Criminal Justice Division
Vermont Attorney General's Office

Vermont Criminal Law Month

August - September 2010

Vermont Supreme Court Slip Opinions: Full Court Rulings

Includes three justice bail appeals

RESTITUTION ORDER CAN IMPOSE JOINT AND SEVERAL LIABILITY

State v. Hughes, 2010 VT 72. Published entry order. RESTITUTION: JOINT AND SEVERAL LIABILITY; INSURANCE – BURDEN OF PROOF; SELF-INSURANCE.

Order of joint and several restitution affirmed. The defendant was convicted of grand larceny and unlawful mischief arising out of an incident in which he and two friends drove off from a grocery store in three electric carts and drove them into a river. The defendant was ordered to pay joint and several restitution for the loss of all three carts. 1) Joint and several liability for all three carts was permitted where the defendant was charged with and pled guilty to stealing and destroying electric shopping carts, in the plural. The theft of the carts was joint, depending on mutual encouragement by all three of the participants. As long as the court finds a direct link between the damages awarded and the conduct covered by the defendant's conviction, there is no reason to limit restitution liability. 2) The state met its burden of proving the absence of insurance by presenting the testimony of a long-time employee whose job was to assess and mitigate similar losses. 3) The store was not insured for the loss, despite the defendant's argument that the store's decision to save money through a lower premium on its high-deductible policy constitutes a "self-insurance" plan. The store's decision to pay out-of-pocket for certain smaller losses does not preclude them from receiving compensation through the restitution statute. This is unlike the self-insurance pool at issue in State v. LeDuc. Doc. 2009-130, August 4, 2010.

LIVE TESTIMONY BY CHILD DOES NOT PRECLUDE USE OF 804(a) STATEMENTS AS WELL

State v. Spooner, 2010 VT 75. Full court opinion. RULE 804a: USE AS CORROBORATIVE EVIDENCE; RIGHT OF DEFENSE TO CALL CHILD.

Aggravated sexual assault of a child affirmed. 1) A child's recorded statements that otherwise met the requirements of VRE 804a were not inadmissible simply because the child had already testified, and the

recorded statement was being played, at least in part, to corroborate the live testimony. 2) The defense waived his right to call the child as a witness after the recorded statements were played, when it agreed to play other recordings in lieu of calling her to the stand a second time. Doc. 2009-260 (August 13, 2010).

MOMENTARY INATTENTIVENESS CAN BE GROSS NEGLIGENCE

*State v. Carlin, 2010 VT 79.
GROSSLY NEGLIGENT OPERATION: CHECKING GPS WHILE APPROACHING BICYCLIST.

Full court published opinion. Trial court's dismissal of charge of grossly negligent operation of a vehicle reversed. A jury could reasonable conclude that the defendant acted with gross negligence where she was driving on a straight stretch of road in which a bicyclist would have been clearly visible prior to the accident, and decided to take her eyes off the road in order to look down at a GPS unit. The fact that her period of inattentiveness was only about two seconds was not decisive, because that momentary inattention occurred in a place where there was great potential for immediate danger. Doc. 2009-483, August 19, 2010.

NECESSITY DEFENSE NOT AVAILABLE WHERE DEFENDANT DID NOT SEEK MEDICAL MARIJUANA EXEMPTION

State v. Thayer, 2010 VT 78.
NECESSITY DEFENSE: SUFFICIENCY OF DEFENDANT'S PROFFER.

Full court opinion. Interlocutory appeal from denial of defense motion for jury instruction on the necessity defense. The trial court correctly found that the defendant had failed to establish the third element of the necessity defense, that the emergency presented no reasonable opportunity to avoid the injury without doing the criminal act. The defendant grew marijuana for the use of her son, who suffered from wasting symptoms, a condition recognized under the state's medical use of marijuana act. The defendant had failed to qualify for cultivation of marijuana under the act because she refused to grow indoors, and because the limit on the number of plants was insufficient to ensure an adequate supply to compensate for the risks of loss to frost, drought, excess rain, animals, mold, and disease. The defendant failed to demonstrate that indoor cultivation was impossible or impractical for her, or that it would not have cured the need to grow more marijuana than authorized by the statute. Her assertion that she had no time to create a compliant indoor facility for growing marijuana is not reasonable, given over three years in which to do so. The fact that she felt that the law was inadequate does not cure this defect in the proof. Reiber, with Johnson, dissenting: The defendant had offered sufficient proof on each element, and the majority opinion usurps the jury's function of determining credibility and reasonableness. A reasonable juror could conclude that the defendant reasonably conceived that it was necessary to grow marijuana. Doc. 2008-415, August 20, 2010.

PRIOR DOMESTIC ABUSE ADMISSIBLE TO EXPLAIN DELAY AND CONTINUED CONTACT

State v. Williams, 2010 VT 77. PRIOR BAD ACTS: CONTEXT OF RELATIONSHIP IN DOMESTIC ASSAULT.

Full court opinion. Aggravated domestic assault affirmed. The defendant was charged with an assault on the complainant in November, 2008, for striking her on the mouth, and choking her. The State introduced evidence of two prior assaults, in September and October, 2007, during both of which the defendant was said to have struck and choked the complainant. The Court criticized the State's motion, noting that it did not attempt to relate the prior incidents to any other anticipated trial evidence or defense in order to show how and why they were necessary and material to demonstrating an absence of accident or mistake or establishing a broader context to the parties' relationship. The Court's prior decisions which permit the use of prior bad acts to show context do not mean that prior bad acts, even by the same defendant against the same domestic assault victim, are automatically admissible. The State continues to bear the burden of establishing that the evidence does not simply show a propensity to commit the crime charged, but instead is relevant to a genuine, separate issue in the case and that its probative value outweighs the potential for unfair prejudice. However, in this case it turned out that the prior bad acts evidence did become relevant to several issues developed more fully at trial, including the nature or context of the relationship between the defendant and the complainant. Defense counsel's trial strategy was aimed precisely at establishing an incongruity between complainant's allegations and her actions before and after the assault. In closing, defense counsel recalled the complainant's testimony expressing affection for the defendant, her hopes of retaining some contact between him and their daughter, and the evidence that she had written defendant letters and been in telephone contact with him subsequent to the restraining order of March 2008. He also argued that she didn't follow through in a way that someone in that kind of situation would follow through, she did not report it that night, she did not go to the hospital, and she didn't tell anyone that night. There were not the actions, counsel argued, of a person responding in a reasonable way under these circumstances. This is precisely the sort of argument that context evidence is designed to address. The evidence was also relevant to address issues of motive and claims of fabrication, as defense counsel argued that the allegations only made sense as an effort to appease her mother and her former partner, both of whom were hostile to defendant. Defense counsel also argued that the complainant was concerned that the father of her older child would seek to modify custody if she did not somehow remove the defendant from the scene. The Court also found that the evidence was not unduly prejudicial, as it did not concern other victims of abuse, and the court gave a limiting instruction. Doc. 2009-253, August 20, 2010.

OBJECTIVE STANDARD DOES NOT APPLY TO DIMINISHED CAPACITY MANSLAUGHTER

State v. Williams, 2010 VT 83. VOLUNTARY MANSLAUGHTER: MENTAL STATE; HARMLESS ERROR. MIRANDA: HARMLESS ERROR.

Full court opinion. First degree murder, two

counts, attempted first-degree murder, and attempted second-degree murder, affirmed. 1) The trial court erred when it instructed the jury that it should use a reasonable person standard in determining whether the defendant acted under extenuating circumstances that would mitigate but not justify the killing, for the purposes of voluntary manslaughter. While the reasonable person test applies to the "provocation" basis for voluntary manslaughter, it does not apply to the "diminished capacity" basis. 2) This error was harmless because the defendant was not entitled to the voluntary manslaughter instruction based on diminished capacity. The defendant failed to put forth even minimally sufficient evidence in support of diminished capacity. 3) The defendant argued that the trial court erred when it admitted statements that the defendant volunteered while under guard at the hospital, on the grounds that these statements were part of a continuous, five hour illegal interrogation, much of which the trial did suppress as in violation of Miranda. The defendant's constitutional claim is not addressed, as even if the court did err in denying the motion to suppress, such error was harmless, as the jury would have convicted the defendant even absent the error. There was ample evidence supporting the defendant's convictions, specifically evidence that the defendant possessed the requisite mental state for murder. The statements at issue in this motion were largely duplicative of admissible statements the defendant made to a number of people about the shootings. Although the statements were relevant to counter a credible diminished capacity defense, the defendant did not offer one. Doc. 2008-469, August 26, 2010.

AGE OF CHILDREN COULD BE INFERRED FOR PROBATION VIOLATION

State v. Amidon, 2010 VT 46A. PROBATION VIOLATION: SUFFICIENCY OF EVIDENCE; COLLATERAL CHALLENGE.

Five justice published entry order. Revocation of probation and suspended sentence affirmed. 1) The evidence was sufficient for the court to find that the defendant participated in a relationship with a parent of minor children, even though the children's ages were never specifically stated. The defendant told the police that the children were living with their father in New Hampshire, and it was not unreasonable for the court to infer that there were not three adult children all living with their father; furthermore, there was no reason for the defendant to have mentioned the location or custody of the children at all but for the probation condition. 2) The court also properly concluded that the defendant had a relationship or friendship with the woman, given that he had exchanged telephone numbers with her, borrowed her car, and bought her roses. 3) The defendant's challenge to the probation condition itself as having no nexus to his underlying conviction and unduly restricting his First Amendment right of association, would not be heard as a collateral challenge, where it could have been raised on direct appeal from the sentencing order. Doc. 2009-143, August 26, 2010.

IMPOSSIBILITY REQUIRES REVERSAL OF ATTEMPTED VOYEURISM CONVICTION

State v. Devoid, 2010 VT 86. ATTEMPTED VOYEURISM: SUFFICIENCY OF THE EVIDENCE.

Attempted voyeurism reversed. The defendant's conviction for attempted voyeurism was not supported by the evidence because, since the defendant was unable to see complainant's intimate areas from his position on the ground, his actions of standing and looking would not be likely to end in the consummation of the crime intended. Had he attempted to elevate himself from the ground to a position from which he would be able to gain a view of complainant's intimate areas, this case would be different. But the act of merely looking at complainant's window from a place where no view of her intimate areas was possible is insufficient for the jury to find him guilty of attempted voyeurism. Skoglund and Johnson concurring, also would note that the trial court erred when it decided to instruct the jury on the attempted voyeurism charge after they had begun to deliberate on the charge of voyeurism, and had send a note asking what to do if they thought he was guilty of trying, but was not able to see the complainant's nipples. The trial court offered a new charge which altered the central theory of the defendant and denied him the right to respond to it. September 17, 2010, Doc. 2009-208.

ANY TRAFFIC VIOLATION WILL JUSTIFY MOTOR VEHICLE STOP

State v. Marshall, 2010 VT 81. MOTOR VEHICLE STOP: JUSTIFIED BY MINOR DEVIATION FROM RIGHT LANE.

Dismissal of DUI charge on the grounds that the traffic stop was unreasonable is reversed. The trial court erroneously found that a motor vehicle stop was not justified by a momentary failure to remain on the right side of the center lane. Where no traffic violation exists, the totality of the circumstances are used in judging the reasonableness of a DUI stop. But a traffic violation justifies a stop regardless of whether the violation was blameworthy, significant, or indicative of any greater wrongdoing. Skoglund, with Johnson, dissenting: The trial court did not find that the violation was momentary and insignificant, it found that the violation was unproven as a result of the officer's conflicting testimony as to the duration and extent of the deviation from the right lane. Doc. 2009-469 (September 28, 2010).

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."

MANSLAUGHTER SENTENCE UPHELD

State v. Winn, three-justice entry order. SENTENCING: COURT'S DISCRETION.

Consecutive ten-to-fifteen year sentences for manslaughter affirmed. The evidence at the sentencing supported the imposition of the sentences, notwithstanding the defendant's claim that he acted out of fear rather than, as suggested by the court, out of anger; and notwithstanding the fact that the court had earlier suggested that it might accept concurrent sentences. Doc. 2009-283, August 2010.

VICTIM'S MINOR DISCREPANCY DID NOT REQUIRE REVERSAL OF SEXUAL ASSAULT CONVICTION

State v. MacJarrett, three-justice entry order. SEXUAL ASSAULT: SUFFICIENCY OF THE EVIDENCE. SENTENCING: DEFENDANT PUT UNDER OATH.

Sexual assault on a child affirmed. 1) The evidence was sufficient to support the verdict where the complainant testified to the assault, and other witnesses established that she reported it shortly afterwards. A minor, and explained, discrepancy between the complainant's deposition and her trial testimony did not require a different result. 2) At sentencing, after the defendant gave several varying answers concerning whether he actually committed the offense, the judge put him under oath and asked him one more time. Regardless of the propriety of the court's decision, there was no prejudice to the defendant from the ruling. He did not say anything under oath that he had not earlier stated in allocution, and in any event none of his statements could be used in any subsequent criminal proceeding. Doc. 2009-373, August 2010.

FILTHY CONDITION DID NOT ESTABLISH HEALTH HAZARD FOR DOGS

State v. Dufresne, three-justice entry order. ANIMAL FORFEITURE: MOOTNESS; SUFFICIENCY OF THE EVIDENCE.

Order of forfeiture of two dogs due to animal cruelty reversed. 1) The case was not moot despite the animals' return to the owner, because the forfeiture order left him liable for all reasonable costs incurred during the

period of seizure. 2) There was insufficient evidence that the condition of the defendant's home presented a health hazard to his dogs, despite a very strong smell of urine and feces, heavy saturation marks on the floor where the animals had urinated or defecated, filthy, thin dogs smelling of urine and feces, with one dog's coat covered in brown flecks. The veterinarian stated that it would be very difficult to know whether an animal would be bothered by living in such an environment. Doc. 2009-317, August 2010.

Vermont Supreme Court Slip Opinions: Single Justice Rulings

VEHICLE IMMOBILIZATION ORDER REVERSED

State v. Lee, single justice bail appeal. CONDITIONS OF RELEASE: VEHICLE ON BLOCKS.

The defendant was charged with reckless or grossly negligent operation of a motor vehicle for driving on I-89 at speeds of up to 101 miles per hour. As a condition of release, the defendant was ordered to place the vehicle on blocks, and not to drive any motor vehicle. The no driving condition is appropriate, and sufficient to protect the public. The additional condition that the vehicle be immobilized goes beyond the "least restrictive" means of protecting the public, since nothing suggests that the defendant is likely to violate the no operation condition. Doc. 2010-320, August Term. Dooley, J.

Criminal And Appellate Rule Changes

V.R.Cr.P. 26(e) and V.R.A.P. 10(b)(8) have been amended to require that, when an audio or video recording is presented as evidence, the proponent of the evidence must "clearly identify on the record the starting and stopping points of the portions actually presented to the trier of fact," by reference to frame or other indicators on the recording medium or by reference to specific words in the recording. This is so that the appellate record will indicate what the fact finder actually saw or heard of the recording.

V.R.Cr.P. 32 has been amended to conform to a 1999 legislative change. It provides that the court must give the victim an opportunity to make a statement regarding sentencing, and eliminates the prior requirement that the statement be given under oath, as well as broadens the provision to misdemeanors as well as felonies. The rule also provides a definition of "victim," as well as setting forth certain procedural practices.

V.R.Cr.P. 41 has been substantially amended to make detailed provisions for the electronic issuance and transmission of search warrants and the use of wire warrants and other methods

of monitoring conversations.

V.R.Cr.P. 44.2 has been amended to permit attorneys from other states who are performing their three-month clerkship in Vermont government attorney officers to handle a regular volume of cases without having to file a separate motion and licensing statement for each case, and also waives the $200 fee per case.

The new rules can be found here:

http://www.vermontjudiciary.org/LC/Statutes%20and%20Rules/PROMULGATEDVRCP2010andAO41AMENDMENTS.pdf

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.