Criminal Division
Vermont Attorney General's Office

Vermont Criminal Law Month

June – July 2013

Vermont Supreme Court Slip Opinions: Full Court Rulings

Includes three justice bail appeals

PRIOR SEXUAL CONTACT WITH TEENAGER ADMISSIBLE TO IMPEACH CHARACTER TESTIMONY

*State v. Fellows, 2013 VT 45. CHARACTER EVIDENCE: REBUTTAL; CLOSING ARGUMENT. HEARSAY: HARMLESS ERROR.

Full court opinion. Sexual assault and lewd and lascivious conduct with a child affirmed. 1) There was no error when the State cross-examined the defendant's character witnesses concerning his having impregnated a teenage girl some fourteen years previously, when the witnesses had testified on direct that the defendant had no sexual interest in teenage girls. 2) The State's argument in closing that because the defendant had done it before, he did it again, went beyond impeachment of the character witnesses, but it was invited error and not plain error. 3) Hearsay statements by the victim admitted through another witness were harmless as duplicative of other testimony and not prominent in the State's case. Doc. 2011-386, June 28, 2013. http://info.libraries.vermont.gov/supct/current/op2011-386.html

DISORDERLY CONDUCT CONVICTION POSSIBLE EVEN WHERE DEFENDANT IS TAKEN TO PUBLIC PLACE AGAINST HER WILL

State v. Amsden, 2013 VT 51. DISORDERLY CONDUCT: DEFENDANT IN PUBLIC PLACE INVOLUNTARILY; SUFFICIENCY OF THE EVIDENCE; REQUISITE MENTAL STATE. CRUELTY TO A CHILD: REQUISITE MENTAL STATE; SUFFICIENCY OF THE EVIDENCE.

Full court opinion. Disorderly conduct and cruelty to a child affirmed. 1) The defendant was properly convicted of disorderly conduct in a public place, a hospital, even though she had been taken to the hospital against her will. It is not necessary that the person be voluntarily present in a public place, merely that he or she voluntarily engage in violent, tumultuous, or threatening behavior while in a public place. 2) The defendant's behavior at the hospital – becoming so loud and disruptive that she had to be placed in a safe room, then had to be handcuffed, after which she banged the bed into the wall with such force that it had to be separated from the wall to avoid

damage, was sufficient to support the trial court's conclusion that she engaged in criminally tumultuous behavior. The fact that this behavior occurred in an emergency room, allegedly inherently unruly places, does not change the result. 3) The trial court found, and the evidence supported the finding, that the defendant was subjectively aware of the risk of public inconvenience from her behavior. 4) The evidence was sufficient to support the trial court's finding, in connection with the cruelty charge, that her son was neglected or exposed in a manner to endanger his health where he was left unsupervised, at the age of four, under a bridge abutment, while the defendant had sex nearby, and the area contained broken glass, feces, and urine, and was directly adjacent to a brook, access to which was unimpeded by any protective barrier, the child was barefoot, had wandered away, and the defendant's attention was fixed on her companion such that she did not notice the approach of the police. She was also unable to assist the child if needed because of her degree of intoxication. The danger to the child was not too speculative to support the conviction. 5) The trial court erred in concluding that only the defendant's actions in exposing or neglecting her child needed to be willful, and that the result of those actions, that a child's health be endangered or that a child suffered unnecessarily, was not subject to any requisite level of criminal intent. The defendant's actions must have been willful as to the result of her actions as well as to simply neglecting or exposing. This requires that the defendant have some knowledge of the dangerous conditions. However, the trial court made an alternative finding, that the defendant was, in fact, subjectively aware of the hazards present under the bridge, and then exposed her son to them. This finding was supported by the evidence. Doc. 2012-128, July 12, 2013. http://info.libraries.vermont.gov/supct/current/op2012-128.html

A CAR MAY BE THE SITE OF A TRESPASS

State v. Stokes, 2013 VT 63. Full court opinion. UNLAWFUL TRESPASS: CAR AS SITE OF OFFENSE. PROBATION CONDITION: DOMESTIC ABUSE PROGRAM WHERE OFFENSE IS NOT VIOLENT; FAILURE TO ADMIT TO OFFENSE AS GROUNDS FOR VIOLATION OF PROBATION.

Unlawful trespass conviction, violation of condition of probation, and denial of motion to modify conditions of probation, affirmed. 1) Vermont's unlawful trespass statute, which prohibits a person from remaining on "any land or in any place" as to notice against trespass has been given, is not limited to buildings and lands, but also applies, as here, to the inside of a car. 2) The trial court did not abuse its discretion when it ordered, as a condition of probation, that the defendant attend a domestic abuse program, even though he was not convicted of a crime of violence. The court found that the crime had been motivated by power and control issues, and that the defendant needed to address these issues to prevent similar incidents from recurring. 3) The defendant was found to have violated that condition of probation because he refused to admit to the offense, which is a prerequisite for participation in the program. That the defendant maintains he is innocent neither absolves him from probation nor makes it "impossible" for him to comply. He may choose not to comply and take the consequences of the violation. An unpleasant choice is not synonymous with no choice. 4) The defendant's argument on this point in the trial court, that he should not have to participate in the program because he did not plead guilty, is also without merit. The trial court is

authorized to suspend a sentence on conditions of probation notwithstanding a defendant's protestations of innocence in the face of a guilty verdict and without a defendant's agreement. 5) The evidence supported the trial court's conclusion that the defendant violated the condition of probation when he refused to admit to the offense, after being told that it was a condition of entry into the program, and that completion of the program was a condition of probation. Although the defendant argued below that the coordinator for the program did not distinguish between the broader affidavit of probable cause and the more specific charge addressed by the jury, the outcome is the same because the defendant admitted to none of it. Docs. 2012-003 and 2012-455, August 2, 2013. http://info.libraries.vermont.gov/supct/current/op2012-003.html

MEDICAL MARIJUANA LAW DOES NOT MEAN THAT SMELL OF MARIJUANA NO LONGER ESTABLISHES PROBABLE CAUSE

State v. Senna, 2013 VT 67. Full court opinion. PROBABLE CAUSE FOR SEARCH WARRANT: STATEMENTS OF IDENTIFIED NEIGHBOR AND SMELL OF FRESH MARIJUANA; EFFECT OF MEDICAL MARIJUANA LAW.

Conditional plea to cultivation of marijuana affirmed. The police had sufficient probable cause to support the search of the defendant's apartment based upon the fact that the officers smelled fresh marijuana just outside the front door when they responded to a screaming child complaint, and on the fact that an identified neighbor advised the police that the defendant had used heroin in front of his children, had told her that they sell marijuana and heroin out of their home, that every day she observed a great deal of foot traffic of unfamiliar individuals in and out of the home at all times, and that frequently people mistaking her residence for theirs knock on her door looking to purchase marijuana or heroin. 1) The fact that Vermont allows certain individuals under given circumstances to possess marijuana does not mean that a court may not rely upon the smell of unburned marijuana in determining probable cause. The law in effect creates an affirmative defense to the crime of cultivation of marijuana, but the police need not rule out affirmative defenses before obtaining a search warrant, at least in the absence of any indication that a resident of a home is a registered patient. 2) The neighbor's information was sufficiently reliable to be considered in deciding whether probable cause existed. The fact that the informant was named is a factor supporting the credibility of the information she provided, but that factor alone is not sufficient to satisfy the credibility prong. However, the fact that she was identified, in combination with circumstances surrounding her statements, was sufficient to establish reliability. She did not provide the information in exchange for money, leniency, or any other benefit; and there is no indication that she had any preexisting relationship with law enforcement that could suggest a motive to lie. The only evidence of her motive is her apparent concern for the defendant's children. 3) The smell of fresh marijuana outside the defendant's door, coupled with the neighbor's statements, collectively constitute sufficient evidence of criminal activity, and grounds to conclude that evidence of the crime would be found in the defendant's home, to support the search warrant. Doc. 2012-173, August 2, 2013. http://info.libraries.vermont.gov/supct/current/op2012-173.html

ADVISEMENT OF IMMIGRATION CONSEQUENCES AT CHANGE OF PLEA WAS ADEQUATE

*State v. Mutwale, 2013 VT 61. MOTION TO WITHDRAW GUILTY PLEA: ADVISEMENT OF IMMIGRATION CONSEQUENCES.

Full court opinion. Denial of motion to withdraw guilty plea affirmed. The defendant argued that he was not sufficiently advised of the potential immigration consequences of his conviction when the judge advised him that his conviction "could have an impact on your ability to become a citizen, could lead to deportation, or you could be denied reentry into the country." 1) The provisions of 13 VSA § 6565 providing that a defendant may withdraw a guilty plea if the court fails to advise the defendant of the consequences of the plea in terms of deportation or denial of citizenship, and adverse consequences result from the plea, supersede the provision of V.R.Cr.P. 32(d) which limits a motion to withdraw plea to the time period before the defendant is in custody under sentence. 2) The language used by the trial court adequately advised the defendant, as required by the statute, that pleading guilty may have the consequence of deportation or denial of citizenship. The trial judge was not required to recite the language of the statute verbatim. There was no substantive difference between the language used by the judge and the language of the statute. In fact, the court exceeded the requirements of the statute by also warning of the possibility of denial of reentry. 3) The court was not required to advise the defendant that he was subject to automatic denial of citizenship. The court is required to put the defendant on notice that federal authorities may impose specified immigration consequences, but does not require the court to predict whether federal authorities will definitely impose those consequences, nor does the court have the ability to do so. Doc. 2012-363, August 2, 2013. http://info.libraries.vermont.gov/supct/current/op2012-363.html

SHOUTING IN FRONT OF COURTHOUSE THAT PROBATION OFFICER WAS GOING TO END UP IN A BODY BAG WAS NOT THREATENING BEHAVIOR

State v. Johnstone, 2013 VT 57. VIOLATION OF PROBATION: CONDITIONAL PLEA; THREATENING BEHAVIOR.

Full court opinion. Violation of probation reversed. 1) Although the defendant admitted to the violation, he was entitled to appeal from it because his admission was essentially a conditional plea by which he reserved the right to appeal a contested issue of law while admitting to the facts as charged. The trial court required an admission to this violation as part of a plea package, but assured the defendant that he could appeal it if he chose to. 2) The defendant did not engage in violent or threatening behavior when he shouted in front of the courthouse that his probation office was going to end up in a body bag, because there was no allegation that he knew that the target of his statement was within earshot, and he was simply mouthing off to his ex-girlfriend. Even an expression of a desire or plan to harm someone cannot reasonably be treated as a threat without a finding that the statement represented an actual intent to put another in fear of harm or to convey a message of actual intent to harm a third party. If the state had alleged that the defendant had directed his comments to the probation officer, or even that he knew she was in earshot, this might be a very different case. Dooley concurrence, with Kupersmith (acting

justice): The standard probation condition at issue here should be modified. Burgess, with Reiber, dissenting in part. Threatening to put your probation officer into a body bag would seem to meet the standard of a communicated intent to inflict physical or other harm. Given the forum, volume, and context, that defendant would not expect the officer to hear of his threat was patently unlikely. In any event, unlawful threats do not require the personal presence of the target. Further, the condition as written puts probationers on fair notice that threatening their probation officers with death qualifies as threatening behavior. http://info.libraries.vermont.gov/supct/current/op2011-246.html

CONSENT TO SEARCH WAS NOT VOLUNTARY WHERE OFFICER THREATENED UNLAWFUL DETENTION

*State v. Betts, 2013 VT 53. CONSENT TO SEARCH: COMPELLED BY THREAT OF ILLEGAL DETENTION. DE FACTO ARREST: TRANSPORTATION TO BARRACKS IN HANDCUFFS. TIP BY CONFIDENTIAL INFORMANT: SUFFICIENCY OF SHOWING OF INHERENT CREDIBILITY.

Full court opinion. Conditional plea to possession of crack cocaine reversed. The vehicle in which the defendant was a passenger was stopped for a traffic violation. The police also had information that crack cocaine was being transported in the vehicle. The police asked the defendant if he would consent to a search of his person, which would necessitate a trip to the barracks in handcuffs. The officer also advised the defendant that if he did not consent, he would be seized and the officer would apply for a search warrant. The defendant consented, and was handcuffed and transported to the barracks, where the police subsequently discovered crack cocaine. For purposes of the decision, the Court assumed that the defendant's initial detention when the vehicle was first stopped was not illegal. 1) Absent voluntary consent, the defendant's transportation to the police barracks in handcuffs for a full-body strip search would undoubtedly constitute an arrest, rather than a mere investigative detention. 2) Consent obtained during an illegal detention is invalid, but this case presents the issue of voluntariness of consent given when an officer threatens a detention amounting to an arrest. 3) Consent for a search is not voluntary when obtained in response to the threat of an unlawful detention. 4) The police here did not have probable cause to "arrest" the defendant by seizing him and taking him to the barracks to await a warrant. The confidential informant's tip here was insufficient to establish probable cause because there was inadequate information addressing the informant's inherent credibility or the reliability of his information on this occasion. A summary statement that the CI had provided information in the past that had led to the arrest of at least three separate individuals for various narcotics offenses was insufficient to advise the court as to the actual nature of the informant's cooperation or information in the past, how the information led to the alleged arrests, or the final outcome of any of the cases in which he was involved. Nor was there any information indicating that the tip was necessarily reliable on this occasion, such as that the statements were against penal interest. There was no indication that the police had been able to corroborate the information to the point where it would be reasonable for them to rely on it as accurate, since the information was largely mere innocent details. 5) Given the absence of probable cause here, the defendant's consent was not so much a

submission to a claim of lawful authority to perform the requested act, as it was a submission to an implied claim of authority to carry out what would be an illegal arrest as a predicate to attempting to obtain a warrant. 6) The police may not hold a suspect in order to preserve possible evidence while they apply for search warrants, unless they actually have probable cause at the time that they hold the suspect. 7) The defendant's admission to possession of cocaine after it was found on the ground outside the cruiser resulted directly from his invalidly obtained consent, and his admission and the cocaine must be suppressed. Doc. 2011-371, August 2, 2013.
http://info.libraries.vermont.gov/supct/current/op2011-371.html

DEFENDANT'S ALLEGED GOOD MOTIVE FOR THREATENING TO SHOOT SOMEONE DID NOT NEGATE HIS INTENT TO THREATEN

*State v. Cahill, 2013 VT 69.
AGGRAVATED ASSAULT: INTENT TO THREATEN NOT NEGATED BY ALLEGEDLY GOOD MOTIVATION; INSTRUCTION ON INTENT TO THREATEN – PLAIN ERROR REVIEW.

Full court opinion. Aggravated assault affirmed, remanded for vacatur on either the reckless endangerment conviction or the aggravated assault conviction. 1) The defendant argued that the State did not prove that he possessed the specific intent to threaten, because he intended only to attract publicity for his environmental cause. This argument conflates motive and intent. The defendant's motive to publicize his cause is not inconsistent with, and does not negate, an intent to threaten to achieve that end. Pointing a firearm at another, then demonstrating its capability to injure in the manner for which it is ordinary designed by firing it in another direction, taken together with the defendant's initial denial that he had fired the weapon, which was evidence of guilty intent, was sufficient to show that the defendant had the specific intent to threaten, even if the communication thereof was implicit and not explicit. 2) There was no plain error in the trial court's instruction on the element of intent to threaten. Although the instruction did not explicitly call for a subjective intent to threaten, it still made clear that there could be no conviction without proof that the defendant's message was to threaten injury to another, and that it was the State's burden to prove that he communicated an intent to injure. An actual intent to injure was not required. 3) The court's instruction that a threat may consist of "words or conduct which a reasonable person would understand to be a threat" did not transform the instruction into one of general intent. The instruction differentiated between explicit threats, communicated verbally, and implicit threats, conveyed through conduct. Although the instruction also wrongly suggests that the necessary mens rea can be arrived at by the objective perception of a reasonable observer rather than determining the defendant's actual subjective intent, the facts here show a message that was barely, if at all, implicit. The apparent lack of ambiguity in the behavior proved, coupled with the defense focus on motive over intent, left the instruction's error less than critical. 4) The defendant argued on appeal that the instruction prejudiced his defense that he intended only to attract publicity to his environmental cause. This motive defense was meritless as a matter of law, and warranted no jury instruction to support it. Short of legal necessity, a good motive cannot ordinarily justify or excuse a specifically intended criminal act. 5) The State conceded that the felony convictions are mutually exclusive in this case. On remand, the State must move to vacate one of the convictions at its election. Doc. 2012-

085, August 9, 2013.
http://info.libraries.vermont.gov/supct/current/op2012-085.html

VICTIM'S PRIOR FALSE STATEMENTS COULD BE EXCLUDED ON CROSS EXAMINATION IN DISCRETION OF COURT

State v. Lawrence, 2013 VT 55.
WITNESS'S PRIOR FALSE STATEMENTS OFFERED TO IMPEACH: DISCRETION OF COURT. NEWLY DISCOVERED EVIDENCE. PRIOR BAD ACTS: HARMLESS ERROR.

Full court opinion. Lewd and lascivious conduct with a child affirmed. 1) The trial court did not abuse its discretion in excluding evidence that the complainant had previously lied to a friend about having an abortion, even after the State asked the complainant at trial whether the complainant had ever lied before about being touched. This alleged act of untruthfulness neither concerned a material issue of the case nor a topic of direct examination. Further, the defendant had already introduced evidence of the complainant's character and reputation for untruthfulness from the complainant's friend and the friend's mother. 2) The trial court did not err in denying a motion for a new trial based on newly discovered evidence, which was that after the trial a post stating, "I wasn't really sexually assaulted, I was just doing it for attention" appeared on the complainant's MySpace page. At a hearing the complainant denied posting the message, and testified that her former friend had access to her account and password. Thus, there was only speculation as to authorship of the post, and thus there was no abuse of discretion in denial of the motion under the standard applicable where there is a claim of false testimony. Nor was there error under the more general framework applicable to newly discovered evidence, as, given the amount of evidence offered at trial concerning the complainant's veracity, and the defendant's inability to establish that the complainant actually posted the message, the trial court did not err in concluding that the newly discovered evidence would not probably change the result upon retrial. 3) The prior act by the defendant, admitted by the trial court to show absence of mistake, was not necessary to explain the prior relationship between the defendant and the complainant, nor was it relevant to show lack of mistake, since the complainant could not testify that the previous touching was intentional, and the defendant never claimed a defense based on some type of mistake or accident. Admission of the prior bad act was error, but was harmless, because the offending testimony was weak. The complainant admitted that the previous contact was likely unintentional or an accident, and thus it offered little danger of inflaming the jury. Moreover, the State introduced strong evidence that after the charged incident the complainant was visibly upset, crying, and shaken, among other things. Doc. 2011-126, August 9, 2013.
http://info.libraries.vermont.gov/supct/current/op2011-126.html

LICENSE PLATE BECOMES NON-HORIZONTAL WHEN ITS ANGLE MAKES IT DIFFICULT TO READ

State v. Tuma, 2013 VT 70. MOTOR VEHICLE STOP: LICENSE PLATE NOT HORIZONTAL.

Suppression of evidence obtained as the result of a motor vehicle stop affirmed. The defendant was stopped because his license plate was askew, with one side approximately one to two inches lower than the other side, thus, according to the officer, a violation of 23 V.S.A. sec. 511, which mandates that the license plate "shall be kept horizontal." Dictionary definitions do not conclusively favor either side's view of the plain and ordinary meaning of the term horizontal. The court declined to make a specific mathematical ruling as to the exact degree at which a license plate is no longer horizontal, ruling instead that a license plate ceases to be horizontal when the angle of the license makes it difficult for a person with normal vision to read it. While declining to define what that angle is, the Court suspects that it might be something akin to the defense proposal of "closer to diagonal than it is to horizontal." Evidence of an observer's ability to read a license plate may inform an interpretation in a specific case. Doc. 2012-365, August 9, 2013.
http://info.libraries.vermont.gov/supct/current/op2012-365.html

Criminal And Appellate Rule Changes

The Act decriminalizing possession of less than 1 oz of marijuana includes some specific language regarding advice that must be given during a Rule 11 colloquy. The act is here:

http://www.leg.state.vt.us/DOCS/2014/ACTS/ACT076.PDF

The language in question is:

> Prior to accepting a plea of guilty or a plea of nolo contendere from a defendant charged with a violation of this subsection, the court shall address the defendant personally in open court, informing the defendant and determining that the defendant understands that admitting to facts sufficient to warrant a finding of guilt or pleading guilty or nolo contendere to the charge may have collateral consequences such as loss of education financial aid, suspension or revocation of professional licenses, and restricted access to public benefits such as housing. If the court fails to provide the defendant with notice of collateral consequences in accordance with this subdivision and the defendant later at any time shows that the plea and conviction may have or has had a negative consequence, the court, upon the defendant's motion, shall vacate the judgment and permit the defendant to withdraw the plea or admission and enter a plea of not guilty. Failure of the court to advise the defendant of a particular collateral consequence shall not support a motion to vacate.

18 VSA sec. 4230(a)(5) (emphasis supplied). Thus, starting July 1 persons charged with marijuana offenses are required to be provided with advice during a plea colloquy that no other defendants are entitled to. You may well need to remind the trial court to conduct this extended colloquy.

Cases marked with an asterisk were handled by the AGO.

Vermont Criminal Law Month is published bi-monthly by the Vermont Attorney General's Office, Criminal Justice Division. Computer-searchable databases are available for Vermont Supreme Court slip opinions back to 1985, and for other information contained in this newsletter. For information contact David Tartter at (802) 828-5515 or dtartter@atg.state.vt.us.