Criminal Division
Vermont Attorney General's Office

Vermont Criminal Law Month

February - March 2016

Vermont Supreme Court Slip Opinions: Full Court Rulings

Includes three-justice bail appeals

SEXUALLY TOUCHING A CHILD CONSTITUTES VIOLENT BEHAVIOR FOR PROBATION CONDITION

State v. Bryan, 2016 VT 16.
CONDITIONS OF PROBATION: NOTICE; TOUCHING CHILD AS VIOLENT BEHAVIOR. APPOINTMENT OF SUBSTITUTE COUNSEL.

Full court published opinion. Denial of motion to withdraw counsel and order finding a violation of probation affirmed. 1) The condition of probation prohibiting "violent or threatening behavior" was sufficient to put the defendant on notice that sexual touching of a child would constitute a violation. The term violence includes situations in which a person oppressively, unjustly, and corruptly exploits his power imbalance to target a child in a manner that violates, injures, or forcibly interferes with the personal freedom of the child. 2) The trial court did not abuse its discretion when it declined to appoint substitute counsel. There was little evidence that the mutual confidence between the defendant and his attorney had been destroyed, and since the motion was filed on the day of the hearing, the court was justified in considering the potential for delay. Dooley, J., dissenting: The main elements of the definition of violence concern physical force. The use of minor alternative definitions generally violates the fair notice standard, and in this case their use creates a serious overbreadth problem. Doc. 2014-362, February 12, 2016.
https://www.vermontjudiciary.org/LC/Supreme%20Court%20Published%20Decisions/op14-362.pdf

STOP EXTENDED BEYOND DEALING WITH WINDSHIELD OBSTRUCTION WAS NOT SUPPORTED BY REASONABLE SUSPICION

State v. Alexander, 2016 VT 19.
TRAFFIC STOP: NO REASONABLE SUSPICION TO PROLONG VALID TRAFFIC STOP.
Full court published opinion. Trafficking in heroin reversed due to error in denial of motion to suppress evidence obtained as a result of an unlawful seizure that was not supported by reasonable suspicion. 1) The traffic stop was lawful based upon a windshield obstructed by a GPS device. The stop was expanded beyond the scope of the initial traffic stop when the officer asked the driver to get out of the vehicle and speak with the officer privately. By that

time the officer had performed the routine records checks relating to traffic safety and had apparently abandoned or at least indefinitely suspended any intention of ticketing the driver. The fact that the driver was not the target of suspicion makes no difference, because the passenger was subject to the stop as much as the driver. At this point, additional reasonable suspicion was required to support the extended seizure. 2) The extended stop was based on several factors. The first two, that the defendant was looking for a Chinese restaurant on Main Street which he thought was called the Chinese Buffet, and that the Lucky Dragon Chinese restaurant on Main Street is a known drug hotspot, had virtually no probative value. Travel to an area of known criminal activity does not provide reasonable suspicion of criminal wrongdoing. The next two factors, that heroin and crack cocaine dealers from out of state were using cabs and buses to travel to Bennington to distribute drugs, and that the defendant lived in Brooklyn and was in a cab coming to Bennington from Albany, added little to the analysis, as they rely on conduct engaged in by a very large category of presumably innocent travelers. The last three factors, that the police had information that an unidentified large African-American with the nickname "Sizzle" traveled to Bennington by taxi or by public transportation in the company of a woman named Danielle for the purpose of selling drugs; that the defendant is a large, African-American male who was traveling to Bennington by himself in a taxicab; and that the defendant was arrested in 2010 in Dover, Vermont and has an alias of "Snacks," were insufficient to create a reasonable suspicion. The defendant differed from the individual described in the tip in that he was traveling alone, and had a different nickname. There was no other identifying information concerning Sizzle, such as height, hair length and style, facial hair, etc. Nor was there any particularized information suggesting that Sizzle was traveling to Bennington by taxi on that particular day. The Court noted that even if the police could have reasonably inferred that the defendant was Sizzle on the basis of a more detailed and specific description, in the absence of a reasonable and objective basis to suspect that he was then in possession of illegal drugs or engaged in any other criminal activity sufficient to justify an investigation detention, the police would not have been justified in detaining him. 3) Because the extended seizure of the defendant was unconstitutional, his consent to search his bag was invalid. No intervening events attenuated the taint of the illegality of the extended seizure. Doc. 2014-347, February 12, 2016. https://www.vermontjudiciary.org/LC/Supreme%20Court%20Published%20Decisions/op14-347.pdf

DEFENDANT MAY NOT ARGUE FOR DOWNWARD DEPARTURE FROM BINDING PLEA AGREEMENT

State v. Careau, 2016 VT 18. CONDITION OF PROBATION: FULL PO AUTHORITY OVER RESIDENCE AND EMPLOYMENT. BINDING PLEA AGREEMENT: DEFENSE RIGHT TO ARGUE FOR LOWER SENTENCE.

Full court published opinion. Sentence in sexual assault of a minor case affirmed; probation condition giving probation officer unbridled authority over where the defendant lives and works, is reversed and remanded for justification, or to be made more specific, or to be stricken. 1) The probation condition requiring the probation officer's approval of his residence and employment was imposed without any separate findings or any explanation suggesting that such a condition was

reasonably related to the offender's rehabilitation or necessary to reduce risks to public safety. This was plain error, as the issue was already determined in State v. Freeman, 193 Vt. 454 (2013). 2) Where the defendant entered into a binding plea agreement, he was not entitled to argue at sentencing for a downward departure. Although the trial court had discretion under Rule 11 to impose a less onerous disposition, both the State and the defendant were bound by the plea agreement, including the agreed-upon sentence. The defendant's right to allocution did not extend to contravening the plea agreement. Doc. 2015-001, February 12, 2016. https://www.vermontjudiciary.org/LC/Supreme%20Court%20Published%20Decisions/op15-001.pdf

PROSECUTOR'S IMPROPER CLOSING ARGUMENT WAS HARMLESS ERROR

State v. Atherton, 2016 VT 25. VOIR DIRE: INDIVIDUAL INQUIRY OF JURORS WHO INDICATED DOUBTS ABOUT IMPARTIALITY ON QUESTIONNAIRE. IMPEACHMENT WITH PRIOR CONVICTION: HARMLESS ERROR. CLOSING ARGUMENT: IMPROPER APPEAL TO SYMPATHY, HARMLESS ERROR.

Full court published opinion. Sexual assault conviction affirmed. 1) The juror questionnaire asked if the jurors had ever known anyone who was a victim of a sexual crime, and if so whether it would affect their ability to be fair and impartial. Two jurors answered "yes" to these questions. However, during the voir dire neither responded when defense counsel asked if there was anyone who, because of knowing someone who had been a victim, would find it difficult to be impartial. It was not error to permit the two jurors to sit. By the time this question was asked, the jurors had sat through much of the voir dire process, in which the presumption of innocence and the State's burden to prove guilt beyond a reasonable doubt were discussed. It is not surprising therefore that a juror's initial written response on a questionnaire may change in the voir dire proceeding. 2) The defendant was barred from using a 2008 conviction of one of the witnesses for providing false information to a police officer. The court found that the probative value was outweighed by the prejudicial effect. This ruling was based on a markedly inadequate record of the factors the trial court considers in making such decisions, contrary to the explicit requirements of V.R.E. 609. Nonetheless, the ruling was harmless error. Unlike two other witnesses, this witness did not see the offense, and other than that, her testimony was essentially the same as the other two witnesses. 3) The prosecutor's closing remarks were improper because they were a patently improper effort to play upon the jurors' natural sympathy for the victim. However, the remarks were not objected to, and did not result in a fundamental miscarriage of justice. The prosecutor's later statement that neither of the two main witnesses had a motive to lie, and questioning whether the same could be said of the defendant, were not of such character that the jury would naturally and necessarily take them to be a comment on the failure of the accused to testify, but rather on the defendant's statements to the police. Nor do the comments suggest a personal view of the prosecutor that the defendant is a liar. Doc. 2014-273, February 26, 2016. https://www.vermontjudiciary.org/LC/Supreme%20Court%20Published%20Decisions/op14-273.pdf

SEALING OF PRIOR DUIs DID NOT ENTITLE DEFENDANT TO RETROACTIVE AMENDMENT OF LATER ENHANCED DUI CONVICTION

State v. Rosenfield, 2016 VT 27. SEALING OF DUI CONVICTION: DID NOT REQUIRE RETROACTIVE AMENDMENT OF LATER ENHANCED DUI CONVICTION.

Full court published opinion. Denial of motion to "correct the record" by amending DUI-3 to appear as a DUI-1 affirmed. The defendant successfully sought to have his first two DUIs sealed pursuant to 33 V.S.A. 5119(g), even though he was already aged twenty-one at the time of the second DUI. He then sought to modify the sentence for the third DUI, arguing that because the first two DUIs had been sealed, the third was no longer a DUI-3. The motion was denied on the grounds that at the time of sentencing, his record indicated two prior DUI convictions. 1) The DUI-3 cannot be amended through V.R.Cr.P. 35 because it was correct when entered and, as a conviction, not a sentence, is not subject to Rule 35. 2) The correction of record provision of Rule 36 does not apply because the authorization in that rule is limited to clerical mistakes. 3) Section 5119(g) does not provide authority to retroactively amend convictions that had been enhanced by earlier sentences that were later sealed. 4) 13 V.S.A. 7607, which details the effect of sealing, does not empower the court to amend the convictions. The statute's application is limited to the sealed offense, not to subsequent convictions that have been enhanced due to the sealed offense. Eaton, concurring: The Court should have directed the criminal division to examine whether an error was made in the sealing of the second DUI conviction, and correct any error. Dooley, dissenting: It is clear that if the defendant had obtained the sealing prior to conviction for DUI-3, that he could not have been convicted of DUI-3. There is no reason to deny relief simply because the defendant had his convictions sealed later rather than sooner. The writ of coram nobis would be the appropriate method of obtaining relief in this case. Doc. 2015-080, February 26, 2016. https://www.vermontjudiciary.org/LC/Supreme%20Court%20Published%20Decisions/op15-080.pdf

RULE 11 WARNING RE IMMIGRATION CONSEQUENCES DID NOT HAVE TO USE THE WORD "DEPORTATION."

State v. Mendez, 2016 VT 24. Full court published opinion. RULE 11 WARNING RE IMMIGRATION CONSEQUENCES DID NOT NEED TO USE THE WORD "DEPORTATION."

Denial of motion to withdraw guilty plea in two domestic assault cases affirmed. The defendant, a citizen of the Dominican Republic, argues that the trial court, in the Rule 11 proceeding, should have used either the term "deportation," or some clearly equivalent language, rather than "affect your ability to remain in the country." Rule 11 does not contain language that must be used verbatim. The trial court here first determined that the defendant understood the written plea agreements, which explicitly stated that pleading guilty "may have the consequence of deportation." The court asked the defendant whether he

had read and understood the written plea agreements, whether he had discussed them with his attorney, and whether he was satisfied with his attorney's advice. The defendant replied affirmatively to all three questions. The court then orally advised the defendant of the risk of deportation by rephrasing the language found in the written plea agreements. The court then asked the defendant whether he understood, and the defendant responded affirmatively. The language used by the court was within its discretion. The phrase "ability to remain in the country" is not vague, and in context is synonymous with "deportation." Dooley and Robinson, concurring: Concur in the decision because the words are synonymous, but would not use the "substantial compliance" standard. Doc. 2015-125, February 26, 2016. https://www.vermontjudiciary.org/LC/Supreme%20Court%20Published%20Decisions/op15-125.pdf

REFUSAL TO PERFORM FIELD SOBRIETY TESTS ADMISSIBLE AGAINST DUI DEFENDANT EVEN WITHOUT WARNING THAT REFUSAL COULD BE USED IN COURT

State v. Farrow, 2016 VT 30. Full court opinion. EVIDENCE OF REFUSAL TO PERFORM FIELD SOBRIETY TESTS: WARNING OF ADMISSIBILITY OF REFUSAL NOT REQUIRED.

DUI affirmed. A defendant's refusal or failure to perform voluntary field sobriety exercises is admissible without regard to whether police advised the individual that a refusal to perform the exercises could be admitted as evidence in court. 1) The trial court's finding that the evidence was relevant was not an abuse of discretion. The evidence may have some probative value in showing consciousness of guilt. The fact that the defendant may have some other explanation does not mean that the evidence does not have some tendency to show consciousness of guilt. The court's instruction that the jury need not draw any inference from the refusal mitigated any possible prejudice. 2) As per established law, the request that the defendant conduct field sobriety exercises when supported by reasonable suspicion was reasonable under the Fourth Amendment, and no warrant was required. 3) The defendant's argument that the Vermont Constitution's Article 10 provision that no person may be compelled to give evidence against him or herself provides broader protection than the Fifth Amendment, has been repeatedly rejected, and in any event would have little application to the argument that field sobriety exercises must be preceded by a warning that a refusal can be used in court. Doc. 2014-427, March 11, 2016. https://www.vermontjudiciary.org/LC/Supreme%20Court%20Published%20Decisions/op14-427.pdf

REVOCATION OF BAIL WAS NOT SUPPORTED BY TRIAL COURT'S FINDINGS

State v. Gates, 2016 VT 36. Full court opinion. REVOCATION OF BAIL.

Revocation of bail reversed. 1) The trial court's finding that a 13 VSA 7575(1) (intimidating or harassing in violation of a condition of release) did not justify revocation of bail where the defendant

contacted his mother in violation of a condition of release, but where she did not testify that she had been intimidated. The court referenced allegations of other violations of contact with his mother, but did not rely upon those allegations in making its findings. 2) The trial court was not justified in revoking bail pursuant to 13 VSA 7575(2), repeated violations of conditions of release, because the court made no finding, as was required to revoke bail on this ground, that the violations disrupted the prosecution of the underlying crime. 3) The trial court was not justified in revoking bail pursuant to 13 VSA 7575(3), violations of conditions which constitute a threat to the integrity of the judicial system, because this violation was supported only by a finding of probable cause, and not by preponderance of the evidence. Furthermore, the State did not present, as required, any live testimony in support of the allegation. 4) The trial court was not justified in revoking bail pursuant to 13 VSA 7575(5) (charged with a felony or an offense like the underlying charge), because revocation of bail on this ground requires a finding that the violation disrupted the prosecution of the underlying crime. Doc. 2016-053, March 16, 2016. https://www.vermontjudiciary.org/LC/Supreme%20Court%20Published%20Decisions/op16-053.pdf

A VARIETY OF PROBATION CONDITIONS AFFIRMED

State v. Gauthier, 2016 VT 37. CONDITIONS OF PROBATION: ADEQUATE NOTICE; AMBIGUITY.

Full court opinion. Violation of probation affirmed. 1) On appeal, the defendant claims that he was not adequately notified of the special sex offender conditions because the list of conditions had a box next to each one, but none of the boxes were checked. There was no plain error. The defendant clearly understood he was bound by these conditions, because he later moved to modify some of them. 2) The court imposed two alcohol conditions, one that he not drink alcohol to the extent it interferes with his employment or the welfare of his family, and the second that he not purchase, possess, or consume alcohol. The defendant was found to have violated the second one, but he argues that because the two conditions are contradictory and therefore ambiguous, he should only be bound by the less restrictive condition. These two conditions are not contradictory or ambiguous. The terms are not in conflict – the defendant can meet the terms of both requirements simply by abiding by the stricter condition. Even if there were some ambiguity or inconsistency, the defendant has not shown plain error, and he did not raise this claim below. The defendant was aware at all times of both conditions, and never indicated that he was confused or mislead about their requirements. 3) The defendant was found in violation of a condition that he not access or loiter in places where children congregate, by attending the Tunbridge World's Fair. The defendant argues that the conditions provides an exclusive list of places that he cannot attend, and the list does not include fairs. The list is preceded by "i.e.", and not by "e.g.," so he argues that the list are not simply examples. When read in its entirety, it is clear that the list is not meant to be exclusive, but to be illustrative. The list has "etc." at the end of it, indicating that there are other places that could satisfy the operative language. Nor is the language overly vague. The term "congregate" is not vague. 4) The condition does not impermissibly delegate authority to his probation officer, because the condition itself provides the defendant with sufficient notice that he was precluded from attending the fair. Robinson, J., with Skoglund, J. dissent re the alcohol-related conditions. The two conditions send inconsistent

messages about what is permitted, and therefore the rule of lenity should control. However, there was no plain error. Doc. 2014-142, March 25, 2016.

https://www.vermontjudiciary.org/LC/Supreme%20Court%20Published%20Decisions/op14-142.pdf

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."

MOTOR VEHICLE STOP WAS VALID DESPITE NO ACTUAL OFFENSE

State v. Surdam, three-justice entry order. MOTOR VEHICLE STOP: ONLY SUSPICION OF AN OFFENSE, NOT AN ACTUAL OFFENSE, IS REQUIRED.

Criminal refusal and civil suspension affirmed. The defendant's motor vehicle was stopped after an officer observed the vehicle coming towards him and appearing to cross the center line, causing the officer to swerve to the right to avoid a collision. The video subsequently indicated that although the vehicle touched the first yellow line, it did not cross the second yellow line. Nonetheless, the stop was valid based upon a suspicion that the defendant had violated the statute requiring vehicles to be driven, "as nearly as practicable, entirely within a single lane." Although the unchallenged facts establish that no such traffic violation occurred, the question is not whether the defendant actually committed a traffic violation, but whether the officer had a reasonable basis to suspect that he had. Where the defendant's vehicle had moved out of his lane of traffic toward the center line enough so that it caused the officer to reflexively swerve to avoid a collision, the officer had a reasonable suspicion of a traffic violation. Nor does this ruling violate Article 11 by allowing a stop based on an officer's erroneous and subjective belief; it was based upon an objectively reasonable basis to believe that a traffic violation had occurred. Docs. 2015-180 and 231, February Term, 2016.
https://www.vermontjudiciary.org/UPEO2011Present/eo15-180,15-231.pdf

AVAILABILITY OF PCR FILING PRECLUDED CORUM NOBIS WRIT CHALLENGING DENIAL OF NEW TRIAL BASED ON NEWLY DISCOVERED EVIDENCE

State v. Russell, three-justice entry order. WRIT OF CORAM NOBIS: NOT AVAILABLE.

Denial of new trial based on newly discovered evidence in aggravated assault matter affirmed. The trial court denied the motion on the grounds that it had been filed past the two-year limit for such motions. The defendant argued on appeal that the trial court erred by not reaching the merits of his claim pursuant to the doctrine of coram nobis. This issue does not appear to have been raised below, and no plain error argument is made on appeal. In any event, there is no error at all. The doctrine is only

available when no other remedy is available, including a PCR petition. The defendant filed a PCR petition based on identical grounds, and therefore the use of coram nobis here is precluded. Doc. 2014-425, February Term 2016.
https://www.vermontjudiciary.org/UPEO2011Present/eo14-425.pdf

PCR PROPERLY DENIED WHERE TRIAL COURT FOUND DEFENSE STRATEGY REASONABLE

State v. Gergov, three-justice entry order. PCR: REASONABLE DEFENSE STRATEGY.

Denial of petition for post-conviction relief affirmed. The trial court considered the petitioner's evidence and found it unpersuasive, and considered and rejected the petitioner's arguments. The trial court explained why the defense attorney's strategy was reasonable under the circumstances, and there is no basis to disturb this judgment. The trial court's order was attached to the decision. Doc. 2015-016, February Term, 2016.
https://www.vermontjudiciary.org/UPEO2011Present/eo15-016.pdf

DENIAL OF MOTION FOR SPEEDY TRIAL WAS CORRECT

State v. Stone, three-justice entry order. SPEEDY TRIAL.

Denial of motion to dismiss convictions for disorderly conduct and resisting arrest affirmed. The trial court's finding that there was no denial of the right to a speedy trial was correct. Doc. 2015-153, February Term, 2016.
https://www.vermontjudiciary.org/UPEO2011Present/eo15-153.pdf

EVIDENCE WAS SUFFICIENT TO FIND DEFENDANT CAME WITHIN 300 FEET OF COMPLAINANT'S HOME IN VIOLATION OF RFA ORDER

State v. Mckinstry, three-justice entry order. VIOLATION OF RFA ORDER: SUFFICIENCY OF THE EVIDENCE.

Conviction for violating a relief-from-abuse order affirmed. The evidence was sufficient to support the verdict where the jury could reasonably infer from the evidence that the defendant had been within 300 feet of the complainant's home, in violation of the order, even though it was not conclusively established that all points in the parking lot he had entered were within 300 feet of the home. It was also reasonable for the jury to infer that the defendant had asked a friend to speak with the complainant, given the circumstances, even though there was no direct evidence of this fact. Doc. 2015-177, February Term 2016.
https://www.vermontjudiciary.org/UPEO2011Present/eo15-177.pdf

DEFENDANT WHO TWICE SPOKE WITH PUBLIC DEFENDER HAD A MEANINGFUL OPPORTUNITY TO CONSULT WITH COUNSEL

State v. Lanzetta, three-justice entry order. DUI: MEANINGFUL OPPORTUNITY TO CONSULT WITH COUNSEL.

Denial of motion to suppress in DUI case affirmed. The defendant was afforded a

meaningful opportunity to consult with a lawyer where he twice spoke with the public defender, then asked to speak to his own lawyer and gave his wife's telephone number, which the officer declined to call. Even assuming that the officer did not then again offer to call a lawyer, the defendant was given a meaningful opportunity to consult with counsel. Nor was the officer required to call the public defender a third time after the defendant asked to speak to "my lawyer." At that point the defendant unequivocally refused the breath test, and the officer was not required to wait until the thirty-minute period expired. Docs. 2015-188 and 336, February Term 2016. https://www.vermontjudiciary.org/UPEO2011Present/eo15-188,15-336.pdf

"OPERATION" OF A VEHICLE INCLUDES ATTEMPTING TO OPERATE A VEHICLE

State v. Fuller, three-justice entry order. DUI: SUFFICIENCY OF EVIDENCE OF ATTEMPT TO OPERATE.

DUI affirmed. 1) The defendant argued that she was convicted of being in actual physical control of a vehicle, when she was charged with operation of a vehicle. In fact, the trial court found her guilty of attempting to operating, and "operation" includes an attempt to operate. 23 V.S.A. 4(24). 2) There was sufficient evidence for the trial court to find that the defendant attempted to operate the vehicle on a public highway, where the vehicle was found eight inches from a traveled portion of a road of general circulation, and she was attempting to engage the engine and move the vehicle. Doc. 2015-335, February Term 2016. https://www.vermontjudiciary.org/UPEO2011Present/eo15-335.pdf

EVIDENCE SUPPORTED FINDING OF INTENT TO INFLICT SERIOUS BODILY INJURY

State v. Sheldon, three-justice entry order. SUFFICIENCY OF THE EVIDENCE: INTENT TO COMMIT SERIOUS BODILY INJURY.

Aggravated domestic assault affirmed. The evidence was sufficient to support a finding that the defendant acted with the intent to inflict serious bodily injury on the victim where she testified that he choked her, saying that he wished that she would die, and banged her head on the floor. March, 2016 term. https://www.vermontjudiciary.org/UPEO2011Present/eo15-117.pdf

Vermont Supreme Court Slip Opinions: Single Justice Rulings

NO BAIL ORDER REVERSED DUE TO INSUFFICIENT EVIDENCE THAT NO CONDITIONS OF RELEASE WOULD PREVENT FUTURE VIOLENCE TO VICTIM

State v. Lontine, 2015 VT 26. NO BAIL ORDER: INSUFFICIENT EVIDENCE THAT NO CONDITIONS WILL PREVENT FUTURE VIOLENCE. Single justice bail appeal. Order holding defendant without bail reversed and

remanded for release of defendant under conditions. The defendant is charged with, inter alia, three counts of first-degree aggravated domestic assault. 1) The defendant was not entitled to bail pursuant to Section 7553b(b), which requires bail is the trial is not commenced within 60 days, and the delay is not attributable to the defendant, because the operative date for beginning the 60 day period is the decision to hold without bail, not the date of the arraignment, and because subsequent delays were attributable to the defendant. 2) The State did not meet its burden of demonstrating by clear and convincing evidence that there are no conditions of release that will prevent future violence to the victim. The defendant 's past does not indicate an inability to abide by court-imposed conditions, and at one point, in 2008, the defendant was able to improve his disposition and treatment of the victim for some period of time. The defendant does not present a risk of flight for which monetary bail needs to be set. The conditions of release which should be imposed shall include that the defendant not engage in violent or threatening behavior; shall be placed in the custody of an appropriate person; shall not be in the vicinity of the victim's residence; shall have no contact with the victim, direct or indirect, or within 300 feet of her, her residence, or her motor vehicle. He is also bound by a curfew, and is required to engage in substance abuse screening and treatment. His parents are not approved as custodians, since they have, to a large extent, enabled or at the least not acted to control his behavior, and he is able to bully his mother. Docs. 2016-025 and 033, February 18, 2016.
https://www.vermontjudiciary.org/LC/Supreme%20Court%20Published%20Decisions/eo16-025.bail.pdf

TRIAL COURT ERRED IN FINDING THAT EVIDENCE OF GUILT WAS NOT GREAT IN SEXUAL ASSAULT ON MINOR CASE

State v. Bergquist, single justice bail appeal. BAIL: SUFFICIENCY OF EVIDENCE THAT GUILT IS GREAT.

The defendant is charged with two counts of aggravated sexual assault on a minor, a crime that carries a potential life sentence. The State sought to have the defendant held without bail. Following an evidentiary hearing the court declined to do so, holding that the evidence of guilty was not great, as required by 13 VSA 3253(a)(8), where the only evidence was a video recording of the seven-year-old's interview with a detective. 1) The State was entitled to rely upon the child's recorded statement. 2) The statement was properly admitted as a sworn statement pursuant to V.R.E. 603, and the State did not need to meet the requirements of V.R.E. 804a. The interview contained statements that sufficiently approximate an oath. Further, the child was presumed competent to testify, and therefore no specific finding was required. 2) The trial court erred when it declined to find that the evidence of guilt is great on the grounds that the statement was "an uncorroborated statement by a child." The standard is whether the evidence, taken in the light most favorable to the State, without consideration of modifying evidence, sufficient to support a finding of guilt. By discounting the testimony based upon the child's age and lack of corroborating evidence, the court went beyond the appropriate analysis. 3) The matter is remanded for the court to consider whether, in its discretion, the defendant should be admitted to bail, in light of the evidence of guilt being great. Eaton, J. Doc. 2016-022, March 2, 2016.
https://www.vermontjudiciary.org/UPEO2011Present/eo16-022.bail.pdf

RECORD DID NOT SUPPORT DENIAL OF BAIL PENDING VOP HEARING

State v. Kane, single-justice bail appeal. DENIAL OF BAIL PENDING VIOLATION OF PROBATION HEARING.

Order holding defendant without bail pending merits hearing on probation violation reversed. The defendant was not entitled to bail pending the VOP merits hearing, as the underlying offense was unlawful restraint in the second degree. The trial court's decision denying release is reviewable for an abuse of discretion. Here, the transcript demonstrates that the defendant had no meaningful opportunity to speak at the preliminary hearing, as to either the evidence supporting probable cause or whether she should be held pending the final hearing. In addition, the court made scant findings concerning its consideration of the factors pertinent to the decision, as set out in 13 V.S.A. 7554(b). The record does not show that adequate consideration to those factors was given here. The matter is therefore remanded for a further hearing. March, 2016 term. https://www.vermontjudiciary.org/UPEO2011Present/eo16-050.bail.pdf

**Cases marked with an asterisk were handled by the AGO.*

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