Criminal Division
Vermont Attorney General's Office

Vermont Criminal Law Month

December 2012 – January 2013

Vermont Supreme Court Slip Opinions: Full Court Rulings

Includes three justice bail appeals

TRIAL COURT CAN PLACE CONDITIONS ON COMPUTER SEARCH WARRANT

*In re Appeal of Application for Search Warrant, 2012 VT 102. JURISDICTION: EXTRAORDINARY RELIEF IN THE NATURE OF MANDAMUS. EX ANTE CONDITIONS ON SEARCH WARRANTS FOR COMPUTER CONTENTS.

Full court opinion. Conditions placed upon search warrant for contents of computer affirmed; trial court's abrogation of the plain view doctrine reversed. The trial court issued a search warrant for the contents of a computer with ten conditions, requiring, inter alia, that the search be conducted behind a firewall, so that information obtained in the course of the search which was not covered by the search warrant would not be disclosed to the investigators or used by the State in any other prosecution or investigation. The court also restricted the police from relying on the plain view doctrine to seize any incriminatory electronic record not authorized by the warrant. 1) The Court has jurisdiction over this issue pursuant to the State's direct petition for extraordinary relief in the nature of mandamus, which permits relief when a court's decisions are usurpations of judicial power, clear abuse of discretion, or arbitrary abuses of power. 2) The issue here is whether the judicial officer in approving a search warrant can add instructions to protect the privacy interests of the person to be searched. The decision here rests on Fourth Amendment law, not on Article 11 or on Vermont non-constitutional law. Further, the decision decides that such instructions are permissible generally, but does not determine whether they are appropriate or not in this case, which was not argued by the State. 3) The court does not hold that ex ante decisions are ever required; the decision considers only whether the judicial officer has authority to impose them. 4) Ex ante instructions are sometimes acceptable mechanisms for ensuring the particularity of a search. Ex ante instructions which narrow the scope of the proposed search from, say, an entire house to a single room, are acceptable. Often the way to specify particular objects or spaces will not be by describing their physical coordinates, but by describing how to locate them. Judicial officers are also authorized to describe in general terms what sort of invasion is authorized, such as by authorizing a no knock warrant, or placing a time limit on the execution of warrants. However, judicial officers should not micromanage the execution of the warrant. 5) The trial court's instruction abrogating the plain view

doctrine was unnecessary for privacy protection and inappropriate because other instructions segregating the search from the investigation and limiting the results of the search that can be shared, obviate application of the plain view doctrine; and, it is beyond the authority of a judicial officer issuing a warrant to abrogate a legal doctrine in this way. The court may not alter what legal principles will or will not apply in a particular case. 6) The instructions requiring that the search be performed by third parties or trained computer personnel separate from the investigators and operating behind a firewall was a valid attempt by the judicial officer to remedy the lack of particularity in the search warrant application, which sought to search every area of every computer in the house. This result is based largely on the broad authorization sought by the applicant law enforcement officer. 7) The instructions limiting the search techniques the police can employ and prohibiting the use of sophisticated searching software without prior court authorization were within the court's power to ensure satisfaction of the probable cause and particularity requirements of the Fourth Amendment and Article 11. The warrant application sought to examine every file on every type of electronic media found at the location listed in the warrant, regardless of ownership. In the judicial officer's view, this application did not provide probable cause for such a broad search without some further specification of the particular places to be searched and particular items to be seized. As noted earlier, especially in a non-physical context, particularity may be achieved through specification of how a search will be conducted. Although the application noted that criminals often hide incriminating evidence by using non-identifying titles, changing file extensions, and encryption or password protection, there was no information presented that there was reason to believe the suspect in this case had used such techniques, or even that those engaged in identity theft typically do so. There was no attempt to limit the search based on the known details of the suspected crime such as the time-period, the victim, or the institutions involved in the suspected identity theft. The judicial officer did not abuse his discretion by restricting law enforcement's search to those items that met certain parameters based on dates, types of files, or the author of a document. This was especially appropriate where the State proposed no limiting instructions of its own. 8) The instructions requiring that only responsive information be copied, that non-responsive data should be returned and the court informed, that copies must be destroyed absent judicial authorization otherwise, and that the return should specify the information seized, returned, and destroyed, would all be normal requirements for searches conducted on-site. Given that the instructions essentially echo the requirements of Rule 41, it was within the judicial officer's discretion to impose them. The instructions do not prevent the segregated search persons from imaging the computer hard drive and other electronic storage media so that the computer and media can be returned to the owner. Burgess and Reiber, dissenting: agrees that ex ante conditions are permissible, but would not require the fire wall and the use of separate investigators, as expressly designed to frustrate the plain view doctrine, which is not rooted in any constitutional principle or privacy protection. Doc. 2010-479, December 14, 2012. http://info.libraries.vermont.gov/supct/current/op2010-479.html

DEFENSE COUNSEL'S AGREEMENT TO WAIVE WITNESS'S PERSONAL APPEARANCE DID NOT OVERRIDE DEFENDANT'S OBJECTION

State v. Tribble, full court opinion. 2012 VT 105. HEARSAY: PRESERVATION DEPOSITION TESTIMONY; UNAVAILABILITY; COUNSEL AND CLIENT CONFLICT ON WAIVER OF CONFRONTATION CLAUSE; HARMLESSNESS. DIMINISHED CAPACITY: COUNSEL AND CLIENT CONFLICT.

Second-degree murder conviction reversed. The defendant's constitutional right to confrontation was violated where the trial court admitted the videotaped deposition of a key state witness who was out of the country but willing to travel to the trial, with defense's counsel's agreement but over the objection of the defendant. 1) Absent a valid waiver, the Constitution does not except "preservation deposition" testimony from the requirements of the Confrontation Clause. 2) The expert witness in this case was not "unavailable" for Confrontation Clause purposes. Although it would have been immensely inconvenient to the witness and his employer for him to return to the country to testify, he indicated that he was willing to do so. The only two impediments to his testifying at trial were inconvenience and costs, and neither of these will support a finding of unavailability. 3) Assuming, without deciding, that counsel can in some circumstances stipulate to a waiver of a defendant's Confrontation Clause rights pursuant to a prudent trial strategy, here, where the defendant timely objected to such a waiver on the record, the purported waiver by defense counsel was invalid. 4) The error here was not harmless beyond a reasonable doubt. The State used the witness's testimony to challenge the defendant's claims about the sequence of events, and was therefore an important part of the State's case, as it provided substantial support to the State's rebuttal of the defendant's account. 5) A competent criminal defendant retains final authority over the decision whether to present a diminished capacity case. Doc. 2010-021, December 21, 2012. http://info.libraries.vermont.gov/supct/current/op2010-021.html

QUESTIONING IN POLICE CRUISER WAS CUSTODIAL

State v. Tran, full court opinion. 2012 VT 104. CUSTODIAL INTERROGATION: CUSTODY.

Suppression of defendant's statements in assault and attempted robbery case affirmed. The interview of the defendant in a police cruiser was a custodial interview, based on the following factors: the police never specifically informed the defendant that he was free to leave, which strongly indicates a custodial setting; throughout the interview the police repeatedly confronted the defendant with evidence of his guilt, believed that he was guilty, and communicated this belief to the defendant, thus creating the kind of coercive environment that is indicative of police custody; the police instructed him not to use his cell phone, thus cutting off his contact with others and asserting their authority; the defendant had not sought out the contact; and the questioning was in a small space with two officers in close proximity for an hour. The trial court relied upon the defendant's young age (19); the Supreme Court did not reach the issue of whether this was an error, since he was an adult and therefore his age was otherwise irrelevant, because the remaining factors supported the finding of custody. Nor does the fact that the police did not begin to confront the

defendant with evidence of his guilt until later in the interview affect the result, because there were indicia of custody and police dominance over the defendant from the outset of questioning. Burgess, with Reiber, dissenting: Disagrees that the Miranda warnings were required at the outset of the questioning, but only after the detectives made it reasonably clear to the defendant that he could be arrested and charged with armed robbery. Doc. 2011-341, December 21, 2012. http://info.libraries.vermont.gov/supct/current/op2011-341.html

UNSATISFACTORY DISCHARGE FROM PROBATION REVERSED WHERE DEFENDANT WAS NOT GIVEN A HEARING

State v. Nolen, full court opinion. 2012 VT 106. UNSATISFACTORY DISCHARGE FROM PROBATION: HEARING REQUIREMENT.

Order discharging defendant unsatisfactorily from probation reversed. The defendant was on probation for three counts of negligent operation of a motor vehicle. The Department of Corrections petitioned the court for an unsatisfactory discharge from probation, claiming that he had failed to comply with certain special conditions of probation, including treatment and mental health counseling, and avoiding contact with the victim. The State objected, stating that if the defendant refused to comply with probation requirements, he should be found in violation, his probation revoked, and his sentence served. The defendant requested a hearing on the matter. The defendant filed a motion to waive appearance at a status conference, presenting a letter from an oncologist explaining that aggressive chemotherapy had rendered him physically exhausted and weakened his immune system. The court cancelled the status conference and ruled that an unsatisfactory discharge of probation was in the interests of justice and judicial economy. The court's ruling is reversed, as a probationer is entitled to hearing on disputed material facts before the trial court can order a less than satisfactory discharge from probation. Doc. 2012-062, December 28, 2012.

http://info.libraries.vermont.gov/supct/current/op2012-062.html

DEADLINE ON FINAL CIVIL SUSPENSION HEARING, WAIVED TO PERMIT MOTIONS, WAS NOT REVIVED WHEN MOTIONS WERE DECIDED

*State v. Hawkins, full court opinion. 2013 VT 5. FINAL CIVIL SUSPENSION HEARING: REVIVAL OF WAIVED TIME LIMIT. PROBABLE CAUSE: NEGLIGENT OPERATION. SUPPRESSION OF EVIDENCE: ATTENUATION.

Conditional plea from criminal refusal of an evidentiary breath test and civil suspension of driver's license. Reversed in part and remanded. 1) The defendant moved for a continuance of the final hearing on the civil suspension matter in order to depose the police officer, thus waiving the statutory mandate that the final hearing occur within 42 days of the alleged offense. The final hearing did not occur within forty-two days after the last pretrial motion was decided, and the defendant argued that the deadline began to run again from that date. The court declined to find that the deadline was automatically restarted or revived. 2) The officer lacked probable cause when he arrested the defendant by drawing his gun, ordering him to his knees, and handcuffing

him. There was no probable cause for negligent operation of a motor vehicle despite the fact that the defendant had driven his car on a dirt road across a wash out at a high enough speed that the car bottomed out. The defendant did not operate negligently by driving over a dirt road in poor condition, as such roads are common in Vermont. Nor did his speed change the result, as "there was no evidence that his speed was excessive under the circumstances" [but what about bottoming out??]. Since the arrest was illegal, the defendant's statements in the subsequent interrogation should be suppressed. 3) Whether the physical evidence obtained as a result of the arrest must also be suppressed depends upon whether the chain of causation proceeding from the unlawful conduct has become so attenuated or has been interrupted by some intervening circumstance as to remove the taint imposed upon that evidence by the original illegality. The matter is remanded for findings by the trial court on this issue. Docs. 2011-203 and 2011-384, January 18, 2013.
http://info.libraries.vermont.gov/supct/current/op2011-203.html

BREATH TEST WAS NOT REASONABLY AVAILABLE WHERE DEFENDANT WAS UNDERGOING MEDICAL EVALUATION AND TREATMENT

State v. Dubuque, full court opinion. 2013 VT 3. REQUEST FOR BLOOD TEST: REASONABLE AVAILABILITY OF BREATH TEST MACHINE.

Refusal to comply with request for evidentiary test affirmed. The defendant argued that he should have been offered a breath test rather than a blood test because breath-testing equipment was "reasonably available." He noted that once he was released from the hospital, the car that transported him to Act One and then to the detox facility at the Chittenden Regional Correctional Center passed several locations with available breath-testing machines. This is true, but the test had to be administered within a reasonable time after the accident, and the officer had no way of knowing when he could leave the hospital with the defendant to drive to a breath-testing machine. Given the permissive inference from a test given within two hours of operation, it is reasonable for an officer to request a test that can be completed within this two-hour window. In this case, the two hour window would close in about fifteen minutes, and the officer could not determine when the defendant's medical evaluation and treatment would end. It was not reasonable for the officer to prematurely remove the defendant from the hospital in order to obtain a breath test. Nor is there any evidence that the officer could have reached another location and administered the breath test within the two hour window. Doc. 2012-131, January 18, 2013.
http://info.libraries.vermont.gov/supct/current/op2012-131.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."

ENHANCED SENTENCE AS RESULT OF STATUTE ENACTED AFTER PRIOR CONVICTION WAS CONSTITUTIONAL

In re Day, three-justice entry order. EX POST FACTO CLAUSE: ENHANCEMENT OF DUI SENTENCE.

Denial of motion for sentence reconsideration affirmed. The trial court enhanced the defendant's sentence for DUI, third conviction, based upon a sentence enhancement scheme enacted after his first conviction for DUI. This did not violate the Ex Post Facto Clause of the United States Constitution, because the enhanced penalty is not for the earlier offense, but for the later offense, which occurred after the statute was enacted. Doc. 2012-222, December Term, 2012. http://www.vermontjudiciary.org/d-upeo/Microsoft%20Word%20-%20eo12-222.pdf

MV STOP FOR MALFUNCTIONING OPTIONAL EQUIPMENT WAS LEGAL

State v. Corbeil, three-justice entry order. MV STOP: MALFUNCTIONING OPTIONAL EQUIPMENT.

Dismissal of DUI and civil suspension reversed. The trail court found that the motor vehicle stop was invalid because it was based upon a malfunctioning fog light, which is optional equipment. However, the Vermont vehicle inspection manual states that if a vehicle is equipped with a light, it must work properly. Therefore, the nonfunctioning fog light indicated that the vehicle would not have passed inspection, and this gave rise to a reasonable possibility that the defendant was operating a vehicle without a valid inspection sticker. Doc. 2012-194, December Term, 2012. http://www.vermontjudiciary.org/d-upeo/Microsoft%20Word%20-%20eo12-194.pdf

DEFENDANT'S CLAIM THAT HE THOUGHT PLEA WAS CONDITIONAL WAS NOT SUPPORTED BY THE EVIDENCE

*State v. Burke, three-justice entry order. VOLUNTARINESS OF PLEA: MISUNDERSTANDING CONCERNING WHETHER IT WAS A CONDITIONAL PLEA.

Obstructing justice affirmed. The defendant's plea waived his right to

challenge the court's rulings on his pretrial motions. The defendant claimed that he understood the plea to be a conditional plea which would have permitted him to appeal those rulings. On the contrary, at the change of plea the trial court took great pains to ensure that the defendant understood and affirmed the fact that he would not be able to appeal adverse pretrial rulings. For a plea to be unknowingly and involuntarily entered, an alleged misunderstanding may not be based solely on the defendant's subjective misunderstanding, but must be based on objective evidence, which reasonably produced the misunderstanding. There was no such objective evidence here. The court declined to reach the defendant's claim of ineffective assistance of counsel, for which there is no record to make a determination. Doc. 2012-111, December Term, 2012. http://www.vermontjudiciary.org/d-upeo/Microsoft%20Word%20-%20eo12-111.pdf

DEFENDANT'S CLAIM THAT ATTORNEY TOLD HIM TO LIE AT CHANGE OF PLEA WAIVED THE ATTORNEY-CLIENT PRIVILEGE

State v. Vivian, three-justice entry order. ATTORNEY-CLIENT PRIVILEGE: WAIVER. MOTION TO WITHDRAW PLEA: CREDIBLITY.

Denial of motion to withdraw plea affirmed. The defendant attempted to withdraw his plea, claiming that his attorney had told him to lie about being guilty. After hearing what the defendant had to say about his discussions with his attorney, the court replaced the attorney, and then held a hearing on the motion to withdraw plea. Statements by the defendant made during the first hearing were admitted at the hearing on the motion to withdraw plea, over the defendant's objection that those statements were protected by lawyer-client confidentiality. However, these communications related to an issue of breach of duty by the lawyer to his client. The defendant argued that this exception did not apply because he was not making a claim against his attorney, but the exception is not limited to attorney-client disputes, but may extend to situations where a party puts the content of the communications between the party and the party's attorney at issue, which the defendant did when he claimed that his lawyer had told him to lie to the court and had forced him to plead guilty. The trial court also correctly found that the privilege had been impliedly waived, and that it was not necessary that there be an explicit waiver, or that the trial court or his attorney have advised him concerning the privilege. The defendant's voluntary action of writing a letter to the court making these claims voluntarily disclosed the content of conversations with his attorney and put the content of those conversations at issue. Finally, the court did not abuse its discretion when it denied the defendant's motion to withdraw his guilty plea. The court found, based upon the credible evidence, that the plea was entered knowingly and voluntarily. The court was not compelled to accept the defendant's own countervailing testimony. Doc. 2012-051, December Term, 2012. http://www.vermontjudiciary.org/d-upeo/Microsoft%20Word%20-%20eo12-051.pdf

Vermont Supreme Court Slip Opinions: Single Justice Rulings

COURT DOES NOT DECIDE CREDIBILITY WHEN DETERMINING IF EVIDENCE OF GUILT IS GREAT FOR PURPOSES OF DENIAL OF BAIL

State v. Knight, single justice bail appeal. DENIAL OF BAIL: WHEN EVIDENCE OF GUILT IS GREAT. REVOCATION OF CONDITIONS OF RELEASE: DISRUPTION OF PROSECUTION.

Denial of motion to revoke conditions affirmed; denial of motion to detain without conditions for new charged affirmed. The trial court erred in taking on the role of a fact finder when determining if the evidence of guilt is great. The court found that a statement by the four year victim that his father "popped him in the mouth" was "ambiguous." Where a statement is ambiguous, if it can nonetheless provide a legally sufficient basis for a guilty verdict if the fact finder found it credible, the court must leave determination of the credibility of such statement to the fact finder. The court also improperly resolved a factual issue whether a sore in J.K.'s mouth was a cold sore or an injury. When testimony includes evidence for more than one explanation of a certain situation, the determination of which explanation is correct lies with the fact finder. Because these two pieces of evidence could have provided a legally sufficient basis for a guilty verdict, the court erred in finding that the evidence of defendant's guilt was not great. The matter is therefore remanded for the court to reconsider the State's motion to hold defendant without conditions of release. The trial court's denial of a motion to revoke earlier conditions of release is affirmed, as there was no nexus between the defendant's violations and a disruption of the prosecution. Doc. 2012-473, Dooley, J., January Term 2013. http://www.vermontjudiciary.org/d-upeo/Microsoft%20Word%20-%20eo12-425.bail.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.