Vermont Department of State's Attorneys

Vermont Criminal Law Month

February - March 2017

Vermont Supreme Court Slip Opinions: Full Court Rulings

Includes three-justice bail appeals

BAIL NEED NOT BE AN AMOUNT THAT THE DEFENDANT CAN PAY

State v. Pratt, 2017 VT 9. Full court bail appeal. BAIL: COURT NEED NOT IMPOSE BAIL IN AN AMOUNT THAT THE DEFENDANT CAN PAY.

Trial court's imposition of bail affirmed. The trial court may, in order to secure a defendant's appearance in court, impose bail in an amount that the defendant is unable to pay. Although the court must consider the defendant's financial resources in determining conditions of release, neither the U.S. nor Vermont Constitution nor the applicable Vermont statutes require trial courts to find that a defendant has a present ability to raise bail in the amount set by the court. However, bail requirements at a level a defendant cannot afford should be rare. In this case, the trial court determined that the defendant's lack of family ties, stable residence, and job, as well as the number and seriousness of the charged crimes showed that he presented a risk of flight. His recent flurry of extensive alleged criminal activity, much of which occurred while he was out on bail after the arraignment on the first set of charges, was viewed as evidence of the defendant's state of mind. The court acknowledged that the defendant was indigent and did not have any financial resources. The court concluded that conditions of release would be insufficient to secure the defendant's appearance, and that $25,000 bail, with 10% down, was the minimum amount needed to secure the defendant's appearance. The court acted within its discretion in setting bail. Doc. 2017-029, March 6, 2017. https://www.vermontjudiciary.org/LC/Supreme%20Court%20Published%20Decisions/op17-029.bail.pdf

STATE MUST SHOW IT HAS ADMISSIBLE EVIDENCE OF GUILT FOR HOLD WITHOUT BAIL ORDER, BUT NEED NOT PRODUCE THAT EVIDENCE ITSELF AT THE HEARING

State v. Bullock, 2017 VT 7. DENIAL OF BAIL: SUFFICIENCY OF SHOWING OF SUBSTANTIAL, ADMISSIBLE EVIDENCE OF GUILT.

Three justice published bail appeal. Order

holding the defendant without bail is affirmed, as the State met its burden of showing that it will have sufficient admissible evidence of guilt at trial on two of the charges against the defendant. The State's evidence consisted of an audio recording of the alleged victim giving a statement to two state police troopers. She was administered an oath at the beginning of the statement. The defendant argues that because the recording would not be admissible at trial, the State had not presented sufficient admissible evidence of guilt against the defendant as required for a hold without bail order. However, although the State has to show that it has substantial, admissible evidence that it can use at trial, it does not have to actually present this evidence at the bail hearing, merely show that it has it. Here, the victim's statement includes facts which, if true, would satisfy each element of two of the charges brought against the defendant, and thus if she testifies at trial, the same statement would be admissible evidence and a jury could reasonably find the defendant guilty of the charged offenses. The State thus met its burden to show that substantial, admissible evidence of guilt exists that can fairly and reasonably convince a fact-finder beyond a reasonable doubt that the defendant is guilty. Doc. 2017-006, January 27, 2017. https://www.vermontjudiciary.org/LC/Supreme%20Court%20Published%20Decisions/eo17-006.bail.pdf

IMPOSITION OF BAIL AND RESPONSIBLE ADULT CONDITION WAS WITHIN TRIAL COURT'S DISCRETION

State v. Bailey, 2017 VT 18. RELEASE ON BAIL AND RESPONSIBLE ADULT CONDITION: DISCRETION OF TRIAL COURT.

Full court bail appeal. The trial court's order setting bail at $25,000, and its determination that neither his father nor his girlfriend are responsible adults to whom he can be released, is affirmed. The defendant is charged with manslaughter. 1) The record shows that the bail amount was set specifically with the intention of reducing the defendant's risk of flight, and not for some improper purpose. 2) The court did not abuse its discretion in determining that the combination of bail with a responsible adult condition was the least restrictive set of conditions to reasonably ensure the appearance of the defendant as required. Among the factors considered was the fact that the defendant has no real family or community ties to the area, and that releasing him to his home in Granville, New York, would make it much more difficult to monitor his abiding by the conditions of release. 3) Nor does the record indicate that the trial court abused its discretion in determining that neither the defendant's father nor his girlfriend satisfied the responsible adult condition. The father had failed to accurately state his history of criminal convictions, which the trial court found to be evidence that he might not be forthcoming if his son committed a violation of his conditions of release. As for the girlfriend, the court pointed to her young age, and the fact that there had been some intimidating action by the defendant against her, as evidence that questions whether or not she would turn him in if he violated his conditions of release. Doc. 1410-12-Rdcr, March 10, 2017. https://www.vermontjudiciary.org/LC/Supreme%20Court%20Published%20Decisions/op17-026.bail.pdf

TRIAL COURT PROPERLY RELIED ON TESTIMONY AT EARLIER TRIAL TO FIND EVIDENCE OF GUILT IS GREAT FOR BAIL PURPOSES

State v. Rondeau, three-justice bail appeal. DENIAL OF BAIL: FINDING THAT EVIDENCE OF GUILT IS GREAT.

The trial court's order denying bail is affirmed. The defendant is charged with two counts of aggravated sexual assault, following this court's reversal of his convictions for the same offenses following a jury trial on the bases that they violated the prohibition against ex post facto laws. 1) In making the determination that the evidence of guilt was great, the trial court considered every element of the offense, including the element of repeated nonconsensual sexual acts. The trial court referenced the victim's testimony during the trial that the abuse began at age 4 and continued until she was around 17. 2) The defendant's argument that there should be no presumption in favor of incarceration when the court finds that the State has shown that the facts are legally sufficient to sustain a guilty verdict is rejected. 2) The court considered each of the factors regarding conditions of release. Although the defendant had been released before the first trial, the trial court was not required to justify why he was not suitable for pretrial release now. The court has broad discretion in this matter. That discretion was not abused here, where the trial court assessed the nature and circumstances of the offense charged, the defendant's family ties, employment, financial resource, and the defendant's character and mental condition. No family members came forward after the remand to offer to take him into their custody and supervise him; he was mostly unemployed at the time of the offense, and he offered no information about whether he has a job lined up, and a number of his family members testified at the first trial that he was not honest or trustworthy, and he made a specific threat to kill the victim if she pushed him too far. Doc. 2017-060, March Term, 2017.
https://www.vermontjudiciary.org/LC/Supreme%20Court%20Published%20Decisions/eo17-060.bail.pdf

Vermont Supreme Court Slip Opinions: 3 Justice Panel Rulings

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."

DUI DEFENDANT NEED NOT EXPLICITLY WAIVE RIGHT TO INDEPENDENT BLOOD TEST

State v. Pomerantz, three-justice entry order. WAIVER OF RIGHT TO INDEPENDENT BLOOD TEST: WAIVER BY SILENCE; TIMING OF ADVISEMENT.

Civil suspension of driver's license affirmed. The defendant argues that his breath test result must be suppressed because the processing officer interfered with his right to an independent test. The officer did not read

from the DUI processing form the option stating, "Since you are being released, if you wish additional tests, to be paid for at your own expense, you will have to make your own arrangements. Do you intend to obtain additional tests?" Because the officer did not read this passage, defendant never affirmatively waived his right to obtain additional testing. However, when the officer initially went through the implied consent portion of the DUI processing form with the defendant, the officer advised the defendant that if he submitted to an evidentiary test, he had the right to have additional tests administered at his own expense by someone of his choosing, and he provided the defendant with a list of facilities in the area where he could have his blood drawn. The officer provided the information required by the statute. The statute does not require that this information be provided after the evidentiary test has been taken. His silence upon being told of his right to an independent test was a valid waiver of that right where the evidence indicated that he understood his rights. Doc. 2016-322, February Term, 2017. https://www.vermontjudiciary.org/UPEO2011Present/eo16-322.pdf

SENTENCE RECONSIDERATION PROPERLY DENIED; CLAIM OF INEFFECTIVE ASSISTANCE AT SENTENCE RECONSIDERATION HEARING WOULD NOT BE CONSIDERED ON DIRECT APPEAL

State v. Durham, three-justice entry order. INEFFECTIVE ASSISTANCE CLAIM ON DIRECT APPEAL. SENTENCE RECONSIDERATION: DENIAL WAS WITHIN TRIAL COURT'S DISCRETION.

Denial of motion for sentence reconsideration affirmed. 1) The defendant argues that his attorney was ineffective at the hearing on the motion for sentence reconsideration. Such claims must be made through a motion for post-conviction relief and not on direct appeal, unless the claim was raised and adjudicated before trial, which is not the case here, and the Court could not conclude that the record on its face demonstrated that counsel was ineffective. 2) The court did not err in denying the motion. The defendant argued that he did not participate in the PSI or express remorse at the sentencing hearing because he had charges pending in New York State and did not want any admission to be used against him there. But he neither sought a continuance of the sentencing hearing nor raised these concerns at that hearing. Nor was it clear how the defendant's expression of remorse, as opposed to the convictions themselves, could have been used against him in New York. In any event, the defendant's lack of remorse was not a primary factor in the sentencing. Doc. 2016-252, February Term, 2017. https://www.vermontjudiciary.org/UPEO2011Present/eo16-252.pdf

MOTION FOR RETURN OF PROPERTY DENIED WHERE DEFENDANT DECLINES TO ORDER HEARING TRANSCRIPTS NECESSARY FOR APPELLATE REVIEW

State v. Mannoia, three-justice entry order. MOTION FOR RETURN OF PROPERTY: FAILURE TO ORDER TRANSCRIPT. Denial of motion for return of property affirmed.

The defendant argued that the trial court erred in finding that the items which he sought to have returned was stolen

property; that the search warrant pursuant to which they were seized was based on false information, and that the police seized items not listed in the warrant; that he received ineffective assistance of counsel; and that he is entitled to damages for the value of the property retained by the state. Because the defendant expressly declined to order transcripts of the trial court hearings, he has waived any issue for which a transcript is necessary for informed appellate review, which is all of the issues he raised. Doc. 2016-116, February Term, 2017.
https://www.vermontjudiciary.org/UPEO2011Present/eo16-116.pdf

NONCOMPLETION IS NOT AN ELEMENT OF ATTEMPT

State v. Murphy, three-justice entry order. ATTEMPTS: NONCOMPLETION NOT AN ELEMENT. VERDICTS: LOGICAL CONSISTENCY NOT REQUIRED.

First degree aggravated domestic assault affirmed. The jury indicated on the verdict form that the defendant was guilty both for attempting to cause bodily injury, and for recklessly or willfully causing bodily injury. On appeal, the defendant argued that these are inconsistent verdicts, because one finds that he completed the offense, and the other that he only attempted the offense. He did not object below, and there is no plain error, if any error at all. The State does not need to prove beyond a reasonable doubt that a crime was not completed in order to obtain a conviction for an attempted crime. Because noncompletion is not an element of attempt, there was no inconsistency here. The jury found that the defendant not only attempted to cause bodily harm, but in fact did so as well. In any event, logical consistency between verdicts is not a requirement of law. Doc. 2016-247, March 24, 2017.
https://www.vermontjudiciary.org/UPEO2011Present/eo16-247.pdf

INCONSISTENT CONTACT ORDERS DID NOT PRECLUDE PROSECUTION FOR VIOLATIONS

State v. Dow, three-justice entry order. INCONSISTENT ORDERS RE CONTACT WITH COMPLAINANT: DUE PROCESS.

Conditional plea to violation of conditions of release and an abuse prevention order affirmed. The defendant was convicted of violating a condition of release that prohibited the defendant from contacting the complainant, either directly or through a third party, and of violating an abuse prevention order that prohibited him from contacting the complainant except through a named third party, and then only concerning their mutual debts, finances, and the like. The defendant argued that his conviction violated due process because the two orders contradicted each other. This argument has no merit – the defendant could easily have complied with both simply by complying with the stricter of the two. In any event, the conduct for which he was convicted violated both of the orders. Doc. 2016-232, March 24, 2017.
https://www.vermontjudiciary.org/UPEO2011Present/eo16-232.pdf

MOTOR VEHICLE STOP WAS JUSTIFIED BY STORE CLERK TIP PLUS INTRALANE WEAVING AND TURN SIGNAL WITHOUT A TURN

State v. Giknis, three-justice entry order. DUI affirmed. MOTOR VEHICLE STOP: STORE CLERK TIP COUPLED WITH OBSERVATIONS OF OPERATION.

The police were justified in stopping the defendant's vehicle, based upon a tip from a convenience store clerk that a drunk person was driving a vehicle fitting the defendant's vehicle's description, with the same license plate number, and driving the route described by the clerk, coupled with the officer's observations of intralane weaving and the operator's use of a left turn signal without turning. The State was not required to present evidence concerning what the store clerk told dispatch, and could instead rely upon the officer's judgment, based upon the information relayed to him by dispatch coupled with his observations, that a stop was justified. This case is unlike those involving stops based on "wanted" fliers, which provide no specific factual information from which another officer could make his or her own determination as to reasonable suspicion. Nor did the cruiser video undermine the trial court's finding of "some" intralane weaving. Doc. 2016-153, March 24, 2017. https://www.vermontjudiciary.org/UPEO2011Present/eo16-153.pdf

MOTION TO AMEND POST CONVICTION RELIEF PETITION PROPERLY DENIED AS UNTIMELY

In re Wool, three-justice entry order. POST-CONVICTION RELIEF PETITIONS: AMENDMENT OF PETITION; PRESERVATION OF CLAIM.

Summary judgment for the State in post-conviction relief proceeding affirmed. (Underlying offense is two counts of burglary). 1) The trial court did not err in denying the petitioner's motion to amend his complaint. The motion was filed after he had requested summary judgment, and he gave no explanation for his failure to raise the issue earlier. The State had also moved for summary judgment, and that was a legitimate factor in ruling on the motion to amend. 2) The petitioner was charged with burglary. He claims that the information did not allege that he personally entered the premises burglarized. This claim was not preserved below. Although the petitioner points to an amended petition which claims that the plea must be withdrawn because the petitioner never personally entered it, this refers to the plea, not to the premises. Doc. 2016-344, March Term, 2017. https://www.vermontjudiciary.org/UPEO2011Present/eo16-344.pdf

Vermont Supreme Court Slip Opinions: Single Justice Rulings

TRIAL COURT NEEDED TO MAKE FINDINGS WHY SURETY BOND, RATHER THAN A LESS RESTRICTIVE OPTION, WAS REQUIRED

State v. Parker, single justice bail appeal. BAIL: AMOUNT AND TYPE.

Bail amount of $7500 affirmed; matter remanded for further consideration as to the type of bail. The trial court's order setting the amount of bail was supported by the trial court's findings that the defendant posed a flight risk based on his recent connections to Vermont, his significant criminal record from Florida, the allegation that he used violence in the commission of a crime, and his long-term connections to Florida. The defendant requested a less restrictive condition than cash or a surety bond, but the court made no findings that explicitly supported the imposition of cash or a surety bond rather than a secured or an unsecured appearance bond. The court should have made some minimal findings that would support the imposition of a surety bond rather than the other, less restrictive options contemplated in the statute. Doc. 2017-072, March Term 2017. Eaton, J. https://www.vermontjudiciary.org/UPEO2011Present/eo17-072.bail.pdf

Proposed Rule Amendment

A proposed amendment to V.R.Cr.P. 32 would create procedures for restitution hearings. It would place the burden on the State of establishing the amount of restitution and the defendant's ability to pay by a preponderance of the evidence; would require the State to disclose at least 14 days prior to the hearing the amount of restitution claimed and copies of any supporting documentation, as well as any insurance covering the losses (the prosecutor must make "reasonable inquiry" concerning insurance). The rule would also require the defendant to provide at least 14 days notice before the hearing if he or she intends to raise the issue of inability to pay the requested restitution amount. The draft rule can be found at: https://www.vermontjudiciary.org/sites/default/files/documents/PROPOSEDVRCrP%2032%28g%29%20March%202017_0.pdf

Vermont Criminal Law Month is published bi-monthly by the Vermont Department of State's Attorneys. For information contact David Tartter at david.tartter@vermont.gov.