Criminal Division
Vermont Attorney General's Office

Vermont Criminal Law Month

February – March 2014

Vermont Supreme Court Slip Opinions: Full Court Rulings

Includes three justice bail appeals

"SHOW THE VICTIM THERE IS JUSTICE" WAS IMPROPER, BUT HARMLESS, CLOSING ARGUMENT.

State v. Reynolds, 2014 VT 16. Full court opinion. SPEEDY TRIAL. PROSECUTORIAL MISCONDUCT.

Sexual assault affirmed. 1) Dismissal of the charge for failure to comply with Administrative Order 5, which does not provide defendants with substantial rights concerning speedy trial, was not required. Furthermore, the 1972 order has proved to set impossibly short deadlines for the pre-trial preparation of serious felony cases, and the matter is referred to the Criminal Rules Committee for possible revision or repeal of the order. 2) The Court declines to adopt a stricter standard for speedy trial under the Vermont Constitution than under the U.S. Constitution "at present." 3) Although the twenty-three months of delay is sufficient to trigger speedy trial review, there was no violation because most of the delay was not attributable to the State or the courts (problems with sign language interpretation and substitution of defense counsel after defendant ran out of money); although the defendant asserted his right to a speedy trial, he appeared to acquiesce in the delays thereafter, and this is not a case in which repeated calls for a trial went unanswered; and the defendant was unable to point to concrete instances of prejudice to his defense from the delay, and was out on bail for the entire period of the delay. 4) The prosecutor's appeal to the jury in closing argument to "show [the complaining witness] that there is justice" was an improper appeal to the jury's sympathies, but harmless in the overall context of the closing – it was a rhetorical flourish, not part of a broader theme. The prosecutor's attempt to explain the fact that the complainant made thirty-seven calls and texts after the alleged incident, by noting that inadvertent dialing happens, and that the prosecutor knows lots of people who have had the experience, was improper as it was not based on testimony, but was not plain error. The prosecutor's argument that the thirty-year disparity in age between the defendant and the complaining witness made it unlikely that she would consent to have sex with him was not unfair or discriminatory. The prosecutor was pointing to circumstantial evidence against the defense of consent, and it was an appropriate argument, since the age difference, the defendant's marital status, and his family connection to the complaining witness through marriage all militated against a consensual romantic relationship. Doc. 2012-239, February 14, 2014. http://info.libraries.vermont.gov/supct/current/op2012-239.html

RULE 11 PROCEEDING FAILED TO ESTABLISH FACTUAL BASIS FOR PLEA; SHOWING OF PREJUDICE NOT REQUIRED.

In re Stocks, 2014 VT 27. RULE 11: FAILURE TO ESTABLISH FACTUAL BASIS FOR PLEA.

Full court opinion. Grant of summary judgment to the State on petitioner for post-conviction relief reversed. The plea colloquy did not substantially comply with the Rule 11 requirement that the court make such inquiry as shall satisfy it that there is a factual basis for the plea. The trial court asked the petitioner if he understood the charges against him, and if he understood the alleged factual basis for the charge, but never asked him if he admitted the truth of the allegations, nor whether the State could prove the underlying facts. The court never asked him to describe the facts giving rise to the charges in his own words, and never sought any other admissions from him to support the conclusion that the guilty pleas had a factual basis. The court did not elicit from the petitioner any information to support the finding of a factual basis. The petitioner was not required to show prejudice from the court's failure to ascertain that there was a factual basis for the plea. Doc. 2012-369, March 21, 2014. http://info.libraries.vermont.gov/supct/current/op2012-369.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."

DEFENDANT NOT ENTITLED TO REDONE PSI INCORPORATING JUDGE'S CHANGES; JUDGE'S HANDWRITTEN NOTES ON PSI SUFFICED

State v. McAllister, 3 justice entry order. PRE-SENTENCE INVESTIGATION REPORT.

Sentencing on burglary, false information to a police officer, and petit larceny, affirmed. The trial court made written notations on the PSI in response to several objections. The defendant was not entitled to redaction and a new, "clean", PSI, despite his claim that the Department of Corrections might rely upon the prior version of the report, not including the court's corrections, in making placement and programming decisions. Doc. 2013-266, February Term, 2014. https://www.vermontjudiciary.org/UPEO2011Present/eo13-266.pdf

PCR PETITIONER'S TESTIMONY AS TO WHAT HIS EX-WIFE WOULD HAVE TESTIFIED TO REJECTED AS NOT CREDIBLE; FINDING OF NO PREJUDICE FROM FAILURE TO CALL HER AT TRIAL AFFIRMED.

In re Nolen, 3 justice entry order. POST-CONVICTION RELIEF: FAILURE TO SHOW PREJUDICE.

Judgment for the state in post-conviction relief proceeding affirmed. The petitioner failed to show prejudice from his counsel's failure to call the petitioner's wife at trial in order to provide exculpatory evidence. The only evidence as to what the (now ex-) wife would have testified to was provided by the petitioner, and the PCR court rejected his testimony as not credible. There is no basis to reverse this credibility determination, and without the petitioner's statement, there was no evidence to support the contention that the testimony of his wife would reasonably likely have produced a different result at trial. Doc. 100-2-11 Wncv. February Term, 2014.
https://www.vermontjudiciary.org/UPEO2011Present/eo13-304.pdf

PHOTO LINEUP WAS NOT UNDULY SUGGESTIVE.

State v. Lowell, 3 justice entry order. PHOTOGRAPHIC LINE-UP: SUGGESTIBILITY.

Petit larceny affirmed. 1) The record supports the trial court's finding that the photographic line-up was not unduly suggestive because the photograph of the defendant showed a closer up view of his head than the other photographs. In addition, the record supports the trial court's finding that the complainant's identification was reliable based upon her seeing the defendant from thirty feet away from thirty seconds to one minute, and again from about five feet for ten to fifteen seconds. 2) The identification was not compromised by the state police having told the complainant that they had arrested a suspect with a lengthy criminal record and that they were confident that they had the right guy, and giving her a physical description, since the description did not include a description of the suspect's face, which was all that was revealed in the photo lineup. The fact that the trooper also left documents in an office with the complainant, from which she could have learned the defendant's name, and thence discovered elsewhere a photograph of him, does not affect the outcome, as the trial court found that the witness credibly testified that she had a good look at the perpetrator on the day of the crime, and based her identification at the photo lineup solely on her observation of him that day. Doc. 2013-298, February Term, 2012.
https://www.vermontjudiciary.org/UPEO2011Present/eo13-298.pdf

ASSAULT BY MUTUAL CONSENT: NOT A LESSER INCLUDED OFFENSE OF SIMPLE ASSAULT

State v. Kunhardt, 3 justice entry order. VINDICTIVE SENTENCING. LESSER INCLUDED OFFENSES.

Simple assault affirmed. 1) There is no evidence that the trial court's sentence was vindictive because the defendant insisted on going to trial – the fact that it exceeded an offer made prior to trial is insufficient to demonstrate vindictiveness. 2) The trial court committed neither plain error nor any kind of error when it failed, sua sponte, to instruct the jury on simple assault by mutual consent. A defendant is entitled to a jury instruction on a lesser-included offense when the evidence reasonably supports the instructions. However, assault by mutual consent contains elements not included in the offense of simple assault, and is therefore not a lesser-included offense. Doc. 2013-233, February Term 2013.
https://www.vermontjudiciary.org/UPEO2011Present/eo13-233.pdf

EVIDENCE OF GUILT BASED ON NOT PARTICULARLY RELIABLE HEARSAY WAS NOT "GREAT" FOR PURPOSES OF DENIAL OF BAIL

State v. Jones, 3 justice entry order. DENIAL OF BAIL: EVIDENCE OF GUILT WAS NOT "GREAT" WHEN BASED SOLELY ON HEARSAY THAT WAS NOT PARTICULARLY RELIABLE.

Ruling denying bail reversed. Defendant was charged with attempted second-degree murder. The "evidence of guilt is great" standard, required for denying bail in cases involving offenses punishable by life imprisonment, was not met here. The State's only evidence as to the identity of the perpetrator was a hearsay statement made by a witness in the hospital an hour after the incident. Even assuming that this statement is admissible as an excited utterance, it is insufficient to sustain a conviction. Standing alone, a hearsay statement, even if admissible, generally will not be sufficient to support a conviction unless the circumstances indicate that the statement is particularly reliable. The statement here does not bear indicia of reliability – it was not corroborated by supporting evidence, and was in fact denied by the declarant while on the stand. The court noted that the State could present additional evidence of the defendant's guilt on remand, which the court could take into evidence in deciding the amount of bail, the conditions of release, and whether to deny bail. Doc. 2014-070, March Term. https://www.vermontjudiciary.org/UPEO2011Present/eo14-070.bail.pdf

United States Supreme Court Case Of Interest

Thanks to NAAG for this summary

Fernandez v. California, 12-7822. In Georgia v. Randolph, 547 U.S. 103 (2006), the Court held that when one occupant of a premises consents to a warrantless search by police, "a physically present co-occupant's stated refusal to permit entry prevails, rendering the warrantless search unreasonable and invalid as to him." By a 7-2 vote, the Court held that the same result does not obtain when an occupant objects to police entry into the premises, is later arrested and removed from the premises, and then a co-occupant consents to the police's entry. The Court concluded that Randolph "went to great lengths to make clear that its holding was limited to situations in which the objecting tenant is present," and that (unlike the situation in Randolph) consensual entry by the police here was not contrary to "widely shared social expectations."

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.