Criminal Division
Vermont Attorney General's Office

Vermont Criminal Law Month

December 2014 – January 2015

Vermont Supreme Court Slip Opinions: Full Court Rulings

Includes three justice bail appeals

JUVENILE WAS IN CUSTODY DURING QUESTIONING AT HIS HOME

In Re E.W., 2015 VT 7. Full court opinion. MIRANDA WARNINGS: CUSTODY.

Conditional plea in delinquency proceeding to burglary, unlawful trespass, and operating a vehicle without owner's consent reversed. E.W.,15 years old, had been in a foster home for about seven weeks when a police officer appeared to talk to him about a stolen car. E.W.'s foster father spoke with E.W., and also to E.W.'s guardian ad litem. When the G.A.L. told the officer that juveniles' attorneys generally do not like the children questioned without them present (E.W. was represented by counsel at the time in connection with a prior pending juvenile delinquency petition),the officer responded that there was a family without their car and that E.W. was the only one who knew where the car was because they believe he had taken it, and that they would like to be able to get these people back their car. E.W. spoke privately with his foster father, who spoke about the importance of honesty, and stated that it's not always easy to do the right thing. He denied having told E.W. to do the right thing, or that he had to speak with the officer. The ensuing interview lasted about an hour, and took place both inside the house, then outside on the porch, then in a roofed vegetable stand in front of the house. E.W. subsequently made admissions to offenses beyond those that the officer had described. The Court held that E.W. was in custody at the time of the questioning, and therefore suppressed his statements because there had been no Miranda waiver. The court relied upon the following factors: the officer's failure to advise E.W. that he was free to leave; the officer's implications that he believed in E.W.'s guilt; E.W.'s age, which would affect his maturity, judgment, and ability to withstand the pressures of a police interrogation; the fact that the independent adult present did not clearly enhance E.W.'s sense of freedom to decline to answer the officer's questions, in light of his statements about honesty and doing the right thing; and the physical setting, which, although a home, was not the juvenile's actual home but a mandated placement where he had only been for six to eight weeks. Dooley, dissenting: the interview was at E.W.'s home, conducted by one officer who did not communicate a belief in E.W.'s guilt or confront him with evidence of the crime; E.W. was free to move around; the interview was terminated at several points to allow him to consult with his foster father; and no deceptive interview techniques were used. Doc. 2013-441, January 16, 2015. http://info.libraries.vermont.gov/supct/current/op2013-441.html

PRIOR BAD ACT PROPERLY ADMITTED TO SHOW MOTIVE

*State v. Noyes, full court opinion. 2015 VT 11. PRIOR BAD ACTS: OFFERED TO SHOW MOTIVE; IMPEACHMENT WITH PRIOR INCONSISTENT STATEMENT: FOUNDATION REQUIREMENTS. LEADING QUESTIONS ON DIRECT TESTIMONY: HOSTILE WITNESS. CLOSING ARGUMENT: PLAIN ERROR. SUFFICIENCY OF EVIDENCE: FAILURE TO PRESERVE.

Disorderly conduct and simple assault by mutual affray affirmed. 1) Evidence suggesting that the defendant was having an affair with his stepdaughter was not improperly admitted. The evidence was not admitted to prove that he was having such an affair, but as the defendant's motive for starting a fight with the complainant, and to rebut the defense claim that it was the complainant who began the fight. 2) The State was correctly permitted to confront a defense witness with her prior, contradictory, statement despite the fact that the prior statement had not been notarized. The form of a prior inconsistent statement is immaterial when used to impeach the credibility of a witness. 3) The defense sought to show that the complainant had given the witness pills in order to induce her to change her story. Whether or not this was properly excluded, there was no prejudice to the defense from the ruling, as the witness was thoroughly cross-examined and her credibility adequately tested. 4) The prosecutor's questions of witnesses were not inappropriately leading, where one witness was found to be hostile, and with another witness the prosecutor was merely having the witness reaffirm his earlier testimony. 5) The prosecutor's statements during cross-examination of a witness were not comments on the evidence, but were understood in context as questions. 6) Comments by the prosecutor in closing argument were not objected to by the defense and were not plain error. 7) The claim that the evidence was insufficient to show actual public inconvenience as required for disorderly conduct was not preserved for appeal when the defense failed to renew its motion for judgment of acquittal either at the close of the evidence or within ten days after the jury verdict. Doc. 2013-392, January 23, 2015.

COURT DECLINES TO MODIFY STANDARD FOR DENIAL OF BAIL

State v. Breer, 2014 VT 132. Three justice bail appeal. DENIAL OF BAIL: REQUEST FOR CONTINUANCE OF HEARING; MEANING OF GREAT EVIDENCE OF GUILT; AVAILABILITY OF LESS RESTRICTIVE ALTERNATIVES; EFFECT OF VIOLATION OF PROBATION CHARGES; EFFECT OF DEFENDANT PROCEEDING PRO SE IN UNDERLYING CASE.

Denial of review of hold-without-bail order affirmed. 1) The defendant's request for a continuance of the bail appeal hearing is denied. The defendant did not demonstrate that he had an insufficient period of time to prepare nor how he was prejudiced by proceeding. 2) The Court declined to overrule State v. Turnbaugh, which defined the term "evidence of guilt is great" as meaning that substantial, admissible

evidence, taken in the light most favorable to the State and excluding modifying evidence, can fairly and reasonably show defendant guilty beyond a reasonable doubt." 3) The trial court did not arbitrarily exercise nor withhold its discretion in declining to set bail based upon the availability of less restrictive options. 4) Even if the trial court had granted bail in relation to the charges carrying a penalty of life imprisonment, the defendant would be properly held without bail in connection with his charges for violating probation, pursuant to which there is no right to bail or release. 5) The fact that the defendant has encountered difficulties in representing himself in the criminal case by virtue of being incarcerated is not a reason to grant bail. Nor is the defendant's complain that the State has been listening to his telephone conversations from the correctional center that relate to the preparation of his defense grounds for release on bail. The trial court addressed this issue in a separate order, and if the defendant believes this decision was made in error, he can raise that claim on appeal if he is convicted. Doc. 2014-392, December Term, 2014. http://info.libraries.vermont.gov/supct/current/eo2014-392.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."

STOP FOR MALFUNCTIONING OPTIONAL EQUIPMENT WAS VALID

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

CLAIM OF INEFFECTIVE ASSISTANCE CONCERNING PLEA OFFER WAS WAIVED FOR FAILURE TO RAISE IN FIRST PCR PETITION

State v. Bruyette, three-justice entry order. POST-CONVICTION RELIEF: SUCCESSIVE PETITIONS.

Denial of petition for post-conviction relief affirmed. The petition claimed that the petitioner's attorney had been ineffective when he failed to properly advise him of the

benefits of accepting the State's plea offer prior to trial. The trial court dismissed this petition as successive, because the petitioner's first petition had claimed ineffective assistance of counsel, and had been dismissed on the merits after his PCR attorney told the court that he saw no credible basis for an ineffective assistance claim. On appeal, the petitioner argues that the ineffective assistance claim as to plea bargain advice could not have been brought earlier than 2012, when the U.S. Supreme Court recognized that post-conviction relief was available for such trial counsel failings. However, the U.S. Supreme Court did not recognize a new ground for relief, but merely applied a set of facts to a known standard in evaluating an ineffective assistance of counsel claim. In any event, the Vermont Supreme Court recognized such a basis for an ineffective assistance of counsel claim in 1992. The Court also declined to find that all conflict counsel who have contracted with the Defender General's Office share the conflict in this case which the Defender General's Office has. Doc. 2012-471, December Term, 2014.
https://www.vermontjudiciary.org/UPEO2011Present/eo12-471.pdf

EVIDENCE THAT DEFENDANT WAS DRIVER WAS SUFFICIENT

State v. Laraway, three-justice entry order. GROSSLY NEGLIGENT OPERATION OF A MOTOR VEHICLE, SERIOUS INJURY RESULTING: SUFFICIENCY OF EVIDENCE THAT DEFENDANT WAS DRIVER.

Conviction for operating a motor vehicle in a grossly negligent manner resulting in serious bodily injury affirmed. The evidence was sufficient for the jury to find beyond a reasonable doubt that it was the defendant who was operating the vehicle at the time, where, shortly before getting in the car the defendant told the subsequently injured person, Stone, that he, the defendant would drive; Stone was so intoxicated that he had no recollection of being in the vehicle other than seeing a blue light in the passenger side rearview mirror; several people arrived at the scene of the accident shortly after it occurred but no one saw anyone other than the defendant and Stone who could have been driving the car; after the accident the defendant wanted to get away from the scene and gave inconsistent stories over the next few days as to who was driving the vehicle, either Stone or some unnamed friend of Stone's; the defendant tried to get his daughter to back up the version that he eventually settled on; and one of Stone's injuries was consistent with bruising from a front passenger-side seat belt. Doc. 2014-052, December Term 2014.
https://www.vermontjudiciary.org/UPEO2011Present/eo14-052.pdf

IDENTIFICATION OF ASSAULTER AS EX-BOYFRIEND WAS EXCITED UTTERANCE AND SUFFICIENT TO PROVE ELEMENT OF HOUSEHOLD MEMBER

State v. Francisco, three-justice entry order. HEARSAY: EXCITED UTTERANCE.

Domestic assault affirmed. The trial court did not err in admitting the victim's statement, immediately after being assaulted by the defendant, that the defendant was her ex-boyfriend. This statement was sufficient to prove the element of "family or household member." Doc. 2014-027, January Term 2015.
https://www.vermontjudiciary.org/UPEO2011Present/eo14-027.pdf

FAILURE TO TRY TO EXCLUDE DEFENDANT'S PRIOR CONVICTIONS WAS NOT INEFFECTIVE ASSISTANCE WHERE EVIDENCE OF GUILT WAS OVERWHELMING

In re O'Dell, three-justice entry order. POST-CONVICTION RELIEF: FAILURE TO SHOW PREJUDICE.

Denial of post-conviction relief petition affirmed. The court did not err in finding no prejudice from trial counsel's error in having the petitioner testify about his prior convictions without first filing a motion in limine to try to have them excluded. The evidence of guilt was overwhelming, and this was not, as petitioner claims, a close case "about credibility." Disinterested onlookers gave an account that was consistent with the complainant's account and inconsistent with the defendant's account, which itself was inconsistent. Furthermore, the prior offenses were remote and unrelated to the current charge. Nor was there any prejudice from defense counsel's failure to object to the trial judge's colloquy with the jury concerning time constraints for their deliberations. The evidence of guilt was overwhelming, and the jury did deliberate carefully, taking four hours after the colloquy, and asking for a read back. Nor was there any prejudice from defense counsel's failure to subpoena a physician to the second day of trial after time ran out for him to testify on the first day, since his testimony concerning the complainant's injury was largely consistent with the evidence and could not remotely have altered the verdict. Defense counsel's failure to immediately object to the presence of a crowbar in the courtroom was also not a basis for a finding of unprofessional conduct, since he objected as soon as he became aware of it. The claim that seeing the crowbar could have affected the complainant's testimony and that defense counsel failed to make this objection, is not supported by the record and was not clearly raised below. Doc. 2014-051, January Term 2015.
https://www.vermontjudiciary.org/UPEO2011Present/eo14-051.pdf

SAVINGS CLAUSE DID NOT PREVENT USE OF DEFENDANT'S PRIOR DUI CONVICTIONS

In re Day, three-justice entry order. DUI SUBSEQUENT OFFENSE: SAVINGS CLAUSE.

Grant of summary judgment for the State in petition for post-conviction relief affirmed. The defendant was convicted of DUI, third offense, based upon predicate offenses that would have fallen under the savings clause of the 1991 statute which eliminated the forgiveness periods for prior DUIs, if those convictions occurred before July 1, 1991. However, although the conduct for the later prior conviction took place before July 1, 1991, the conviction was entered afterwards. In the post-conviction relief proceeding, the defendant argued that his conviction for DUI, third offense, violated the Ex Post Facto Clause and that his trial counsel rendered ineffective assistance by failing to advise him of, and raise, this as a defense. This issue has already been litigated and decided against the defendant, on his appeal from the denial of his motion for sentence reconsideration. Since one of the two convictions occurred after July 1, 1991, the savings clause did not apply.
https://www.vermontjudiciary.org/UPEO2011Present/eo14-134.pdf

EVIDENCE OF INTENTIONAL CONTACT IN VIOLATION OF PROBATION WAS SUFFICIENT

State v. Doyle, three justice entry order. VIOLATION OF PROBATION: SUFFICIENCY OF THE EVIDENCE.

Violation of condition of probation affirmed. The evidence was sufficient for the court to find that the defendant's contact with the complainant was intentional and not inadvertent. The defendant came to the complainant's place of work knowing that she worked there, looked toward the register where she was working as he entered, then placed himself within twenty to thirty feet of her, staring and smiling at her for a period of five or six minutes before making a waving hand gesture towards her and leaving. Doc. 2014-148, January Term, 2015.
https://www.vermontjudiciary.org/UPEO2011Present/eo14-148.pdf

Single Justice Bail Appeal

DEFENDANT'S CRIMINAL HISTORY AND BEHAVIOR JUSTIFIED HIGH BAIL

State v. Morris, single justice bail appeal. BAIL APPEAL: NEED FOR AND AMOUNT OF BAIL JUSTIFIED BY THE RECORD.

The trial court's imposition of substantial cash bail was supported by its findings and conclusions concerning the risk of nonappearance. Notwithstanding defendant's acknowledged ties to the community and past history of appearing, given the seriousness of the charge, the strength of the evidence, defendant's substantial criminal history, and defendant's behavior in connection with and subsequent to the alleged offense, the trial court was within its discretion in concluding that substantial cash bail was required to secure his appearance. Defendant's repeated threatening telephone messages and direct threats of violence in the presence of a state trooper demonstrate a threat to public safety but also reflect on his character and mental condition – factors that bear on the defendant's risk of nonappearance. With respect to the amount of the bail requirement, the trial court's minimal findings and discussion concerning the amount of bail, as opposed to the necessity of bail, make this a close case. On the one hand, when setting such high bail ($100,000) for an indigent defendant, a trial court must cite some evidentiary support for the amount set. On the other hand, a defendant need not be capable of meeting bail in order for the amount to be supported by the record. The court was cognizant that the amount being set was substantial and appropriately justified it on the record. At some point a court's bail requirement may be so out of synch with a defendant's conceivable ability to meet bail that it cannot be fairly considered to be the least restrictive means of securing a defendant's appearance, but on this record the trial court did not exceed its discretion. Doc. 2014-462, December Term, 2015. Robinson, Justice.
https://www.vermontjudiciary.org/UPEO2011Present/eo14-462.bail.pdf

United States Supreme Court Case Of Interest

Thanks to NAAG for this summary

Heien v. North Carolina, 13-604. By an 8-1 vote, the Court held that a police officer's reasonable "mistake of law can give rise to the reasonable suspicion necessary to" justify a traffic stop. Sergeant Matt Darisse stopped a car after noticing that only one of its brake lights was working. He gave the driver a warning and asked whether he could search the car. The passenger, petitioner Nicholas Heien, owned the car and gave the officer permission. The officers found drugs in the car and arrested both men. The state later charged Heien with attempted trafficking in cocaine. Heien moved to suppress the evidence seized from the car. The trial court denied the motion, finding that the faulty brake light gave Sergeant Darisse reasonable suspicion to initiate the stop. Heien pleaded guilty but reserved his right to appeal the suppression decision. Ultimately the North Carolina Supreme Court reversed, holding that Sergeant Darisse's mistaken interpretation of the statute was reasonable. In an opinion by Chief Justice Roberts, the United States Supreme Court Court affirmed.

The Court reaffirmed that "the ultimate touchstone of the Fourth Amendment is 'reasonableness'" (internal quotation marks omitted). Because "[t]o be reasonable is not to be perfect," the Court has "recognized that searches and seizures based on mistakes of fact can be reasonable." "But reasonable men make mistakes of law, too, and such mistakes are no less compatible with the concept of reasonable suspicion. Reasonable suspicion arises from the combination of an officer's understanding of the facts and his understanding of the relevant law. The officer may be reasonably mistaken on either ground."

Justice Kagan filed a concurring opinion, which Justice Ginsburg joined. She read the majority opinion as including "important limitations": (1) because an officer's "subjective understanding" is irrelevant, "an officer's reliance on an incorrect memo or training program from the police department makes no difference" (internal quotation marks omitted); and (2) the appropriate standard is whether "the law at issue is 'so doubtful in construction' that a reasonable judge could agree with the officer's view."

Justice Sotomayor dissented. She "would hold that determining whether a search or seizure is reasonable requires evaluating an officer's understanding of the facts against the actual state of the law." In her view, the Court's prior cases "frame the reasonableness inquiry around factual determinations"; the Court's new approach "further erod[es] the Fourth Amendment protection of civil liberties in a context [traffic stops] where that protection has already been worn down"; and there is no evidence "that law enforcement will be unduly hampered by a rule that precludes consideration of mistakes of law."

Criminal And Appellate Rule Changes

The Vermont Supreme Court adopted a number of changes to the Vermont Rules of Criminal Procedure in order to adopt gender-neutral language and to reflect changes in nomenclature pursuant to the Judicial Restructuring Act. These changes are not summarized.

Substantive changes are as follows:

V.R.Cr.P. 6, concerning grand juries, has been revised. The Court Administrator and the superior court clerks are given responsibility for summoning grand jurors, and express provision is made for the selection and service of alternate grand jurors. The rule permits the presence of a court security officer when particular case circumstances reasonably dictate the need for such presence. The rule now sets out more specific criteria for exceptions to the general rule of secrecy, and for disclosure of grand jury matter, including disclosure to other government personnel. Material developed in a grand jury proceeding may be provided to a successive or concurrently running Vermont grand jury. Procedures are clarified for the return of an indictment and for the custody of the record in the event that a true bill is not found by the grand jury.

V.R.Cr.P. 12 has been generally amended and rewritten for clarity. The rule divides motions into two categories: those that may be made at any time, and those that must be made before trial. Those that must be made before trial must be made if the basis for the motion then exists, and the motion can be determined without a trial on the merits. The list of such motions has been enlarged. The rule enlarges the discovery requests that are required to be made pretrial, and adds motions to dismiss for lack of prima facie case to those that must be made pretrial. The motion deadline is within the discretion of the trial court, but if no deadline is set, then it will be 60 days after arraignment. The rule specifies that good cause is required for filing a motion out of time. The provision of the rule concerning status conferences has been rewritten to give the court full discretion as to whether or not to hold status or discovery conferences or to enter orders as necessary to ensure the orderly procession of the proceeding.

V.R.Cr.P. 18, concerning venue, has been rewritten to permit prosecution of a criminal charge in one of multiple units, provided that the charge is one of multiple charges that could have been joined for trial had all charges originated in one unit.

V.R.Cr.P. 41(f) is amended to make it clear that a motion for return of property may be filed not only upon assertion of an unlawful search or seizure in the context of a motion to suppress, but for the return of property that is legally seized and is not contraband, once the need for it has ceased.

Vermont Rule of Evidence 807, which allows hearsay statements from victims who are minors, or have a psychiatric, intellectual, or developmental disability, has been amended so that such statements can be admitted not only in prosecutions for sexual assault, aggravated sexual assault, or lewd and lascivious conduct with a child, but also in prosecutions for domestic assault or aggravated domestic assault.

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 david.tartter@state.vt.us.