Criminal Justice Division
Vermont Attorney General's Office

# Vermont Criminal Law Month

December 2009 - January 2010

## Vermont Supreme Court Slip Opinions: Full Court Rulings

*Includes three justice bail appeals*

### EVIDENCE OF INTENT TO COMMIT LARCENY WAS SUFFICIENT DESPITE INTOXICATION

State v. Langdell, 2009 VT 125.
BURGLARY: SUFFICIENCY OF THE EVIDENCE ON INTENT; JURY INSTRUCTION.

Full court published entry order. Burglary affirmed. 1) The defendant argued on appeal that the evidence was insufficient to prove that he had the intent to commit a larceny, because he was highly intoxicated, and nothing was taken from the premises. However, the evidence indicated that the defendant had first broken into one building and rifled through drawers, cupboards, and dressers, and then forcibly entered a second building and did the same. The jury could therefore conclude that the defendant was unable to find anything to steal in the first building and continued to the second building in hopes of better luck there. Nor was the evidence of intoxication so overwhelming as to justify taking away the question of intent from the jury. 2) There was no plain error in the jury instruction on intent. The defendant took issue with the trial court's inclusion of the definition of larceny within the definition of burglary, but the Court finds that it is actually a wise practice. Doc. 2008-360, December 14, 2009.

### ANDERS BRIEF NOT REQUIRED IN ORDER TO WITHDRAW FROM PCR

In re Bailey, 2009 VT 122.
WITHDRAWAL OF COUNSEL FROM PCR: FRIVOLOUS CLAIMS.

Full court opinion. Attorney's motion to withdraw as appointed counsel for petitioner is granted. The attorney had originally moved to withdraw asserting that she could not continue to represent the petitioner in light of the Vermont Rule of Professional Conduct which prohibits bringing a frivolous action. She was then directed by a justice to provide additional information to support her motion, specifically, a specification of the petitioner's claims, the law or argument that arguably supported each claim, and a statement that the attorney did not consider the claims to be warranted by existing law or by a nonfrivolous argument for extension,

modification, or reversal of existing law or the establishment of new law (similar to an Anders brief). The attorney argued that such information should not be required, as this matter did not involve a constitutional right to an attorney, and because the Legislature had expressly limited the right to state-funded legal representation in PCR proceedings to nonfrivolous cases as determined by counsel, and that the Public Defender has an in-house system to evaluate whether a PCR is frivolous. The Court agreed, stating that there is no basis to require counsel to file an Anders brief, and that such a requirement would defeat the cost-saving purpose of the statute and expand the statutory right to counsel to cases that this Court, rather than the appointed attorney, considers appropriate. Dooley dissent: The Court has inherent power to require the brief in order to ensure that appointed counsel not unilaterally withdraw from representation of a needy person without an independent judicial review to ensure that the eprson's interests have been adequately represented. Johnson dissent: The Court should require the attorney to file a brief, and exempt her from the professional conduct rules prohibiting the filing of frivolous claims. Doc. 2007-454, December 24, 2009.

# 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."*

## FINDING OF EFFECTIVE ASSISTANCE OF COUNSEL AFFIRMED

In re Valentine, three-justice entry order. PCR: INEFFECTIVE ASSISTANCE OF COUNSEL; SUFFICIENCY OF EVIDENCE.

Denial of petition for post-conviction relief affirmed. Underlying offense is attempted second-degree murder. The petitioner argued that his counsel was ineffective for failing to obtain in time for the trial and sentencing Social Security documents which showed that he had been diagnosed with PTSD in 1994. The trial court found that this did not rise to the level of ineffective assistance, where defense counsel had sought to obtain the document before trial and had sought a continuance in part to obtain the document; he had obtained numerous other medical documents going back many years; he had no reason to expect that the Social Security Administration would have medical records that did not already exist in a medical provider's office; and where the petitioner's expert did not testify that counsel's attempts to obtain the document were insufficient. On appeal, the petitioner simply reargues his case below, asking the Court to reweigh the evidence and reach a different conclusion. This it would not do. The trial court's findings were supported by the record, and the findings support its conclusion, and therefore the decision must stand on appeal. Doc. 2009-044, November 18, 2009.

## FEAR OF BODILY INJURY IN ASSAULT AND ROBBERY CASE MUST BE OF IMMINENT AND SERIOUS INJURY

State v. Reynolds, three justice entry order. ELEMENTS OF ASSAULT AND ROBBERY: JURY INSTRUCTIONS. PROSECUTOR'S CLOSING ARGUMENT: PERSONAL OPINION RE CREDIBILITY; UNJUSTIFIED INFERENCES.

Assault and robbery reversed. 1) The trial court's instruction erroneously stated the elements of assault and robbery, by stating that the jury need only find that the defendant caused the victims to fear bodily injury, instead of stating that the defendant must have caused the victims fear of imminent serious bodily injury. The assault component of the crime incorporates the elements of assault, which requires either actual harm, which did not occur here, or an attempt by physical menace to put another in fear of imminent serious bodily injury. It does not make a difference that the defendant was charged with subsection (b) of assault and robbery, which involves being armed with a deadly weapon – the offense still requires an assault as defined in §§ 1023 and 1021. Nor was the error harmless despite the fact that mistaken identity was the main defense. The evidence raised a real question as to whether the victims were placed in fear of imminent serious bodily injury. 2) The prosecutor, in closing argument, stated that one of the defendant's witnesses had a motive to lie for the defendant, and then stated that he should be sitting in the defendant's chair. This was improper as it insinuated the prosecutor's own belief, but insufficient to warrant reversal standing alone. The prosecutor further argued that the assault and robbery was a joint effort by the defendant and the two witnesses he called. There was no evidence directly implicating a conspiracy and therefore this was not a reasonable inference. This also suggested an additional, uncharged, crime by the defendant of conspiracy, also without any evidence. Under these circumstances, it cannot be said that the error was harmless beyond a reasonable doubt. Doc. 2008-452 (November 18, 2009).

## SUCCESS WITH FIELD SOBRIETY TESTS DOES NOT PRECLUDE A PRELIMINARY BREATH TEST

State v. Checklick, three-justice entry order. ROADSIDE TESTING FOR DUI: PBT CAN FOLLOW SATISFACTORY PERFORMANCE ON FIELD SOBRIETY EXERCISES.

Judgment for State in civil suspension hearing affirmed. It is undisputed that the police officer had reasonable grounds to stop the defendant's vehicle for traffic violations, and that he had a reasonable suspicion that she was operating while intoxicated, justifying the administration of field sobriety exercises and a preliminary breath test. The fact that the defendant performed satisfactorily on the field sobriety exercises did not mean that the officer could not also then administer the PBT. Her performance on the field sobriety tests did not compel the officer to cease his roadside investigation. Here, the officer reasonably suspected that the defendant was intoxicated given the totality of the circumstances, and he was justified in administering the PBT. Doc. 2009-157, November 18, 2009.

## SUCCESS WITH FIELD SOBRIETY TESTS DOES NOT PRECLUDE A PRELIMINARY BREATH TEST, PART II

State v. Galipeau, three-justice entry order. ROADSIDE TESTING FOR DUI: PBT CAN FOLLOW SATISFACTORY PERFORMANCE ON FIELD SOBRIETY EXERCISES.

Motion to suppress in DUI, and judgment for defendant in civil suspension proceeding, reversed. Also holds that the officer had reasonable grounds to request a PBT even after the defendant performed satisfactorily on the field sobriety tests. Docs. 2009-189 and 190 (November 18, 2009).

## MOTION FOR SENTENCE RECONSIDERATION DID NOT NEED TO DETAIL REASONS FOR ORIGINAL SENTENCE

*State v. Wallen, three justice entry order. MOTION FOR SENTENCE CONSIDERATION: DISCRETION IN TRIAL COURT.

Denial of motion for sentence reconsideration affirmed. Assuming that the trial court had jurisdiction to entertain the defendant's motion to reconsider the denial of motion for sentence reconsideration (the Court had previously held that reconsideration of sentence after revocation of probation is untimely when filed more than ninety days after the defendant's original sentence; the defense argued that this was not applicable here because he was not asking for reconsideration of his original sentence, but of the court's decision to revoke his probation), the court did not withhold or abuse its discretion in denying the motion. The trial court fully considered the defendant's objections following a lengthy and detailed proceeding, and then explained the basis for its decision at length, balancing the need for treatment with the need to protect the community. The court was not required again to explain in detail why the defendant's objections to revocation were without merit after the defendant filed the motion to reconsider. It is evident from the record that the court considered the defendant's arguments, and nothing more was required. Doc. 2009-175, January 15, 2010.

## ADMISSION OF CUMULATIVE HEARSAY STATEMENT, IF ERROR, WAS HARMLESS

*State v. Stevens, three justice entry order. HEARSAY: HARMLESS ERROR.

Second-degree murder affirmed. The defendant argued that he was denied a fair trial and due process of law by the trial court's refusal to admit a portion of a recording of a call to 911, in which a witness states that the defendant had said that the victim was going after him (to support a claim of self-defense). Regardless of whether the trial court's finding that the witness was no longer in a state of excitement at the time of this statement was correct or not, the exclusion of the statement was harmless beyond a

reasonable doubt because multiple statements by the defendant to the same effect had already been admitted during the State's case. Doc. 2009-451, January 15, 2010.

## EVIDENCE SUPPORTED FINDING THAT DEFENDANT SERVED IN A PARENTAL ROLE FOR MINOR IN SEXUAL ASSAULT

State v. Hutchins, three-justice entry order. SEXUAL ASSAULT BY ONE IN A PARENTAL ROLE: JURY INSTRUCTION; SUFFICIENCY OF THE EVIDENCE. REASONABLE DOUBT JURY INSTRUCTION: "GREAT CERTAINTY."

Sexual assault of a minor affirmed. 1) It was not plain error for the court to instruct the jury to consider whether the defendant lived in the minor's household when determining if the defendant was serving in a parental role, despite the fact that living in the same household is already included as a required element in the statute. The fact that this was only one of five factors presented for the jury to consider in making its determination on the parental role issue prevented it from being plain error. 2) It was not plain error for the court to fail to include in its instruction on "parental role" whether the defendant fulfilled the functions of a parent such as educating the child and caring for the general welfare of the child. Considering the instruction as a whole, it gave sufficient guidance to the jury. 3) There was sufficient evidence here for the jury to determine that the defendant served in a parental role to the victim, where the defendant had been in a long-term relationship with the victim's mother, had resided in her house for many years, was left alone to care for her and her siblings, was responsible for household chores related to her and her siblings, and had authority to discipline her and her siblings. 4) It was not plain error, if error at all, for the court to instruct the jury that to believe something beyond a reasonable doubt means to be convinced of it with great certainty, when the instruction was considered with the court's remaining instructions on proof beyond a reasonable doubt. Doc. 2009-041, January 15, 2010.

## COMPLAINANT CAN TESTIFY TO VALUE OF CAR FOR GRAND LARCENY

State v. Mills, three-justice entry order. BURGLARY: SUFFICIENCY OF THE EVIDENCE OF IDENTITY. GRAND LARCENY: SUFFICIENCY OF THE EVIDENCE OF VALUE OF PROPERTY TAKEN.

Burglary and grand larceny affirmed. 1) The evidence was sufficient to prove that the defendant was the one who committed the burglary. There is no dispute that the defendant was later found driving the victim's car, which was taken during the burglary. Other evidence established that the defendant worked with the victim, knew where he lived, and was wearing a hat that matched the victim's description. 2) The victim's testimony concerning his opinion of the value of the vehicle was sufficient to establish that its value exceed the amount required for grand larceny. Doc. 2009-091, January 15, 2010.

## SELF-DEFENSE NOT AVAILABLE WHERE JURY MUST FIND COMPLAINANT ACTED WITH LAWFUL FORCE AS AN ELEMENT OF THE CRIME

State v. Griffin, three-justice entry order. SELF-DEFENSE: UNAVAILABLE WHERE CRIME HAS AS AN ELEMENT USE OF LAWFUL FORCE BY VICTIM.

Simple assault on a correctional officer affirmed. It was not plain error to fail to give an instruction on self-defense where one of the elements of the charge was that the victim have been performing a lawful duty as a correctional officer. Since self-defense is limited to situations where a person is repelling unlawful force, the jury's finding that the victim was acting with lawful force at the time that the defendant bit him precluded any entitlement to self-defense. The court did not reach the trial court's basis for the ruling, that the defense was not available where the defendant did not admit to committing the act itself. Doc. 2009-098, Jan. 15, 2010.

## JUDGE WAS ENTITLED TO IMPOSE ENTIRE SENTENCE ON REVOCATION OF PROBATION

State v. Winnie, three-justice entry order. REVOCATION OF PROBATION: REASON FOR IMPOSING UNDERLYING SENTENCE.

Revocation of probation and imposition of remainder of underlying sentence affirmed. The judge's comments at sentencing did not indicate, as defendant claimed, that the court felt that it was required to impose the underlying sentence, but rather that, given the defendant's repeated violations, the next logical step was to impose the remainder of the underlying sentence. Doc. 2009-214, January 15, 2010.

## CLAIM OF ILLEGAL SEARCH COULD NOT BE LITIGATED THROUGH POST-TRIAL MOTIONS

State v. Bain, three-justice entry order. ILLEGAL SEARCH CLAIM MAY NOT BE LITIGATED THROUGH POST-TRIAL MOTIONS.

Denial of various post-trial motions affirmed. Convictions were for possession of stolen property and of marijuana, and of being a habitual offender. 1) The trial court properly denied the defendant's motion for sentence reconsideration which was based on the claim that the police had conducted an illegal search of the defendant's home, which claim had already been found without merit. Sentence reconsideration is not an appropriate means for the defendant to challenge the legality of a search or to bring new evidence before the trial court. 2) Nor did the court err in denying the defendant's motion for a new trial based on the same grounds. The defendant did not present any newly acquired evidence that an illegal search had occurred, merely allegations. Nor did he demonstrate that any new evidence was discovered after trial, or that it would, with reasonable assurance, result in a different result at trial. 3) The defendant's motion for acquittal was properly denied as untimely. 4) The defendant's motion to compel the disclose of Brady material was properly denied, as the defendant did not demonstrate that the prosecution withheld any information. 5) The defendant's motion for return of property was properly denied where the Court had already concluded that

the search of the defendant's home was legal. 6) The defendant was not entitled to trial counsel to assist with these motions where he did not request counsel until the same day that the motions were denied, and he was at the time represented by his appellate counsel. His decision to file these motions pro se rather than through his counsel was his own. Doc. 2009-235, January 15, 2010.

### OBSERVATIONS JUSTIFIED EXIT ORDER AND PBT

State v. Szwaja, three justice entry order. EXIT ORDER AND PBT TESTS: SUFFICIENT JUSTIFICATION.

Civil suspension of driver's license affirmed. 1) The officer was justified in ordering the defendant to exit her vehicle under suspicion of DUI, based on her erratic driving, bloodshot and watery eyes, odor of alcohol emanating from the vehicle, and her admission to having consumed alcohol. 2) The officer had "reason to believe" that she was intoxicated, and therefore was authorized to administer a preliminary breath test, for the same reasons, as well as due to observing several indicia of intoxication during the field dexterity tests. Doc. 2009-268, January 15, 2010.

## Vermont Supreme Court Slip Opinions: Single Justice Rulings

### BAIL JUSTIFIED BY RISK OF FLIGHT DESPITE VICTIM'S DEPARTURE

State v. Castillo-Vasquez, single justice bail appeal. BAIL APPEAL. EVIDENCE OF RISK OF FLIGHT; STRENGTH OF CASE.

Bail of $35,000 affirmed, as the trial court properly considered the serious nature of the crimes charged, the evidence of the defendant's culpability, and the need to assure his appearance, notwithstanding the defendant's claim that there was insufficient evidence of risk of flight and that the State's case had been severely compromised by the complaining witness's departure from Vermont. Doc. 2009-442, December 10, 2009.

### BAIL DECISION JUSTIFIED BY FAILURE TO NOTIFY COURT OF MOVE

State v. Salmon, single justice bail appeal. BAIL APPEAL: SUFFICIENCY OF THE EVIDENCE.

The defendant appealed from the district court's decision not to reduce bail below $5000. The record reflects that the trial court properly considered the length of the defendant's criminal history, his failure to notify the court when he moved from the St. Albans area to Bennington, and the need to assure the defendant's appearance. The defendant's failure to notify the court of his move in particular raises concerns about his willingness to comply with court orders. Under these circumstances, the court's decision was supported by the record. Doc.

# United States Supreme Court Case Of Interest

Thanks to NAAG for this summary

*Presley v. Georgia*, 09-5270. By a 7-2 vote, the Court summarily reversed the Georgia Supreme Court and held that petitioner's Sixth Amendment right to a public trial was violated because the public was excluded from the *voir dire* of prospective jurors. The Court pointed to two earlier decisions that expressly held that the trial court must consider alternatives before closing the court room to the public. Here, "[n]othing in the record shows that the trial court could not have accommodated the public at [petitioner's] trial." [http://www.supremecourtus.gov/opinions/09pdf/09-5270.pdf ]

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