Criminal Division
Vermont Attorney General's Office

Vermont Criminal Law Month

December 2015 – January 2016

Vermont Supreme Court Slip Opinions: Full Court Rulings

Includes three-justice bail appeals

70% RULE FOR HIGH RISK OFFENDERS DOES NOT OFFEND THE SEPARATION OF POWERS OR THE RIGHT TO A JURY TRIAL

*State v. Goewey, 2015 VT 142. TAINT IN SENTENCING: USE OF TERM SODOMY. 70% RULE: RIPENESS; SEPARATION OF POWERS; RIGHT TO JURY TRIAL; APPLICATION TO LIFE SENTENCES. SENTENCING: REFERENCE TO ANOTHER CASE.

Full court opinion. Sentence of twenty years to life after a guilty plea to one count of aggravated sexual assault affirmed. 1) The defendant argued that the trial court's characterization of his criminal acts of oral sex with a member of the same sex (a minor) as "sodomy" is an expression of a religious view or moral judgment by the judge about sexual practices, which impermissibly tainted the sentencing hearing. However it is clear from the record that the judge's reference to sodomy, which was a passing one, was not intended to convey a personal religious or moral judgment concerning same-sex sexual practices. 2) If the defendant is designated a high risk offender by the Department of Corrections, he will have to serve at least 70% of his maximum sentence before being eligible for any kind of early release. At the time of the sentencing, the Department had not yet made this determination, so it is not known if he will be subject to the rule. However, his challenge to it would be heard on direct appeal anyway. 3) The 70% rule is not a usurpation of judicial power. The establishment of minimum and maximum potential sentences is largely, if not wholly, a legislative function. 4) The rule does not constitute an enhancement of the sentence in the absence of a jury determination of aggravating factors. The rule is not an enhancement of a potential sentence to a different and harsher one; the sentence remains the same. The amount of time a defendant must actually serve is dependent upon many factors, and the application of the 70% rule is no more an enhancement of a sentence than would be a denial of parole. 5) However, the 70% rule is inapplicable here anyway, because it does not apply to sentences carrying a maximum sentence of life imprisonment, because there is no such thing as 70% of a life sentence. 6) The judge's comment concerning her recent experience considering medical factors as a basis for mitigation in another case was not improper reliance upon conduct of another person. The judge was merely expressing her general view about medical conditions as mitigating factors. Robinson and Skoglund concur, but stress that the use of the term sodomy was totally inappropriate and had no place in a sentencing hearing. Doc. 2014-009, December 11, 2015.

https://www.vermontjudiciary.org/LC/Supreme%20Court%20Published%20Decisions/op14-009.pdf

DEFENDANT CAN BE HELD WITHOUT BAIL FOLLOWING EARLIER RELEASE

State v. Blow, 2015 VT 143. DENIAL OF BAIL: DENIAL AFTER EARLIER RELEASE; DENIAL OF HOME DETENTION: ABUSE OF DISCRETION STANDARD.

Three-justice published bail appeal. Denial of bail and of home detention affirmed. Defendant was charged with second-degree murder. 1) The judge originally ordered the defendant held without bail; after new evidence was discovered, the court found that the evidence of guilt was no longer great, and released the defendant on bail. Subsequently, additional evidence was discovered, and the court again found that the evidence of guilt was great, and ordered the defendant held without bail. On appeal, the defendant argues that the court did not possess the authority to hold him without bail after having released him on bail. Nothing in the plain language of the statute prevents a trial court from engaging in this type of evidentiary analysis as the weight of evidence changes. 2) Denial of home detention was also not an abuse of discretion. The court properly considered all three factors in Sec. 7554b(b), and found that the factors favoring home detention were outweighed by factors not supporting home detention. Doc. 2015-431, December 21, 2015. https://www.vermontjudiciary.org/LC/Supreme%20Court%20Published%20Decisions/eo15-431.bail.pdf

COURT ADOPTS PRISON MAILBOX RULE

*In re Bruyette, 2016 VT 3. PRISON MAILBOX RULE.

Full court opinion. The Court adopts the prison mailbox rule, and holds that a notice of appeal is deemed filed for purposes of Vermont Rule of Appellate Procedure 4 when an unrepresented incarcerated inmate delivers it to the prison authorities for forwarding to the court clerk. Therefore, the dismissal of the defendant's appeal as not timely filed is reversed. Doc. 2015-181, January 8, 2016. https://www.vermontjudiciary.org/LC/Supreme%20Court%20Published%20Decisions/op15-181.motion.pdf

DOG SNIFF RESULTS SUPPRESSED DUE TO UNLAWFULLY PROLONGED MOTOR VEHICLE STOP

*State v. Alcide, 2016 VT 4. TIMELY APPEAL: FILING OF WRONG NOTICE. DE MINIMIS PROLONGATION OF MOTOR VEHICLE STOP FOR DOG SNIFF. CAUSAL RELATIONSHIP BETWEEN VIOLATION AND CONTRABAND: PLAIN ERROR ARGUMENT.

Full court published opinion. State's denial of granting of motion to suppress and dismiss denied. 1) The State's appeal was not untimely, despite the fact that the State erroneously filed a motion for permission to file an interlocutory appeal instead of a notice of appeal. The defendant was aware of the State's intent and has not indicated

that he suffered any prejudice as a result of the erroneous filing. 2) The officer was not entitled to prolong a motor vehicle stop, even for a de minimus period, in order to conduct a dog sniff, where the officer had no individualized suspicion justifying such a brief detention. 3) The Court declined to reach the State's argument that suppression was an inappropriate remedy where the contraband would have been discovered even without the unlawful detention of the defendant, since it was discovered in a motor vehicle which the defendant could not drive away (because his license was suspended). This argument was not made below, and the Court declined to find plain error. The Court also noted that it had not yet decided whether a drug dog can be used to sniff out drugs without reasonable suspicion of criminal activity under the Vermont Constitution. Doc. 2014-340, January 8, 2016. https://www.vermontjudiciary.org/LC/Supreme%20Court%20Published%20Decisions/op14-340.pdf

MOTION FOR EARLY DISCHARGE FROM PROBATION MOOTED BY EXPIRATION OF PROBATION

State v. Theodorou, 2015 VT 139. MOTION FOR EARLY DISCHARGE FROM PROBATION: MOOTNESS.

Full court published entry order. Appeal from denial of motion for early discharge from a fixed term of probation denied because the case is moot, the defendant's fixed term of probation having expired on September 13, 2015. No exceptions to the mootness doctrine appear. Doc. 2014-335, October Term, 2015. https://www.vermontjudiciary.org/LC/Supreme%20Court%20Published%20Decisions/eo14-335.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."

MOTION TO RECUSE JUDGE WITHOUT MERIT

State v. Piquette, three-justice entry order. MOTION TO RECUSE NOT SUPPORTED BY EVIDENCE. DENIAL OF MOTION TO REDUCE SENTENCE WAS NOT ABUSE OF DISCRETION.

Denial of motion to recuse trial judge, and of motion to reduce sentence, affirmed. 1) The defendant failed to identify any concrete evidence to overcome the presumption of honesty and integrity that is accorded to the trial judge. The mere fact that a Judicial Conduct Board complaint was filed by the defendant against the judge, and that the defendant disagrees

with the sentence he received does not suffice. 2) The court did not abuse its discretion in denying his motion to reduce sentence. The court could properly consider whether the defendant lied during the trial, and also consider his subsequent refusal to take responsibility for his actions. The defendant here was provided with Begins-type immunity and still refused to accept responsibility for his crimes. Nor did the court ignore the mitigating factors identified with the defendant, but simply found them insufficient to overcome the other factors that warranted the original sentence. Doc. 2014-476, November Term, 2015.
https://www.vermontjudiciary.org/UPEO2011Present/eo14-476.pdf

OUT OF COURT STATEMENTS NOT ADMITTED FOR THEIR TRUTH BUT TO EXPLAIN OFFICER'S ACTIONS

State v. Trapani, three-justice entry order. OUT OF COURT STATEMENTS NOT OFFERED FOR TRUTH: PREJUDICE.

DUI affirmed. Witness statements describing the defendant's operation of a vehicle while intoxicated were read to the jury in order to explain the reasons for the officers' subsequent actions, and the jury was advised that they were not admitted for their truth. The court acted within its discretion in admitting the statements despite the defendant's claim that they were unnecessary, unfairly prejudicial, and confusing. The statements were relevant to an additional charge of resisting arrest to demonstrate whether the arrest was lawful, and were not prejudicial because they were repeated in direct testimony from witnesses while relating their personal accounts of the incident. The instructions from the court eliminated the danger of confusing the jury. Doc. 2015-046, November Term, 2015.
https://www.vermontjudiciary.org/UPEO2011Present/eo15-046.pdf

TRIAL ATTORNEY FOLLOWED REASONABLE STRATEGY

In re Brown, three-justice entry order. PCR: REASONABLE TRIAL STRATEGY; REFERENCE TO DEFENDANT'S SILENCE.

Denial of petition for post-conviction relief affirmed. The petitioner argued that his attorney was ineffective in his handling of the defense that the victim's description of his penis was inaccurate, by eliciting testimony that supported this account. The trial court did not abuse its discretion when it found that counsel followed a reasonable trial strategy that actually contrasted the victim's description with that of other witnesses. Nor did trial counsel err in eliciting testimony from an officer that the defendant had said that his attorney had said not to talk to the police. This brief and indirect reference to the petitioner's silence was insignificant in the context of the trial as a while. Doc. 2015-084, November Term, 2015.
https://www.vermontjudiciary.org/UPEO2011Present/eo15-084.pdf

LONGER SENTENCE FOLLOWING RETRIAL AFFIRMED

State v. Ennis, three-justice entry order. RESENTENCING FOLLOWING REMAND: VINDICTIVENESS.

Sentence following guilty plea to simple assault affirmed. The trial court did not abuse its discretion in sentencing the

defendant to a longer maximum sentence than her initial sentence, which was reversed after a successful post-conviction relief petition. A different judge presided at the second sentencing than had at the first, so there is no presumption that the harsher sentence on remand reflects a retaliatory or vindictive motive. Nor does the record support the claim that the judge was motivated by vindictiveness. The court cited legitimate reasons for the sentence it imposed, including the defendant's past conduct and the need to provide supervision. Doc. 2015-095, November Term, 2015.
https://www.vermontjudiciary.org/UPEO2011Present/eo15-095.pdf

PROBATIONER'S MENTAL CONDITION DID NOT PRECLUDE ADMISSION TO OFFENSE

State v. Foley, three-justice entry order. VIOLATION OF PROBATION: FACTORS BEYOND CONTROL OF DEFENDANT.

Appeal from finding of violation of probation affirmed. The defendant was found to have violated the condition that he attend sex offender screening and counseling. He argued that he could not comply with this requirement for reasons beyond his control, specifically, that he has a mental impairment that prevents him from admitting to having committed the offense. The defendant bore the burden of showing that he was unable to comply for reasons beyond his control, and the trial court did not err in concluding that he failed to meet this burden, notwithstanding a social worker's description of him as paranoid and delusional. Doc. 2015-145, November Term, 2015.
https://www.vermontjudiciary.org/UPEO2011Present/eo15-145.pdf

WRITTEN FINDINGS AND HEARING WERE NOT REQUIRED BEFORE DENIAL OF MOTION TO EXCLUDE BREATH TESTS

State v. Dunbar and Taylor, three-justice entry order. MOTION TO EXCLUDE BREATH TESTS: NECESSITY OF HEARING AND WRITTEN FINDINGS.

DUI convictions affirmed. The defendants argued that the trial court erred in denying their motions to exclude breath tests because it failed to hold an evidentiary hearing and did not issue written findings. The criminal rules do not require written findings to resolve a motion, and permit the court to make any necessary essential findings on the record. V.R.Cr.P. 47. Nor is the court required to hold an evidentiary hearing, unless the motion papers indicate a real dispute for one or more relevant facts. Where, as here, the pleading is a renewed motion to suppress, the court has broad discretion in deciding whether to reopen the evidence. The defendants here failed to present a sufficient record for the Supreme Court to determine whether the trial court abused its discretion in denying an evidentiary hearing, as they failed to order a transcript of the on-the-record denial of the hearing. Having failed to order a transcript, the defendants waived any challenge to the sufficiency of the court's oral rulings.
https://www.vermontjudiciary.org/UPEO2011Present/eo15-206,15-207.pdf

ONE NOTIFICATION OF RIGHT TO COUNSEL WAS ENOUGH

State v. Durham, three-justice entry order. MOTION TO WITHDRAW PLEA: RIGHT TO NOTICE OF RIGHT TO COUNSEL; DISCRETION IN DENYING REQUEST FOR COUNSEL; FACTUAL FINDINGS; LAW OF THE CASE DOCTRINE.

Denial of post-sentence motion to withdraw guilty plea to false pretenses and providing false information to a police officer affirmed. This matter was heard following a remand from the Supreme Court ordering a hearing on the motion. 1) The trial court was not obligated on remand to notify him that he had a right to defender general services. His multiple requests for counsel demonstrate unequivocally that he was well aware of his right to counsel, and in fact had sought his counsel's removal and moved to proceed pro se in connection with this proceeding. The hearing on remand was not a new proceeding, but a continuation of the withdrawal-of-plea proceeding, and therefore a renewed notification of the right to counsel was not required. 2) The defendant argued that he did request counsel on remand, but the record indicates that the first such request came three and a half weeks after the hearing, and the court did not abuse its discretion in denying the request at that time. 3) The defendant claims that he should be allowed to withdraw his pleas because they were premised on his attorney's promise to have his property returned to him the next day. The trial court made a finding that no such promise was made. 4) The defendant's new claim on this appeal, that there was an insufficient factual basis for his pleas, is precluded by the law of the case doctrine, because it could have been raised earlier but was not. Docs. 2015-196 and 2015-197, December Term, 2015. https://www.vermontjudiciary.org/UPEO2011Present/eo15-196,%2015-197.pdf

STRADDLING LEFT TURN LINE JUSTIFIED MOTOR VEHICLE STOP

State v. Colucci, three-justice entry order. MOTOR VEHICLE STOP: INTRA-LANE WEAVING; FAILURE TO STAY WITHIN A SINGLE LANE AS NEARLY AS PRACTICABLE.

Civil suspension of driver's license affirmed. The police officer's affidavit indicated that he stopped the vehicle because he observed the defendant's vehicle cross the center line and then the fog line. The trial court found that this was an inadequate basis for a stop, but after viewing the cruiser video, held that the stop was justified by the defendant's intra-lane weaving. However, given that the trial court had no testimony from an officer explaining the significance of the intra-lane weaving in the context of the totality of the circumstances, the trial court's finding of intra-lane weaving, even if supported by the evidence, is likewise insufficient. However, the trial court's denial of the motion to suppress is affirmed on a different basis. The trial court's findings establish reasonable suspicion of a violation of 23 V.S.A. 1038, which requires that a vehicle shall only be driven, as nearly as practicable, entirely within a single lane. The trial court expressly found that the defendant drove outside of his marked lane of traveling, straddling into the left turn lane. If cited for this offense, the defendant may ultimately prove that some factor made driving within his lane impracticable, but the straddling did provide a reasonable suspicion of a traffic violation. Doc. 2015-242, December Term, 2015. https://www.vermontjudiciary.org/UPEO2011Present/eo15-242.pdf

EVIDENCE SUPPORTED DISORDERLY CONDUCT CONVICTION

State v. Lebert, three-justice entry order. DISORDERLY CONDUCT: SUFFICIENCY OF THE EVIDENCE.

Disorderly conduct conviction affirmed. The evidence was sufficient to support the conviction where the defendant and another person were mouthing off to each other in loud voices, then, after the witness looked away briefly, the other person was seen on the ground, knocked out; and the defendant testified that the other person approached him, and the defendant placed his hands on the other person with enough force to knock him to the ground. In addition, the court's finding that a crowd of people were drawn to the incident was sufficient to support a conclusion that the defendant's actions created a risk of public inconvenience or annoyance. Doc. 2015-120, December Term 2015. https://www.vermontjudiciary.org/UPEO2011Present/eo15-120.pdf

EXPERT TESTIMONY THAT SUBSTANCE DID NOT CONTAIN HEROIN DID NOT PRECLUDE CONVICTION FOR POSSESSION OF HEROIN

State v. Nunn, three-justice entry order. POSSESSION OF HEROIN: SUFFICIENCY OF THE EVIDENCE; CONFLICTING EXPERT TESTIMONY; NEW TRIAL.

Possession of heroin conviction affirmed. The evidence was sufficient to support a finding beyond a reasonable doubt that the substance at issue was heroin, despite the testimony of a defense witness that he found no trace of heroin. The jury was free to determine the weight to be given to the State's expert and to the defense expert, and the State's expert unequivocally testified that the substance contained heroin; in addition, the defendant admitted to the police that he had purchased ten bags of heroin, and the substance was field tested and gave a positive result for heroin. Nor was there error in the denial of a motion for a new trial based upon a claim that the evidence preponderated heavily against the verdict and a serious miscarriage of justice would otherwise result. While there was a conflict in the evidence, it did not rise to the level necessary for a new trial, nor was there a serious miscarriage of justice where the defendant believed he bought heroin, but it was so diluted that it escaped measurement by at least some devices. Doc. 2014-447, December Term, 2015. https://www.vermontjudiciary.org/UPEO2011Present/eo14-447.pdf

ADMISSION OF PRIOR STATEMENTS WAS HARMLESS

State v. LaPlant, three-justice entry order. PRIOR STATEMENTS OFFERED TO REHABILITATE: HARMLESSNESS.

Sufficiency of the evidence. Attempted assault and robbery affirmed. 1) The defendant was not prejudiced by the admission of prior statements by a witness in order to rehabilitate that witness. The prior statements were cumulative to those made during the witness's testimony at trial, were not necessary to establish any

element of the crime, and were brief. The defendant cross-examined the witness about the prior statements and had ample opportunity to impeach them. Most significantly, the other evidence of guilt was compelling. 2) The evidence was sufficient to support the verdict beyond a reasonable doubt. Doc. 2014-210, December Term, 2015.
https://www.vermontjudiciary.org/UPEO2011Present/eo14-210.pdf

PROBATIONER COULD HAVE FOUND RIDE TO MEETING WITH PROBATION OFFICER

State v. Massey, three-justice entry order. VIOLATION OF PROBATION: FAULT OF DEFENDANT.

Finding of violation of condition of probation affirmed. The defendant missed a meeting with his probation officer. He testified that he did not go to the meeting because he did not have a ride. He argued on appeal that the trial court failed to find that his violation was willful, and did not result from factors beyond his control and through no fault of his own. However, the court found that the defendant had been getting to work without difficulty, and that he had had at least two days' notice that his ride to the meeting had fallen through, thus the reasonable inference is that he could have arranged alternative transportation or called his probation officer to notify him otherwise. The trial court was justified in finding that it was the defendant's fault that he missed the meeting. Doc. 2015-173, January Term 2016.
https://www.vermontjudiciary.org/UPEO2011Present/eo15-173.pdf

FACTUAL BASIS FOR PLEA WAS SUFFICIENT DESPITE DEFENDANT'S LACK OF MEMORY

In re Rheume, three-justice entry order. GUILTY PLEA: SUFFICIENCY OF FACTUAL BASIS.

Denial of PCR, alleging that guilty plea to lewd and lascivious conduct was not in compliance with Rule 11(f), affirmed. The defendant said he did not remember whether he had committed the offense in order to create sexual excitement, because he had had a blackout from drinking, and said that he believed that the event happened the way described by the State's evidence, and that he believed that a jury could find that he intended it as a lewd act. This statement, combined with the affidavit of probable cause which the court said it was relying upon for the factual basis, was sufficient to establish the factual basis. The facts were sufficient to find that the act was both lewd and lascivious. Doc. 2015-078, January Term 2016.
https://www.vermontjudiciary.org/UPEO2011Present/eo15-078.pdf

PROMULGATED EMERGENCY RULE AMENDMENTS

Order Promulgating Emergency Amendments to Rules 5 and 11 of the Vermont Rules of Criminal Procedure

Rules 5 and 11 are amended to conform with the Uniform Collateral Consequences of Conviction Act (UCCCA), 2013, No. 181 (Adj. Sess.), § 1, which is in pertinent part codified at 13 V.S.A. §§ 8002-8005, and effective January 1, 2016. The amendments direct that at a first appearance before a judicial officer and before accepting a guilty or nolo contendere plea, the court must inform the defendant as to the potential collateral consequences of conviction, extending to such consequences as loss of educational financial aid, suspension or revocation of professional licenses, and restricted access to public benefits such as housing. Defendants must be advised of the specific potential collateral consequences enumerated in the statute, of an established Internet source for access to further information about them, and of the availability of process under which some relief from collateral consequences may be obtained.

This Order, promulgated on December 21, 2015, effective January 1, 2016, can be found at the following address:

https://www.vermontjudiciary.org/LC/Statutes%20and%20Rules/PROMULGATEDVRCrP5%20and%2011Emergency%2012-21-15.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.