Criminal Justice Division
Vermont Attorney General's Office

Vermont Criminal Law Month

August - September 2011

Vermont Supreme Court Slip Opinions: Full Court Rulings

Includes three justice bail appeals

RESTRAINT IN KIDNAPPING CHARGE WAS NOT INCIDENTAL TO BURGLARY

State v. Jones, 2011 VT 90. KIDNAPPING: RESTRAINT AS INCIDENTAL TO BURGLARY.

Full court published entry order. Conditional guilty plea to kidnapping affirmed. The defendant argued that the restraints he imposed on the victims were incidental to the burglary of an occupied dwelling, and therefore was not a confinement for a "substantial period," as required by the statute. Restraining another person is neither an element nor a necessary component of burglary, which does not require any interaction between the burglar and the victims. Here, the burglary was accomplished once the defendant entered the residence, but after that time, he bound both the victims, battering and threatening one of them. Binding the limbs of the victims and firing a gun near one of them significantly increased the dangerousness and undesirability of the burglary. The motion to dismiss was therefore properly denied. Doc. 2010-024, August 10, 2011. State v. Jones, Jr. (2010-024) (10-Aug-2011)

RACE-NEUTRAL JUSTIFICATION NOT REQUIRED SOLELY FOR STRIKING ONLY MINORITY MEMBER OF VENIRE

*State v. Bol, 2011 VT 99. Full court opinion. RACIALLY BASED PEREMPTORY CHALLENGES – SOLE MINORITY MEMBER OF VENIRE.

False information to a police officer and possession of cocaine reversed. The trial court declined to permit defense counsel to use a peremptory strike on the sole African-American on the jury panel, without giving a "good reason," and "instinct" was not considered good enough. An attorney in a criminal case may not exercise a peremptory challenge on the basis of race. If opposing counsel or the trial court establish that a prima facie case of discrimination has occurred, the attorney making the challenge must provide the court with a race-neutral justification for the challenge. The court must then determine if this rationale is merely a pretext for discrimination. The court here erred in finding that a prima facie case of discrimination had occurred, merely on the basis of a challenge to the single minority member of the panel. Doc. 1827-5-09 Cncr, September 9, 2011. State v. Bol (2010-009) (09-Sep-2011)

NON "FUNDAMENTAL DEFECTS" IN JURISDICTION CAN BE WAIVED BY ACQUIESCENCE OF THE STATE

State v. Thompson, 2011 VT 98. MOTIONS TO WITHDRAW PLEA: JURISDICTION WHEN DEFENDANT IS IN CUSTODY UNDER SENTENCE.

Full court entry order. Dismissal on jurisdictional grounds of motion to withdraw plea is reversed, and matter is remanded for the court to consider the merits of the motion. The defendant was charged with lewd or lascivious conduct with a child. The defendant entered into a plea agreement pursuant to which he pled to the misdemeanor of prohibited act, and the agreement recommended a suspended sentence and probation. At the change of plea hearing the State explained that the parties had agreed that the defendant could reside in Massachusetts, where he lives and works, during the period of probation. The prosecutor explained that the agreement to allow defendant to live in Massachusetts was contingent upon approval by probation officials. The plea was accepted and the defendant was sentenced and placed on probation. Ten days later the defendant filed a motion asking the court either to allow him to withdraw his plea or to strike a special probation condition that prohibited him from living in a neighborhood with large numbers of children. The reason for the motion was that Massachusetts officials were refusing to allow him to reside in his Massachusetts home on the grounds that it would violate this special condition. At the hearing the court struck the sentence but kept the plea agreement in place for thirty days to allow the defendant to obtain alternative housing in Massachusetts. Once the court struck the defendant's sentence, Massachusetts officials refused to approve any housing for the defendant or otherwise remain involved in the case. The defendant then asked the trial court either to order his supervision in Massachusetts by Vermont officials or to allow him to withdraw his plea. The State responded with memoranda in opposition, then, four months after the original order vacating the sentence, argued for the first time that the court lacked jurisdiction to consider the merits on the motion. The court agreed, and dismissed the motion on jurisdictional grounds. The court reinstated the original sentence, but struck the condition concerning residence. The dismissal on jurisdictional grounds is reversed because the State failed to show that the order striking the sentence was beyond the subject matter jurisdiction of the court. The State acquiesced in the decision, so even if the court had improperly exercised its jurisdiction, that erroneous exercise of jurisdiction is not the type of fundamental jurisdictional defect that would compel this Court, absent a timely objection on jurisdictional grounds, to vacate any order pursuant to the exercise of that jurisdiction. Reiber, with Burgess, dissent: Simply stated, the court lacked jurisdiction over defendant's motion to withdraw his plea, because defendant was in custody under sentence. The parties could not confer jurisdiction on the court by agreement, much less by acquiescence. Doc. 2010-045, August 31, 2011. State v. Thompson (2010-045) (31-Aug-2011)

NO WARRANT REQUIRED FOR POLICE TO LISTEN TO TELEPHONE CALL INTO A RESIDENCE

State v. Wetter, 2011 VT 111. Full court opinion. ARTICLE 11: EXPECTATION OF PRIVACY IN TELEPHONE CALL MADE TO ONE'S RESIDENCE. CONSPIRACY: RENUNCIATION DEFENSE. NEWLY DISCOVERED

EVIDENCE: IMPEACHMENT ONLY.

Endeavoring to incite a felony and conspiracy to murder affirmed. 1) On instructions of a police officer, a confidential informant phoned the defendant and elicited incriminating statements. The officer was present and listened to both sides of the conversation on a speaker phone. The CI did not tell the defendant that she was on a speaker phone. Testimony concerning this call by the officer did not violate the defendant's Article 11 expectation of privacy. The defendant had no subjective expectation of privacy, since at one point she stated during the call "we can't talk about that over the phone," indicating that she did not expect the telephone conversation to be private. Nor would it be reasonable to expect that, when speaking on the telephone, knowing that one's words are being transmitted electronically beyond the home, that the conversation would not be heard by a third party. 2) The court did not err in declining to instruct the jury on the defense of renunciation of the conspiracy, which requires conduct designed to prevent the commission of the crime, or a timely, positive statement to one or more of the other parties that the defendant will not participate. Suspecting that the "hit man" was actually a police officer, the defendant's daughter told her mother this, and testified that after that, "it was over and it ended there, because we realized what we were doing and that it was nothing that we wanted to get ourselves into." When the "hit man" contacted them again, she told him that "they were all set as far as needing [his] assistance." The defendant's statements do not indicate renunciation, merely a change in plans. Furthermore, the aim of the renunciation defense is to avoid punishing nondangerous people, whereas here the defendant rejected the services of the hit man only because she was scared of getting caught. Defendant's later statement that "it was all done," also did not meet the requirements of the defense. At most, it seemed that the defendant was trying to calm down the person she was speaking to. 3) The trial court did not abuse its discretion in denying a new trial on the basis of newly discovered evidence, that the daughter had stated that she planned to testify against her mother in order to keep custody of her child. This evidence was merely impeaching, and therefore did not meet the standard for a new trial. Doc. 201-158, September 16, 2011. State v. Wetter (2010-158) (16-Sep-2011)

VOLUNTARINESS OF CONSENT TO SEARCH IS REVIEWED DE NOVO

State v. Weisler and King, 2011 VT 96.
CONSENT TO SEARCH: VOLUNTARINESS; STANDARD OF REVIEW ON APPEAL.

Full court opinion. Conditional pleas of guilty to possession of cocaine affirmed. The defendants argued below that the vehicle driver's consent to search the vehicle was coerced and not voluntary, after he witnessed his passengers being loudly ordered out of the car at gunpoint, told to lay on the ground, handcuffed, and frisked. 1) The first issue on appeal is whether the standard of review on appeal of a finding of voluntariness is de novo review, as a question of constitutional fact, or whether it is reviewed solely for clear error. The court adopts the former test. Once the underlying historical facts are determined, to which the appellate court gives substantial deference, the ultimate question of whether a reasonable person in defendant's circumstances would have felt free to refuse the officer's request is reviewed de novo on appeal. 2) Applying this standard, the Court finds that the consent here was voluntary. The driver's observation of the display of force may have been unsettling, but it was not specifically directed at him, and there was nothing to suggest that his capacity to reason should have been unhinged or his ability to consent overborne. The officer emphasized that the driver did not have to

agree to the search. Even assuming that the driver was being illegally detained, nothing about the detention led to or tainted the later consent. In any event, probable cause to arrest the driver was present where the officer observed green flakes on a passenger he believed to be marijuana, and where he observed in plain view on the floor of the vehicle what appeared to be a bag of cocaine. Dooley, dissenting and concurring. Agrees that the consent here was voluntary, but would apply a deferential standard of review to the trial court's determination. Docs. 201-040 and 067, September 16, 2011. State v. Weisler, State v. King (2010-040, 2010-067) (16-Sep-2011)

SENTENCE MAY BE ENHANCED FOR PERJURY BY A WITNESS

*State v. Charland, 2011 VT 107. SENTENCING: RELIANCE ON SUBORNATION OF PERJURY DURING TRIAL; ADVANCE NOTICE; TRIAL COURT FINDINGS.

Full court opinion. DWI third sentence affirmed. The trial court specifically relied upon the defendant's husband having committed perjury during the trial when sentencing the defendant. 1) A sentencing court may rely upon the defendant's having suborned perjury at trial when sentencing a defendant. 2) The record in this case amply supports the trial court's determination that the defendant's husband gave perjured testimony at the trial when he testified that he had been operating the vehicle. His son testified to the contrary, the defendant herself told a police officer she had been driving, and her husband submitted an affidavit to the same effect. There is also a strong inference that the defendant knew the testimony would be false and intended to obstruct justice. She knew the true facts, and her husband's testimony was the only defense evidence at trial. 3) The trial court was not required to provide her with advance notice that it was contemplating enhancing her sentence based upon her use of perjured testimony at trial. The rule requires disclosure of all information submitted to it for consideration at sentencing, but this was not information submitted to the court for consideration at sentencing. It was the trial court's own observations at the trial. In any event, the defense raised no objection to this at sentencing, nor did it request a continuance for an opportunity to respond. The court notes that had the defendant objected, the court would have been required to review the evidence and make independent findings necessary to establish a willful impediment to or obstruction of justice, or an attempt to do the same. Doc. 2010-149, September 16, 2011. State v. Charland (2010-149) (16-Sep-2011)

VERMONT CONSTITUTION DOES NOT REQUIRE EXIGENT CIRCUMSTANCES TO SEARCH CLOSED CONTAINERS AFTER A GENERAL CONSENT TO SEARCH OF A VEHICLE

State v. Lamonda, 2011 VT 101. CONSENT TO SEARCH VEHICLE AND SEARCH OF CLOSED CONTAINERS.

Full court published entry order. Conditional plea to possession of a narcotic drug affirmed. The defendant was stopped after an officer determined that the registered owner of the vehicle was under suspension. He subsequently obtained permission to search the vehicle, and found marijuana inside a closed tin within the defendant's purse on the front seat. Article 11 does not require "exigent circumstances" to search the closed containers, because this was a consent case. No other Article 11 issues are reached, as no other Article 11 challenge was preserved and presented.

Johnson and Skoglund dissent: Would find other Article 11 claims preserved, and would require specific consent to a search of closed containers despite a general consent to search of the vehicle. Doc. 2010-209, September 8, 2011. State v. Lamonda (2010-209) (8-Sep-2011)

EXPUNGEMENT ORDER REQUIRES DELETION OF ELECTRONIC COURT RECORDS

State v. F.M., 2011 VT 100. EXPUNGEMENT: REMOVAL OF REFERENCES FROM DOCKETING SHEET.

Full court published entry order. Removal of references to an expunged case from docket entries regarding the case ordered. The defendant pled guilty to one of four counts, and the remainder were dismissed. The defendant received a deferred sentence which he successfully completed, and the matter was ordered deferred. However, the docket sheet still referred to the count, labeling it "expunged." The trial court declined to delete these references because of the complexities involved in deleting docket entries from the electronic system. The defendant is entitled to deletion pursuant to the statute despite the complexities involved. Doc. 2010-211, September 7, 2011. State v. F.M. (2010-211) (7-Sep-2011)

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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."

VIOLATION OF ORDINANCE PROHIBITING CROSSING THE CENTER LINE DOES NOT REQUIRE A PAINTED CENTER LINE.

State v. Parah, three-justice entry order. U TURN ORDINANCE: CROSSING CENTER LINE DOES NOT REQUIRE PAINTED LINE.

Civil suspension of driver's license and conditional guilty plea to DUI affirmed. The defendant was stopped for making a U turn, in violation of a city ordinance which prohibits crossing the center line of a road. The defendant argued that since there was no painted center line, he did not violate the ordinance and therefore the stop was illegal. The trial court correctly held that the ordinance referred to the middle of the road, whether there was a painted line or not. Docs. 2010-420 and 2011-059. http://www.vermontjudiciary.org/d-upeo/Microsoft%20Word%20-%20eo10-420.pdf

POTENTIAL JUROR'S COMMMENT ABOUT HOUSE ARREST DIDN'T REQUIRE A MISTRIAL

State v. Mason, three-justice entry order. COMMENT FROM POTENTIAL JUROR RE DEFENDANT HAVING BEEN ON HOUSE ARREST – MISTRIAL. EXPERT RELYING UPON HEARSAY. SUFFICIENCY OF THE EVIDENCE – CREDIBILITY OF THE WITNESSES. RESTITUTION ORDER – INSURANCE COMPANY AS VICTIM.

First degree arson and burning to defraud affirmed. 1) The trial court did not err in denying a mistrial motion after a member of the jury pool stated that he thought the defendant had been on house arrest at a relative's house. The individual was dismissed from the pool, there was no evidence the incident affected the jury's ability to be fair and impartial, and the court gave a curative instruction. 2) The State's expert was entitled to rely upon hearsay in order to reach his opinion as to how the fire started, and who started it. 3) The defendant's claim that the evidence was insufficient relies upon claims that the evidence was circumstantial, and that the witnesses were unreliable and inconsistent, but the credibility of the witnesses is a matter for the jury to decide. When considered in the light most favorable to the State, the evidence was sufficient to prove that the defendant was guilty. 4) A restitution order may be issued for payment of restitution to an insurance company, where the company is directly damaged by a crime. In this case, the insurance company's status as a direct victim is apparent because the defendant was not only convicted of arson, but also of burning to defraud an insurer. Doc. 201-384, August term, 2011. http://www.vermontjudiciary.org/d-upeo/Microsoft%20Word%20-%20eo10-384.pdf

Vermont Supreme Court Slip Opinions: Single Justice Rulings

BARRING FACE TO FACE CONTACT WITH DAUGHTER WAS APPROPRIATE CONDITION OF RELEASE IN SEX CASE INVOLVING VICTIM OF SAME AGE AND GENDER

State v. Eastman, single justice bail appeal. CONDITION OF RELEASE: CONTACT WITH BIOLOGICAL DAUGHTER.

The defendant was charged with sexual assault of a victim under the age of sixteen and entrusted to his care, and aggravated sexual assault of a victim under the age of ten. The victim was his step-daughter. As a condition of release, the defendant was barred from any in-person contact with his nine-year-old biological daughter, who is the same age as the victim, and for whom the defendant is not the custodial parent. The defendant argued that the accusation of a single instance of illegal sexual activity with a step child absent any physical evidence, does not present a compelling state interest sufficient to justify a bar on his in-person contact with his biological daughter. The

trial court's finding that barring face-to-face contact with the daughter was an appropriate means to balance the defendant's right to see his daughter with the responsibility of the State to protect the public was supported by the record. Doc. 2011-259, Reiber, J. July Term, 2011. http://www.vermontjudiciary.org/d-upeo/Microsoft%20Word%20-%20eo11-259.pdf

Cases marked with an asterisk were handled by the AGO.

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