Vermont Department of State's Attorneys

Vermont Criminal Law Month

December 2016 – January 2017

Vermont Supreme Court Slip Opinions: Full Court Rulings

Includes three-justice bail appeals

SEARCH WARRANT WAS SUPPORTED BY PROBABLE CAUSE TO BELIEVE THAT DEFENDANT WAS MANUFACTURING METHAMPHETAMINE

State v. Cleland, 2016 VT 128. SEARCH WARRANT: SUFFICIENCY OF AFFIDAVIT TO ESTABLISH CRIMINAL ACTIVITY; TWO PRONG RULE 41 TEST.

On appeal from a conditional guilty plea, the denial of the defendant's motion to suppress the results of a search warrant is affirmed. The police obtained a search warrant to search the residence and curtilage of the defendant based upon evidence that the premises were being used to manufacture methamphetamine. 1) There was ample evidence in the affidavit to support a conclusion that the manufacture of methamphetamine was occurring at the specific address given in the application. The defendant himself admitted to storing drugs in private places within his residence and two confidential informants had stated that the defendant was manufacturing methamphetamine in his residence. 2) The information from the confidential informants met both prongs of the V.R.Cr.P. 41 test. However, evidence of criminal activity at the residence was also provided by other information in the affidavit, including the defendant's regular and illegal purchases of PSE products, the defendant's own statements to police concerning his drug use, and, most particularly, the statements of an informant named Shorty, tying the defendant's drug and manufacturing operation to his residence. Although Shorty's statements provided no substantial evidence relative to the charged crime of manufacturing methamphetamine, they did provide evidence of a crime, at least with respect to the possession of PSE, if nothing more. 3) The factual basis prong of Rule 41 was met by the fact that some of the statements were based on first-hand knowledge. Even though the observations were not of the manufacture of methamphetamine, they were sufficient to establish possession of PSE. Doc. 2015-440, December 9, 2016. https://www.vermontjudiciary.org/LC/Supreme%20Court%20Published%20Decisions/op15-440.pdf

DISMISSAL FOR PRE-CHARGE DELAY REQUIRES ACTUAL PROSECUTORIAL MISCONDUCT

State v. King, 2016 VT 131. DUE PROCESS: PRE-CHARGE DELAYS. Full court opinion. To establish that the State's preaccusation delay violated a defendant's due process rights under either the U.S. Constitution or the Vermont Constitution, the defendant must demonstrate actual substantive prejudice and prosecutorial misconduct intended to gain a tactical advantage or to advance some other impermissible purpose that violates fundamental conceptions of justice. The Court rejects a test which would balance the prejudice against the reasonableness of the delay. Here, the defendant was not substantially prejudiced by the delay, in that his right to a fair trial was not impaired. The witness and complainant's memories may have dimmed, but this appears to have benefitted the defendant. There is no evidence that the State delayed in order to gain a tactical advantage or to advance some other impermissible purpose, where the delay was caused by the former prosecutor's desire to be assured that the complainant would support the charges and would be willing to proceed with the case. Robinson, dissenting and concurring: would use a different test under the Vermont Constitution. Would consider negligent delays, as opposed to only impermissible prosecutorial purposes. Doc. 2015-053, Dec. 23, 2016. https://www.vermontjudiciary.org/LC/Supreme%20Court%20Published%20Decisions/op15-053.pdf

EXPERT TESTIMONY IS REQUIRED WHERE DRUG USE IS OFFERED TO SHOW GROSSLY NEGLIGENT OPERATION OF A VEHICLE

State v. Cameron, 2016 VT 134. GROSSLY NEGLIGENT OPERATION: SUFFICIENCY OF THE EVIDENCE. EVIDENCE OF MARIJUANA USE TO SHOW GROSSLY NEGLIGENT OPERATION: NECESSITY OF EXPERT TESTIMONY. CONSTITUTIONAL CHALLENGES TO STATEMENTS: FAILURE TO PRESERVE. PRETRIAL INSTRUCTIONS: NECESSITY OF PROHIBITING INTRAJURY DISCUSSION. DEFINITION OF REASONABLE DOUBT.

Grossly negligent operation of a motor vehicle resulting in death reversed. 1) The evidence of grossly negligent operation was sufficient to create a legitimate jury question for deliberation. While momentary inattention without more is not grossly negligent, it may be if it co-occurs with an elevated risk of danger. The State's evidence here was that the defendant was driving at a speed of probably mid-nineties to high nineties, around a blind corner, and that he looked as though he had fallen asleep or passed out because he was leaning forward with his head tilted to the side. The defendant's first words at the scene after the accident were, "I can't believe I fell asleep." A jury could reasonably find that the blind corner presented an elevated risk of danger such that drivers should operate with extra caution, and that the defendant was driving in such a way that he could not control his car as he came around the corner. Whether he was operating within the speed limit is not dispositive. 2) The defendant argued that the court erred in admitting evidence

that the defendant had stated to the police that he had used marijuana during the morning before the accident. His arguments that the police failed to administer the Miranda warnings, that the defendant did not have an opportunity to consult with an adult, and that his statements were involuntary, were not made below, where trial counsel explicitly stated that he was not making a constitutional claim to exclude the evidence, and had not made a timely motion to suppress before the trial. The inadequacy of the record precludes plain error review. 3) The defendant argues on appeal that the trial court erred in admitting the marijuana evidence under V.R.E. 401 and 403 because the State failed to establish a relationship between the marijuana usage testimony and whether the defendant operated in a grossly negligent manner. The Court has previously held that expert testimony is required where the State alleges operation of a vehicle under the influence of a substance other than alcohol, because it takes no special scientific knowledge or training to recognize intoxication, but drugs can produce a variety of symptoms that cannot be sorted out without specialized training. State v. Rifkin. To the extent that State v. Devine is inconsistent with this ruling, it is overruled. In this case, the evidence of marijuana usage had no probative value absent expert testimony relating the marijuana usage to whether the defendant was grossly negligent in his operation of his vehicle at the time of the accident. 4) The pre-trial instructions here told the jurors not to discuss the case with others, but did not clearly tell them not to discuss it among themselves. Trial judges should give an explicit presubmission nondiscussion instruction, along with an instruction not to communicate with others about the case. 5) The defendant's argument that defining "beyond a reasonable doubt" as being convinced with "great certainty" rather than with "utmost certainty" was structural error, is not reached, and the argument was rejected at least in part in State v. Levitt. Doc. 2015-366, Dec. 23, 2016. https://www.vermontjudiciary.org/LC/Supreme%20Court%20Published%20Decisions/op15-366.pdf

EVIDENCE OF FLIGHT AND VIOLATION OF THE GOLDEN RULE IN CLOSING ARGUMENT REQUIRED REVERSAL

State v. Scales, 2017 VT 6. EVIDENCE OF FLIGHT; IMPROPER CLOSING ARGUMENT.

Lewd and lascivious conduct with a child, three counts, reversed. 1) The State presented evidence that the defendant, seven years after the alleged offense, denied that he was Lamar Scales and said he was Shahid Nur, and provided the police officer with a credit or debit card in that name. The officer said that he would be fingerprinted to confirm identification, and a woman present told the defendant to just tell the officer who he was, and he then said he was Lamar Scales, but that he had changed his name to Shahid Nur. Admission of this evidence was error. This Court has long recognized that so-called consciousness of guilt evidence has little probative value, most often in the context of evidence of flight. Here, giving the police his alternative name is highly ambiguous conduct that does not demonstrate that the defendant was attempting to elude the police, as there were other reasons to explain his identification of himself as Shahid Nur. Further, the defendant identified himself using a name he apparently used consistently, and as such cannot be seen as consciousness of guilt. There was scant evidence to show that at the time he was aware that the warrant being served on him in Pennsylvania was connected to charges filed in Vermont for conduct alleged to have occurred years before. Without any probative value, its prejudicial effect was

high. 2) This error was compounded by the court's refusal to give the instruction requested by the defendant, that consciousness of guilt evidence cannot sustain a guilty verdict on its own. The Court is unclear whether it was also necessary for the trial court to have given the remainder of the requested instruction, that evidence of flight in and of itself is generally considered to have little probative value, and that there are many reasons that a person might give a false name, having nothing to do with guilt. 3) The error was not harmless beyond a reasonable doubt. The State began its case with this evidence, and the defendant had other possible reasons for giving a false name. The evidence was patently irrelevant and prejudicial and the court refused to give the requested, proper limiting instruction. The only substantive evidence came from the testimony of a twelve-year old girl about events that occurred more than six years prior and whose testimony was, at best, inconsistent. 2) Reference to the defense as smoke and mirrors was not proper but standing alone would not be grounds for reversal. Reference to the jurors' promise in voir dire that they could return a verdict of guilty on the word of a child alone verges on impropriety, but would not constitute reversible error standing alone. The prosecution violated the "golden rule" when it asked the jurors how difficult it would be for an adult to talk about one's first sexual experience, and asked them to "then put yourself in the eyes of a twelve-year old child." The prosecutor's repeated improper remarks showed a studied purpose to arouse the jury. Urging jurors to place themselves in the victim's shoes is highly improper. Doc. 2015-224, January 20, 2017. https://www.vermontjudiciary.org/LC/Supreme%20Court%20Published%20Decisions/op15-224.pdf

AT HOLD WITHOUT BAIL HEARING, STATE'S EVIDENCE NEED NOT ITSELF BE ADMISSIBLE AT TRIAL, BUT NEED ONLY SHOW THAT THE STATE HAS EVIDENCE THAT WILL BE ADMISSIBLE AT TRIAL

State v. Bullock, 2017 VT 7. HOLD WITHOUT BAIL HEARING: ADMISSIBLITY OF EVIDENCE.

Three justice bail appeal. The trial court's order holding the defendant without bail is affirmed. In order to demonstrate that the evidence of guilt is great, the State presented a recorded, sworn statement of the victim. The defendant argued that the State was required to rely only on evidence that would be admissible at trial. However, the State's burden is to show that it has evidence that will be admissible at trial, not to have it lawfully admitted at the hearing as if it were a trial. Here, the sworn oral statement demonstrated that the State has admissible evidence of the defendant's guilt that it can use at trial, namely the content of the statement that will be provided by a live witness at trial. Doc. 2017-006, January Term, 2017. https://www.vermontjudiciary.org/LC/Supreme%20Court%20Published%20Decisions/eo17-006.bail.pdf

Vermont Supreme Court Slip Opinions: 3 Justice Panel Rulings

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."

COURT WAS ENTITLED TO REJECT WITNESS'S TESTIMONY CONCERNING TIME OF OPERATION AS NOT CREDIBLE

State v. Kendall, three-justice entry order. SUFFICIENCY OF EVIDENCE OF OPERATION WITHIN TWO HOURS OF BAC TEST.

Civil suspension affirmed. The trial court was entitled to credit the police officer's testimony that the defendant told him that he had operated the vehicle at approximately 11:50 p.m., over the defendant's girlfriend's testimony, which was that he had been driving shortly after 10 p.m., which was more than two hours before the breath test with a BAC above the legal limit. Nor did the girlfriend's testimony constitute a rebuttal of the State's evidence that he was over the legal limit at the time of operation based upon a BAC that was over the limit within two hours of operation, because the court rejected that testimony as not credible. Doc. 2016-179, December Term, 2016. https://www.vermontjudiciary.org/UPEO2011Present/eo16-179.pdf

CLAIM THAT DEFENDANT SHOULD HAVE BEEN ALLOWED TO WITHDRAW FROM PLEA AGREEMENT AFTER CONVICTION WAS REVERESED FOR RULE 11 VIOLATION WAS MOOTED WHEN DEFENDANT ENTERED INTO A NEW PLEA AGREEMENT.

In re Campbell, three-justice entry order. MOOTNESS: CHALLENGE TO REFUSAL TO WITHDRAW PLEA FOLLOWING ENTRY INTO NEW PLEA AGREEMENT. PLEA PROCEEDING: VOLUNTARINESS.

Denial of petition for post-conviction relief affirmed. The petitioner successfully challenged a conviction which was based upon a plea agreement, because the trial court had failed to inform him that he could withdraw the plea if the court exceeded the agreed-upon sentence (which it did). On remand to the trial court, the trial judge refused to allow the petitioner to withdraw from the original plea agreement, ordered a presentence investigation report, scheduled a sentencing hearing, and invited the petitioner to file a motion to withdraw his plea. The petitioner subsequently entered into a new plea agreement which the trial court accepted. The petitioner then filed a new petition for post-conviction relief, arguing that he should have been allowed to withdraw his plea. This claim became moot when the court allowed the petitioner to enter into a new plea agreement. Nor did the petitioner controvert the State's evidence that the second plea was entered into voluntarily. Docket 2016-054, December Term, 2016. https://www.vermontjudiciary.org/UPEO2011Present/eo16-054.pdf

ORDER THAT DEFENDANT PAY EXPENSES OF ANIMAL CARE AFTER CONVICTION FOR ANIMAL CRUELTY WAS WITHIN THE COURT'S DISCRETION

State v. Goodell, three-justice entry order. ANIMAL CRUELTY: PAYMENT FOR CARE OF ANIMALS.

Order that defendant pay costs for care of two dogs following conviction for cruelty to animals affirmed. The animal cruelty statute provides that a person convicted of that crime shall be required to repay all reasonable expenses incurred by the custodial caregiver for caring for the animal, including veterinary expenses. These provisions are separate from the general restitution provisions, which require a material loss and a current ability to pay. Under the statute, the only discretion afforded to the trial judge is to determine which costs were reasonable, a decision which is reviewed only for abuse of discretion. The court had a reasonable basis for awarding the costs of care and treatment at animal shelters and in foster care, based on the testimony by the shelter managers and the comparable fees charged by other facilities in the area. Doc. 2016-041, December Term, 2016. https://www.vermontjudiciary.org/UPEO2011Present/eo16-041.pdf

NEITHER MONOSYLLABIC RESPONSES NOR FAILURE EXPLICITLY TO PLEAD GUILTY SPOILED RULE 11 PROCEEDING

In re Parda, three-justice entry order. POST-CONVICTION RELIEF: RULE 11 – FACTUAL BASIS, INTENT TO PLEAD GUILTY.

Denial of post-conviction relief affirmed. 1) The defendant's claim that the court failed to establish a factual basis because the defendant's participation was limited and his responses to the court's recitation of the facts were monosyllabic, was not raised below, and in any event, these facts do not undermine the validity of the plea. 2) Although the trial court neglected to obtain an express guilty plea to the charge of possession of stolen property, the record as a whole demonstrates the defendant's clear and unequivocal intent to plead guilty, given the repeated references to the fact that the defendant was going to, and then had, pleaded guilty. Doc. 2015-474, December Term, 2016. https://www.vermontjudiciary.org/UPEO2011Present/eo15-474.pdf

POST-CONVICTION RELIEF PETITION WAS IMPROPERLY DISMISSED AS SUCCESSIVE WHERE IT RAISED A NEW CLAIM, BUT ON REMAND COURT CAN CONSIDER DISMISSAL FOR ABUSE OF THE WRIT

In re Carpenter, three-justice entry order. POST CONVICTION RELIEF: SUCESSIVE PETITIONS.

Dismissal of post-conviction relief proceeding as successive reversed and remanded. 1) The petitioner cannot avoid a petition being deemed successive by labeling it as habeas corpus rather than PCR. 2) The petitioner's most recent petition contained new arguments that he did not raise in the first petition, in particular, that the underlying relief from abuse order was unlawful because it exceeded the scope of the statute. 3) The petitioner pled guilty to the charge, and therefore waived his right to directly challenge the charge, but he may have an ineffective assistance of

counsel claim in this connection, based on counsel's failure to object to the allegedly defective indictment. No abuse of the writ claim was made by the State, although it may be considered on remand. Doc. 2015-325, December Term 2016. https://www.vermontjudiciary.org/UPEO2011Present/eo15-325.pdf

EVIDENCE SUPPORTED ATTEMPTED SEXUAL ASSAULT CONVICTION

State v. Stevens, three-justice entry order. SUFFICIENCY OF THE EVIDENCE: ATTEMPTED SEXUAL ASSAULT.

Attempted sexual assault affirmed. Evidence that the defendant touched the complainant's bare breast, unbuttoned her pants, took off her belt, and put his hand down her pants, trying to remove her pants, was sufficient to support a jury verdict that he attempted to sexually assault the complainant, either by putting his finger in her vagina or by having sexual intercourse with her. It is evident that the defendant's actions had advanced from mere intent to the commencement of the consummation of a sexual assault. Doc. 2016-219, February 9, 2017.

Vermont Supreme Court Slip Opinions: Single Justice Rulings

PROSECUTOR'S REPRESENTATIONS SUPPORTED NO-CONTACT CONDITION OF RELEASE

State v. Woods, single justice bail appeal. CONDITIONS OF RELEASE: EVIDENTIARY SUPPORT.

Modification of conditions of release to prevent the defendant from having any contact with his wife, the complainaing witness in the underlying domestic assault case, affirmed. The modificatio0n was supported by the unchallenged representations by the prosecutor, on the record, that the defendant had violated the existing contact condition. Although the information in the record was sparse, no-contact conditions require only that the trial court exercise sound discretion, based on the information in the record. Doc. 2016-333, November Term, 2016. https://www.vermontjudiciary.org/UPEO2011Present/eo16-333.bail.pdf

NO CONTACT CONDITION PERMISSIBLE DESPITE APPLICATION TO PERSONS OTHER THAN ALLEGED VICTIMS, WHERE DEFENDANT HAD THREATENED THOSE PERSONS

State v. Rabtoy, single justice bail appeal. NO-CONTACT CONDITION OF RELEASE: PERSONS OTHER THAN VICTIM OF ALLEGED CRIME.

Condition of release limiting contact with the defendant's children affirmed. Although the children are not the alleged victims of the misdemeanor simple assault charged here, the condition limiting her contact with her children fits squarely within the kinds of conditions a trial court may order, as necessary to reasonably assure protection

of the public. Two separate individuals told police that the defendant had made threats against the lives of her own children, including the defendant's mother who told police that her daughter had threatened to slash each one of her kid's throats, call the police and have them shoot her. The court can impose a condition on the associations of a defendant when required to protect the public safety, and these are not confined to the alleged victims of a charged crime. The no-contact condition imposed here is supported by the record below and, given the gravity of the threats the defendant made against her four children, the trial court correctly declined to strike it. Doc. 2016-403, December Term 2016, Dooley, J. https://www.vermontjudiciary.org/UPEO2011Present/eo16-403.bail.pdf

COURT SETTING BAIL DID NOT NEED TO MAKE PARTICULARIZED FINDINGS ON THE ABILITY TO PAY; MATTER REMANDED FOR DETERMINATION OF DOC POLICY ON HOME DETENTION FOR DEFENDANTS FOR WHOM BAIL WAS IMPOSED.

State v. Fidler, single justice bail appeal. BAIL APPEAL: PARTICULARIZED FINDINGS RE DEFENDANT'S ABILITY TO PAY NOT REQUIRED. RELEASE IN CUSTODY OF THIRD PARTY: REMAND FOR DETERMINATION OF DOC POLICY.

1) Where a defendant has no right to bail, but the trial court elects to allow bail anyway, the Supreme Court will review the conditions of release solely for an abuse of discretion. The trial court did not abuse its discretion when it set the defendant's bail at $25,000. The court considered the applicable Section 7554 factors, including the seriousness of the charges, the sentencing exposure the defendant faced if convicted, his relative lack of ties to Vermont, and his lack of stable employment, as well as his previous convictions in California for conduct similar to the current charges he faces. This analysis was sufficient – nothing in Section 7554 suggests that a trial court must make particularized findings regarding a defendant's ability to pay; rather, the various factors must be evaluated as a whole to ensure the least restrictive means of ensuring a defendant's appearance in court. 2) The court also imposed a condition that the defendant not be released into the custody of some person or organization that has not been approved in advance by the court. Defense counsel represented to the Court that DOC will not release the defendant to a less restrictive pretrial detention, such as a residential treatment program or home detention, if the court imposed any bail. This would be directly at odds with Section 7554b(a), which states that a defendant who is on home detention shall remain in the custody of DOC, and thus by implication does not have to make bail. The matter is therefore remanded for the court to determine if DOC policy prevents the defendant from being placed in the least restrictive pretrial detention. Skoglund, J. Doc. 2016-423, January Term 2017. https://www.vermontjudiciary.org/UPEO2011Present/eo16-423.bail.pdf

NEW SUPREME COURT FORMS

The Vermont Supreme Court recently published new forms, including a new docketing statement form and a motion form. The forms are here: https://www.vermontjudiciary.org/MasterPages/Court-Forms-Supreme.aspx

You should **start using the new docketing statement**, because the docketing statement form is a required form. See VRAP 3 (parties must file docketing statements "using a form prescribed by the clerk"). The new form is shorter and easier to use. You may continue to attach additional sheets if needed. Note one significant change: the appellant is no longer required to list the hearings held in the case. As appellee, you need to make sure you were copied on the transcript order form and use that form to evaluate whether the appellant has ordered the necessary transcripts. Along with the new forms, the Court has posted new instructions for ordering transcripts using the vendor website.

Use of the other forms is generally not mandatory. See VRAP 46 ("Forms approved by the Supreme Court suffice under the rules and illustrate the simplicity and brevity that these rules contemplate."). One of the new forms is a suggested cover sheet for briefs and printed cases.

Using the motion form is optional. The form is not required, as long as motion filings contain the same information. It may be easier to use the form for some short, simple motions (although note that the form does not accommodate signatures of both parties, as required for stipulated extensions of time). Any substantive motion, however, will require additional pages and using the form would probably not save any time. The form notice of appeal is also not required. It does, however, "suffice" under the rules and may be appropriate to use.

RULE AMENDMENTS

V.R.Cr.P. 17, dealing with subpoenas, has been amended, effective February 20, 2017. Rule 17(a) now clarifies that a subpoena is provided by the clerk of court, but actually issued by a judicial officer, subject to certain notice of rights on the part of persons subject to subpoena to object thereto, and the procedures for doing so. Rule 17(c) adds express provisions for "nonproceeding" subpoenas, for production of specified objects such as documents and electronically stored information, outside of the context of deposition or judicial proceedings. The rule contains provisions for the filing of objections or motions to quash such subpoenas, and requires notice, when school records or other confidential records are sought, to the person whose records are sought, prior to the service of such subpoenas. The Rule can be found here: https://www.vermontjudiciary.org/LC/Statutes%20and%20Rules/PROMULGATEDVRCrP17.pdf

V.R.Cr.P. 30, dealing with instructions, has been amended, effective April 10, 2017, to provide that objections to jury instructions need not be made after the charge is read to the jury, if the objection was made during the charge conference. Objections after the charge need only be made if the charge as given did not comport with the language of the instruction as indicated by the court in a precharge ruling, or the court has omitted a particular instruction altogether. However, objections not made at the charge conference are not waived as long as they are made with sufficient particularity after the instructions are read to the jury. The trial court is required to advise the parties of its proposed instructions, and include a copy of those instructions in the record. The Rule can be found here: https://www.vermontjudiciary.org/LC/Statutes%20and%20Rules/PROMULGATEDVRCrP30andVRCP5.pdf

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