Criminal Division
Vermont Attorney General's Office

Vermont Criminal Law Month

June - July 2014

Vermont Supreme Court Slip Opinions: Full Court Rulings

Includes three justice bail appeals

BRASS KNUCKLES DEFINED

State v. Brunner, 2014 VT 62. POSSESSION OF BRASS KNUCKLES: DEFINITION OF BRASS KNUCKLES.

Full court opinion. Conviction for possession of brass knuckles or a similar weapon with intent to use it affirmed. The statute applies to the weapon at issue here. The core elements of brass knuckles are: a device designed to be gripped in a clenched fist, that fits over the knuckles, and that is designed to increase the damages caused from a strike of the fist. It does not matter that the weapon is designed so that the damage is caused by a blade rather than by blunt impact. The fact that the weapon could theoretically reasonably be put to legitimate uses does not exclude it from the definition. The fact that the weapon could also be classified as a "dangerous weapon," which is regulated by a separate statute does not mean it cannot also be brass knuckles for purposes of this statute. The rule of lenity does not apply in this case, because there is no ambiguity – that is, the statute is not capable of more than one reasonable interpretation. The defendant's claim that the trial court erred in not requiring the State to demonstrate the requisite intent to use the weapon was not raised below, and was therefore not preserved for appeal. Doc. 2013-239, June 20, 2014. http://info.libraries.vermont.gov/supct/current/op2013-239.html

LEWD AND LASCIVIOUS CONDUCT DOES NOT CARRY REQUIRED MINIMUM JAIL TIME

State v. Fontaine, 2014 VT 64. EXTRAORDINARY RELIEF: IN CAMERA MEETING WITH VICTIM. SENTENCE OF LEWD AND LASCIVIOUS CONDUCT WITH CHILD MAY BE SUSPENDED.

Full court opinion. State's petition for extraordinary relief in lewd and lascivious conduct with a child matter denied. 1) The standard required for extraordinary relief is not satisfied where the judge met with the child victim in camera during the sentencing, and the discussion in chambers

was allegedly broader in scope than agreed. The judge exercised his judgment in directing and leading the discussion with a vulnerable young person, and there is nothing indicating a clear violation of judicial discretion amounting to an abuse of authority. 2) The court did not impose an illegal sentence by declining to impose a minimum incarcerative sentence of two years. The lewd and lascivious conduct with a child statute provides for a sentence of not less than two years and not more than 15 years for a first offense. The statute does not exclude or forbid the suspension of all or part of the sentence. Trial courts may suspend sentences in all cases in which incarceration is not specifically required by the Legislature. There is no specific requirement of an incarcerative sentence. Doc. 2014-096, June 20, 2014. http://info.libraries.vermont.gov/supct/current/op2014-096.html

ATTORNEY WAS NOT REQUIRED TO HIRE SECOND EXPERT TO CONFIRM FINDINGS OF FIRST

In re Williams, 2014 VT 67. POST-CONVICTION RELIEF: INEFFECTIVE ASSISTANCE OF COUNSEL – EXPERTS, SENTENCING.

Full court opinion. Denial of post-conviction relief based on ineffective assistance of counsel at guilty plea affirmed; grant of post-conviction relief based on ineffective assistance of counsel at sentencing affirmed, and the sentence is vacated, and a new sentencing hearing is to be scheduled. 1) There was no attorney error where the defense failed to hire a second arson expert after the first arson expert agreed with the conclusions of the police investigation. 2) There was no attorney error where the defense failed to file a motion to dismiss three of the arson causing death counts on the grounds of multiplicity, because the claim would have been meritless. 3) The defense adequately investigated the case, and therefore was not ineffective for advising the petitioner to plead guilty based on that investigation. 4) The trial court's finding that counsel failed to conduct a thorough investigation of the petitioner's background or to prepare for or present an effective sentencing presentation, is supported by the evidence. 5) The trial court erred in applying a presumed prejudice standard, which applies only in cases where counsel completely fails to provide representation. 6) The evidence supports a finding of actual prejudice, where the defense failed to counterbalance the state's evidence and argument in favor of retributive justice. On remand, a different judge should impose the sentence. Burgess, dissenting: the petitioner has failed to show any facts in favor of mitigating the sentence that were not presented to the court, and therefore has failed to show prejudice. Doc. 2012-179, July 11, 2014. http://info.libraries.vermont.gov/supct/current/op2012-179.html

EXPANDED DNA DATABASE RULED UNCONSTITUTIONAL

*State v. Medina, et al., 2014 VT 69. DNA DATABASE: CONSTITUTIONALITY.

The expansion of the DNA database from those convicted of felonies to those arraigned for felonies, violates Article 11 of the Vermont Constitution. The State's interest in identifying perpetrators of future crimes, and deterring future crimes, where that interest extends only to persons who either will be convicted and be entered into the DNA data base anyway, or acquitted

and therefore have their DNA expunged, does not outweigh the privacy interests of people who are not yet convicted of offenses. Reiber and Burgess, dissenting: would hold that the State's interest in solving past and future crimes outweighs the privacy rights of those for whom probable cause has been found that they committed a felony. Doc. 2012-087 et al., July 11, 2014. http://info.libraries.vermont.gov/supct/current/op2012-087.html

CLAIM OF RETALIATORY DENIAL OF FURLOUGH FOR EXERCISE OF CONSTITUTIONAL RIGHT WAS REVIEWABLE BY THE COURT

In re Girourard, 2014 VT 75. FURLOUGH DENIAL: ALLEGATION OF RETALIATION FOR EXERCISE OF CONSTITUTIONAL RIGHT.

Denial of motion to reopen VRCP 75 petition reversed. The petitioner argued that the Department of Correction's reasons for its refusal to grant him furlough (thus making him eligible for parole) were pretextual, and the actual reason was retaliation for his successful litigation of the issue of his furlough eligibility. The trial court concluded that the department's programming decisions are unreviewable under Rule 75. Although discretionary programming decisions are not reviewable by courts, constitutional claims are. The fact that a colorable constitutional claim implicates a programming decision committed to the DOC's discretion does not insulate the alleged constitutional violation from judicial review. The petitioner's allegations here state a claim sufficient to survive dismissal, because the petitioner alleged that DOC had taken tangible and affirmative steps to prepare for his furlough up until he filed in the earlier case. DOC may have entirely credible evidence countering the petitioner's allegations, but dismissal on the pleadings in the face of these allegations is premature. Doc. 2012-372, July 18, 2014. http://info.libraries.vermont.gov/supct/current/op2012-372.html

EXTRADITION PAPERWORK FOUND INSUFFICIENT

In re LaPlante, 2014 VT 79. EXTRADITION: INSUFFICIENT PAPERWORK.

Grant of writ of habeas corpus affirmed. The trial court properly granted the petitioner's writ of habeas corpus where he was being held on an extradition warrant that failed to contain evidence that he had been convicted and sentenced, and had broken the terms of his bail, probation, or parole. Doc. 2013-214, July 18, 2014. http://info.libraries.vermont.gov/supct/current/op2013-214.html

RELIABLE HEARSAY PERMITTED IN RESTITUTION HEARING

State v. Morse, 2014 VT 84. Restitution order affirmed. RESTITUTION: SUFFICIENCY OF THE EVIDENCE RE LACK OF INSURANCE; USE OF HEARSAY TO PROVE AMOUNT OF LOSS; COST OF REPAIR VERSUS DIMINUTION IN VALUE AS MEASURE OF RESTITUTION OWED.

1) The defense argues that the State failed to meet its burden of showing that the loss was uninsured, because there was no evidence whether the defendant's own insurance would cover the loss. Any error was harmless, because if the defendant does have insurance, any payment by his insurance company will operate as a credit against his restitution obligation. 2) The court did not err in using a repair estimate, which was hearsay, because the sentencing rules permit the use of hearsay. Although the trial court did not make an explicit finding on reliability, as required by the sentencing rule, the record supports that the estimate had sufficient indicia of reliability. 3) The court did not commit plain error in using the cost of repair rather than the difference in the vehicle's fair market value before and after the accident in order to determine the amount of loss. Dooley, concurring: Urges advisory committee on the rules of criminal procedure to develop a draft of procedural rules for restitution proceedings. Crawford, with Skoglund, dissenting: would find plain error in the trial court's finding that the loss was uninsured. The victim testified that her car was insured, and uninsured motorist coverage is mandatory in Vermont, therefore it was unmistakable that the victim had insurance coverage available to her that would respond to this loss. (The majority opinion did not reach this issue because it was not raised below nor briefed on appeal). Doc. 2013-045, July 25, 2014. http://info.libraries.vermont.gov/supct/current/op2013-045.html

JUDGE SHOULD HAVE CONSIDERED EFFECT OF EXTRADITION DETAINER WHEN SENTENCING

*State v. Lumumba, 2014 VT 85. EXPERT TESTIMONY: COMMENT ON VICTIM'S CREDIBILITY. ORDER OF TAKING TESTIMONY. LIMITS ON CROSS-EXAMINATION. SENTENCING: EFFECT OF LIKELY DEPORTATION DETAINER.

Sexual assault conviction affirmed; reversed and remanded for resentencing. 1) The expert testimony in this case did not cross the line from educating juries about the behaviors of victims, and directly commenting on the victim's truthfulness, the defendant's guilt, or whether the victim was in fact sexually abused. The expert testified about behaviors exhibited by female sexual assault victims; the fact that this testimony included many behaviors exhibited by the victim here does not qualify as direct commentary on the victim; rather, it served the permissible purpose of assisting the jury to place her behavior following the incident into the context of common sexual-assault victim behaviors. 2) It was not reversible error for the trial court to allow the State's expert to testify between the victim's direct examination and the defense's cross-examination, due to scheduling conflicts. 3) The court did not err when it declined to require the victim to review transcripts in order to confirm an inconsistency in her prior testimony, after she testified that she could not remember whether she had made an inconsistent statement earlier. This was a reasonable exercise of the trial court's authority to exercise reasonable control over the presentation of evidence to avoid needless consumption of time. This is especially true where the victim admitted that it was possible that her earlier statements were inconsistent. 3) Testimony by a police officer as to statements made to her by the victim concerning her reasons for not reporting the assault earlier were admissible as statements of the declarant's then-existing statement of mind. The

defendant argues that they were not made contemporaneously with the assault, but this misreads the moment in time that is relevant. The statements were offered to show the victim's state of mind during her discussions with the officer. 4) Where the sentencing hearing included testimony that, due to the near-certainty of the defendant being placed under a deportation detainer, he would serve the maximum of any to-serve sentence because he would not qualify for required pre-release treatment under DOC rules, the trial court should have considered the effect of a to-serve sentence and acknowledged such consideration through findings on the matter. Instead, the court declared it did not understand the immigration process and would not attempt to. The court failed to consider whether the sentence under these circumstances would be effectively a determinate life sentence. Doc. 2012-254, August 1, 2014. http://info.libraries.vermont.gov/supct/current/op2012-254.html

POLICE TESTIMONY THAT SUSPECTS WERE ELIMINATED AS RESULT OF INTERVIEW WAS INADMISSIBLE AS LACKING PERSONAL KNOWLEDGE

State v. Porter, 2014 VT 89. EVIDENCE: PERSONAL KNOWLEDGE REQUIREMENT. EYEWITNESS IDENTIFICATION: SUGGESTIVE CIRCUMSTANCES, UNDUE PREJUDICE. POLICE FAILURE TO COLLECT EXCULPATORY EVIDENCE.

Attempted kidnapping reversed and remanded. 1) The police identified twenty trucks which met the description of the truck used by the assailant in this offense. The owners of ten of those trucks testified at trial. The police testified that they spoke to the other owners and eliminated them as possible suspects. The defense objection that this constituted hearsay was sufficient to preserve an objection based upon VRE 602, which requires that a witness testify from personal knowledge. 2) Here, the substance of hearsay statements was introduced in the guise of conclusions reached by the witnesses. Permitting the witnesses to testify about their conclusions violated the personal knowledge requirement of Rule 602. The error was not harmless, given the importance of eliminating the other trucks to the State's case. 3) The defendant's claim that an eyewitness identification was made under suggestive circumstances, and therefore violated the Due Process clause because the court did not make a finding of reliability, is rejected because the Due Process clause only applies where the suggestive circumstances were arranged by law enforcement. Here, the suggestive circumstance was the broadcast of the defendant's photograph on television news. The defendant's argument that all suggestive eyewitness identifications are subject to the Vermont Constitution's due process clause is rejected as inadequately briefed. 4) The eyewitness's testimony, limited by the trial court to testimony that the defendant was similar to the person he saw, did not violate V.R.E. 403. The identification had probative value despite the fact that the eyewitness had never seen the assailant's face and could not identify him in a photo lineup, and its prejudicial effect was lessened by the limitation on his testimony, and the opportunity for cross-examination. 5) The defendant argued that the failure of the police to collect potentially exculpatory evidence, such as hairs found with the complainant's clothing, is equivalent to destroying, losing, or failing to preserve exculpatory evidence. The court disagreed, holding that the police do not have a duty to collect all evidence that could potentially favor the defense. However, negligent conduct of the police may be sufficiently prejudicial to the defense to

warrant sanctions. In this case, the court appropriately applied the test to the State's conduct and determined that there was no violation of Article 10. 6) The trial court erred in ruling irrelevant testimony by a proffered expert witness who would have explained the significance of the failure by the police to collect the evidence. The Supreme Court does not rule, however, on whether the testimony was otherwise admissible under the rules of evidence. Doc. 2012-344, August 1, 2014. http://info.libraries.vermont.gov/supct/current/op2012-344.html

DEFENDANT DID NOT VIOLATE HOUSING CONDITION OF PROBATION WHERE HE COULD NOT FIND HOUSING

State v. Bostwick, 2014 VT 97. VIOLATION OF CONDITIONS OF PROBATION: SUFFICIENCY OF EVIDENCE.

Violation of conditions of probation reversed. The defendant was found to have violated a condition of probation that he reside where his probation officer directed, and not change his residence without permission, based upon his failure to find permanent approved housing by a deadline set by the probation officer, and because there were periods of time in which the defendant was not attempting to locate housing. Neither of the requirements were violated – the defendant was residing at a motel, which the probation officer had approved for temporary housing, and had not changed his residence without permission. The condition did not support a probation officer imposing requirements of either housing search call frequency or a final, hard deadline for finding permanent housing. Nor did the defendant violate the condition that he not live in an area where children gather. The probation officer directed the defendant to live at the motel, adjacent to a playground, and withdrew that direction only because of the defendant's alleged noncompliance with the first condition. Reiber and Crawford, concurring: Encourages trial courts to use their discretion in imposing probation conditions or finding violations, and urges the Supreme Court to avoid, if possible, micromanaging the articulation of those conditions. Doc. 2013-013, August 1, 2014. http://info.libraries.vermont.gov/supct/current/op2013-013.html

IMPOSITION OF "STANDARD SEX OFFENDER CONDITIONS" GAVE INADEQUATE NOTICE

State v. Cornell, 2014 VT 82. CONDITIONS OF PROBATION: ADEQUATE NOTICE.

Sentencing for lewd and lascivious conduct with a child reversed and remanded. The defendant did not have adequate notice of the probation conditions from either the PSI, the court's oral order during sentencing, or the court's entry order after the hearing. The PSI included the "standard sex offender conditions," but none of the boxes were checked off. The court's oral order during sentencing imposing all sexual offender conditions as mentioned in the PSI was unclear because the PSI contained many conditions not immediately related to sex offenses. The court's post-hearing entry order stating that the defendant must abide by all sex offender conditions as directed by his probation officer appeared to delegate discretion to the probation officer to decide which conditions would actually be imposed. The matter is therefore remanded for the court to reconsider the defendant's challenges to the various conditions

imposed and to ensure, among other things, that they are reasonably necessary to ensure that the offender will lead a law-abiding life or to assist the offender to do so. Dooley concurrence: This case shows a serious need for rule-making to address the process of creating and implementing probation conditions and the procedures for objecting to or challenging proposed conditions. Doc. 2012-400, August 1, 2014. http://info.libraries.vermont.gov/supct/current/op2012-400.html

DEFENDANT COULD BE VIOLATED FOR FAILURE TO COMPLETE PROGRAM EVEN THOUGH HE HAD TIME REMAINING ON PROBATION

State v. Provost, 2014 VT 86. PROBATION CONDITIONS: SUFFICIENCY OF EVIDENCE.

Violation of condition of probation affirmed. The conditions of probation required that the defendant participate in the Domestic Violence Solutions program, and the term of probation was fixed at one year. After he failed to participate in the program, he was cited for a violation of probation. The defendant argued on appeal that he still had time remaining in which to complete the program because the one year term had not yet expired. The Court held that the evidence was sufficient to support the violation. Doc. 2013-201, August 1, 2014. http://info.libraries.vermont.gov/supct/current/op2013-201.html

CONFIDENTIAL INFORMANT'S SUBSEQUENT LYING WAS ADMISSIBLE TO REBUT HER CASE OFFICER'S TESTIMONY THAT HE TRUSTED HER WHEN HE WORKED WITH HER

*State v. Felix, 2014 VT 68. HEARSAY. SPECIFIC INSTANCES OF CONDUCT: CONTEXT OF RELATIONSHIP; REBUTTAL OF TESTIMONY RE TRUTHFULNESS.

Conviction for sale or delivery of 200 milligrams or more of heroin reversed. The defense sought to introduce into evidence the fact that the State's confidential informant had, a month after the transaction at issue, been terminated as a confidential informant because she had lied to a police officer who had stopped her vehicle, telling him that at the time of the stop she was working as a confidential informant. The court permitted testimony on cross-examination from the CI's case officer that he had terminated her as a CI, but would not allow him to testify concerning the traffic stop, because that was hearsay and extrinsic evidence prohibited by VRE 608(b). The defense was permitted to ask the CI herself if the reason she was terminated was lying during the traffic stop, but she denied that. She also denied having told the officer that she was then working as a CI. 1) The hearsay ruling was correct, and the CI's case officer was properly precluded from testifying about the underlying traffic stop. 2) The CI's case officer was also precluded on cross-examination from testifying that he had terminated the CI because he no longer trusted her. This testimony was not admissible to show the CI's motive to lie (to try to get back into the good graces of the State before her sentencing, after having blown her first opportunity), because it had little additional probative value to other evidence that the CI had a great motive to lie in order to obtain leniency in sentencing. 3) However, without this evidence, the jury's understanding of the relationship

between the CI and law enforcement was incomplete and potentially misleading. The jury learned about all the steps taken by the State to ensure the CI's reliability, but it never learned that the CI had not complied with her commitments. The evidence left the jury with the impression that she was terminated because she decided to stop cooperating, not because of any concerns about her credibility on the part of law enforcement. This was exacerbated by the CI's case officer's testimony that if he hadn't trusted the CI, he wouldn't have worked with her, when in fact he did not trust her and that is why he stopped working with her. 4) This question would not have violated Rule 608(b), excluding examination on specific instances of conduct to show untruthfulness. Even if the officer's opinion concerning the CI's untruthfulness was based upon a single specific instance of conduct, the officer had in effect vouched for the CI's credibility, and therefore could have been cross-examined about specific instances of conduct. Reiber and Crawford dissenting: The officer did not vouch for the CI's credibility, but merely testified that he had trusted her at the time of the controlled buy. He then testified that he had later chosen to terminate her as a CI, and would never work with an informant he did not trust. The jury also heard about the traffic stop through the cross-examination of the CI herself. Finally, the defense could have, but did not, ask the officer his opinion of the CI's truthfulness at the time he terminated her. Doc. 2012-248, August 1, 2014. http://info.libraries.vermont.gov/supct/current/op2012-248.html

Vermont Supreme Court Slip Opinions: 3 Justice Panel Rulings

Note: The precedential value of decisions of three-justice panels of the Vermont Supreme Court is governed by V.R.A.P. 33.1(c), which states that such decisions "may be cited as persuasive authority but shall not be considered as controlling precedent." Such decisions are controlling "with respect to issues of claim preclusion, issue preclusion, law of the case, and similar issues involving the parties or facts of the case in which the decision was issued."

EVIDENCE SUPPORTED FINDING THAT DEFENDANT KNEW THE SUBSTANCE SOLD WAS COCAINE

State v. McKirryher, 3 justice entry order. SALE OF COCAINE: KNOWLEDGE OF NATURE OF SUBSTANCE.

Aiding in the sale of cocaine and in the sale of a non-controlled drug represented as a controlled substance affirmed. The evidence was sufficient to establish that the defendant acted knowingly, even though he merely handed over a cigarette pack which was given to him by another person, where he drove the person to the location; told the CI to move aside while the person removed the pack from inside her clothes; motioned the CI back to the car; took $150 in cash from the CI; and handed the CI a cigarette pack that the person had handed to him. The person had stated that she had put the pack in her crotch because she was scared after having seen a sheriff on their way to the meeting. Finally, the defendant had admitted to the police that he had sold drugs numerous times with the person within the past three to six months. Doc. 2013-279, June Term, 2014. https://www.vermontjudiciary.org/UPEO2011Present/eo13-279.pdf

OFFICER'S TESTIMONY THAT HIS DUTIES ARE TO INVESTIGATE SERIOUS FELONIES DID NOT WARRANT MISTRIAL

*State v. Piquette, three-justice entry order. MISTRIAL MOTION: OFFICER'S TESTIMONY THAT HE INVESTIGATES FELONIES.

Sexual assault and domestic assault affirmed. The trial court did not err in denying the defendant's motion for a mistrial, made after the investigating officer testified that his responsibilities were to investigate "serious crimes such as homicides, sexual assaults, child sexual assaults, a lot of the major felony-type offenses." The fact that the officer investigated serious crimes came as no surprise to the jury, which presumably recognized this as a serious case. The statement did not suggest anything about the defendant's character, did not tell the jury that the case warranted special attention, and touched only by implication on the issue of sentencing. No reasonable juror could construe the officer's description of his job responsibilities as a suggestion that the defendant "must be guilty of something." Doc. 2013-329, July 24, 2014. https://www.vermontjudiciary.org/UPEO2011Present/eo13-329.pdf

COUNSEL WAS NOT INEFFECTIVE FOR FAILING TO CONVEY PLEA OFFER THAT LIKELY NEVER WAS MADE

In re Mayo, three-justice entry order. POST-CONVICTION RELIEF: FAILURE TO CONVEY PLEA OFFER; QUASHING OF SUBPOENA.

Denial of post-conviction relief affirmed. 1) The petitioner alleged that his counsel was ineffective for failing to convey a plea offer. The trial court's finding that the plea offer likely never happened is supported by competent evidence in the record. 2) The petitioner was not entitled to relief on the grounds that the trial court's quashing of his subpoena of jailhouse telephone conversations of the State's chief witness violated his confrontation and due process rights. The trial court gave the petitioner an opportunity to demonstrate that the conversations were material to his defense, which the petitioner failed to follow up on until more than a year after trial. Doc. 2013-330, July 24, 2014. https://www.vermontjudiciary.org/UPEO2011Present/eo13-330.pdf

OFFICER HAD REASONABLE BELIEF DEFENDANT WAS OPERATING VEHICLE

State v. Swan, 3 Justice entry order. CIVIL SUSPENSION, REFUSAL: EVIDENCE OF REASONABLE BELIEF OF OPERATION.

Civil suspension of driver's license for refusal to take an evidentiary BAC test affirmed. The defendant claimed he had not been operating the vehicle. The State demonstrated that the officers had a reasonable belief that the defendant was operating the van, whether or not he actually was. Doc. 2014-064, July Term, 2014. https://www.vermontjudiciary.org/UPEO2011Present/eo14-064.pdf

DEFENDANT'S CLAIM THAT HE ENTERED PLEA BASED ON UNFULFILLED PROMISE REQUIRED A HEARING

State v. Durnham, 3 Justice entry order. MOTION TO WITHDRAW PLEA: HEARING REQUIRED.

Denial of motion to withdraw plea reversed. The trial court erred in denying the motion without a hearing. The defendant claimed that he had entered into the plea on the understanding that his property would be returned to him, and that that had not happened. The trial court assumed that all of the facts alleged by the defendant were true, but found that there was nonetheless insufficient basis for allowing him to withdraw his plea. An unfulfilled promise that induced a plea may provide grounds for setting aside the plea. Thus, the facts as alleged do not support the trial court's ruling, and the matter must be remanded for a hearing. Docs. 2014-003 and 2014-004, July Term, 2014. https://www.vermontjudiciary.org/UPEO2011Present/eo14-003,%2014-004.pdf

DENIAL OF EARLY DISCHARGE FROM PROBATION WAS WITHIN COURT'S DISCRETION

State v. Bailey, 3 Justice entry order. EARLY DISCHARGE FROM PROBATION: DISCRETION OF COURT.

Denial of motion for early discharge from probation affirmed. The trial court did not abuse its discretion when it denied the motion, where the evidence supported the court's finding that the defendant had profited from supervision, which had also provided an added layer of protection to both the public and the victim in this case, and thus that completion of the original two year probationary period was more appropriate than early discharge. Nothing in the record suggests that the court relied on unproven allegations in the affidavit of PC rather than the charges to which the defendant pled guilty in making its decision. Doc. 2013-457, July Term, 2014. https://www.vermontjudiciary.org/UPEO2011Present/eo13-457.pdf

EXACT DATE OF OCCURRENCE IS NOT AN ELEMENT OF VAPO

State v. Castegnaro, 3 Justice entry order. VIOLATION OF ABUSE PREVENTION ORDER: EVIDENCE OF DATE OF OFFENSE.

Two counts of violating an abuse prevention order, subsequent offense, affirmed. The actual date that the alleged acts occurred is not an element of the crimes, as long as the State proves that they occurred while the order was in effect. The State's evidence sufficiently proved the dates of the offense as "on or around" certain specific dates. Docs. 2013-378 and 2013-379, July Term, 2014. https://www.vermontjudiciary.org/UPEO2011Present/eo13-378,%2013-379.pdf

NO ERROR IN COURT'S FAILURE TO MAKE VRE 804a FINDINGS WHERE DEFENDANT AGREED TO ADMISSIBILITY OF CHILD HEARSAY STATEMENTS

State v. Edson, 3 Justice entry order. CHILD HEARSAY STATEMENTS. PRIOR BAD ACTS.

Aggravated sexual assault and lewd and lascivious conduct with a child affirmed. 1) Defense counsel's agreement that the proffered 804a recorded statements by the victim were admissible and that no hearing was necessary, the defense waived any objection to their admission on appeal. There was no requirement that the trial court issue 804a findings despite the defendant's agreement that the statement was admissible. 2) In any event, there was no plain error in the court's failure to engage in a Rule 804a analysis, since there was a sufficient basis to meet all of the 804a criteria. The interview was not taken in preparation for litigation where it was done at the beginning stages of the investigation and was the first interview by law enforcement. The time, content, and circumstances of the interview provide substantial indicia of trustworthiness despite the claim that the child was reluctant to speak and that best interview practices were not followed, where the statements were in keeping with the child's initial disclosure to her father, and the child's accounts of the act and identity of the perpetrator were consistent. 3) There was no plain error in the admission of the defendant's prior violent acts, which the defense did not object to in line with an apparent strategy to honestly admit to illegal behavior so as to give credence to his denials of sexually assaulting the child. Doc. 2013-328, July Term, 2014. https://www.vermontjudiciary.org/UPEO2011Present/eo13-328.pdf

EVIDENCE SUPPORTED FINDING THAT DEFENDANT KNEW CHECKS IN HIS POSSESSION WERE FORGED

State v. Durham, 3 Justice entry order. PRIOR BAD ACTS. FORGERY: SUFFICIENCY OF THE EVIDENCE.

Identity theft, attempting to utter a false instrument, and possession of stolen property, affirmed. 1) The investigating officer's reference to other crimes by the defendant did not exceed the trial court's pre-trial ruling on such evidence, and was therefore not plain error. 2) The evidence was sufficient to show that the defendant was aware that the checks in his possession were forged, where the checks were made out to him, and the evidence was that the defendant did not know or transact any business with the check writer. Doc. 2013-309, July Term, 2014. https://www.vermontjudiciary.org/UPEO2011Present/eo13-309.pdf

Vermont Supreme Court Slip Opinions: Single Justice Rulings

DENIAL OF PRETRIAL HOME DETENTION WAS NOT ABUSE OF DISCRETION

State v. Goucher, single justice bail appeal. PRETRIAL HOME BAIL DETENTION.

Denial of motion for pretrial home detention affirmed. The trial court did not abuse its discretion where the charges against the defendant were serious, and he faced a long term of imprisonment if convicted; he had an exceedingly long criminal history spanning multiple jurisdictions, as well as a history of violence and violation of conditions of release; he had previously been a fugitive and therefore was a risk of flight; and he lacked stable employment or a permanent residence. In addition, the court found that the posed an unacceptable risk of harm to the complainant; his initial charges were based on alleged physical violence against her; and he is alleged to have further harmed her while on conditions of release. Doc. 2014-180, June Term, 2014.
https://www.vermontjudiciary.org/UPEO2011Present/eo14-180.bail.pdf

United States Supreme Court Case Of Interest

Thanks to NAAG for this summary

Riley v. California, 13-132; United States v. Wurie, 13-212. The Court unanimously held that the police may not, without a warrant, search digital information on a cell phone seized from an individual who has been arrested. The Court held that the search-incident-to-arrest exception to the warrant requirement does not apply "with respect to digital content on cell phones" because the governmental interests that support the doctrine — harm to officers and destruction of evidence — are rarely implicated "when the search is of digital data," while the privacy interests at stake are high given the immense amount of personal information contained on cell phones. The Court rejected various "fallback arguments" proposed by California and the United States as "flawed" and instead noted that the exigent circumstances exception could justify the warrantless search of a particular cell phone.

Cases marked with an asterisk were handled by the AGO.

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