Criminal Division
Vermont Attorney General's Office

Vermont Criminal Law Month

February - March 2015

Vermont Supreme Court Slip Opinions: Full Court Rulings

Includes three justice bail appeals

CURVING ROAD DIDN'T REQUIRE TURN SIGNAL

*State v. Hutchins, 2015 VT 38.
MOTOR VEHICLE STOP: SIGNAL NOT REQUIRED FOR FOLLOWING CURVE IN ROAD.

Full court opinion. Conditional plea of guilty to DUI reversed. The defendant was stopped for failing to signal a turn. Although the defendant turned his steering wheel, he did so to follow the natural course of the road, and therefore did not "turn," and therefore was not required to signal. The road makes a jog at an intersection, but it forms a single curving road that is bisected by another road in the middle of that curve. Doc. 2013-2015, February 6, 2015. http://info.libraries.vermont.gov/supct/current/op2013-210.html

DEFENDANT NEED NOT ADMIT TO JURISDICTION AT RULE 11 PROCEEDING

State v. Fucci, 2015 VT 39.
JURISDICTION: NECESSITY OF ADMISSION AT PLEA.
OBSTRUCTION OF JUSTICE: OVERT ACT REQUIREMENT. CORRUPTLY ENDEAVOR ELEMENT: SUFFICIENCY OF ADMISSION AT PLEA.

Full court opinion. Two counts of endeavoring to procure or hire another person to commit a felony – first-degree murder – and one count of obstruction of justice affirmed. 1) The defendant argued that the trial court's failure to obtain an admission from him at the change of plea concerning where his efforts to hire a hit man took place, meant that the trial court lacked jurisdiction to accept the plea and to convict him. Rule 11 requires that the defendant have each element of the offense explained to him, and that a factual basis be admitted for each element, but the location of the alleged act, while essential to jurisdiction, is not an element of the crime. 2) The defendant argues that the plea is invalid because the factual basis of the plea colloquy failed to establish that he committed the overt act required for a violation of the obstruction-of-justice statute. Regardless of whether the requirement that the defendant "endeavor" to obstruct justice requires the same steps as necessary for

an "attempt," the defendant's admitted acts satisfy either standard. The recital of the facts indicated that the defendant "believed he had reached an agreement" to have his opponent in a civil law suit killed. The defendant could not have "believed" that he had reached an agreement without having "endeavored" to have reached that agreement. 3) The defendant claims that he admitted to no facts establishing the requisite mens rea for the offense, "corruptly endeavor." Whether this term requires merely that the defendant's acts would reasonably and foreseeably have obstructed the due administration of justice, or whether the defendant must have had a corrupt or evil motive, the necessary showing was made here. The defendant admitted that he had knowingly, wrongfully, and unlawfully, sought to have a civil opponent killed. To the extent that "corruptly" adds a requirement of evil motive on top of the specific intent to obstruct the administration of justice, the nature of the defendant's admitted endeavor evinces such a motive. Seeking to have the opposing party in a civil lawsuit killed is obviously a corrupt and evil obstruction of justice. Doc. 2013-39, February 13, 2015. http://info.libraries.vermont.gov/supct/current/op2013-151.html

REASONABLE MISTAKE OF LAW PERMITS MOTOR VEHICLE STOP

State v. Hurley, 2015 VT 46. MOTOR VEHICLE STOP: OBSTRUCTION OF WINDSHIELD; REASONABLE MISTAKE OF LAW.

Full court opinion. DUI affirmed. 1) Hanging an air freshener from the rearview mirror of an automobile does not violate 23 VSA 1125, Obstructing Windshields, despite the language of the statute, which states that "no person shall … hang any object, other than a rear view mirror, in back of the windshield." The title of the statute indicates the intent that drivers have clear and unobstructed views of the road in front of them. Interpreting the statute to prohibit any object hung from any point behind the windshield would be unreasonable, as it would render conduct that is ubiquitous, and does not necessarily jeopardize anyone's safety, an infraction. Such an interpretation would significantly reduce the personal liberty of drivers and passengers on Vermont's highways by subjecting a substantial proportion of them to police stops without any commensurate benefits to public safety. Finally, the rule of lenity favors a constricted interpretation of the statute, to require that the hanging object must materially obstruct the driver's vision in order to run afoul of the law. 2) Although the officer's motor vehicle stop was based on a misapprehension of law, the officer's misapprehension was a reasonable one under the circumstances, and the Fourth Amendment does not require exclusion of the evidence gathered from the traffic stop in this case. Doc. 2014-032, March 6, 2015.

http://info.libraries.vermont.gov/supct/current/op2014-032.html

DOUBLE JEOPARDY BARS CONVICTION FOR BOTH SEXUAL ASSAULT AND SEXUAL ASSAULT OF A VULNERABLE ADULT

State v. Breed, 2015 VT 43. JURY SELECTION AND TRIAL: DELAY. SEXUAL ASSAULT AND SEXUAL ASSAULT OF A VULNERABLE ADULT: DOUBLE JEOPARDY. HEARSAY: EXCITED UTTERANCE.

Full court opinion. Sexual assault conviction vacated on Double Jeopardy grounds; sexual assault of a vulnerable adult affirmed. 1) There was no plain error in the trial court's allowance of a three-week separation period between the jury selection and the trial, without an opportunity for supplemental juror examination and challenges, which the defense acquiesced to below. 2) The defendant's conviction for both sexual assault and sexual assault of a vulnerable adult based upon a single incident violated the Double Jeopardy Clause of the U.S. Constitution. Although sexual assault of a vulnerable adult contains an element that is not required for proof of sexual assault, the reverse is not true. Every element that must be proved for a conviction of sexual assault must also be proved for a conviction of sexual assault of a vulnerable adult. Although the latter can be proven with evidence of sexual activity, not a sexual act, in this case the State charged a sexual act. At the request of both the defense and the State, the Court vacates the sexual assault conviction, and not the sexual assault on a vulnerable adult conviction. The defendant's request for resentencing is denied, as the trial court's comment that the defendant was convicted of two very serious crimes does not indicate that the defendant would have received a lower sentence on the sexual assault on a vulnerable adult conviction had that been the only conviction. 3) The trial court did not abuse its discretion in admitting a hearsay statement by the victim under the excited utterance exception, where the witness testified that the victim was more upset than he had ever seen her, and that she was talking about the incident. This indicates that the victim was upset about the incident, and not merely about talking about the incident. The victim's testimony that she was "still a little nervous" when she spoke to the witness because she was afraid of how he would react does not require a different result. Dooley, dissenting: The fact that sexual assault on a vulnerable adult carries a lesser sentence than sexual assault indicates that the Legislature intended to allow convictions for both offenses arising from a single incident. Doc. 2013-288, March 13, 2015.
http://info.libraries.vermont.gov/supct/current/op2013-288.html

PROBATION REQUIREMENT OF EMPLOYMENT APPROVAL WAS OVERBROAD

State v. Campbell, 2015 VT 50.
PROBATION CONDITIONS: POLYGRAPH EXAMINATION; APPROVAL OF EMPLOYMENT.

Full court opinion. One special sex-offender condition of probation affirmed; the other is remanded to be stricken or revised, following conviction for aggravated sexual assault and sexual assault. 1) The condition that the defendant submit to polygraph examinations is related to the offense for which he was convicted. This type of non-evidentiary use of a polygraph examination will help ensure that the defendant is on track with both his rehabilitation and sex offender therapy, as well as ensure public safety, all of which relate to the goals of probation and compliance investigation. The condition is reasonable in that it is not unnecessarily harsh or excessive in achieving these goals. 2) The probation condition that the probation officer approve in advance the defendant's work is overbroad and unduly restrictive. The defense did not waive this issue for appeal by stating, "Certainly, thank you," after the trial court agreed to add that approval shall not be unreasonably withheld. This was a gesture of courtesy, not an acquiescence. Under the circumstances of this case, a condition restricting where the defendant may work can be seen as reasonably related to the

defendant's rehabilitation and public safety. However, the condition as worded gives the probation officer the authority to control the defendant's place of employment without any guiding standards. A probation condition that authorizes a probation officer to control a probationer's place of employment without any guiding standards contained within the condition itself may be acceptable where the sentencing court makes sufficient findings of fact justifying use of a probation officer's substantial discretionary power to implement the condition. More precise standards within a condition itself, providing implementation guidance to a probation officer, must be included in any situation where the court can anticipate the relevant issues. With a change of employment, as with a change of residence, there is no reason why the sentencing court cannot anticipate the relevant issues and construct a proper condition. The language requiring that approval not be unreasonably withheld does nothing to appropriate guide the probation officer's decision-making process as it relates to the defendant's proposed locations of employment. Dooley, concurring: Criticizes the practice of judges routinely including conditions that have been printed out on a computer-generated form. Doc. 2014-026, March 27, 2015. http://info.libraries.vermont.gov/supct/current/op2014-026.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."

EVIDENCE OF BURGLARY WAS SUFFICIENT

State v. Hughes, 3 justice entry order. BURGLARY AND POSSESSION OF BURGLARY TOOLS: SUFFICIENCY OF THE EVIDENCE.

Unlawful trespass, possession of burglary tools, and burglary, affirmed. 1) The evidence supported the burglary conviction, where the defendant was found bicycling away from an area where a burglary occurred; bicycle tire tracks matching the defendant's tires were observed near the property; the defendant admitted being present at the door when the alarm was triggered, but claimed not to have gone inside; he was found covered in cobwebs, and the stairwell itself was also full of cobwebs; he implied during speaking with the police that he had entered; and he was found to be in possession of tools that could aid in a burglary. 2) The defendant's argument that the evidence was insufficient to prove that he possessed the tools with the intent to commit a burglary rests on the same assumptions as his first argument, and is therefore rejected. 3) There was no plain error in the trial court's failure to instruct the jury that the tools must have been adapted and designed for a burglarious purpose. The fact that the statute criminalizes possession of tools adapted and designed for cutting through buildings, rooms, vault, safes or other depositories does not necessarily mean that

the tools have to be adapted and designed for a burglarious purpose. 4) There was no plain error in submitting to the jury both the unlawful trespass and the burglary charges. Each contains an element that the other does not. Docket 2014-174, February Term, 2015. https://www.vermontjudiciary.org/UPEO2011Present/eo14-174.pdf

APPROACH TO MOTOR VEHICLE WAS CASUAL ENCOUNTER

State v. Mongeon, three-justice entry order. MOTOR VEHICLE STOP AND CASUAL ENCOUNTER.

DUI and civil suspension affirmed. 1) The initial encounter between defendant and the officer was a casual encounter and not a seizure. The officer parked his car next to defendant's vehicle without blocking defendant's exit; the officer casually approached the vehicle and gestured for defendant to roll down his window; although he was in uniform and armed, he did not brandish a weapon or make an outward show of force; he engaged defendant in a nonconfrontational conversation regarding whether defendant had seen someone in distress; he did not question defendant about criminal conduct; although he and his cruiser were nearby, the second officer did not approach defendant; and his cruiser did not block defendant's vehicle. A reasonable person in these circumstances would not have felt compelled to comply or to conclude he was not free to leave. In contrast with State v. Jestice, here, the exit was not blocked by the officer's cruiser, and the officer did not shine his car lights into defendant's vehicle. 2) Although the officer testified that he "instructed" the defendant to roll down his window, the trial court did not err in finding that he "asked" the defendant to do so, where the officer tapped on the window and made a motion with his hand. 3) Some lack of clarity in the testimony concerning the location of the second officer does not affect the finding that there was no seizure. Docs. 2014-204 and 229, February Term, 2015. https://www.vermontjudiciary.org/UPEO2011Present/eo14-204.pdf

MARIJUANA IS STILL A REGULATED DRUG

State v. King, three-justice entry order. PROBATION CONDITION: TIME REQUIREMENT FOR SCREENING. VIOLATION OF PROBATION: EVIDENCE OF LACK OF WILLFULNESS. VIOLATION OF PROBATION: SUFFICIENCY OF EVIDENCE OF POSSESSION OF REGULATED DRUG – MARIJUANA.

Finding of violation of two conditions of probation affirmed (underlying offense is first-degree aggravated domestic assault). 1) Defendant asserts that the probation condition that he have alcohol and/or drug screening did not contain a time requirement, and therefore he was not on notice that he would be violated for failing to complete the assessment by a certain date. However, the language of the condition and concurrent instructions of the defendant's probation officer on three occasions that he have the screening done "as soon as possible" adequately put the defendant on notice. 2) The defendant failed to meet his burden of demonstrating his lack of compliance was not willful, even though he was arrested the day after his probation officer told him that he had to complete the assessment by November 6 or face a sanction. The facts show that the defendant's probation officer specifically informed defendant on three occasions that he had to complete the assessment or face sanction. That the officer gave the

defendant a reprieve until November 6 does not indicate that the defendant was not already out of compliance before that date for failing to have the assessment. 3) The evidence was sufficient to show that the defendant was in possession of a regulated drug. The defendant had at least constructive possession of marijuana where a police officer testified that he saw the defendant leave the trailer in which the trooper found marijuana in the main living area, and defendant's mother testified that defendant was living on the property. The defendant's claim that the trooper's field test of the substance was insufficient to prove that it was marijuana was waived for appeal by failure to raise below. Finally, there is no merit to the defendant's argument that because the Legislature decriminalized possession of small amounts of marijuana, the State did not meet its burden of showing that the substance was a regulated drug. The penalty that results for possession of differing amounts of marijuana is separate from the question of whether marijuana is a regulated drug. The State was not required to prove that the defendant's possession was criminal, merely that the substance he possessed was a regulated drug. Vermont law clearly identifies marijuana as a regulated drug. Doc. 2014-331, February Term, 2015.
https://www.vermontjudiciary.org/UPEO2011Present/eo14-331.pdf

SHOOTING ACROSS ROADWAY WITH CAR APPROACHING WAS RECKLESS ENDANGERMENT

State v. Hayes, 3 justice entry order. RECKLESS ENDANGERMENT: SUFFICIENCY OF EVIDENCE. DENIAL OF TRIAL CONTINUANCE: DISCRETION OF TRIAL COURT.

Reckless endangerment and taking game by shooting from a motor vehicle, affirmed. 1) The evidence of reckless endangerment was sufficient where he fired a rifle from inside his vehicle across a roadway while another driver was slowly approaching from the opposite direction, was yards away, and was about to cross the line of fire. 2) The court did not abuse its discretion when it denied a motion to continue because of an unavailable witness. The witness was well known to the defendant, and the defense had known for some time of the scheduled jury draw, and therefore could have ensured that the witness was available, or otherwise acted before the day before a long-delayed trial. In any event, the probative value of the witness's proffered testimony was diminished by the fact that it was cumulative of the defendant's, and the witness was close to the defendant. Doc. 2013-471, March Term, 2015.
https://www.vermontjudiciary.org/UPEO2011Present/eo13-471.pdf

EXCLUSION OF CHILD'S HEARSAY STATEMENTS AS INSUFFICIENTLY RELIABLE WAS NOT ABUSE OF DISCRETION

State v. Tatro, 3 justice entry order. HEARSAY: VICTIM OF CHILD ABUSE EXCEPTION.

Exclusion of hearsay statements offered under the exception for statements by a victim of child sexual abuse, affirmed. The trial court's conclusion that the time, content, and circumstances of the statements did not provide substantial indicia of trustworthiness, was not an abuse of discretion. The court determined that the inconsistencies in the child's statements, his "unclear commitment to telling the truth," his

repeatedly making up stories, the fact that it was his mother who first brought up the subject of possible abuse, and the absence of corroborating medical evidence, required that the statements be excluded. The court's findings are supported by evidence in the record, and while the State disagrees with the conclusion reached by the court, it has not demonstrated that the court abused its discretion as a matter of law requiring reversal. Doc. 2014-105, March Term, 2015.
https://www.vermontjudiciary.org/UPEO2011Present/eo14-105.pdf

EXCLUSION AT SENTENCING OF REPORT CONCERNING DEFENDANT'S ELIGIBILITY FOR PROGRAM NOT AN ABUSE OF DISCRETION

State v. Haskins, three-justice entry order. SENTENCING: EXCLUSION OF DEFENSE EVIDENCE.

Sentence following guilty pleas to domestic assault, unlawful mischief, and several counts of violating conditions of release and violating an abuse prevention order affirmed. The trial court did not abuse its discretion when it declined to admit a report concerning the defendant's having been screened for a VA program, where the report was almost seven months old, had not been offered in advance of the hearing, and was not supported by any live witness who could be available for cross-examination. In any event, the report was unlikely to have made any difference in the sentencing, given the trial court's conclusion that the defendant was an inappropriate candidate for probation and supervision, in light of the violence of his actions and his warped perspective on his conduct and responsibility even after months of incarceration and sobriety. Doc. 14-154, March Term, 2015.
https://www.vermontjudiciary.org/UPEO2011Present/eo14-154.pdf

EVIDENCE SUPPORTED ASSAULT CONVICTION

State v. Epps, three-justice entry order. DOMESTIC ASSAULT AND DISORDERLY CONDUCT: SUFFICIENCY OF THE EVIDENCE.

Domestic assault and disorderly conduct convictions affirmed. The evidence was sufficient to support the conviction where a witness saw a man swinging his arm and a woman who sounded scared; the first officer who arrived saw defendant straddling and striking the victim, heard the physical sounds of impact from the punches, and heard the defendant saying to the victim, "how do you like that, bitch?" Another eyewitness saw defendant picking up the victim, punch her in the back of the neck, and kick her. Based on this evidence, a reasonable jury could find that defendant attempted to cause bodily injury to the victim.
https://www.vermontjudiciary.org/UPEO2011Present/eo14-179.pdf

MOTION TO MODIFY SENTENCE WAS TIMELY

State v. Snow, three-justice entry order. MOTION TO MODIFY SENTENCE: TIMELINESS.

Denial of motion to reduce or modify sentence for sexual assault remanded. The defendant filed a motion to modify sentence two weeks after his conviction was affirmed on appeal. The State argued that the filing was premature because the mandate had

not yet issued, because the 21 days after the decision was issued had not yet expired. Even assuming that the motion was filed prematurely, the defendant's subsequent filings were timely and sufficient to preserve the motion. The defendant wrote a letter on May 24, 2013 requesting that the court hear the merits of his motion. This request was timely filed under either construction of V.R.Cr.P. 35 because it was within 90 days of both the date the mandate executed and the date of this Court's decision. Therefore he is entitled to a review of his motion on the merits. Doc. 2014-358, March Term, 2015.
https://www.vermontjudiciary.org/UPEO2011Present/eo14-358.pdf

Vermont Supreme Court Slip Opinions: Single Justice Rulings

DENIAL OF BAIL JUSTIFIED BY VIOLENCE OF CHARGED ACT

State v. Weaver, 2015 VT 35. Single justice bail appeal. BAIL: DENIAL OF BAIL.

Order that defendant be denied bail is affirmed. The defendant was charged with aggravated domestic assault and unlawful restraint, after he allegedly threatened his girlfriend with hot oil. The court found a substantial threat of physical violence based upon the defendant's prior threats against the complaint; his prior convictions for serious felony offenses, which he bragged of; the defendant's volatile and dangerous actions of intimidation and violence as described by the complainant; the complainant's fear of the defendant; and the defendant's awareness that the complainant has testified against him. The defendant's proposal that he be released into the custody of his fiancé would not reasonably prevent the physical violence, as she works full time, and has not shown that she will be able to obtain a twelve week family medical leave, nor what would happen after that leave expired. In addition, the defendant's loss of control in the face of a stray phone call, his brandishing of a knife and his threats to scar the complainant with hot oil are the acts of a volatile and dangerous person. Doc. 2015-008, January 23, 2015. Devine, J. specially assigned.
http://info.libraries.vermont.gov/supct/current/eo2015-008.html

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 david.tartter@state.vt.us.