Criminal Justice Division
Vermont Attorney General's Office

Vermont Criminal Law Month

February - March 2010

Vermont Supreme Court Slip Opinions: Full Court Rulings

Includes three justice bail appeals

DEFENDANT FAILED TO SHOW STATE KNOWINGLY USED FALSE TESTIMONY

State v. Davis, full court published entry order. STATE'S KNOWING USE OF FALSE TESTIMONY. PRESERVATION.

Aggravated sexual assault affirmed. 1) The defendant's claim that the state violated his right to a fair trial by calling a witness whom they expected to commit perjury was adequately preserved below. 2) The record does not support the claim that the State expected false testimony – the State repeatedly articulated the favorable testimony it expected the witness to give, and expressed its hope than an explanation of immunity and the threat of a perjury charge would convince the witness to testify truthfully. The fact that the witness had given a contradictory account of events in his deposition did not change this fact. There is nothing to suggest that the state knowingly used false testimony. Where the State believed the testimony to be false, it impeached the witness and did not ask the jury to believe those portions. Nor could the State have "known" that the witness would testify falsely. Doc. 2008-304, February 1, 2010.

ACCIDENTAL INTRODUCTION OF PRIOR BAD ACTS REQUIRED NEW TRIAL

State v. Smith, full court published entry order. PRIOR BAD ACTS: PREJUDICE. PHOTO OF DEFENDANT'S PENIS: RELEVANCE.

Sexual assault and possession and sale of marijuana reversed. 1) Three references to the defendant's alleged molestation of his girlfriend's daughter were erroneously admitted at trial while a recording of an interview was being played by the defense in order to cross-examine a state's witness. The fact that the defense played the CD did not mean that the error was invited or waived. The prejudice to the defendant cannot be said to have been harmless. The cautionary instruction was too vague to negate the potential prejudice inherent in the offending statements. Furthermore, any value it had was undermined when the balance of the recording was played immediately after the judge stated that it had been cleansed of any further offending

material, and the balance of the recording contained yet another reference to the prior acts. Since the State's case was essentially founded on the credibility of the complainant it cannot be said that the prosecution's case was particularly strong. 2) Photographs of the defendant's penis were not relevant to corroborate the complainant's description of it, where the defendant had admitted having sexual relations with her. Doc. 2008-396, February 22, 2010.

FAILURE TO HIRE EXPERT WAS INEFFECTIVE ASSISTANCE

In re Russo, 2010 VT 16, full court opinion. POST-CONVICTION RELIEF: FAILURE TO ENGAGE EXPERT.

Grant of post-conviction relief petition affirmed. Underlying crime was aggravated assault. The petitioner's trial attorney deprived him of effective representation by failing to engage a firearms expert at trial, and failing to test-fire the rifle at issue. The defendant was charged with chasing the victim through Brattleboro, and firing shots at the victim with a bolt action rifle. He was found with the rifle in the front seat, with one live round of ammunition in it, one spent cartridge in the rifle's chamber, bullets in an ammunition box, and four spent bullet casings on the vehicle's floor. The police did not assess the gun for operability, nor determine whether the bullets and casings found in the car fit the rifle. Nor did they test the petitioner's fingers for recent firing, or determine the age of the casings. The defense attorney elicited testimony from a police officer that one could determine directionality from muzzle flash, which was harmful to her case, but failed to obtain an expert to rebut this claim. Burgess and Dooley dissent: The petition failed to prove his case because he did not have an expert test the rifle for flash and introduce the results to the PCR court. The majority simply speculates as to what the outcome of the testing would have been. Doc. 2008-070, February 26, 2010.

ERROR IN CHARGING AGGRAVATED SEXUAL ASSAULT REQUIRED REVERSAL

State v. Wilder and Campbell, 2010 VT 17, full court opinion. AGGRAVATED SEXUAL ASSAULT: ERROR IN CHARGING LANGUAGE.

Defendants' convictions for aggravated sexual assault are vacated, and the matter remanded for resentencing under the remaining convictions. Defendants were convicted of sexual assault, aggravated sexual assault, and furnishing alcohol to a minor. On appeal, the defendants claimed that there was insufficient evidence to show that they joined or assisted the other's sexual assault. However, these arguments were not reached, because the Court sua sponte addressed a defect in the information underlying the second count of aggravated sexual assault. Each of these counts alleged that the defendant joined or assisted the other in restraining the victim, while the other committed the crime of sexual assault. However, the crime of aggravated sexual assault is not joining or assisting another who commits a sexual assault, it consists of actually sexually assaulting someone, while being joined or assisted by another. The statute requires as a predicate that the person charged commit the sexual assault. Neither of the aggravated sexual assault charges here alleged that. Therefore, the conduct for which each defendant was charged was not a crime. Nor can the charging language be defended as the equivalent of aiding in the commission of a felony under 13 V.S.A. § 3, because the term "aid in the commission"

has a different meaning than "joined or assisted." Those convictions are therefore reversed, and the matter remanded for resentencing under the remaining convictions, since the full sentencing package must be redetermined when defendants challenge interdependent sentences. Docs. 2008-134 and 2008-349, February 26, 2010.

DEFENDANT ON PROBATION "MINGLED" WITH CHILDREN IN VIOLATION OF ORDER

State v. Bailey, 2010 VT 21. Full court published entry order. NO CONTACT PROBATION ORDER: "MINGLING." RECUSAL. JURISDICTION WHILE APPEAL PENDING.

Violation of probation and denial of motion to disqualify trial judge affirmed. 1) The finding of a violation here did not violate State v. Rivers, where the Court declined to find a probation violation based only upon the defendant's mere proximity to members of a generally prohibited class while in a public place. This case does not involve incidental proximity-contact in a public place. The defendant visited his son's residence on a number of occasion, where he knew young grandchildren would be, and visited in the yard in the midst of the children. Some of these visits lasted hours, and the defendant freely mingled with the children. To mingle is to exceed mere proximity. This conduct plainly constituted initiating and maintaining contact with members of the prohibited class in violation of the probation condition. 2) The trial judge was not required to recuse himself from the case because at sentencing the judge accepted the plea agreement, but expressed doubt about whether the agreed-upon sentence was long enough, and warned the defendant that if he did not abide by the probation conditions, the judge would see to it that he would serve as much of the remaining sentence as possible. While the trial judge's comments could have been better phrased, the administrative trial judge did not abuse her discretion by not presuming bias based upon these comments. 3) The trial court was not deprived of jurisdiction to find a probation violation during the pendency of an appeal from an earlier decision in which the defendant had challenged that condition. Johnson dissents: There was no evidence that the defendants was ever inside his sons' residence, or that he ever talked with, touched, or in any way communicated with any minor child while at the residence. Mingling is not materially different from mere proximity. Doc. 2008-353, March 8, 2010.

RESTITUTION MAY NOT BE ORDERED FOR VIOLATION OF PROBATION COSTS

State v. Bohannon, 2010 VT 22, full court opinion. RESTITUTION: COSTS RESULTING FROM VOP.

Order of restitution to the State for the costs of extraditing the defendant from Washington to Vermont for violation of probation vacated. Violation of probation is not a crime, and therefore restitution cannot be ordered as a result under Vermont's restitution statute. Skoglund and Burgess concur: would not find that a State agency can be a victim for purposes of the restitution statute. Doc. 2008-508, March 11, 2010.

DEFENDANT SHOULD HAVE BEEN GIVEN BIFURCATED TRIAL ON AGGRAVATING ENHANCEMENT CONSISTING OF VIOLATION OF CONDITION OF RELEASE

State v. Brillon, 2010 VT 25. Full court opinion. SPEEDY TRIAL UNDER VERMONT CONSTITUTION: WAIVER. BIFURCATION.

Aggravated domestic assault reversed. 1) The defendant's claim that his right to a speedy trial under the Vermont Constitution was violated was not adequately raised or briefed, and therefore the issue is not reached on appeal. 2) The defendant sought to have a bifurcated trial, separating the substantive domestic assault offense from the aggravating enhancement for violating a condition of release order. The court should have ordered bifurcation, as it is appropriate when the prejudice from introducing the bifurcating factor outweighs any relevance or factual connection the factor holds to the rest of the charge. Here, the aggravating circumstance involved conduct that had taken place a year earlier and held little probative value or factual connection to the incident that formed the basis of the domestic assault charge presented to the jury. The evidence was highly prejudicial as it established that a court had found it necessary to issue a protective order on behalf of the putative victim against the defendant. Nor was there any limiting instruction from the trial court. Johnson dissent: Would find a state constitutional violation of right to a speedy trial. Dooley, concurring: Agrees with Johnson that this case presents a violation of the state constitutional right to a speedy trial, but argues that the Court must accept the appellate fact-finding of the US Supreme Court, finding that the defendant had manipulated the system. Therefore, concurs in the judgment that the conviction should be affirmed with respect to the state constitutional speedy trial claim. Reiber and Burgess concurrence and dissent: Agrees that the state constitutional claim was not preserved for appeal but would find no prejudice from any error with regard to bifurcation. Burgess and Reiber separate concurrence and dissent: Would not find a state constitutional violation on these facts. Doc. 2005-167, March 19, 2010.

DEFENDANT FACING HABITUAL OFFENDER SENTENCE CAN BE HELD WITHOUT BAIL

State v. Pellerin, full court opinion. NO BAIL FOR LIFE IMPRISONMENT OFFENSES: APPLICABILITY TO SENTENCE ENHANCED OFFENSES.

Trial court's order holding defendant without bail affirmed. The defendant faces five criminal charges, three of which are felonies, but none of which carry the risk of life imprisonment. However, the defendant has at least three prior felony convictions, and as a result, under Vermont's habitual offender statute, he faces the possibility of life imprisonment if he is convicted of any of the three felonies with which he is currently charged. The State has given notice of its intent to seek life imprisonment. 13 VSA § 7553 permits a person "charged with an offense punishable by life imprisonment" to be held without bail, when the evidence of guilt is great. The trial court determined that the defendant was charged with an offense punishable by life imprisonment because the habitual offender statute is applicable, and ordered him held without bail. Using a plain language analysis, it is clear that each

of three felonies with which the defendant is charged is an offense punishable by life imprisonment. Although the defendant argues that he was never "charged" under the habitual offender statute, but merely given notice of the State's intent to invoke it, the habitual offender statute is not an offense in itself punishable by life imprisonment, and therefore it is irrelevant whether it is charged or not. The court also held that the trial court correctly determined that the evidence of guilt was great on at least two of the charges. Finally, the trial court did not abuse its discretion in denying bail, given that he has a long history of sexual offenses, and used his home to facilitate his proximity to his target victims of young girls. Johnson dissenting with Skoglund: Would interpret Section 7553 narrowly, such that the reversal of the presumption of release is triggered only when a defendant is charged with a crime that by itself carries with it the possibility of life imprisonment. Doc. 2010-082, March 26, 2010.

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."

REPEATING STATEMENTS HEARD ON TELEPHONE WAS PRESENT SENSE IMPRESSION

*State v. Barnes, three-justice entry order. HEARSAY: PRESENT SENSE IMPRESSION; TO GIVE CONTEXT TO DEFENDANT'S STATEMENTS; HARMLESS ERROR.

Sale of cocaine and attempted sell of non-controlled substance under representation that it was a controlled drug, affirmed. 1) Confidential informant's statements repeating to police statements by the defendant as they were made to her over the telephone were admissible under the hearsay exception for present sense impressions. Even if the exception was not applicable as the declarant was an agent of the police and therefore whose statements might not necessarily be as free from calculation as most witnesses, any possible error in their admission was plainly harmless. There was ample testimony from the investigating officers concerning the meeting place and purchase price, the amount of money given to the confidential informant, and the police observations of the defendant during the transaction. 2) There was no error in the admission of recorded conversations between the confidential informant, because the confidential informant's statements were admissible in order to provide context for the defendant's statements, and therefore were not inadmissible hearsay. In any event, admission of these statements was at most harmless error in view of the remaining evidence against the defendant, including his own admissions to the police. Doc. 2009-187, February 25, 2010.

SUCCESSIVE PETITIONS APPLIES TO PRIOR PETITIONS FOR WRITS OF HABEAS CORPUS AS WELL AS FOR POST CONVICTION RELIEF

*In re Laws, three-justice entry order. PCR'S: SUCCESSIVE PETITIONS, RIGHT TO COUNSEL.

Denial of petition for post-conviction relief affirmed. 1) The petitioner's constitutional right to apply for a writ of habeas corpus was not violated by the court's failure to distinguish between prior PCR petitions and petitions for writ of habeas corpus when considering a claim by the State of successive petitions. 2) The petitioner's claim that his attorney was constitutionally ineffective in the PCR proceeding currently on appeal was properly rejected, as the court below considered the petitioner's pro se filing in support of a motion for reconsideration; in any event, there is no constitutional right to counsel in a PCR proceeding. 3) The petitioner's various arguments centering on the validity of his plea colloquy are also without merit. The petitioner was precluded from raising this issue in his second PCR petition, for failure to raise it in his first petition. Doc. 2008-245, February 25, 2010.

EXIT ORDER JUSTIFIED BY CIRCUMSTANCES

State v. Corley, three-justice entry order. DUI: JUSTIFICATION FOR EXIT ORDER, DEXTERITY TESTS, AND PBT.

Civil suspension and conditional guilty plea to DWI affirmed. The officer was justified in ordering the defendant to exit his vehicle and to perform dexterity tests where he had received a report of a possibly intoxicated man having trouble using a gas pump; identified the reported vehicle and observed it run a red light; smelled an odor of intoxicants emanating from the vehicle; and obtained an admission from the defendant that he had consumed alcoholic beverages earlier. During the performance of the dexterity tests, the officer observed five cues of intoxication. All of this information, taken together, justified the officer's request that the defendant submit to a preliminary breath test. Docs. 2009-313 and 2009-392, February 25, 2010.

VOP FINDING SUPPORTED BY THE EVIDENCE

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

Violation of probation affirmed (underlying is sexual assault on a minor). The defendant was found to have been in contact with children under the age of 16 in violation of his conditions of probation (the children of H.H.). 1) Trial court did not commit clear error in finding the State's witnesses to have been unbiased even though the evidence suggested some tension between the witness and H.H. and another witness who testified on the defendant's behalf – as this did not necessary suggest any animus towards the defendant. The building manager's description of the defendant as a squatter did not clearly undermine the court's finding that he was a reliable and credible witness. Nor did the court err in finding a contradiction between H.H.'s prior statement and her testimony, even though

the contradiction was slightly different than the court found. 2) The court did not commit plain error when, without objection, it relied upon a witness's prior inconsistent statement in her affidavit as substantive evidence. Furthermore, it was plainly harmless. Doc. 2009-274, February 25, 2010.

REFERENCE TO DEFENDANT'S CUSTODIAL STATUS WAS HARMLESS

State v. Williams, three-justice entry order. REFERENCE TO DEFENDANT IN CUSTODY: HARMLESS ERROR.

Sexual assault, domestic assault, unlawful restraint, and operating a motor vehicle without the owner's consent, affirmed. The prosecutor's question of the victim whether she had had any further contact with the defendant since she had learned that he was back in custody (after escaping on the night of his arrest) was plainly harmless despite the defendant's claim that the question suggested that the defendant had been in custody continuously to trial, and thus removed the presumption of innocence to which he was entitled. The victim had previously testified without objection that the police had called her on the evening in question and told her that the defendant was in custody, then subsequently warned her to stay in her house because the defendant had escaped from custody. They later called again to tell her that the defendant had been found. Thus, the question, understood in context, was simply whether the complainant had any further contact with the defendant since he was re-arrested that evening. Even if the question were understood differently, there was no possibility of undue prejudice. The question and answer were brief and fleeting, and neither party revisited the issue. The jury was already aware that the defendant had been taken into custody, and would not have been surprised or unduly influenced by the prosecutor's question. Finally, the jury actually acquitted the defendant of several additional domestic assault charges stemming from earlier incidents involving the same victim, thus tending to dispel any concern that the remark may have improperly prejudiced the jury against the defendant or destroyed the presumption of innocence. Doc. 2009-195, February 25, 2010.

Vermont Supreme Court Slip Opinions: Single Justice Rulings

HOLD WITHOUT BAIL ORDER AFFIRMED AFTER DEFENDANT VIOLATED DRUG CONDITION OF RELEASE

State v. Bower, single justice bail appeal. BAIL APPEAL: NO BAIL ORDER; USE OF DRUGS WHILE ON PROBATION.

Order holding defendant without bail pending merits hearing on his alleged violation of the conditions of his probation (use of cocaine) affirmed. The trial court considered all pertinent factors in 13 V.S.A. § 7554(b), and its finding that the defendant's drug use while on probation weighed against release provided sufficient support for the order to hold the defendant without bail. Burgess, J. Doc. 2010-042, February 17, 2010.

Criminal And Appellate Rule Changes

Amendments to the Vermont Rules of Criminal Procedure

V.R.Cr.P. 16(c): now exempts law enforcement officers who have participated in an investigation from the rule limiting prosecution access to witnesses first included on a defense witness list.

V.R.Cr.P. 18(b): requires prosecution of pre-trial release violations in the county or circuit of the court that imposed the conditions of release unless the defendant is charged with a new offense.

V.R.Cr.P. 24(d): permits the court to retain alternate jurors after the jury retires in order to ensure the availability of a sufficient number of jurors if a sitting juror is unable to complete deliberations.

V.R.Cr.P. 32(a) and (b): permits the clerk to sign a judgment reflecting the court's ruling from the bench.

V.R.Cr.P. 32(c): provides defense attorneys notice and an opportunity to attend PSI interviews of the defendant.

These amendments are effective on April 26, 2010, and can be found at:

http://www.vermontjudiciary.org/LC/Statutes%20and%20Rules/PROMULGATEDVRCrP16.1_c_18_b_24_d_32_a__b__c_.pdf

United States Supreme Court Case Of Interest

Thanks to NAAG for these summaries

Maryland v. Shatzer, 08-690. The Court held that the *Edwards v. Arizona*, 451 U.S. 477 (1981), prohibition against interrogating a suspect who has invoked his Fifth Amendment right to counsel terminates when the suspect has been released from custody and 14 days have elapsed since the release. The Court also concluded that releasing a suspect back into the general prison population, where he is serving a sentence on an unrelated crime, constitutes a break in custody for purposes of this new "break in custody for 14 days" rule. Accordingly, the Court held that *Edwards* did not mandate suppression of a statement taken from respondent, who had invoked his right to counsel during an interrogation more than two years earlier and had then been released back into the general prison population.
[http://www.supremecourtus.gov/opinions/09pdf/08-680.pdf *]*

Padilla v. Kentucky, 08-651. The Court held that counsel provides constitutionally deficient representation under the first prong of *Strickland v. Washington*, 466 U.S. 668 (1984), if she fails to advise her non-citizen client whether a plea of guilty carries the risk of deportation. More precisely, where deportation is the clear consequence of pleading guilty, counsel has a duty to advise the defendant of that fact; where the deportation consequences of a plea are unclear,

counsel must advise the defendant that pleading guilty *may* carry adverse immigration consequences. The Court did not extend its holding to other collateral consequences of pleading guilty, finding that deportation has unique consequences and is intimately related to the criminal process. And the Court did not address whether petitioner is entitled to relief, which depends on whether he can show prejudice, an issue the lower courts can address on remand. [http://www.supremecourt.gov/opinions/09pdf/08-651.pdf]

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