furthermore, the method used here, where the attorney stipulated to the factual basis, had been specifically approved by the Vermont Supreme Court. The Bridger decision should not be applied retroactively here. Notes he will continue to concur in judgments based on Bridger "unless a majority forms to depart from Bridger, as I hope that it will." Doc. 2015-339, September 8, 2017. https://www.vermontjudiciary.org/sites/default/files/documents/op15-339.pdf

## STATE CAN ARGUE FOR A HOLD WITHOUT BAIL IF DEFENDANT SEEKS BAIL REVIEW

State v. Collins, 2017 VT 85. HOLD WITHOUT BAIL MOTION FOLLOWING GRANT OF BAIL AND WITHOUT ADDITIONAL EVIDENCE. HOLD WITHOUT BAIL ORDER: NECESSITY OF EXERCISING DISCRETION.

Three justice bail appeal. The trial court ordered the defendant held on bail as the State had requested at arraignment. At a bail review hearing, the trial court lowered the amount of bail, and the defendant was subsequently able to post bail. During the bail review hearing, the State asked the court to hear an oral motion to hold the defendant without bail pursuant to 13 VSA 7553. The court declined, stating that any such motion should have been filed previously, and that if the State wished to proceed on such a motion, it should be filed in writing. The State filed a written motion to hold defendant without bail the same day, and the motion was subsequently granted after a hearing. The defense conceded at oral argument on this appeal that the State could have argued for a hold without bail order at the bail review hearing, which had been requested by the defendant. Given this concession, it was not an abuse of discretion for the trial court to postpone hearing that permissible argument to a later hearing. The Court notes that this case presents the novel question whether the State can open a hold without bail proceeding after the court has set conditions of release following a bail review proceeding in the absence of changed circumstances. (When new

evidence appears, the Court has already held that the State can request a new evidentiary analysis). This question need not be answered because of the defendant's concession that the trial court could have addressed the hold without bail motion at the bail review hearing. However, the trial court here did not consider the factors listed in 13 VSA 7554 before ordering the defendant held without bail. If a trial court finds that the evidence against a defendant is great pursuant to section 7553, it must still exercise its discretion under the factors listed at section 7554. As conceded by the State, the court here failed to exercise that discretion. The matter is therefore remanded for a hearing to consider the Section 7554 factors. Doc. 2017-289, September 8, 2017. https://www.vermontjudiciary.org/sites/default/files/documents/eo17-289.bail_.pdf

**NO REASONABLE LIKELIHOOD LOST EVIDENCE WOULD HAVE BEEN EXCULPATORY**

State v. Manning, 2017 VT 90. LOST EVIDENCE: REASONABLE LIKELIHOOD EVIDENCE WOULD HAVE BEEN EXCULPATORY. CLOSING ARGUMENT: COMMENT ON DEFENSE FAILURE TO OBTAIN EVIDENCE; COMMENTS DISPARAGING DEFENSE. PROBATION CONDITIONS: RESTORATIVE JUSTICE PROGRAM REQUIRED OF DEFENDANT WHO MAINTAINS HIS INNOCENCE.

Full court published opinion. Conviction for embezzlement affirmed. 1) The defendant claimed to have made a bank deposit during certain particular days because he had been unable to make night deposit box deposits the nights before. A police officer and the bank security manager testified that they viewed the video taken inside the bank on those days, but did not see the defendant enter the bank. On appeal, the defendant argued that the State's failure to preserve this video violated his right to due process. Assuming that this argument was appropriately preserved below, there was no due process violation because the defendant failed to show a reasonable probability that the footage would provide exculpatory evidence. Without this threshold showing, the court does not go on to weigh the degree of negligence or bad faith, the importance of the evidence lost, and other evidence of guilt adduced at trial. Video recordings made at the night deposit box, and shown to the jury, plainly showed the defendant on three separate occasions pantomime putting deposit bags into the box, but then not depositing the money. These videos do not provide any support for the defendant's claim that he had deposited the money the next day because the deposit box was not operating properly. There was also evidence that the bank had reviewed video of the night deposit vault being emptied, examined bank records and night deposit logs, and that the defendant had never told his employers of any problems with the night deposit box, nor had the bank a record of any malfunction or complaints about the box not functioning properly. Given all of this evidence, the defendant cannot show a reasonable possibility that the interior bank footage would have produced exculpatory evidence. 2) In rebuttal closing, the prosecutor informed the jury that the defense had the power to subpoena the videos. This followed an argument in the defense closing that the investigation was inadequate because the videos were not subpoenaed. To the extent that the prosecutor's comments erroneously suggested that the defendant had the

burden of obtaining exculpatory evidence, or went beyond reasonable inferences that could be drawn from the evidence presented at trial, the comments amounted to harmless error in light of the weighty evidence of guilt. 3) The prosecutor's statements in closing argument that it was defense counsel's job to say, "hey look a squirrel," and to blow hot air, disparaged the defendant's efforts to mount a defense. Nonetheless, in view of the weight of the evidence, the comments did not deprive the defendant of a fair trial. 4) The trial court was entitled to require completion of the restorative justice program, which the defendant claims requires an admission of guilt, even though the defendant had consistently denied his guilt. Assuming that it is true that an admission of guilt is required, the condition is appropriate irrespective of the defendant's continued claim of innocence, as long as there are proper protections, i.e. against self-incrimination. Doc. 2016-141, September 29, 2017. https://www.vermontjudiciary.org/sites/default/files/documents/op16-141.pdf

## LOST WAGES WERE NOT FORESEEABLE CONSEQUENCES OF CRIME SO NO RESTITUTION

State v. Baker, 2017 VT 91. RESTITUTION: REASONABLE FORESEEABILITY; LOST WAGES.

Full court opinion. Restitution order reversed. 1) The co-owner of an automobile which was struck by the defendant in an accident was a "victim" of the defendant's grossly negligent operation, even though he was not in the car at the time. 2) The co-owner's lost wages, as a result of leaving work to come to Vermont to pick up his family and attend to matters resulting from the accident, were not a direct result of the commission of the crime, and therefore not the proper subject of a restitution order. There must be a direct link, a proximate cause, between the criminal act and the losses claimed. In general, injuries that are the proximate cause of a defendant's crime are those which are natural and probable, and ought to have been foreseen. In addition, restitution is not meant to cover losses that are consequential to or incidental to the crime. Unliquidated and difficult-to-ascertain damages are excluded as well. It was not reasonably foreseeable that as a result of the defendant's grossly negligent operation of his vehicle an out-of-state individual not present for the accident would elect to miss work, even if that individual was a co-owner of the vehicle. He was not directly prevented from continuing to work as a result of the accident. Doc. 2016-326, October 6, 2017. https://www.vermontjudiciary.org/sites/default/files/documents/op16-326.pdf

## CHALLENGE TO CHARGES MOOTED BY REFILING UNDER DIFFERENT PROVISION

State v. Boulet, full court entry order, publishing status not indicated. MOOTNESS: NEW CHARGES FILED.

Defendant's interlocutory appeal from denial of his motion to dismiss a charge of aggravated sexual assault pursuant to 13 VSA 3253a(a)(8) is dismissed as moot. He argued that the aggravating factor of "repeated nonconsensual sexual acts" should not include acts that are non-consensual due to the complainant's age. However, while the appeal was pending, the State amended the charge to aggravated

sexual assault pursuant to 13 VSA 3253(a)(9), also requiring repeated nonconsensual sexual acts. This Court has held that the nonconsensual sexual acts referred to in Section 3253(a)(9) do include acts that are non-consensual due to the complainant's age. Because the defendant is now charged under Section 3253, the interpretation of Section 3253a is no longer a live controversy, and the appeal is dismissed. Doc. 2017-298, September Term, 2017. https://www.vermontjudiciary.org/sites/default/files/documents/eo17-298.pdf

## DENIAL OF SEVERANCE APPROPRIATE WHERE THERE WAS A COMMON SCHEME AND PLAN

State v. Freeman, 2017 VT 95. SEVERANCE AND JOINDER: COMMON SCHEME AND PLAN; UNDUE PREJUDICE; PRIOR BAD ACTS. SUFFICIENCY OF THE EVIDENCE.

Full court published opinion. Conviction on ten counts involving sexual assault on a minor affirmed. 1) There was no error in the trial court's determination that all the counts in this case involved a common scheme and plan, such that the defendant was not entitled to severance as a matter of right. The victims were all aged 13 to 16; several were involved in the same incidents, whether as victims or witnesses; they were connected within the same peer group, and the defendant met most of them through the others; the offenses share a common pattern in which the defendant offered marijuana in exchange for a sexual act; and the victims were aware of the defendant's offenses against the other victims. 2) The trial court's denial of the defendant's motion to sever the counts involving one of the victims in order to promote a fair determination of his guilt or innocence, V.R.Cr.P. 14, was within its discretion. Because the charges all involved the same scheme or plan, the evidence as to each would have been admissible pursuant to VRE 404(b) in any trial of the others. The defendant did not contest on appeal the trial court's finding of a single scheme or plan, which thus defeats his claim of severance as a matter of right. 3) The defendant also argues that VRE 404(b) would not apply because under VRE 403, evidence of the other counts would have been unduly prejudicial. This argument was not made in the trial court. Nor did the defendant make a showing that the court would have been required to grant a motion under VRE 403. 4) The evidence was sufficient, despite the defendant's challenge to the sufficiency on certain counts involving one particular complainant. Doc. 2016-047, October 6, 2017. https://www.vermontjudiciary.org/sites/default/files/documents/op16-047.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."*

## NO SEXUAL ABUSE FINDING IN CHINS PROCEEDING NOT CLEARLY ERRONEOUS

In re M.H. and K.H., three-justice entry order. CHINS AND CUSTODY ORDER: FATHER WAIVED OBJECTION TO DETERMINATION OF ABUSE BEING MADE AT THE DISPOSITION RATHER THAN THE MERITS HEARING. SUFFICIENCY OF THE EVIDENCE FOR COURT'S FINDING OF NO ABUSE.

Family court order making sole custody with mother the disposition goal affirmed. The issue before the court was not whether the girls were being abused, but whether that abuse took the form of sexual abuse at mother's house, or manipulation by the father's finance resulting in false allegations of sexual abuse. 1) The family court did not err in making this determination at the disposition hearing rather than at the merits hearing, because all the parties, including appellant father, agreed to this method of proceeding at a pretrial hearing. 2) Nor was the court barred from considering at disposition issues relating to parental conduct, and thus to the merits issue, in order to determine what custody order would serve the children's best interests. 3) The family court's finding that the girls were not sexually abused was not clearly erroneous. Although DCF's non-substantiation decision was not evidence itself on this, the court did not rely upon it, but merely noted it. The evidence the court relied upon, including a psychologist's testimony concerning her investigation, and the extreme, illogical, and bizarre nature of the accusations, was sufficient to support its finding. Doc. 2017-070, August 21, 2007. https://www.vermontjudiciary.org/sites/default/files/documents/eo17-070.pdf

## DENIAL OF PERMISSION TO DEPOSE MINOR VICTIM AFFIRMED

State v. Boule, three-justice entry order. DEPOSITION OF MINOR VICTIM: DISCRETION OF COURT. DENIAL OF ADMISSION OF VICTIM'S HEARSAY STATEMENTS: DISCRETION OF COURT.

Conviction for aggravated sexual assault of a minor affirmed. 1) The trial court did not abuse its discretion when it denied the defendant's motion to depose the victim. There was a recorded interview of the victim available to the defendant; the issues in the case were not complex; and much of the information sought by the defendant in the proposed deposition were available through other sources. 2) The court did not err in denying the defendant's request to admit the entire videotaped interview of the victim. The statements in the video were inadmissible hearsay, and the defendant was allowed to use them for impeachment

purposes. Doc. 2016-356, August 21, 2017. https://www.vermontjudiciary.org/sites/default/files/documents/eo16-356.pdf

## CHALLENGE TO ATTORNEY EFFECTIVENESS IN PLEA BARGAINING REQUIRED AN EXPERT

In re Gauthier, three-justice entry order. POST-CONVICTION RELIEF: NEED FOR EXPERT.

Dismissal of petition for post-conviction relief affirmed. The defendant pleaded guilty to sexual assault of a minor in exchange for the imposition of a deferred sentence. He violated the conditions of probation and was sentenced to zero to four years. Additional conditions were violated, and the court revoked the petitioner's probation. That decision was affirmed on appeal. The petitioner filed a petition for post-conviction relief alleging that trial counsel was ineffective for failing to challenge the imposition of certain probation conditions, and for failing to collaterally challenge those conditions as a defense to the violation of probation. The trial court granted summary judgment to the State after the petitioner failed to present expert testimony on the issue of ineffectiveness. On appeal, the petitioner claimed that he did not need to present expert testimony because there was a complete failure of the adversarial process when his attorney advised him to admit to the violations rather than collaterally challenging them. Expert testimony was plainly required here. The conditions the petitioner now challenges were imposed as an integral part of a deferred sentence agreement. Whether counsel's advice and representation were ineffective depends not only on whether the conditions at issue were subject to legal challenge, but also on an assessment of the negotiation that led to the agreement and the reasonableness of the overall agreement. In exchange for the petitioner's admitting the violations, the State dropped other probation violation charges and agreed to a sentence of zero to four years, all suspended. Whether counsel was ineffective in negotiating and recommending this agreement depends not only on whether the conditions themselves may have been subject to a collateral challenge, it also requires an analysis of the agreement as a whole. The petitioner's suggestion that the judge should essentially act as a de facto expert on his behalf is rejected. The claim does not rest solely on a legal analysis, but requires an evaluation of the circumstances surrounding the initial deferred sentence agreement and the later agreement regarding the violations of probation. Nor was there any wholesale failure of representation here, where prejudice would be presumed. Doc. 2017-074, August Term, 2017. https://www.vermontjudiciary.org/sites/default/files/documents/eo17-074.pdf

## DEFENDANT NOT ENTITLED TO CREDIT FOR TIME SERVED SPENT ON HOME CONFINEMENT

State v. Beaton, three-justice entry order. CREDIT FOR TIME SERVED: CONDITIONS OF RELEASE REQUIRING HOME CONFINEMENT.

Trial court order denying credit for time spent on home release affirmed. The defendant was held pending trial under conditions of release requiring him to stay in his home, except for permission to go to work, to do shopping during a two hour period (later two two hour periods), and, later, to be out with his children between 8 a.m. and 8 p.m. While this appeal was

pending, the Court issued its decision in State v. Byam, holding that credit for home detention would be given only where the detention was pursuant to the statutory programs for home confinement and electronic monitoring. The defendant argued that Byam should not be applied retroactively. However, even under prior law, based on the decision in State v. Kenvin, the defendant was not entitled to credit for the time he spend at home under conditions of release. He was free to live at a place of his own choosing with his girlfriend and was free to leave his residence for work, medical appointments, meetings with his attorney, and court appearances, and, during some periods, additional exceptions. The fact that the police checked on him to ensure his compliance with the conditions of release does not change the outcome. And although for one period of time the conditions erroneously did not include permission to leave his home for work, the evidence at the hearing strongly suggests that he continued to work during this time anyway. Doc. 2017-155, October 2, 2017. https://www.vermontjudiciary.org/sites/default/files/documents/eo17-155.pdf

## EXPERT REQUIRED FOR OPINION CONCERNING WHETHER INFANT WAS BORN PREMATURELY

State v. Geoffroy, three-justice entry order. EVIDENCE OF CHILD'S BIRTH WEIGHT TO PROVE PREMATURITY: HEARSAY; EXPERT TESTIMONY.

Sexual assault of a minor affirmed. The defendant wanted to argue that her child, conceived during the sexual assault, was born prematurely, and therefore could have been conceived after the complainant turned sixteen. When the trial court refused to allow the defendant to testify that, in her opinion, the baby was born prematurely, the defendant then asked the court to exclude evidence of the baby's date of birth. 1) The trial court did not abuse its discretion in allowing evidence of the baby's date of birth, which was about nine months after the charged sexual assault. The information was relevant because it tended to show that the defendant and the complainant had sexual intercourse before the complainant turned sixteen years old. The jury could infer this based upon common knowledge that the normal period for human gestation is approximately nine months. 2) The trial court also acted within its discretion in precluding the defendant from testifying about the baby's birthweight or opinion regarding its alleged prematurity. The defendant's knowledge of the baby's birthweight was not direct, and therefore the testimony would have been hearsay. And, absent expert testimony, the mere fact that the baby was born weighing five pounds, nine ounces, was not probative of prematurity, since this weight falls within the normal range for a full-term baby. Although the normal human gestational period is a matter of general knowledge, estimating the date of conception based on a baby's allegedly low birth weight is a matter of specialized knowledge for which expert testimony is required. Docket 2017-021, October 5, 2017. https://www.vermontjudiciary.org/sites/default/files/documents/eo17-021.pdf

## EVIDENCE WAS SUFFICIENT THAT DEFENDANT KNEW PROPERTY SHE SOLD WAS STOLEN

State v. VanGuilder, three-justice entry order. SALE OF STOLEN PROPERTY:

SUFFICIENCY OF THE EVIDENCE.

Misdemeanor sale of stolen property affirmed. The evidence of guilt was sufficient to sustain the verdict where it showed that, less than an hour after the complainant's PlayStation was stolen by his ex-girlfriend, the defendant sold it to a shop, telling the employee that it had belonged to an ex-boyfriend before he moved out of their residence a couple of months earlier. These were obviously false statements that the jury could have reasonably inferred were intended to conceal the true origin of the property. The defendant's deceitfulness, coupled with her odd behavior in communicating with the woman who accompanied her to the shop just a short time after the complainant's ex-girlfriend stole the property from the complainant's bedroom, supported the verdict. Doc. 2017-054, September Term, 2017. https://www.vermontjudiciary.org/sites/default/files/documents/eo17-054.pdf

## Vermont Supreme Court Slip Opinions: Single Justice Bail Appeals

### TIES TO COMMUNITY OUTSIDE VERMONT INSUFFICIENT TO SUPPORT RELEASE

State v. Thomas, single justice bail appeal. BAIL: COMMUNITY TIES REFERS TO VERMONT COMMUNITIES. BAIL REVIEW: FACTUAL FINDINGS AND ANALYSIS REQUIRED.

Requirement of surety bond or cash in the amount of $50,001 remanded for a new hearing. 1) The bail statute's directive to consider the defendant's ties to family and community impliedly means to Vermont family and community. The trial court did not err in declining to consider the defendant's family and community ties outside of Vermont. 2) At the hearing on the defendant's motion to review bail, the trial court made no findings, and simply stated that the prior judge must have gone through an analysis as to why the amount of bail was appropriate. The court was required to make findings as to the reasonable basis for continuing the conditions imposed, and therefore the matter is remanded for a hearing and for the court to make the required factual findings and to conduct the required analysis. Doc. 2017-226, July Term, 2017. K. Carroll, J. https://www.vermontjudiciary.org/sites/default/files/documents/eo17-226.bail__0.pdf

## Rule Amendments

Effective January 1, 2018, some important amendments to rules concerning time periods for various filings, and for the computation of time periods, will take effect. The core of the changes is V.R.Cr.P. 45, which eliminates the distinction between time periods of less than 11 days and time periods of 11 days or more. Under the new rule, "a day is a day," and a day includes intermediate weekends and holidays, regardless of the length of the time period. (The rule also

discusses computation of periods stated in hours, the effect of the inaccessibility of the clerk's office on the last day for filing, and the definition of "last day," for which please see the rule).

One important caveat: The rule applies to time periods in any statute which does not specify a method of computing time. Thus, some statutory time periods expressly indicate the use of "business days," and for these time periods, the "day is a day" rule does not apply. The rule does define the term "business day" (any day not a weekend or holiday). Rules which apply these statutory provisions now also use the term "business day," with the same definition.

Some time periods have been changed – previous time periods of less than 11 days have been changed so that the actual time period under the new rule remains more or less the same as under the old rule (i.e. 10 days is now 14 days; 3 days is now 5 days). One exception is the time period for providing notice of alibi, insanity, or expert testimony, which has been changed from ten days prior to trial to 28 days prior to trial.

Similar changes are being made to Appellate, Civil, Environmental, Family, Juror, MCLE, Probate, and Small Claims rules.

The new rule, with commentary, can be found here:
https://www.vermontjudiciary.org/sites/default/files/documents/PROMULGATED%20Criminal%20Day%20is%20Day.pdf

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