Criminal Division
Vermont Attorney General's Office

Vermont Criminal Law Month

August - September 2012

Vermont Supreme Court Slip Opinions: Full Court Rulings

Includes three justice bail appeals

COURT DECLINES TO HEAR SEPARATION OF POWERS CHALLENGE TO INPATIENT MENTAL EXAMINATION PROCEDURES

In re M.W., 2012 VT 66. Full court opinion. MOOTNESS. INPATIENT EXAMINATION OF CRIMINAL DEFENDANT.

Appeal from trial court's refusal to order mental health evaluation dismissed as lacking a justiciable claim. The State's Attorney challenged the statute which permits the court to order an inpatient mental examination only if, after a preliminary screening, a mental health professional determines that the defendant is a person in need of treatment. The State's Attorney argued that this provision violates the doctrine of separation of powers by divesting from the court the authority to determine the location of a mental examination absent a finding from the screener that the defendant is a person in need of treatment. The court declined to order any evaluation at all, and the defendant was held for lack of bail. The court eventually found the defendant incompetent to stand trial on the basis of an earlier mental evaluation. The trial court never ruled on whether examination of the defendant was warranted, whether an inpatient examination was the least-restrictive environment necessary; or whether the statute unconstitutionally prohibited such an examination. Given no decision on the questions raised, the matter is not ripe for appeal. Nor is the issue one which is capable of repetition yet evades review, because, since there was never an order for an evaluation, the issue was never decided in the first place. Doc. 2011-229, August 3, 2012.
http://info.libraries.vermont.gov/supct/current/op2011-229.html

PUBLIC RECORDS ACT REQUIRED RELEASE OF RECORDS OF DE FACTO ARREST

Galloway v. Town of Hartford, 2012 VT 61. Full court opinion. PUBLIC RECORDS ACT: EXEMPTION FOR CRIMINAL INVESTIGATIONS AND

EXCLUSION OF RECORDS RELATING TO ARRESTS. DE FACTO ARRESTS.

Denial of Public Records Act request for records relating to an arrest reversed. The Public Records Act exempts from disclosure records dealing with the detection and investigation of crime, except that "records reflecting the initial arrest of a person…" shall be public. The plaintiff sought records relating to an incident in which a person in a dazed condition was found inside a home, forcibly removed from the home, and handcuffed, before being released shortly afterwards when it was determined that he was the homeowner and was suffering from a medical condition. The records sought were audio recordings of the incident; a recording of a 911 call; officers' reports; the dispatcher's log; and written witness statements. The trial court found that records created during the incident were records dealing with the detection and investigation of crime, but that records created after the decision that there would be no criminal charges were disclosable, since these were not records of the investigation, but were the product of the investigation. The Court concluded that the incident here constituted a de facto arrest, and that the records created during the incident were records reflecting the initial arrest, and therefore must be disclosed. The factors here indicate that this was more than an investigative detention: the police pepper-sprayed and struck the homeowner repeatedly with a baton; he was handcuffed and dragged down the stairs and out of his house, and forced to sit handcuffed on the sidewalk. Thus the amount of force and the restrictions on his freedom of movement were both significant. Dooley concurrence: Would hold that these are not records dealing with the detection and investigation of crime because in this case there was no crime. Burgess dissent: Would find that this is not a record of an arrest because the term should apply only to actual arrests, not de facto arrests, or arrests not resulting in charges. Doc. 2011-211, August 3, 2012. http://info.libraries.vermont.gov/supct/current/op2011-211.html

INTERVIEW OF CHILD FOUND TRUSTWORTHY FOR PURPOSES OF RULE 804a DESPITE ALLEGEDLY COERCIVE INTERVIEW

State v. Reid, 2012 VT 65. Full court opinion. HEARSAY: STATEMENTS BY CHILD VICTIMS OF SEXUAL ABUSE: FINDING OF TRUSTWORTHINESS.

Aggravated sexual assault affirmed. The trial court did not abuse its discretion in finding that the child's statements to interviewers and a nurse were admissible under V.R.E. 804a, despite the defense claim that the time, content, and circumstances of the child's statements did not provide substantial indicia of trustworthiness. The interview occurred after reports of several statements by the child to the neighbors. It began around 10:30 a.m., and ended after the school day concluded, with several breaks, including one for lunch. The child repeated asked to return to her classroom, and when asked about defendant, became more withdrawn and actively changed the subject. The afternoon session continued with more pointed questions. She eventually described being sexually assaulted by defendant, and described a purple bottle of oil that he kept by the bed. Defendant's expert, Dr. Mantel, testified that the interview did not conform with well-developed protocols for such interviews, that it was coercive and marked by confirmatory bias, relied on leading or suggestive questions, and failed to explore alternative explanations for the child's statements. The Court has not adopted or

endorsed any particular methodology for such interviews, relying instead upon a multi-factored approach to determine whether a child's statements possess sufficient indicia of trustworthiness. Here, the child's demeanor and emotional affect was appropriate for the gravity of the disclosures; she provided new information upon prompting and spontaneously provided idiosyncratic details and peripheral details; spoke with biological and anatomical accuracy and evidenced extensive precocious sexual knowledge, using age-appropriate terminology, and provided details about defendant's anatomy and the conduct of the assault; her statements were consistent within the interview and compared to her earlier statements; and, during the interview at the hospital, became more verbal and did not need more prompting or repeated questions. The interview at the school was not egregiously coercive. Dr. Mantel did point out countervailing factors, but the trial court's finding was not an abuse of its discretion. Skoglund, concurring: Agrees that the child's provision of new information and idiosyncratic details provides substantiating content, but disagrees that the interview was not coercive, and expresses concern that proper training is not being provided in this extremely critical and highly sensitive area of investigation. Doc. 2011-082, August 10, 2012. http://info.libraries.vermont.gov/supct/current/op2011-082.html

POSSIBILITY OF MULTIPLICITY CHALLENGE DID NOT UNDERMINE PLEA TO POSSESSION OF CHILD PORNOGRAPHY

In re Kirby, 2012 VT 72. Full court published entry order. POST-CONVICTION RELIEF: KNOWING AND VOLUNTARY PLEA BASED ON ATTORNEY'S ADVICE.

Summary judgment for the State in post-conviction relief proceeding affirmed. Underlying charge is possession of child pornography. The petitioner argued on appeal that his guilty pleas were not knowing and voluntary because his attorney wrongly informed him that a multiplicity challenge to multiple counts of possession of child pornography was not a viable defense. In the trial court, the petitioner had claimed that his attorney never even raised the issue with him, but the trial court, on the basis of defense counsel's affidavit, found that defense counsel did discuss it with him. In 2007, when counsel would have researched the potential for a multiplicity challenge, the state of the law was in flux, and there was no controlling authority on this question. In light of this, and the strong presumption of reasonableness in an attorney's performance, it was reasonable for counsel to doubt the merit of asserting a similar challenge to Vermont's statute, and to inform the petitioner that she thought this challenge was not viable. The petitioner apparently accepted his attorney's opinion, and her opinion was not an objective misunderstanding of the law. Therefore, that assessment did not create a material misunderstanding upon which the petitioner based his guilty pleas, and his pleas were thus entered knowingly and voluntarily. Doc. 2011-291, August 24, 2012. http://info.libraries.vermont.gov/supct/current/eo2011-291.html

SEVERANCE NOT REQUIRED FOR TWO DOMESTIC ASSAULTS LESS THEN 12 HOURS APART

*State v. Brandt, full court opinion. 2012 VT 73. SEVERANCE. JURY INSTRUCTION: BASIS FOR EXCITED UTTERANCE EXCEPTION. PROSECUTORIAL MISCONDUCT: CLOSING ARGUMENT.

Second-degree aggravated domestic assault, two counts, and driving with license suspended, affirmed. 1) The court did not err in declining to sever the two assault charges for trial. The acts were a series of acts connected together, and therefore there was no absolute right to severance – they occurred close in time, less than twelve hours apart, shared the same location, and involved an ongoing conflict over the use of the one car that the complainant and the defendant shared. Each would have been admissible in a trial of the other in order to explain the circumstances of the relationship of the parties. 2) The trial court should not have given a jury instruction explaining the basis for the excited utterance exception to the hearsay rule, but it did not improperly bolster the credibility of the complainant, and was neither inaccurate nor misleading. 3) There was no plain error in the prosecutor's closing argument. The prosecutor's statement that the defendant lied to a police officer did not involve events central to the case. Another statement, that the defendant was lying about not going to a nearby store, was central to the DLS charge, but was closer to fair comment because the defendant had told an officer that witnesses were lying. Nor was the prosecutor's characterization of the complainant as hysterical, frightened, in pain, and brutalized outside comment on the evidence. Finally, the statement that the defendant was contemptuous of the law was not plain error, where his driving with a suspending license showed an intentional disregard for his legal responsibilities, and was otherwise a comment on his conduct with respect to the charges rather than general attacks on his character. Doc. 2010-468, August 31, 2012. http://info.libraries.vermont.gov/supct/current/op2011-082.html

AGGRAVATED ASSAULT REQUIRES SPECIFIC INTENT TO THREATEN

State v. Bourn, 2012 VT 71. AGGRAVATED ASSAULT: SPECIFIC INTENT REQUIREMENT.

Aggravated assault with a deadly weapon, two counts, reversed. The defendant was charged after he emerged into a hallway, facing two police officers, holding a muzzleloader, and raised the muzzle towards the ceiling in a continuous arc, in the course of which the muzzle briefly pointed down the hallway to where the officers were standing. The gun was never leveled at the officers. An earlier plea agreement fell through when the defendant refused to admit that he intended to threatened the officers, although he conceded that the officers may have felt threatened. However, at trial a different judge refused to charge the jury that they needed to find that the defendant specifically intended to threaten the officers, stating instead that the issue is whether the defendant intended to do the actions that are alleged to be threatening, and did not act by accident or mistake. This was error, as aggravated assault requires that the actor have subjectively intended to threatened another person with a deadly weapon. The court's failure to require

specific intent meant that the defendant was not able to avail himself of a diminished capacity defense on these counts. Doc. 2011-161, August 31, 2012. http://info.libraries.vermont.gov/supct/current/op2011-082.html

JUDGE ACTED IMPROPERLY IN SUA SPONTE DISMISSAL FOR LACK OF PROBABLE CAUSE WITHOUT EXPLANATION OR OPPORTUNITY FOR ARGUMENT

State v. Bresland, full court published entry order. 2012 VT 75. DISMISSAL OF CHARGE AT ARRAIGNMENT: EXPLANATION REQUIRED; CANNOT BE BASED ON UNSETTLED QUESTION OF LAW.

Dismissal of refusal to take an evidentiary test for lack of probable cause reversed. The affidavits indicated that the defendant was observed swerving beyond the white and yellow road lines, and showed numerous signs of intoxication. The court did not indicate why it was dismissing the refusal count, but the State speculated that it was because the State cannot use a prior conviction both to enhance a DUI and to establish a previous conviction of DUI in order to render refusal a crime. There is no ground under current law to conclude that the State lacked probable cause on the second count. It may be that such a ground can be developed, but the procedure for doing so cannot be that the trial judge raises the ground sua sponte at arraignment, and then, without opportunity for argument and without explanation, the court dismisses the charge. The proper procedure is for the judge to find probable cause and to allow the issue to be raised by motion under Rule 12(b). If the objection goes to whether a crime was committed or defendant committed it, and the law is settled that an element of the crime was not met, the court can find no probable cause at arraignment, but that was not the case here. Doc. 2011-318, September 6, 2012. http://info.libraries.vermont.gov/supct/current/eo2011-318.html

DENIAL OF NEW TRIAL FOR NEWLY DISCOVERED EVIDENCE WAS WITHIN COURT'S DISCRETION

*State v. Bruno, full court opinion. 2012VT 79. NEW TRIAL MOTION: NEWLY DISCOVERED EVIDENCE. JUROR CHALLENGES. MANSLAUGHTER INSTRUCTIONS.

Second-degree murder affirmed. 1) The trial court did not abuse its discretion when it denied a motion for new trial based on newly discovered evidence, after a witness came forward and stated that she had seen the victim wielding a metal pipe. The trial court found the witness to lack credibility and her testimony weak and inconsistent. The trial court also found that the testimony was not likely to have changed the result on retrial, which conclusion was supported by the record. No other witness saw the pipe, and her description of events did not make sense when compared with the other witnesses' accounts. 2) During voir dire, one juror indicated that she had never heard before that the defendant had no obligation to testify, and that she could honestly say that she could not set that aside. The juror also expressed some concerns about her ability to deal fairly with aspects of the case involving drug dealing. Upon further questioning by the court, the juror repudiated her concerns about the drug

dealing, and stated that she could follow the court's instructions to put those concerns aside. The court thus did not abuse its discretion in denying the defense challenge for cause on this ground. The defense did not make a timely challenge for cause based on the earlier statements. There was no plain error in the court's failure to excuse the juror sua sponte. The juror had demonstrated that she was amendable to modifying her views upon having the law explained to her, but the defense never gave her that opportunity. 3) The trial court did not err in declining to excuse another juror for cause after she was questioned concerning the fact that her brother worked in a correctional facility. This brief, routine questioning did not support the inference that the defendant must be incarcerated, and in any event, a brief reference to a defendant's incarceration is not enough to undermine the presumption of innocence. 4) The court's instruction concerning manslaughter stated that the defendant's mental condition "may" be relevant in determining whether he had the requisite mental capacity. The use of this language reflects the court's recognition that whether or not those conditions sufficiently interfered with the defendant's capacity to form the requisite intent to qualify as diminished capacity was a question for the jury. Nor did the language of the instruction, in which the court referenced "diminished capacity, or sudden passion, or great provocation that would cause a reasonable person to lose self-control," instruct the jury to use an objective standard. Viewing the instruction in its entirety, it did not improperly call for application of an objective standard in the diminished capacity analysis. Docs. 2010-119 and 2011-166, October 5, 2012. http://info.libraries.vermont.gov/supct/current/op2010-119.html

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."

CLOSING ARGUMENT SUGGESTING BELIEF IN VICTIM DIDN'T REQUIRE REVERSAL

State v. Waterman, three-justice entry order. PROSECUTORIAL MISCONDUCT: CLOSING ARGUMENT.

Lewd and lascivious conduct with a child affirmed. The prosecutor began his closing argument by stating: "I'd like to begin by thanking you all for being here to allow [the complainant] to share with you what Mr. Waterman did to her. Many times, in the rush to pay homage to the defendant's rights, we forget the victims." These comments were inappropriate, as they indirectly expressed his belief that the complainant was telling the truth and the defendant was guilty, and suggested that the jury should consider the rights of victims. However, they were isolated, brief,

and incomplete, did not attack the defendant's character and were not particularly inflammatory. They were general remarks, not directly challenging the defendant's claims, and on multiple occasions the court reminded the jury that the attorneys' remarks were not evidence. This was not just a swearing contest, as the defendant made incriminating statements when interviewed by police, and there were several other witnesses supporting the complainant's detailed testimony. Therefore, there is no basis to overturn the trial court's denial of the motion for a mistrial. There was no abuse of discretion. Doc. 2011-333, August term, 2012. http://www.vermontjudiciary.org/d-upeo/eo11-333.pdf

REFERENCE TO "GREAT CERTAINTY" DID NOT SPOIL REASONABLE DOUBT INSTRUCTION

State v. Brandt, three-justice entry order. JURY INSTRUCTIONS: REASONABLE DOUBT.

Second degree aggravated domestic assault affirmed. The court's instruction on reasonable doubt was neither plain error nor error at all. The court's reference to "great certainty" did not diminish the instruction or introduce a lower standard of proof. The prosecutor's use of analogy to a personal decision did not result in plain error either. Doc. 2011-109, September Term, 2012. http://www.vermontjudiciary.org/d-upeo/Microsoft%20Word%20-%20eo11-109.pdf

DOMESTIC ASSAULT DEFENDANT NOT ENTITLED TO RETURN OF HANDGUN

State v. Voog, three-justice entry order. MOTION TO RETURN PROPERTY: FIREARM AND AMMUNITION.

Denial of motion to return handgun and ammunition clip affirmed. 1) The court properly declined to return the gun and ammunition on the grounds that their possession would be a violation of federal law, which forbids the possession of any firearm or ammunition because of his conviction of a crime of domestic violence. The federal definition of firearm includes a weapon which, as the defendant claims here, is inoperable. The federal courts have consistently held that this statute does not violate the Second Amendment. The defendant's commerce clause challenge to the statute is not reached as it was not raised below. The forfeiture of the items was not punishment for purposes of the Double Jeopardy Clause. The defendant's claim that the items were seized as the result of an unlawful search warrant was decided against him during his first appeal. Doc. 2012-124, September Term, 2012. http://www.vermontjudiciary.org/d-upeo/Microsoft%20Word%20-%20eo12-124.pdf

FIFTEEN MONTH DELAY DID NOT VIOLATE SPEEDY TRIAL RIGHT

State v. Menize, three-justice entry order. SPEEDY TRIAL.

Two counts of aggravated sexual assault affirmed. The defendant's speedy trial rights were not violated by the fifteen month time period between the arraignment and the trial. The delay was not extreme, even if it was excessive; the main causes of the delay were neutral (reassignment of

defense counsel; inclement weather; inadequate number of potential jurors at two successive jury draws); the defendant did not expressly invoke his speedy trial right prior to filing his motion to dismiss; and there is no serious claim of prejudice to the defense. Doc. 2011-287, September Term, 2012. http://www.vermontjudiciary.org/d-upeo/Microsoft%20Word%20-%20eo11-287.pdf

Vermont Supreme Court Slip Opinions: Single Justice Rulings

DEFENDANT HELD WITHOUT BAIL WAS ELIGIBLE FOR HOME MONITORING

State v. Merriam, single justice bail appeal. BAIL APPEAL: RELEASE ON HOME-MONITORING PROGRAM.

The trial court's order assigning the defendant to the Department of Corrections' home-detention program pending trial is affirmed. The defendant was charged with second-degree aggravated domestic assault, interfering with access to emergency service, DUI 3, and DLS. He was ordered held without bail, but permitted to attend an inpatient alcohol rehabilitation program, which he completed. The court then permitted the defendant to be placed under home detention at his mother's house, with GPS monitoring and an alcohol monitoring bracelet. 1) Home detention constitute a "release," and thus the State is permitted to appeal such an order pursuant to 13 V.S.A. § 7556(c). 2) The State argued that the defendant was ordered "held without bail," and therefore he was not being held "for lack of bail," which is required to be eligible for home detention. However, the trial court did not order the defendant held without bail. Nor does "lack of bail" only mean financial inability. The term encompasses pre-trial defendants who might be entitled to release under certain conditions, including bail or home-detention, that they have as of yet not met. 3) The record adequately supports the judge's conclusion that 24-hour confinement coupled with electronic location and alcohol monitoring would adequately protect the public. Doc. 2012-263, September Term, 2012. Reiber, Chief Justice. http://www.vermontjudiciary.org/d-upeo/eo12-263.bail.pdf

FINDING OF VIOLATION OF CONDITIONS WAS REQUIRED BEFORE COURT COULD DECLINE TO UPDATE RELEASE ORDER

State v. Synnott, single justice bail appeal. VIOLATION OF PROBATION: EFFECT OF RELEASE ON BAIL.

The defendant was arraigned for violation of probation, and was ordered to be released once a bed was available at Serenity House, a residential facility for drug abuse treatment. When a bed became available, the facility required an updated release order. The court declined to issue such an order, indicating that the motion should be refiled in the county in which the underlying conviction and probation order originated

(probation had been transferred to a different county). In that county, the judge declined to release the defendant to Serenity House. At no time did the State claim or the court cite any violation of the conditions of release or changed circumstances from the original order. Although the court had the discretion to hold the defendant without bail under 28 VSA 301(4), once a decision to release him on bail has been made, he has the same status as any other person released on bail. Thus, the order declining to release the defendant constituted a revocation of bail, which is governed by 13 VSA 7575, pursuant to which the State has the burden of proving a violation of the conditions of release. Since it is undisputed that the defendant never violated the conditions of release, and no other ground for revocation of bail applies, the order denying release is vacated. Doc. 2012-302, September Term, 2012, Dooley, J. http://www.vermontjudiciary.org/d-upeo/eo12-302.bail.pdf

Cases marked with an asterisk were handled by the AGO.

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