Criminal Justice Division
Vermont Attorney General's Office

Vermont Criminal Law Month

June - July 2010

Vermont Supreme Court Slip Opinions: Full Court Rulings

Includes three justice bail appeals

CONSTITUTIONAL VALIDITY OF MOTOR VEHICLE STOP WAS PRESERVED BY NOTICE OF INTENT TO CHALLENGE "REASONABLE GROUNDS" FOR SUSPICION OF DUI

State v. Webb, 2010 VT 54. Full court opinion. DUI: RIGHT TO INDEPENDENT BLOOD TEST. APPROPRIATE NOTICE OF ISSUES TO BE RAISED AT HEARING.

DUI and civil suspension proceedings remanded to provide defendant an opportunity to challenge the validity of the traffic stop. 1) The defendant was not improperly discouraged from exercising his right to an independent blood test where he asked the officer what it might cost, and the officer guessed it might be around $200, particularly where the defendant adduced no evidence that that figure was inaccurate. 2) The defendant's "list" of issues to be raised at the hearing was adequate to put the State on notice that the defendant was challenging the basis for the stop, when he stated that he was challenging whether "the law enforcement officer had reasonable grounds to believe the person was operating, attempting to operate or in actual physical control of a vehicle in violation of section 1201." This Court has previously held that the Legislature assumed that a constitutional stop would be a necessary predicate to finding "reasonable grounds" for suspicion of DUI. Therefore, this issue incorporates the question of the validity of the initial stop. Thus, the trial court erred in barring the defendant from raising this issue. Docs. 2009-280 and 281, June 18, 2010.

CLOSED CONTAINER SEARCH NOT JUSTIFIED BY EXCEPTIONS TO WARRANT REQUIREMENT

*State v. Birchard, 2010 VT 57. SEARCH AND SEIZURE: PLAIN VIEW; SEARCH INCIDENT TO ARREST; THIRD PARTY CONSENT; INEVITABLE DISCOVERY; "STATE PROPERTY" EXCEPTION.

Full court order. The defendant was

convicted of an unspecified offense after he met with a confidential informant and allegedly exchanged money for two pounds of marijuana. The exchange occurred in the CI's car, which had been searched before the meeting. The defendant was arrested in the vehicle immediately after the transaction, and the police observed a backpack that had not been in the car during the earlier search. The police seized the backpack and opened it, revealing the marijuana. The defendant had not been asked by the police to identify the pack as his own, nor did he do so voluntarily. The police may not open and search a closed container, even in a motor vehicle, when there is ample opportunity to obtain a warrant prior to doing so. While the defendant had no expectation of privacy in his conversation with the informant in a car in a public parking lot, he did have an expectation of privacy in the contents of a closed, opaque container. The fact that the police could deduce from the legally monitored conversation that the backpack had to contain the marijuana does not change the outcome. Nor would the Court adopt a new exception for a search incident to arrest of a closed container directed only towards discovering evidence of the crime with which the person is charged. The CI's consent to a search of his vehicle did not extend to the contents of his passenger's closed container. Nor did the search fall within the inevitable discovery exception, even though the officers were certain that the backpack contained the marijuana, and would have inevitably obtained a warrant for it. The record did not support this assertion. Finally, the Court declined to establish an exception for "state property," where the State could seize property that belongs to it (the marijuana had previously been seized from the CI as he attempted to enter the US). Doc. 2008-477, June 24, 2010.

AFFIDAVIT DID NOT ESTABLISH INFORMANT'S CREDIBILITY

State v. McManis, 2010 VT 63. SEARCHES: CORROBORATION OF CONFIDENTIAL INFORMANT.

Full court opinion. Possession of marijuana reversed. The affidavit in support of the search warrant failed to establish that the informant was either an inherently credible source, or that the specific information he provided in this instance was credible. The affidavit's statement that the CI had provided other information in regard to the distribution of illegal drugs, which had been confirmed, was insufficient, because it was a bare and unsupported assertion without enough information to establish the CI's credibility. Nor was the information in this particular instance shown to be credible. The CI's information was not against his penal interest, nor was it sufficiently corroborated by the police. The officer's corroboration that the defendant did own a house and car that matched the descriptions provided by the CI was insufficient because it was a mere innocent detail. The officer also subpoenaed the defendant's electrical records, showing higher power usage at a time when the informant said his friends said they had seen marijuana growing, but the usage was not so high when the informant himself claimed to have seen marijuana growing. The remaining discussion in the affidavit of the defendant's power usage was also insufficient to corroborate the claim that marijuana was growing in the house. Doc. 2009-259, June 24, 2010.

DELAY IN DATAMASTER TEST WENT TO WEIGHT, NOT ADMISSIBLITY, OF BREATH TEST

State v. Burgess, 2010 VT 64. EXIT ORDER SUPPORTED BY SUSPICION OF DUI. SUPPRESION OF DATAMASTER ANALYSIS MORE THAN TWO HOURS OLD WAS ERROR. CIVIL SUSPENSION ORDER: SUPPORTED BY THE EVIDENCE DESPITE CONTRARY HYPOTHETICAL BY EXPERT.

Full court opinion. Trial court's refusal to dismiss civil suspension matter affirmed, and exclusion of Datamaster breathalyzer test results reversed. 1) The exit order here did not violate the defendant's constitutional rights because the objective facts and circumstances supported a reasonable, articulable suspicion that the defendant had been driving while intoxicated. The defendant's admission to drinking, even if only to one beer, and the appearance of watery eyes were sufficient indicia of DUI to validate an exit order. 2) The court erred in suppressing the Datamaster breath results in the criminal proceeding on the grounds that it had been taken more than two hours after operation, because the court's concerns about the validity of the State's retrograde extrapolation analysis went to the weight to be afforded the evidence, not to its admissibility in the first place. 3) The civil suspension order is affirmed as supported by the record. Although the defendant's expert testified to a hypothetical under which the defendant could have had the BAC that he did, at the time he did, without being over the limit at the time of operation, there was no evidence to support that hypothetical (that he had drunk large quantities of alcohol immediately before operating his vehicle). Doc. 2009-109, July 2, 2010.

ONE MONTH SEPARATION OF MINIMUM AND MAXIMUM SENTENCES VIOLATED REQUIREMENT OF INDETERMINATE SENTENCING

*State v. Delaoz. 2010 VT 65. PLAIN VIEW; CONTAINER WHICH ANNOUNCES ITS CONTENTS. RELEVANCE: POSSESSION OF HANDCUFF KEY. SENTENCING: INDETERMINATE SENTENCING.

Full court opinion. Possession of cocaine and marijuana, and providing false information to a police officer affirmed; but cocaine possession sentence is reversed and remanded. The defendant, standing in front of a police officer, dropped a dollar bill which the officer immediately recognized as having been folded into a pouch used to carry illegal drugs. The defendant put his foot over the bill and then quickly picked it up and put it in his pocket. The officer asked if he could see it, and upon being handed it, asked what was inside it. The defendant responded that it was "a little for play." The officer opened the pouch and found a white powdery substance later identified as cocaine. The officer again asked the defendant what was inside the pouch, and he answered that it was "coke." 1) Even assuming that the defendant was in custody at the time of this exchange, and that his statements to the officer were properly suppressed, the trial court did not err in refusing to suppress the cocaine, which was not a fruit of the statements. The distinct characteristics of the pouch made its incriminating nature immediately apparent to the officer, thus justifying the pouch's seizure. The exigent circumstances justified its seizure without a warrant. 2) The

officer's action in opening the pouch was not an unreasonable search, because the defendant did not have a reasonable expectation of privacy in the contents of a pouch, folded in such a way as to unambiguously proclaim its contents, and dropped directly in front of a police officer. 3) Evidence that the defendant was found to have a handcuff key inside his shoe was both relevant and not unfairly prejudicial. Possession of the key was relevant to whether the defendant intended to deflect an investigation from himself, which is an element of providing false information to a police officer. It was also relevant to the element of knowingly and unlawfully possessing the illegal substances. In view of this holding, the court did not err in refusing to give an instruction that the key was not evidence of possession of drugs or of false information to a police officer. 4) The trial court did not err in referencing its own experience as a drug prosecutor in concluding, for sentencing purposes, that the defendant was intending to sell the cocaine and not just use it for personal use. 5) The sentence of four years eleven months to five years violated 13 V.S.A. § 7031(a) by imposing a fixed term. The one month separation between the minimum and the maximum was insufficient to meet the statutory requirement of indeterminate sentencing. Dooley dissent: The Court should not have reached the sentencing issue, because the defendant did not challenge that point on appeal. Rather, the defendant challenged the trial court's suspension of all but five years of the sentence. Burgess dissent: The one month difference between the minimum and the maximum comports with the indeterminate sentencing statute. Doc. 2009-001, July 16, 2010.

A motion for reargument is pending in this matter.

ATTORNEY'S ELICITATION OF RAPE-SHIELD MATERIAL WAS CONTEMPT OF COURT

*In re Pannu, 2010 VT 58. Full court opinion. CONTEMPT OF COURT: ATTORNEY DISREGARDING EVIDENTIARY RULINGS.

Criminal contempt against defense attorney, and fine of $2,000, upheld. The attorney was defending an individual charged with repeated nonconsensual sexual acts with a thirteen year old, J.C. Evidence of J.C.'s prior sexual conduct was excluded with the exception of her statement at one point that she had been impregnated, not by the defendant, but by an eighteen year old man. At trial, however, Pannu asked the investigating officer whether he had learned that J.C. had mentioned three other names that she could allegedly have had sexual contact with. Later in the trial, a mistrial was granted on the request of the State after a witness mentioned that J.C. had had an abortion, a fact which also had been excluded from evidence (Pannu's fault, if any, in eliciting this answer was not an issue in the contempt proceeding). Pannu's claim on appeal that the trial court never prohibited him from asking the detective about a DCF report that the victim had engaged in sexual conduct with three men in 2006, more than a year before the alleged sexual contact with the defendant, is incorrect. The evidence was expressly prohibited by the plain language of the rape-shield law, it was wholly irrelevant, and the trial court made it abundantly clear to counsel that the evidence was inadmissible. Counsel's conduct was particularly egregious given the purpose of the rape-shield law. Counsel was warned several times that he could not question the detective about hearsay statements contained within his investigatory report. Therefore, under no circumstances could Pannu have reasonably believed that his question about the victim's sexual encounters in 2006 was appropriate, and

the court's finding that he willfully violated its prior rulings was amply supported by the evidence. Nor was Pannu's behavior justified by his duty of vigorous and effective advocacy, or by the fact that it was couched in hypothetical language. Securing the admission of prejudicial evidence wholly lacking in probative value by defying court orders cannot be justified as zealous advocacy. Doc. 2009-115, July 22, 2010.

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."

OFFER OF LENIENCY TO INFORMANT DID NOT UNDERMINE HER CREDIBLITY FOR PURPOSES OF SEARCH WARRANT

*State v. Cole, State v. Coble, three justice entry order. CONFIDENTIAL INFORMANT: FAILURE TO NOTE OFFER OF LENIENCY IN SEARCH WARRANT AFFIDAVIT.

Denial of motions to suppress evidence seized pursuant to search warrant affirmed. The search warrant was supported by information obtained from an informant, who provided it after she was arrested, and the officer offered to speak with the state's attorney about leniency if she cooperated. This fact was omitted from the affidavit in support of the warrant. This inducement did not undermine the informant's basic credibility, or the finding of probable cause, especially since the informant revealed the location of the drug buys before any offers of assistance from the officer. Docs. 2009-363 and 364, June 2010.

REVOCATION OF PROBATION AND IMPOSITION OF UNDERLYING SENTENCE WAS WITHIN COURT'S DISCRETION DESPITE PLEA FOR MORE RIGOROUS CONDITIONS

State v. Putnam, three-justice entry order. REVOCATION OF PROBATION: DISCRETION.

Revocation of probation and imposition of full underlying sentence, in second degree unlawful restraint of a minor, domestic assault, and reckless or grossly negligent operation of a motor vehicle, affirmed. The defendant argues that the original probation conditions were insufficient to control his behavior, and that this is the cause of his subsequent behavior. The defendant's speculation that he could successfully be rehabilitated on probation with more rigorous conditions does not demonstrate that the district court abused its discretion in revoking probation and imposing the underlying sentence. Doc. 2009-387, June

2010.

VIOLATION OF MOTOR VEHICLE LAW JUSTIFIED STOP DESPITE OFFICER'S SUBJECTIVE BELIEF THAT OPERATION WAS LEGAL

State v. Verge, three-justice entry order. MOTOR VEHICLE STOP JUSTIFIED BY DEFENDANT'S CROSSING CENTER LINE, DESPITE ABSENCE OF TESTIMONY BY OFFICER THAT HE BELIEVED THIS TO BE A VIOLATION OF LAW.

Trial court's ruling that the motor vehicle stop of the defendant, that resulted in his arrest for DUI, was unlawful reversed. The officer observed the defendant's vehicle cross clearly marked center lines, so that the vehicle was three or four inches into the oncoming lane of traffic, three times on a flat, two mile, stretch of road. The deputy did not testify that he believed that the defendant's actions were a violation of the motor vehicle code, and therefore the court concluded that there was an insufficient basis to stop the car. Crossing the center line is a violation, and therefore the stop was justified. There was no need for additional testimony that the officer believed the defendant had violated the law, as the State need not establish the officer's subjective motivation for stopping the vehicle. The State was not required to demonstrate the reasonableness of the officer's suspicion of wrongdoing, because the basis for the stop was not established through inferences, but based on undisputed evidence of a traffic violation. Doc. 2009-478, June 2010.

STATE'S ATTORNEY MAY NOT FILE PETITION FOR DNA SAMPLE

State v. Delaoz, three-justice entry order. DNA SAMPLES: AUTHORITY TO FILE MOTION TO COMPEL.

Order compelling defendant to submit DNA sample reversed. The DNA sample statute states that if a person refuses to provide a sample, the commissioner of the department of corrections or public safety shall file a motion for an order. Here, the motion to compel was filed by the State's Attorney. The plain language of the statute indicates that the State's Attorney lacked statutory authority to file the motion. The Court declined to reach the defendant's challenge to the procedures and personnel used to collect DNA samples, as he failed to identify with specificity the basis of the objection. Doc. 2009-470, June 2010.

CORRECTIONS SENTENCE CALCULATION WAS NOT IN ERROR

In re Bailey, three-justice entry order. PCR: SENTENCE CALCULATION.

Denial of post-conviction relief affirmed (underlying conviction of sexual assault and domestic assault). The defendant argued that the Department of Corrections violated the terms of his plea bargain when, pursuant to 28 V.S.A. 811(h), it used the unsuspended portion of his sentence as the minimum term of the entire sentence. He argued that this raised his minimum sentence from three to six years, thus affecting his eligibility for parole. However, the statute only deals with calculating the minimum sentence for purposes of calculating good-time credits, and did not affect his parole eligibility. Doc. 2007-454, July 2010.

PROBATION VIOLATION FINDING WAS SUPPORTED BY COURT'S CREDIBILITY DETERMINATION

State v. Bostwick, three-justice entry order. PROBATION REVOCATION: CREDIBILITY DETERMINATION.

Revocation of probation and imposition of underlying sentence affirmed (underlying convictions include domestic assault). The defendant contacted his girlfriend by telephone from the correctional center, in violation of his conditions of probation. He testified that he believed that this condition applied only when he was on the street, and noted that correctional personnel had permitted the contact. The probation officer testified that the defendant had been specifically told that he remained subject to the probation conditions, and that while in jail he was not to contact his girlfriend. The trial court rejected the defendant's testimony as not credible, in part because he engaged in several tactics, such as fake names, to hide his communications with his girlfriend. There was sufficient, if not ample, evidence for the district court to reject the defendant's claim of mistake and to determine that he willfully violated the no-contact probation conditions. Docs. 2009-352 and 2009-353, July 2010.

TRIAL COURT WAS JUSTIFIED IN DISMISSING PCR PETITION SUA SPONTE

In re Ala, three-justice entry order. POST-CONVICTION RELIEF: DISMISSAL WITHOUT MOTION BY STATE.

Dismissal of post-conviction relief petition affirmed (underlying offense is aggravated assault and possession of cocaine). The trial court did not err in dismissing the petition, even in the absence of a motion from the State for dismissal, where the defendant alleged that he entered into the plea agreement because of the trial court's threat to impose the maximum sentence if he did not, and his trial counsel's coercive actions, where the transcript of the hearing demonstrated that these allegations are false. The defendant's claim that his counsel did not adequately challenge the search warrant and did not interview a key witness cannot show prejudice where the defendant decided not to go to trial. The superior court was not required to hold a hearing or to insist on any response from the State before dismissing the petition. Although it is the better practice to state facts and conclusions in support of a summary judgment ruling, they are not necessarily required. Doc. 2009-476, July 2010.

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