Criminal Division
Vermont Attorney General's Office

Vermont Criminal Law Month

February - March 2012

Vermont Supreme Court Slip Opinions: Full Court Rulings

Includes three justice bail appeals

SEARCH WARRANT AFFIDAVIT DID NOT PROVIDE FACTUAL BASIS OR SUFFICIENT INDICIA OF RELIABILITY.

State v. Chaplin, full court published entry order. PROBABLE CAUSE TO SEARCH.

Grant of motion to suppress results of search warrant based on the absence of probable cause affirmed. The affidavit did not meet either prong of the Aguilar-Spinelli test. First, the affidavit did not establish the factual basis for the named informant's information. The incriminating assertion, that Chaplin participated in a burglary, contained nothing to suggest that it was anything more substantial than a rumor. Second, the affidavit contained insufficient indicia of reliability. Although the informant was named and provided a sworn statement, her accusation against the defendant was not against her own penal interests, and the corroborating information was not significant. Information from other informants was also insufficient. A bare statement that the other informants had provided information in the past that had been corroborated by other means is not sufficient to establish inherent credibility. Doc. 2010-477, January 31, 2012. http://info.libraries.vermont.gov/supct/current/eo2010-477.html

HIV TESTING OF SEX OFFENDERS UPHELD

*State v. Handy, 2012 VT 21. Full court opinion. HIV TESTING OF SEX OFFENDERS.

Motion to compel defendant to undergo HIV testing affirmed. 13 VSA § 3256, permitting a victim of a sex offense to require the defendant to undergo HIV testing, serves a special need beyond normal law enforcement, which outweighs countervailing privacy interests. Therefore, the order that the defendant undergo HIV testing is affirmed, with the requirement that the victim be barred from disclosing any results of the testing except to her medical provider or counselor. Reiber, with Burgess, dissenting: The majority's analysis of legislative intent, relying upon statements made in legislative committee hearings, was unnecessary to resolve the

issue of the constitutionality of the statute. In addition, there is no basis for imposing restrictions upon the victim's further disclosure of the information. Doc. 2010-399, March 23, 2012.
State v. Handy (2010-399) (23-Mar-2012)

NO CRIMINAL COURT JURISDICTION OVER 18 YEAR OLD CHARGED WITH CRIME COMMITTED WHEN UNDER 15

In re D.K., 2012 VT 23.
JURISDICTION: 18 YEAR OLD DEFENDANT WHO COMMITTED CRIME WHILE FOURTEEN OR UNDER.

Full court opinion. Dismissal of charges against defendant affirmed. The defendant was a juvenile between the ages of ten and fourteen years when the alleged crimes were committed. The victims did not come forward until the defendant was eighteen years of age, and beyond the jurisdiction of the family division. Nor was there jurisdiction in the criminal division to adjudicate the matter because at the time the criminal division did not have jurisdiction over defendants charged with committing offenses before they were fourteen. The subsequent amendment of the statute to create such jurisdiction was characterized as a clarification of existing law by the legislation, but the Court was not bound by this characterization, and rejected it, holding that the amendment brought about a change in the law. Dooley concurs, urging the Legislature to review the jurisdictional walls between the components of the superior court (family and criminal) and remove them for cases like this, in order to allow an expeditious route to a just result. Skoglund, with Reiber, dissents, arguing that there was no legislative intent to allow defendants that have committed serious felonies to avoid consequences by the mere fact that they were under 14 years of age when they did so. The case could be brought in the criminal division. In re D.K., Juvenile (2011-076) (23-Mar-2012)

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."

NON-TESTIMONIAL EXCULPATORY EVIDENCE IS NOT MODIFYING EVIDENCE FOR PURPOSES OF FINDING THAT EVIDENCE OF GUILT IS GREAT WHEN DENYING BAIL.

State v. Stolte, three-justice bail appeal.
DENIAL OF BAIL: MEANING OF "MODIFYING EVIDENCE."

Denial of motion for bail review reversed and remanded. The defendant was charged with second degree murder and held without bail under 13 V.S.A. § 7553, which permits the denial of bail where the possible punishment is life imprisonment, and the evidence of guilt is great. The defense filed a motion to review bail based upon evidence discovered since the original bail hearing, DNA test results on a hair found on the victim's body which, he argued, undercut the State's argument that he was the only person who could have committed the murder, and therefore undercut the court's finding that the evidence of guilt was great. The trial court declined to consider this evidence, holding that it was "modifying evidence," which, pursuant to State v. Duff, is not to be considered when determining whether the evidence of guilt is great. "Modifying evidence" is testimonial evidence introduced by the defense in contravention to the state's evidence, the credibility or weight of which is ultimately for the fact finder's determination. Non-testimonial evidence is any evidence which does not derive from and depend on the observation, recollection, reliability or veracity of witnesses, whether in the form of live testimony or a sworn statement, and which therefore does not implicate a credibility determination. Examples are DNA analysis, and photographs or other physical evidence, the provenance of which is not contested. Where the validity of such non-testimonial evidence is undisputed, there is no question of credibility. Where the underlying validity of non-testimonial evidence is disputed, the evidence would properly be considered modifying evidence because it raises a factual question that must be left for the jury at trial. Here, it was error to necessarily equate defendant's new DNA evidence, purportedly undisputed as to its foundation, with disputed, testimonial modifying evidence. The court should first ascertain whether the proffered evidence, if relevant, is undisputed as to its origin and result as a matter of fact. If a genuine dispute as to either arises, then the evidence is modifying evidence. But if no such conflict exists, the court must determine whether, if admissible, the evidence would have made a difference to its initial determination on whether the state's prima face evidence of guilt was great. Doc. 2011-407, December Term, 2011 (February 10, 2012). http://info.libraries.vermont.gov/supct/current/eo2011-407.html

DAUBERT HEARING NOT REQUIRED WHERE DEFENSE OBJECTS TO WEIGHT, AND NOT ADMISSIBLITY, OF EVIDENCE

State v. Abair, three justice entry order. EXPERT TESTIMONY RE EFFECTS OF ALCOHOL: NECESSITY OF DAUBERT HEARING.

DUI affirmed. The trial court did not err in admitting expert testimony regarding the effects of alcohol on the human body without conducting a Daubert hearing and applying the standards set out in that case. Daubert is concerned with the admissibility of scientific evidence, not with its weight. The defendant's objection was to the weight of the testimony, not its admissibility. The foundation for the expert's testimony was established through direct examination, voir dire by defense counsel, and the trial court's own questioning. Doc. 2011-089, March Term, 2012. http://www.vermontjudiciary.org/d-upeo/eo11-089.pdf

COMPETENCY FINDING IN FACE OF COMPETING EXPERT TESTIMONY UPHELD

State v. Williams, three-justice entry order. COMPETENCY: SUFFICIENCY OF THE EVIDENCE.

Lewd and lascivious conduct with a child affirmed. The trial court did not commit clear error when it found the defendant competent to stand trial, despite conflicting reports on this point from psychologists. The court's decision was supported by the evidence – the court found that the psychologist testifying in favor of competency was persuasive and adopted his conclusions. It acted well within its discretion in doing so. Doc. 2011-143, March Term 2012. http://www.vermontjudiciary.org/d-upeo/eo11-143.pdf.

SENTENCE PRECLUDING SUBSTANCE ABUSE TREATMENT FOR SEVERALYEARS WAS PERMISSIBLE

State v. Martin, three-justice entry order. SENTENCING: DISCRETION.

DUI, third or subsequent offense, with habitual offender enhancement, affirmed. The court did not abuse its discretion by imposing a sentence which would result in some years of incarceration during which time the defendant would not be able to undergo substance abuse counseling. The court was aware of this, and determined that the protection of the public overrode that concern, and that, given the defendant's record, incarceration was necessary to protect the public. Doc. 2011-119, March Term 2012. http://www.vermontjudiciary.org/d-upeo/eo11-199.pdf

CHANGE OF PLEA HEARING SUBSTANTIALLY COMPLIED WITH RULE 11

In re Miglorie, three justice entry order. PCR: RULE 11 COMPLIANCE: ESTABLISHMENT OF A FACTUAL BASIS.

Denial of post-conviction relief affirmed (underlying is DUI, DLS, possession of regulated drug, and violation of condition of release). The change-of-plea court's colloquy, in which petitioner acknowledged that there was a factual basis for the charges as set forth in the informations and affidavits, was sufficient to demonstrate substantial compliance with Rule 11(f). Doc. 2011-219, March Term 2012. http://www.vermontjudiciary.org/d-upeo/eo11-219.pdf

United States Supreme Court Cases Of Interest

Thanks to NAAG for these summaries

Howes v. Fields, 10-680. The Court unanimously held that the Sixth Circuit erred when it held that the Court's precedents established a categorical rule that a prisoner is always "in custody" for purposes of *Miranda* any time that prisoner is isolated from the general prison population and questioned about conduct occurring outside the prison. And by a 7-2 vote, the Court held that respondent was not in custody when he was taken to a conference room by prison guards and questioned by law enforcement officers about a crime because he was told at the outset of the interrogation that he was free to go back to his cell at any time, and he was neither physically restrained nor threatened. http://www.supremecourt.gov/opinions/11pdf/10-680.pdf

Lafler v. Cooper, 10-209. By a 5-4 vote, the Court held that a defendant's Sixth Amendment right to effective counsel is violated when his counsel provides deficient advice not to accept a plea offer and he is then convicted after a fair trial and sentenced to a longer term than he would have received under the plea offer. The Court ruled that such a defendant can establish *Strickland* prejudice by showing "that but for the ineffective advice of counsel there is a reasonable probability that the plea offer would have been presented to the court (*i.e*., that the defendant would have accepted the plea and the prosecution would not have withdrawn it in light of intervening circumstances), that the court would have accepted its terms, and that the conviction or sentence, or both, under the offer's terms would have been less severe than the judgment and sentence that in fact were imposed." The Court held that the proper remedy will generally be to require the prosecution to reoffer the plea proposal and for the trial court then to exercise its discretion as to which convictions, if any, to vacate and to resentence the defendant accordingly. (The Court also found that the Michigan state court's decision in the case was not entitled to AEDPA deference because the state court failed even to apply *Strickland* when assessing the defendant's claim.) http://www.supremecourt.gov/opinions/11pdf/10-209.pdf

Missouri v. Frye, 10-444. For similar reasons, the Court held by a 5-4 vote that a defendant's Sixth Amendment right to effective counsel is violated when his counsel's deficient performance results in loss of a plea offer and he later pleads guilty and is sentenced to a longer term than he would have received under the lost plea offer. The Court stated that the central importance of plea bargains to our criminal justice system means that the Sixth Amendment requires counsel to provide adequate assistance during that plea bargain process ─ including, at the very least, communicating to the defendant any formal plea offers from the prosecution. Defendants may show prejudice by "demonstrat[ing] a reasonable probability they would have accepted the earlier plea offer had they been afforded effective assistance of counsel" and "a reasonable probability the plea would have been entered without the prosecution canceling it or the trial court refusing to accept it, if they had the authority to exercise that discretion under state law." (As to remedy, the Court cross-referenced its opinion in Laffler v. Cooper.) http://www.supremecourt.gov/opinions/11pdf/10-444.pdf

Criminal And Appellate Rule Changes

Venue

The Vermont Supreme Court has undone its December, 2011, emergency amendment to the venue rule, because the grounds for an emergency amendment were not present. The rule now reads as follows:

RULE 18. PLACE OF PROSECUTION AND TRIAL

(a) In General. Except as otherwise permitted by statute or by these rules, the prosecution shall be had in the county or territorial unit in which the offense was committed ~~or in a contiguous unit~~. The trial of a proceeding in the district court shall be held in either the circuit in which the proceeding was filed or in any contiguous circuit within the territorial unit.

The emergency changes to Rules 18(b) and (c) remain in effect. The normal process of amendment to Rule 18(a) is in effect, and the Advisory Committee on the Rules of Criminal Procedure is to make a recommendation on the amendment by May 31, 2012.

Cases marked with an asterisk were handled by the AGO.

Vermont Criminal Law Month is published bi-monthly by the Vermont Attorney General's Office, Criminal Justice Division. Computer-searchable databases are available for Vermont Supreme Court slip opinions back to 1985, and for other information contained in this newsletter. For information contact David Tartter at (802) 828-5515 or dtartter@atg.state.vt.us.