Criminal Division
Vermont Attorney General's Office

Vermont Criminal Law Month

August - September 2015

Vermont Supreme Court Slip Opinions: Full Court Rulings

Includes three justice bail appeals

ADEQUACY OF LEGAL ADVICE NOT RELEVANT TO DETERMINING VIOLATION OF STATUTORY RIGHT TO COUNSEL PRIOR TO BREATH TEST

State v. Aiken, 2015 VT 99. Full court opinion. EVIDENTIARY BREATH TEST: STATUTORY RIGHT TO COUNSEL.

Denial of motion to suppress defendant's refusal to submit to an evidentiary breath test affirmed. The defendant argued that he was denied his right to counsel . The defendant was put into contact with a public defender, but claimed that before any advice was given, the public defender put him on hold for ten minutes, and a subsequent call was not answered. After thirty minutes, the defendant was told that he had to decide if he would submit to the breath test, and he refused to answer, which was understood to be a refusal. There was no violation of the statutory right to counsel: the officer called the two public defenders on duty, allowed defendant to speak privately with the available attorney, again called the two attorneys after defendant said he had been placed on hold, and gave defendant the full thirty-minute period to wait for the attorneys to return his calls. Additionally, defendant was able to reach a public defender and speak with him on the phone, however briefly. Although the consultation here was brief, an attorney-client relationship was formed, and the court declined to peer behind the veil of that privacy to ascertain the quality of the consultation. Relying upon testimony about the content of confidential communication is unworkable and puts the State in the position of guarantor that the content of the communication is minimally adequate. The best course is to not allow the content of confidential communications to be the basis for determining a violation of the right to counsel. Doc. 2014-410, April Term 2015. https://www.vermontjudiciary.org/LC/Supreme%20Court%20Published%20Decisions/op14-410.pdf

DATAMASTER PRINT OUT NOT NECESSARY TO PROVE BREATH TEST RESULTS

State v. Taylor, 2015 VT 104. CIVIL SUSPENSION: NECESSITY OF DATAMASTER PRINT-OUT.

Full court opinion. Civil suspension of driver's license affirmed. At the final civil-suspension hearing, the trial court granted

defendant's motion to exclude the printout generated by the breath alcohol testing device because the officer's affidavit did not incorporate the ticket by reference. It is true that the State must show the numerical test results, and that the testing methods were valid and reliable and that the test results were accurate, but nothing in the statute requires that the State meet this burden by offering the printout into evidence, rather than other admissible evidence. In this case, the chemist's affidavit adequately established these elements. Doc. 2014-419, August 14, 2015. https://www.vermontjudiciary.org/LC/Supreme%20Court%20Published%20Decisions/op14-419.pdf

DEFENDANT HAD ADEQUATE OPPORTUNITY TO WITHDRAW PLEA AFTER COURT ADDED CONDITIONS OF PROBATION

In re Brown, 2015 VT 107. RULE 11: OPPORTUNITY TO WITHDRAW PLEA.

Full court opinion. Summary judgment for the state in post-conviction relief proceeding affirmed. The trial court added three conditions of probation that were not contained in the original plea agreement. Although the court never explicitly informed the petitioner of his right to withdraw his plea, the court engaged in a lengthy exchange, including asking the petitioner if he was willing to go forward with the original plea agreement, which indicated to the petitioner that he was not required to agree to the new conditions and that he had a choice in going forward with his original plea. Doc. 2014-246, August 14, 2015. https://www.vermontjudiciary.org/LC/Supreme%20Court%20Published%20Decisions/op14-246.pdf

CIRCUMSTANCES SUPPORTED REASONABLE GROUNDS TO REQUEST BREATH TEST

State v. Perley, 2015 VT 102. REASONABLE GROUNDS TO REQUEST BREATH TEST: SUFFICIENCY OF THE EVIDENCE.

Full court opinion. Refusal to submit to evidentiary test affirmed. The term "reasonable grounds" in the DUI statute is akin to probable cause. There was sufficient evidence to support a jury finding that the officer here had reasonable grounds to request a breath sample where the defendant had been involved in a car accident less than two hours earlier, on a day when the roads were clear, and had fled the scene, and was now showing obvious signs of intoxication, and there was no evidence of post-operation consumption of alcohol. The test is an objective one, not dependent upon the officer's actual belief. Doc. 2013-480, August 14, 2015. https://www.vermontjudiciary.org/LC/Supreme%20Court%20Published%20Decisions/op13-480.pdf

EXPERT PROPERLY PERMITTED TO TESTIFY TO FORENSIC SEARCH OF TELEPHONE WITHOUT FAMILIARITY WITH PROGRAMMING BEHIND SOFTWARE USES

State v. Pratt, 2015 VT 8. HEARSAY STATEMENT BY CHILD: INDICIA OF

TRUSTWORTHINESS. EXPERT TESTIMONY: KNOWLEDGE OF UNDERLYING PROGRAMMING. COERCION OF JURY VERDICT.

Full court opinion. Aggravated sexual assault of a minor under the age of 13 affirmed. 1) The trial court did not err in finding that the circumstances surrounding the victim's disclosure of the abuse provided indicia of trustworthiness where she wrote a letter to the vice principal – a trusted adult – expressing her need to tell someone about the incident and her fear of going back home; the language, spelling, and writing of the letter were all age appropriate, indicating that she was not coached or prompted by anyone; and where the victim made spontaneous statements about the abuse after showing the letter to a trusted friend in a safe place; her body language was consistent with the content of the statements; and her statements were consistent with those she made to the police. It was not necessary that anyone have witnessed her actually writing the letter in order to demonstrate that it bore indicia of reliability; in fact, that the letter was written in private is an indicator of trustworthiness because it demonstrates absence of outside influences. 2) The trial court did not err in permitting an expert to testify concerning the results of a forensic search of the defendant's cell phone using a software program even though the expert was not familiar with the programming behind the software. While an investigator must have specialized knowledge in the use of the particular software or device used in a forensic investigation, it is not required – nor is it practical – for an investigator to have expertise in or knowledge about the underlying programming, mathematical formulas, or other inner workings of the software for the testimony to be admissible pursuant to VRE 702. The expert's testimony may also have been admissible pursuant to VRE 703, which permits experts to base their opinions on facts or data of a type reasonably relied upon by experts in the particular field in forming opinions or inferences upon the subject. 3) The chain of custody of the phone, although not perfect, was sufficient to permit admission of the evidence. 4) The trial court's statement to the jury that they would have two hours that day to deliberate, and would return on Monday if they did not have a verdict by 5:30 did not coerce a verdict. The court was not required to have given the jury a choice to start deliberations that day or wait until Monday. Doc. 2014-121, August 14, 2015. https://www.vermontjudiciary.org/LC/Supreme%20Court%20Published%20Decisions/op14-121.pdf

STATUTE OF LIMITATIONS FOR AIDING IN COMMISSION IS SAME AS FOR UNDERLYING OFFENSE

In re Hyde, 2015 VT 106. AIDING IN COMMISSION OF CRIME: STATUTE OF LIMITATIONS. INEFFECTIVE ASSISTANCE: FAILURE TO FILE MOTION DOOMED TO BE UNSUCCESSFUL. RULE 11: SUBSTANTIAL COMPLIANCE.

Full court opinion. Summary judgment denying petition for post-conviction relief affirmed. 1) The crime of aiding in the commission of a sexual assault is treated the same as sexual assault for purposes of the statute of limitations. Therefore the statute of limitations was the six year limit for sexual assaults (subsequently extended to ten years), and not the three year limit for felonies not otherwise listed in the statute. An accessory is in all respects to be treated in exactly the same manner as one charged with the principal crime, unlike the case with accessory after the fact, which is a separate crime whose perpetrators must be treated

differently from principals. 2) The petitioner's counsel did not render ineffective assistance of counsel for failing to file a motion to dismiss the felony accessory charge because such a motion would have been unsuccessful as a matter of law, and therefore the failure to file the motion could not have been prejudicial to the petitioner. 3) The plea colloquy substantially complied with Rule 11(f) despite the fact that the mens rea element for the aiding charge was not specifically mentioned. The petitioner stated that she understood that the charged crime required the State to prove that she knew that the principal was going to engage in a sexual act with her daughter, and that she "did something to specifically assist him or to aid him or to encourage him to do this." The petitioner shared a preconceived plan with the principal and had the requisite intent. It was not an accident or mistake that she put her daughter to bed with a man waiting to sexually assault her. Doc. 2014-373, August 14, 2015. https://www.vermontjudiciary.org/LC/Supreme%20Court%20Published%20Decisions/op14-373.pdf

ABUSIVE LANGUAGE IN VIOLATION OF DISORDERLY CONDUCT MUST BE HIGHLY INFLAMMATORY

*State v. Tracy, 2015 VT 111. DISORDERLY CONDUCT BY ABUSIVE LANGUAGE: FIRST AMENDMENT.

Full court opinion. Disorderly conduct by abusive language conviction reversed. 1) The abusive language provision of the disorderly conduct law survives a facial First Amendment challenge only if it is exceedingly narrow in scope. A likelihood of arousing animosity or inflaming anger, or that the listener will feel an impulse to respond angrily or even forcefully, is insufficient. The provision only reaches speech that, in the context in which it is uttered, is so inflammatory that it is akin to dropping a match into a pool of gasoline. 2) In this case, the defendant's expression was vulgar, boorish, and just plain rude, but it cannot be said to fall in the exceedingly narrow category of statements that are reasonably expected to cause the average listener to respond with violence. The defendant asked emphatically, and angrily, why the coach had not played his daughter in the basketball game. He called her a bitch, and laced his invective with a vulgar four-letter word. But he did not lob heinous accusations against the coach, or taunt her to fight him. In fact, he uttered some of the offending statements as he walked away, rendering them especially unlikely to incite an immediate violent response. The court cannot conclude on this record that an average person in the coach's position would reasonably be expected to respond to the defendant's harangue with violence. Doc. 2014-055, August 28, 2015. https://www.vermontjudiciary.org/LC/Supreme%20Court%20Published%20Decisions/op14-055.pdf

ASKING DRIVER SLEEPING IN CAR AT REST AREA IF HE HAD ANY CONTRABAND WAS STOP UNSUPPORTED BY REASONABLE SUSPICION

State v. Winters, 2015 VT 116. TERRY STOP: REASONABLE SUSPICION; VOLUNTARY ENCOUNTERS.

Conditional guilty plea to possession of cocaine reversed; denial of motion to suppress reversed. 1) A police officer approached a car parked in an Interstate rest area in which a man was sleeping; the owner of the car and a person living at the

same address both had suspended licenses. The officer woke the man and confirmed that he had a suspended the license. The officer told him not to drive the car, and then told him to "rack out." At this point, the officer had concluded the DLS investigation. 2) The officer approached the car a second time, with another officer, and again woke up the defendant, and began questioning him about his involvement with illegal drugs. When the officer asked the defendant if he had anything that he should not possess on him or in his car, the encounter was no longer voluntary, and a reasonable person in the defendant's position would not have felt free to voluntarily terminate the encounter. However, the officer did not have a reasonable suspicion of criminal activity, only a stale arrest record, nearly a decade old. Therefore, his subsequent consents to the search of his person and car were tainted and ineffective. Dooley, with Reiber, dissenting: The second encounter was consensual, at least up until the defendant's disclosure that he was carrying needles, which created reasonable suspicion of criminal activity, when combined with other factors, including the defendant's eleven prior criminal convictions. The officer's "pointed questions" should not, alone, have been held to have converted this encounter into a seizure. In any event, the defendant waived his right to appeal the voluntariness of his consent to search. Doc. 2013-477, September 4, 2015.

CONDITIONS OF PROBATION STRICKEN AS NOT REASONABLY RELATED TO CRIME OF CONVICTION.

State v. Putnam, 2015 VT 113. GROSSLY NEGLIGENT OPERATION: SUFFICIENCY OF THE EVIDENCE. CONDITIONS OF PROBATION: REASONABLE RELATION TO CRIME; OVERBROAD DELEGATION.

Full court opinion. Disorderly conduct and grossly negligent operation affirmed; several probation conditions reversed. 1) The evidence was sufficient to prove grossly negligent operation where the defendant, seized by anger, chased his neighbor and passed him on a road that was barely as wide as the defendant's car turned sideways. He then turned abruptly so that his car sat across the roadway, leaving four tire marks. The defendant stopped just in front of the neighbor, and the neighbor had to put on his brakes to avoid hitting the defendant and the defendant's car. The jury could reasonably conclude that this conduct put the neighbor at risk of injury, regardless of the neighbor's ability to stop in time to avoid a collision. 2) The requirement that probation conditions reasonably relate to the defendant's particular characteristics, including the crime for which the defendant was convicted, applies equally to those conditions that are specifically included in the statutory list of permissive conditions as to other conditions. 3) The imposition of particular probation conditions is reviewed under an abuse of discretion standard, and does not necessarily require the sentencing court to make specific findings regarding each condition. The question is rather whether the record supports the court's exercise of its discretion. 4) Probation conditions which requires notification to the probation officer of a new arrest or citation, of changing address, and of losing or changing employment, and requiring the defendant to meet with his probation officer when asked and to allow the probation officer to visit him where he is staying are properly related to the supervision of the defendant, given the evidence that he had exhibited unusual behavior and angry outbursts. These conditions directly relate to assisting the defendant in leading a law-abiding life. Imposition of substantially

similar conditions relating to the administration of probation would be within the trial court's discretion in any case in which probation is ordered. 5) The condition requiring the defendant to regularly work at a job, look for work, or get job training if required by his probation officer is unsupported by the evidence. There is no suggestion in the record that the defendant's criminal conduct was connected to his lack of employment, or that getting a job, instead of remaining on disability, would help him become more stable or reduce his risk of reoffending. In fact, there is no evidence that the defendant is capable of working. 6) Conditions relating to restitution and community service are stricken, as neither was ordered in this case. 7) The condition that the defendant support his dependents and meet his other family responsibilities is stricken as there is no evidence to support the conclusion that this condition is reasonably related to the defendant and the crime for which he was convicted. 8) The condition that the defendant not buy, have or use any regulated drugs unless prescribed is valid even without a reasonable relationship to the defendant's conviction, because the provision prohibits unlawful conduct. 9) The condition that the defendant submit to random urinalysis testing is stricken as not related to the crime of conviction. The requirement that the defendant not drink alcohol in excess is not related to the crime of conviction, and does not prohibit illegal conduct. 10) The condition that the defendant not operate a motor vehicle on a public highway unless in possession of a valid Vermont operator's license, is reasonably related to the crime of conviction. The court did not need to decide if the fact that such conduct would be a civil violation rather than a crime would permit the imposition of the condition even absent any nexus to the crime of conviction. 11) A condition requiring the defendant to repay $50 for public-defender services rendered in this very case was reasonably related to the crime. 12) A probation condition requiring the defendant to attend any counseling or training program designated by his probation officer and to participate to the probation officer's satisfaction was an overbroad delegation of authority not supported by findings, even under a plain error standard of review. A separate probation condition required the defendant to participate in and complete mental health counseling to include anger management, which was reasonably related to the crime, but this condition is not limited to addressing those concerns, but gives the probation officer unfettered authority to decide whether and what type of counseling or training will be required. This condition is remanded to the trial court for an opportunity to make findings to support the broad delegation, revise the condition to provide more tailored constraints on the probation officer's implementation of the condition, or strike it. Skoglund, with Maley, specially assigned, dissenting in part: Would strike the condition requiring repayment of public-defender fees, as not reasonably related to the crime or rehabilitation, and as a blatant attempt to use probation as a debt-collection agency. Doc. 2014-020, September 4, 2015. https://www.vermontjudiciary.org/LC/Supreme%20Court%20Published%20Decisions/op14-020.pdf

CIRCUMSTANCES SUPPORTED FINDING THAT DEFENDANT WAIVED ATTENDANCE AT TRIAL

State v. Stanley, 2015 VT 117. Sexual assault affirmed. DEFENDANT'S PRESENCE AT TRIAL: WAIVER. PRIOR BAD ACTS: ADMISSIBLE TO SHOW VICTIM'S FEAR; ADEQUACY OF LIMITING INSTRUCTION. HABITUAL OFFENDER ENHANCEMENT: USE OF

CONVICTIONS EARLIER USED FOR SAME PURPOSE – DOUBLE JEOPARDY.

Full court opinion. 1) The defendant validly waived his right to be present at the trial. He was present at the commencement of the action, that is, the impaneling and swearing of the jury. Once the trial has begun in the defendant's presence, it may continue in his voluntary absence. When initially summoned to come to the courtroom, the defendant expressly waived his right to attend by specifically indicating his refusal to come to the courtroom. The trial court periodically gave him opportunities to come to the courtroom, which he declined. He also had the ability to follow the proceedings by remote technology and to confer with counsel throughout the two days of trial. The defendant did indicate that he would rather go to the courtroom after all when given the judge's written order. But it occurred not too long after he was observed ranting, raving, and punching the walls, and within forty minutes of the most recent of his repeated pledges to physically attack his lawyer. He also indicated this new preference while tossing the court's order to the floor, a gesture that could have suggested to the court that he remained agitated. Under these circumstances, the trial court did not abuse its discretion in concluding that the defendant continued to pose a safety threat, especially to his own lawyer, and that an additional cooling off period was required before he would be allowed in the courtroom. 2) Nor did the court err in proceeding with the sentencing hearing despite the defendant's absence, rather than continuing the hearing for two weeks to allow the defendant's new medications to take effect. Before the trial court, the defendant did not request a continuance, and in any event, the hearing had been scheduled about two weeks in advance, giving the defendant ample time to file a motion. 3) The court did not err in permitting introduction of testimony that the victim had witnessed, as a child, the defendant assaulting her mother by stabbing her in the head with a butcher knife. This evidence was relevant to explain the victim's fear of the defendant, and thus to explain why she voluntarily got in a truck with the defendant the next day and failed to immediately report the assault. The trial court repeatedly admonished the jury concerning the limited purpose for which the evidence was admitted. Nor did the court abuse its discretion in finding that the undue prejudice did not significantly outweigh the probative value of the evidence. The limiting instructions were not inadequate. 4) There was no plain error in the State's use of prior offenses for a habitual offender enhancement that had previously been used for a previous habitual offender conviction. This did not violate the Double Jeopardy Clause.
https://www.vermontjudiciary.org/LC/Supreme%20Court%20Published%20Decisions/op14-292.pdf

KNOWING REQUIREMENT IN ENABLING CONSUMPTION OF ALCOHOL BY MINOR APPLIES TO AGE OF MINOR

State v. Richland, 2015 VT 126.
ENABLING CONSUMPTION OF ALCOHOL BY MINOR: KNOWINGLY REQUIREMENT – APPLICATION TO AGE OF MINOR.

Full court opinion. Enabling the consumption of alcohol by a minor reversed. The statute at issue states that "no person shall … knowingly enable the consumption of malt or vinous beverages or spirituous liquors by a person under the age of 21." The trial court instructed the jury that the defendant must have knowingly enabled the victim to consume alcohol, but that the State

did not need to prove that the defendant knew that the victim was under the age of 21. In other words, the trial court found that the knowingly requirement modified only the enabling element, and not the age element. The Vermont Supreme Court disagreed, holding that the knowingly requirement applied to both elements. Justice Easton, with Chief Justice Reiber, dissent. https://www.vermontjudiciary.org/LC/Supreme%20Court%20Published%20Decisions/op14-196.pdf

SERIOUSNESS OF CONDUCT JUSTIFIED NO BAIL ORDER

State v. Ford, 2015 VT 127. NO BAIL ORDER: SERIOUSNESS OF CONDUCT.

Three justice bail appeal. No bail order affirmed. The defendant is charged with two counts of attempted first degree murder and two counts of kidnapping with intent to inflict bodily harm. The trial court did not abuse its discretion in denying bail. The court's weighing of several statutory factors, including the serious nature of the charges, the violent threats which continued even after the defendant was in custody, and the defendant's involvement of innocent bystanders, and determination that these outweighed the defendant's lack of an extensive criminal record, the availability of a place to live, and the lack of evidence of a danger of flight, was not an abuse of discretion. The court also did not err in denying home detention or electronic monitoring, where it properly considered all three statutory factors. Doc. 2015-331, September Term, 2015. https://www.vermontjudiciary.org/LC/Supreme%20Court%20Published%20Decisions/eo15-331.bail.pdf

FURTIVE MOVEMENTS JUSTIFIED DRUG INVESTIGATION

State v. Manning, 2015 VT 124. SUSPICIOUS BEHAVIOR JUSTIFIED INVESTIGATIVE STOP FOR DRUGS.

Full court opinion. Denial of motion to suppress evidence obtained during a traffic stop affirmed. The defendant's car was parked in an area of a parking lot known for drug activity. The officer ran a registration check on the vehicle and discovered that the license of the registered owner, the defendant, was under suspension. The officer approached the vehicle in order to conduct a suspended license investigation. During the course of that investigation, he noted that the defendant made furtive movements as if shuffling an object in the front seat of the car when he saw the officer approaching; the object defendant appeared to hide from the officer was a prescription pill bottle with a worn label; the defendant was nervous and shaking when asked for his identification; and his wallet contained a large amount of crumpled bills. 1) Although none of these factors viewed in isolation could form the basis for reasonable suspicion, looking at the circumstances as a whole, particularly through the lens of the officer's experience in law enforcement, the officer had reasonable suspicion to believe that the defendant was in possession of illegal drugs, permitting him to expand the scope of the suspended-license investigation into a drug investigation, including asking the defendant to exit his vehicle and interviewing him about the contents of the prescription bottle. Thus, when the defendant consented to the opening of the bottle, this consent was not tainted by any prior illegal act by the officer. 2) The exit order did not constitute a de facto arrest, and the defendant was not in custody, requiring the Miranda warnings, when the officer asked about the

prescription bottle. The questioning occurred outside in broad daylight in a public parking lot, where the defendant's freedom of movement was not restrained, where there was only one officer present, and where the interview lasted only around ten minutes and did not involve any deceptive or otherwise coercive interrogation techniques. The fact that the officer did not specifically inform the defendant that he was free to leave did not automatically turn the questioning into a custodial interrogation. Doc. 2014-207, May Term, 2015.
https://www.vermontjudiciary.org/LC/Supreme%20Court%20Published%20Decisions/op14-207.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."

DEFENDANT VALIDLY WAIVED RIGHT TO COUNSEL

*State v. Daignault, three-justice entry order. RIGHT TO COUNSEL: VALIDITY OF WAIVER.

Unlawful trespass affirmed. The defendant validly waived his right to counsel, despite the claim on appeal that he equivocated on whether he wanted assigned counsel but ultimately declined counsel because of a perceived conflict of interest. The court informed him that an attorney from the firm in question would be appointed "unless there is truly a conflict." He was informed several times of his right to a public defender, but nonetheless elected to proceed pro se. There was a valid waiver of the right to counsel. Doc. 2014-333, August 12, 2015.
https://www.vermontjudiciary.org/UPEO2011Present/eo14-333.pdf

COURT LACKED JURISDICTION TO HEAR PCR ON MINNESOTA MURDER CONVICTION

In re Palubicki, 3 judge entry order. POST CONVICTION RELIEF: SUBJECT MATTER JURISDICTION.

Dismissal of petition for post-conviction relief affirmed. The defendant was convicted of first-degree murder in Minnesota and subsequently transferred to a Vermont correctional facility pursuant to the Interstate Corrections Compact. His PCR petition, filed in Vermont superior court, was properly dismissed because in Vermont, and as in Minnesota, a PCR petition may be brought in the "superior court of the county where the sentence was imposed," and therefore the Vermont superior court lacked jurisdiction to consider the petition. Doc. 2015-127, August Term, 2015.
https://www.vermontjudiciary.org/UPEO2011Present/eo15-127.pdf

COMMITMENT ORDER JUSTIFIED BY EVIDENCE

In re J.P., three justice entry order. NINETY DAY COMMITMENT ORDER NOT MOOTED BY SUBSEQUENT EXTENSION; ORDER WAS JUSTIFIED BY THE EVIDENCE.

1) The defendant's challenge to a ninety-day commitment order was not moot even though it had expired and a one year commitment order had taken its place and been upheld on appeal. The negative collateral consequences of being initially adjudicated mentally ill and then involuntarily hospitalized may continue to plague a person with both legal disabilities and social stigmatization. 2) The court did not err in issuing the commitment order. The evidence was sufficient to show that he posed a present danger of harm to others by, as the statute permits, inflicting bodily harm on another, and placing others in reasonable fear of physical harm by his threats or actions. The fact that the infliction of bodily harm occurred in 2010 does not change the result, as it is not that remote in time; and the hearing came immediately after he was declared incompetent to stand trial for that murder. The testimony also demonstrated that his mental illness poses a risk to others, as he is very emotionally involved in his delusional beliefs, is fixed in those beliefs, had demonstrated the ability to carry out a plan based on those beliefs, and has had those beliefs become even more entrenched during the time the examining psychiatrist was examining him. There was also evidence that there was no less restrictive alternative for him than psychiatric treatment requiring involuntary hospitalization, and that he was more likely to be violent if he is allowed out in the community. Finally, the evidence was sufficient to find that the danger of harm that he poses to others is linked to his mental illness. Doc. 2014-123, September Term 2015.
https://www.vermontjudiciary.org/UPEO2011Present/eo14-123.pdf

FAILURE TO CONSULT WITH SECRETARY OF AGRICULTURE WAS NOT FATAL TO CRUELTY TO ANIMALS CHARGE

In re Bona, 3 justice entry order. ANIMAL CRUELTY: FAILURE TO CONSULT WITH SECRETARY OF AGRICULTURE; FAILURE TO SHOW PREJUDICE.

Seventeen counts of misdemeanor cruelty to animals affirmed. 1) The statutory provision that the Secretary of Agriculture be consulted prior to any enforcement action was not mandatory, and its purpose, that accepted livestock practices not be a basis for an action under the animal cruelty statutes, was served by the jury's verdict. 2) The defendant argues that court personnel removed and returned to him a document that he had filed in the record. He failed to explain how he was prejudiced, and the court could not discern it from the record. 3) The defendant did not show the trial court abused its discretion when it declined to enforce a subpoena the defendant had served on the veterinarian who inspected his horses. Doc. 2014-448, September Term, 2015.
https://www.vermontjudiciary.org/UPEO2011Present/eo14-448.pdf

CONDITION OF PROBATION LIMITING CONTACT WITH GRANDCHILDREN WAS NOT ABUSE OF DISCRETION

State v. Waite, 3 justice entry order. PROBATION ORDER: ABUSE OF DISCRETION.

Probation condition precluding contact with defendant's non-victim grandchildren without approval of probation officer, therapist, and any assigned child protection worker affirmed. The court did not abuse its discretion in imposing this condition where it was patently related to the crimes committed, sexual abuse of two of the defendant's granddaughters, where other family members were present, and where the parents of non-victim grandchildren disbelieved the victims. Doc. 2015-096, September Term, 2015. https://www.vermontjudiciary.org/UPEO2011Present/eo15-096.pdf

COURT'S REFUSAL TO GRANT DOWNWARD DEPARTURE IN AGGRAVATED SEXUAL ASSAULT SENTENCING WAS NOT ABUSE OF DISCRETION

State v. Morse, three justice entry order. DOWNWARD DEPARTURE IN SENTENCING FOR AGGRAVATED SEXUAL ASSAULT.

Sentencing in aggravated sexual assault of a child under thirteen affirmed. The court did not abuse its discretion when it rejected a downward departure from the presumptive minimum sentence of ten years, permitted only if the court finds that the downward departure will serve the interests of justice and public safety. Doc. 2015-103, September Term, 2015. https://www.vermontjudiciary.org/UPEO2011Present/eo15-103.pdf

Criminal And Appellate Rule Changes

Proposed Changes to the Vermont Rules of Criminal Procedure

Some important changes to the computation of time have been proposed. Most significantly, the complicated computations involving excluding or including weekends and holidays would be abolished, and all days would be counted, including weekends and holidays, but not the day of the event that triggers the period. The last day of the period would be counted, but the period would not end on a weekend or holiday, but on the next day after expiration of the period that is not a weekend or holiday. The proposal also discusses time periods stated in hours and the effect of the inaccessibility of the clerk's office, and defines "last day," "next day," and "legal holiday."

Some changes in time periods have also been proposed. The time for filing a notice of alibi, insanity, or expert testimony related to a mental condition of the defendant would have to be given at least 30 days before trial, rather than the current limit of 10 days. Motions for judgment of acquittal made after discharge of the jury would have to be made within 14 days, rather than the current 10 days. Objections to pre-sentence investigation reports would have to

be made at least 5 days before the sentencing hearing, rather than the current three days. A motion for a new trial would have to be made within 14 days after the verdict or finding of guilty, rather than the current 10 days. Memoranda in opposition to a written motion would have to be filed within 14 days, rather than the current 10 days. (Note that the changes are not that great, because weekends and holidays would no longer be excluded in the computation).

The proposed changes can be found here:

https://www.vermontjudiciary.org/LC/Statutes%20and%20Rules/PROPOSEDVRCrP12.1,29,33,32,45%20and%2047DayisDay.pdf

Proposed Changes to the Vermont Rules of Appellate Procedure

Analogous changes have been proposed for the Rules of Appellate Procedure. These can be found here:

https://www.vermontjudiciary.org/LC/Statutes%20and%20Rules/PROPOSEDVRAP%20day%20is%20a%20day.pdf

Changes to the Vermont Rules of Appellate Procedure

Vermont Rule of Appellate Procedure 3(b)(2) has been amended to eliminate the automatic appeal provision in life sentences cases, where the defendant was represented by counsel and entered a plea of guilty or nolo contendere. The defendant still has a right of appeal, but entry of the notice of appeal would not be automatic, and would be subject to the time limits for notices of appeal.

The change can be found here:

https://www.vermontjudiciary.org/LC/Statutes%20and%20Rules/PROMULGATEDVRAP3(b)(2)%20and%2010(b)(3).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. For information contact David Tartter at david.tartter@vermont.gov.