Criminal Division
Vermont Attorney General's Office

Vermont Criminal Law Month

August - September 2013

Vermont Supreme Court Slip Opinions: Full Court Rulings

Includes three justice bail appeals

SUSPECT MOVING FREELY ABOUT HER HOME WAS NOT SUBJECT TO CUSTODIAL INTERROGATION OR DE FACTO ARREST

State v. Sullivan, 2013 VT 71. Full court opinion. INVESTIGATIVE DETENTION; CUSTODY; VOLUNTARINESS.

DUI affirmed. 1) The investigating officer had a reasonable suspicion, justifying an investigatory detention, based upon the fact that the defendant had left a car in a snow bank with a portion of the car protruding into the road, with the gearshift in reverse, and the dash and reverse lights illuminated, and, when asked what was going on, the defendant replied, "nothing." In addition, the officer detected a slight odor of alcohol and observed other signs of impairment. 2) The investigative detention did not rise to the level of a de facto arrest where the officer neither used force nor physically restrained the defendant, and she remained in her house and freely roamed around, with at least as many friends or family members by her side as the number of officers in the room. 3) The defendant was not in custody, and thus no Miranda warning was required, when the officers asked her about her alcohol consumption. The interview took place in the defendant's own home. Police did not restrict the defendant's movements within her home, and when she declined the officer's invitation to step outside, he did not force her to go. The officers made no effort to isolate the defendant from others. The questioning was limited, and there is no evidence that the officers used deceptive techniques or harangued the defendant. The police did tell the defendant their reasons for suspecting that she had been DUI, but they did not repeatedly confront her with evidence of her guilt in a way that would suggest she was not free to leave. 4) The Court declined to rule whether a finding of voluntariness for the purposes of the Vermont Constitution, Article 10, is subject to the deferential review ordinarily afforded to trial courts' factual findings, or whether it represents a legal conclusion subject to de novo review, because under either approach, the trial court's finding of voluntariness would be affirmed. The officer's statements that he took the defendant's silence as a "yes" to the question whether she had been drinking, and his statement that they could do things one of two ways, were not so coercive as to overwhelm the substantial evidence that the defendant made her own decisions. Doc. 2012-134, August 23, 2013. http://info.libraries.vermont.gov/supct/current/op2012-134.html

DEFENDANT'S ACTIONS AND VICTIM'S FEAR NEED NOT BE CONTEMPORANEOUS FOR PURPOSES OF STALKING STATUTE

*In re Hoch, 2013 VT 83. POST-CONVICTION RELIEF: FACTUAL BASIS FOR PLEA TO AGGRAVATED STALKING – NECESSITY OF TEMPORAL CONCURRENCE BETWEEN ACT AND VICTIM'S FEAR; GROUNDS FOR INVESTIGATORY STOP; OFFICER ACTING AS PRIVATE CITIZEN; USE OF FORCE TO EFFECT INVESTIGATORY STOP.

Summary judgment for the petitioner in post-conviction relief petition reversed, and conviction reinstated. The defendant pleaded guilty to one count of aggravated stalking. In his PCR petition, he argued that there was no factual basis for the trial court to accept the plea because any fear that the victim felt as the result of his conduct was not contemporaneous with the conduct. He also argued that his trial counsel was ineffective for failing to challenge his initial stop, leading to his arrest. The trial court granted the petitioner summary judgment on the first claim, and denied it on the second. 1) The stalking statute was amended in 2006 to criminalize conduct that would make a reasonable person fearful, thereby relieving the State of the burden of proving that a particular victim actually felt fear. But the trial court's conclusion that the former statute permitted a conviction where the fear was not contemporaneous with the conduct, and that the amendment changed this to require that the fear and the conduct be contemporaneous, is without any basis. Some types of stalking behavior, such as "lying in wait," or "written … threats", are such that the conduct and the fear are unlikely to be contemporaneous. Since the victim here indicated in an affidavit that when she learned of the stalking incident later she became fearful, and since during the plea colloquy the petitioner acknowledged that he could have been found guilty because he caused the victim to be fearful when she learned of his actions, there was a factual basis for the plea. 2) The trial court did not err when it concluded that trial counsel was not ineffective for failing to file a motion to suppress based on the unlawfulness of the petitioner's initial detention. The officer had just seen a man peering into his daughter's bedroom window on multiple occasions late at night. He had every right as a private citizen and homeowner to confront the man to determine what he had been doing on his property. The fact that the homeowner was an off-duty officer did not negate that right. Up until the time he announced he was a police officer and asked petitioner for identification, the officer was acting as a private citizen rather than a government actor subject to the restrictions of the Fourth Amendment. When petitioner sought to explain his behavior with a story that did not comport with what the officer had observed, he was justified in further detaining petitioner to await the arrival of the police based on a reasonable suspicion that he had been engaged in criminal activity. Although voyeurism was not a crime at the time, the officer had reasonable suspicion that the defendant was engaging in aggravated stalking. 3) The duration of the stop and the officer's use of force did not turn the stop into a de facto arrest for which probable cause was lacking. The entire stop lasted several minutes at most. And, reasonable force may be used to effect an investigatory stop that is justified by reasonable grounds for suspicion. When the petitioner attempted to leave in his vehicle, the officer pushed him towards the passenger seat and struck him once on the side with a flashlight. In any event, by this point the officer had probable cause to believe that the defendant was engaged in aggravated stalking. Doc. 2012-330, September 13, 2013. http://info.libraries.vermont.gov/supct/current/op2012-330.html

NEW DNA EVIDENCE, EVEN IF FAVORABLE, WOULD NOT HAVE CREATED A REASONABLE PROBABILITY OF A DIFFERENT OUTCOME AT TRIAL

*In re Towne, 2013 VT 90. INNOCENCE PROTECTION ACT: STANDARD FOR GRANT OF NEW TRIAL.

Denial of request for post-conviction DNA testing under Innocence Protection Act affirmed. The results of the requested test would not have created a "reasonable probability" of a different outcome at trial, as required by the statute. 1) The term "reasonable probability" that the petitioner "would not have been convicted," as used in the statute, creates the same standard as that in the context of claims of ineffective assistance of counsel, which is a probability sufficient to undermine confidence in the outcome. The evidence must create a reasonable doubt that did not exist otherwise. When making this determination, the court must take into account all of the evidence before the jury, considering the trial as it actually unfolded. This is a less onerous standard than the standard of showing by a preponderance of the evidence that there is a reasonable probability of a different outcome. 2) The only DNA testing possible on the evidence at issue here (hairs) is mitochondrial DNA, which would not definitively establish that the hairs came from the person on whom the petitioner casts blame for the murder, but only that the hairs came from that person or any other person descended from a common matrilineal ancestor, including that person's mother, the defendant's former girlfriend. Testimony at trial discussed the easy interpersonal transference of hair samples. Therefore, even if mtDNA analysis established the hair samples belonged to the ex-girlfriend or her son, because the petitioner shared a home with them, the jury could weigh the possibility that petitioner himself was the agent for the deposition of the girlfriend's or son's hair onto the victim's body. The potential impact of this new DNA evidence is simply too speculative and remote to call into doubt the jury's verdict. Doc. 2012-162, October 4, 2013. http://info.libraries.vermont.gov/supct/current/op2012-162.html

PETITIONER RAISED CONTESTED ISSUES OF FACT CONCERNING HIS ATTORNEY'S INEFFECTIVENESS AND CONCERNING PREJUDICE IN PCR PROCEEDING

*In re Lowry, 2013 VT 85. POST-CONVICTION RELIEF: SUMMARY JUDGMENT – CONTESTED MATERIAL FACTS.

Summary judgment for the State in post-conviction relief proceeding reversed. The petitioner's attorney had suggested that the petitioner's girlfriend invoke the Fifth Amendment at trial in order to cast suspicion on her as the perpetrator of the assault on their child. She eventually declined to do so, and testified at trial that the petitioner had asked her to invoke the Fifth. The petitioner now argues that his counsel was ineffective for making this proposal to begin with, and in failing to cross-examine the girlfriend or otherwise address at trial her damaging testimony on this point. It was error to grant summary judgment because there were contested issues of material fact – whether counsel anticipated the consequences of proposing this strategy, and whether counsel apprised the petitioner of the risks of the strategy. While it is true, as the trial court stated, that a defense attorney must permit the defendant to make certain strategic

decisions even if such decisions are not in the defendant's best interest, the defendant should only make tactical decisions after he has fully consulted with counsel. There is a dispute as to whether this consultation took place, and even over whether the petitioner directed the strategy. The court also erred in its finding concerning prejudice, that no prejudice could have resulted from proposing the contested strategy. In closing argument at trial, the State argued that the witness's testimony was "potentially the most damaging evidence in the case." The petitioner's expert's affidavit also strongly supported the factual claim of prejudice. Doc. 2013-85, October 4, 2013. http://info.libraries.vermont.gov/supct/current/op2012-371.html

COMMUNITY CARETAKING FUNCTION DID NOT JUSTIFY MOTOR VEHICLE STOP OF CAR STOPPED ON THE SIDE OF THE ROAD

State v. Button, 2013 VT 92. MOTOR VEHICLE STOP: COMMUNITY CARETAKING EXCEPTION.

Denial of motion to suppress reversed on appeal from conditional guilty plea. The motor-vehicle stop was not justified by the community caretaking doctrine. The officer was following the vehicle on a back-country road, and did not observe any signs of impaired driving or any traffic violations. The car then pulled over and stopped with its engine running in an area with no structures nearby. The operator did not get out of the car, turn on the car's emergency lights, signal for the trooper to pass, ask for help, or take any other observable actions. There were no signs that the car was disabled. The car posed no danger to traffic where it was stopped. About thirty seconds elapsed before the officer activated his blue lights, effecting a motor vehicle stop. The officer's prior observations of the operation of the vehicle gave no basis for believing that the operator was in need of assistance, and the location of the stopped car was not unsafe. A driver's pulling over and waiting patiently does not by itself trigger a community caretaking stop under these circumstances. The trooper could have taken steps short of a traffic stop, such as slowly driving by the car while looking through the driver's window, to see whether the defendant needed help. If a police officer wants to check on someone who may be in distress, there are usually ways to do so short of a seizure. Doc. 2012-270, October 4, 2013. http://info.libraries.vermont.gov/supct/current/op2012-270.html

DEFENDANT HELD WITHOUT BAIL FOR VIOLATION OF PROBATION IS ENTITLED TO BAIL REVIEW HEARING

State v. Houle, full court bail review. REVOCATION OF PROBATION: PROCEDURES FOR REVIEW OF DENIAL OF BAIL.

The petitioner was arraigned on a violation of probation charge and ordered held without bail. He filed a motion for review, and a review was scheduled for two weeks hence. The petitioner then filed a petition for extraordinary relief in the civil division, claiming that he was entitled to an immediate bail review hearing. This petition was denied, and the petitioner then filed a petition for extraordinary relief in the Supreme Court pursuant to V.R.A.P. 21. The statute which deals with detention pending hearing for a probationer, 28 V.S.A. § 301, incorporates by reference the bail procedures found at 13 V.S.A. § 7554, titled "release prior to trial." V.R.CR.P. 32.1 explicitly incorporates the bail review hearing procedures provided in 13 V.S.A §§ 7554 and 7556. Of the two options found at section 7554(d), the best fit with revocation

of probation procedures is subsection 2, which requires a review hearing within five days of the original denial of bail. That time has already expired, and the petitioner is entitled to immediate relief. The criminal division is therefore ordered to hold a bail review hearing as soon as possible, and to decide the motion as soon as possible thereafter. Doc. 2013-331, September Term, 2013. https://www.vermontjudiciary.org/UPEO2011Present/eo13-331.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."

CIRCUMSTANCES SUPPORTED COURT'S FINDING OF A VALID WAIVER OF RIGHT TO COUNSEL

State v. Manfredi, three justice entry order. WAIVER OF RIGHT TO COUNSEL – SUFFICIENCY OF COLLOQUY.

Conviction for stalking following a bench trial affirmed. The trial court did not err in accepting the defendant's waiver of counsel. A waiver of counsel must be knowing and intelligence, but the Court will look to the totality of the circumstances in assessing whether a waiver is valid. The Court does not adhere to a strict two-part test. Here, there is no suggestion in the record that the defendant was mentally incompetent or that he did not understand his rights or the consequences of waiving those rights. The court did not need to make a specific finding that the defendant was mentally competent under these circumstances. The defendant was coherent and responsive to the court's questions. The court's questioning was sufficient to demonstrate that the defendant had a full understanding of his rights and the consequences of waiving them. This was a case where an in-depth inquiry or extensive advice was unnecessary. Doc. 2012-458, September Term, 2013. https://www.vermontjudiciary.org/UPEO2011Present/eo12-458.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 dtartter@atg.state.vt.us.