Criminal Division
Vermont Attorney General's Office

Vermont Criminal Law Month

June - July 2015

Vermont Supreme Court Slip Opinions: Full Court Rulings

Includes three justice bail appeals

PROBATION CONDITION CONCERNING NOTICE OF SEXUAL RELATIONSHIP WAS VAGUE AS APPLIED TO SPONTANEOUS ACTIVITY

State v. Galanes, 2015 VT 80. VOP: VAGUENESS OF CONDITION.

Full court opinion. Violation of probation reversed. The defendant did not violate a probation condition requiring him to inform his probation officer of the name of any person with whom he is planning to have a date or with whom he is planning to begin a dating, sexual or romantic relationship, prior to the date or beginning of the relationship, when he engaged in one spontaneous act of sexual intercourse with his housekeeper. The term "sexual relationship" is vague as applied to the facts here. The same is true of the term "planning." As these two terms are ambiguous, the defendant did not receive fair notice that his conduct was prohibited under this condition. Viewed as a whole, the condition does not appear to apply to a chance sexual encounter. The term "sexual relationship" seemingly requires an association of greater duration and multiple sexual encounters. The concept of planning is inconsistent with the concept of a chance sexual encounter. Burgess, with Reiber, dissenting: In the context of the defendant's prior record and his relationship with his housekeeper, the defendant violated this condition. Doc. 2014-351, June 12, 2015. http://info.libraries.vermont.gov/supct/current/op2014-351.html

USE OF HEARSAY IN VIOLATION OF PROBATION PROCEEDING WAS ERROR

State v. Eldert, 2015 VT 87. VIOLATION OF PROBATION: USE OF HEARSAY EVIDENCE.

Full court opinion. Violation of probation reversed. The trial court erred in finding good cause to permit the use of hearsay evidence that the defendant, while being supervised in Delaware, consumed alcohol in violation of his conditions of release. None of the admitted evidence bore any traditional indicia of reliability. The documents received from Delaware were unsigned, unsworn, and in some instances undated. They contained no certification or indication they are part of an official court record. The documents lack clarity and continuity not just in form, but in substance. It is unclear from the limited substantive information available concerning the defendant's alleged admissions when his alleged alcohol consumption took place,

and when and to whom the defendant made the alleged admissions. In addition, the reason presented by the State for failing to procure a live witness, that Delaware had no particular interest in coming to Vermont, was woefully insufficient. Doc. 2014-141, June 19, 2015.
http://info.libraries.vermont.gov/supct/current/op2014-141.html

COURT'S DEFERRAL TO DOC DETERMINATION FOR VIOLATION OF PROBATION WAS ERROR

State v. Cavett, 2015 VT 91. Full court opinion. VIOLATION OF CONDITION OF PROBATION: NECESSITY OF FINDING SUBSTANTIVE GROUND FOR VIOLATION; EXERCISE OF DISCRETION IN DECISION TO REVOKE.

Violation of condition of probation for failure to complete sex offender program reversed. The defendant was terminated from the sex offender treatment program because of an incident in which he wadded up a piece of paper and threw it at a corrections officer during a meeting to discuss two disciplinary reports lodged against the defendant. The trial court declined to second-guess the Department of Corrections determination that he had engaged in violent or assaultive behavior, and his subsequent removal from the program. Although DOC programming decisions are not reviewable by the courts, that was not the issue in this case, where the court was deciding whether to revoke the defendant's probation. Before exercising its discretion to find a violation of probation, the court must find a substantive ground for revocation. Even if the court does find a violation of a condition of probation, the court has discretion in determining whether to revoke probation. Here, the alleged substantive ground is a violation of the program's cardinal rule against physical violence or threats of physical violence. The court failed to determine whether the requirement was violated, nor did it exercise its discretion to determine whether the alleged violation was such that revocation would be ordered. Doc. 2014-124, July 2, 2015.
http://info.libraries.vermont.gov/supct/current/op2014-124.html

PROBATION CONDITION REQUIRING APPROVAL OF RESIDENCY UPHELD

State v. Lucas, 2015 VT 92. Full court opinion. VIOLATION OF PROBATION: COLLATERAL CHALLENGES; PLAIN ERROR; CONTRADICTORY CONDITIONS; FACTUAL SUPPORT FOR RESIDENCY APPROVAL CONDITION; WAIVER; IMPOSITION OF DEFERRED SENTENCE: DISCRETION.

Violation of probation for failure to obtain prior approval from a probation officer before changing residence, affirmed. 1) The defendant's claim that he did not receive adequate notice of this condition (because of another condition requiring approval of a change of residence within two days) is not an impermissible collateral challenge to the condition. However, this argument was not raised at the violation hearing below. The trial court's enforcement of the more restrictive of the two residence-related conditions did not rise to the level of plain error. 2) The defendant argued that the residency approval condition was imposed without the necessary findings to support such a broad condition. However, the conditions in this case were imposed pursuant to a deferred-sentencing agreement. By entering into the

plea agreement for a deferred sentence, the defendant gave up the chance to obtain factual findings from the trial court to support the broad condition. He then failed to appeal the ensuing deferred sentence and conditions. He thus waived this claim. 3) The defendant argued that because he promptly notified his probation officer of his relocation, and because the change was subsequently approved, any violation was de minimis and could not support imposition of the deferred sentence. This decision was not an abuse of discretion. http://info.libraries.vermont.gov/supct/current/op2014-047.html

PROBATION CONDITION REQUIRING COMPLETION OF PROGRAM WITHIN A YEAR COULD BE GROUNDS FOR VIOLATION BEFORE EXPIRATION OF THE YEAR

State v. Provost, 2014 VT 86. AMENDED OPINION. PROBATION CONDITIONS: PLAIN ERROR.

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 there was no plain error in the trial court's finding of a violation. The defendant had been specifically informed by his probation officer that he must complete the third scheduled intake for the program or be cited for violating probation. It is therefore unnecessary to reach the issue of whether the evidence was sufficient to support the violation of the condition proscribing threatening behavior. Robinson, dissenting: The probation condition requiring completion of the program by the end of the probationary period cannot be rewritten to require completion within a reasonable time as determined by his probation officer. Doc. 2013-201, August 1, 2014. Note: this opinion was reissued on July 17, 2015 with amendments following the defendant's motion for reargument. https://www.vermontjudiciary.org/LC/Supreme%20Court%20Published%20Decisions/op13-201A.amended.pdf

ASSAULT AND ROBBERY COMMITTED EVEN IF THE MONEY TAKEN WAS OWED

State v. Trowell, 2015 VT 96. PRIOR ACTS: HARMLESS ERROR. REASONABLE DOUBT JURY INSTRUCTION: CONFLICTS IN THE EVIDENCE. ASSAULT AND ROBBERY: NO NEED TO PROVE MONEY TAKEN WAS PROPERTY OF ANOTHER. KIDNAPPING: EVIDENCE OF THREAT OF BODILY HARM.

Full court opinion. Assault and robbery, and kidnapping, affirmed. 1) A defense witness testified on direct examination that he knew one of the men involved in the episode "from hanging out on the streets and just associations." The State argued that this testimony opened the door to evidence that the witness and the man had been involved in a confrontation the night before over heroin. The court only allowed the State to ask the witness if he knew the man "from an incident from the evening before." The defense argued on appeal that this was error because the door was not opened, and because the testimony suggested a

nefarious encounter, suggesting guilt by association. Even if this evidence was improperly admitted, it was harmless error, as it was a nondescript passing reference to an unspecified incident, which did not imply that the incident concerned drugs. 2) There was no error in the trial court's refusal to instruct the jury that conflicts in the evidence could raise a reasonable doubt. 3) Given the absence of even a scintilla of evidence that the money the defendant took from the victim was money owed to him by her, the failure of the trial court to instruct the jury that assault and robbery requires that the money taken have been "the property of another" was harmless. In any event, any claim that the defendant was entitled to forcibly take the money from the victim because she, or anyone else, owed him money is not supported by the law. 4) The State was entitled to rely upon the same threat to establish both the unlawful restraint element of kidnapping, and the threat of bodily injury element. In any event, the State did not in fact rely on a single act, but upon multiple episodes in which the defendant specifically threatened bodily harm. 2014-269, July 24, 2015. https://www.vermontjudiciary.org/LC/Supreme%20Court%20Published%20Decisions/op14-269.pdf

TRIAL COURT'S CALCULATION OF DEFENDANT'S SPEED WAS BASED ON SPECULATION

State v. Wisowaty, 2015 VT 97. EXCESSIVE SPEED: SUFFICIENCY OF THE EVIDENCE; SPECULATION BY TRIAL COURT.

Full court opinion. Excessive speed and negligent operation reversed following bench trial. Both the State and the defense used expert witnesses to calculate the defendant's speed while operating a motorcycle shortly before he was involved in an accident. The trial court found that neither expert provided a reliable calculation of the defendant's speed, and thus the defendant's convictions cannot be supported by substantial evidence on the basis of either of their theories. The trial judge used the approach proffered by the defense expert, but replaced one of the inputs used by that witness with a different one, which he derived by applying the Pythagorean Theorem to three points marked on the State's chart of the accident scene. The judge relied upon unfounded assumptions about the lengths and orientations of the two shorter sides of his purported right triangle, and therefore arrived at a clearly erroneous conclusions as to the length of the third side, even though he used an accepted mathematical formula. One of the points on the judge's triangle was unmeasured, and moreover the diagram was not to scale. The location of the point relative to any other measured point was thus speculative. Therefore there was no evidence of a right angle and the judge's measurement of at least one of the shorter sides of the triangle was conjecture. Therefore, the judge's calculation of travel time, and thus of speed, was speculative. This is a case of insufficient evidence, which the factfinder creatively but unsuccessfully attempted to salvage. The defendant is therefore entitled to a judgment of acquittal on both charges. Doc. 2014-300, July 24, 2015. https://www.vermontjudiciary.org/LC/Supreme%20Court%20Published%20Decisions/op14-300.pdf

Vermont Supreme Court Slip Opinions: 3 Justice Panel Rulings

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

EVIDENCE OF SALE OF HEROIN WAS SUFFICIENT BASED SOLELY ON TESTIMONY FROM MIDDLE MAN

State v. Davila, three-justice entry order. SALE OF HEROIN: SUFFICIENCY OF THE EVIDENCE.

Conviction for selling or dispensing heroin and for aiding in the commission of selling or dispensing heroin affirmed. 1) The defendant's challenge to the sufficiency of the evidence was preserved for appeal even though he did not move for acquittal before submission to the jury, because he timely moved for acquittal in a post-judgment motion. 2) The defendant argued that the evidence was insufficient because the only direct testimony that the drugs came from the defendant was from the person who made the actual sales to the confidential informant, who testified that he obtained the drugs from the defendant. This argument concerning the seller's credibility does not impact the sufficiency of the evidence, as circumstances concerning a witness's credibility go to the weight of the evidence, not the sufficiency of the evidence, and this was a matter for the jury to decide. Doc. 2014-164, June Term, 2015. https://www.vermontjudiciary.org/UPEO2011Present/eo14-164.pdf

PRIOR BAD ACTS ADMISSIBLE TO EXPLAIN VICTIM'S OTHERWISE INCONGRUOUS ACT

State v. Highley, three-justice entry order. PRIOR BAD ACTS: ADMISSIBILITY TO PLACE CHARGED ACT IN CONTEXT.

Two counts of first-degree aggravated assault and habitual offender status, affirmed. The trial court did not abuse its discretion when it admitted prior, almost contemporaneous, bad acts. The evidence here could help the jury put into context what might otherwise seem like a random, incongruous act, and it also could help the jury understand the complainant's actions, including her decision to remain at the apartment with the defendant after the alleged assaults and her decision not to immediately contact the police. The evidence also countered the defendant's position that the complainant was the aggressor, that she caused her own injuries, and that the son had nothing to fear from the defendant's threat to "break his face." Nor was there any plain error in the court's failure to sua sponte include a limiting instruction. The defendant identified no specific prejudice that he suffered from the court's failure to provide a limiting instruction, and the Court finds none. Doc. 2014-220, June Term, 2015. https://www.vermontjudiciary.org/UPEO2011Present/eo14-220.pdf

DEFENDANT WAS IN CONSTRUCTIVE POSSESSION OF STOLEN ITEMS WHEN HE MADE THEM APPEAR WITH A PHONE CALL

State v. Mannoia, three-justice entry order. POSSESSION OF STOLEN PROPERTY: SUFFICIENCY OF EVIDENCE OF VALUE; CONSTRUCTIVE POSSESSION.

Possession of stolen property affirmed. 1) The evidence was sufficient to permit the jury reasonably to infer that the value of the property at issue was over $900 at the time they were discovered in the defendant's possession, where the evidence indicated that the cameras were purchased one to two years earlier for just under $5000 to $5500 apiece; that they had a useful life of about ten years; and that it would cost about the same amount of money to replace them; and that the stolen computer was purchased a year earlier for over $3,000 and that the computer contained training videos that cost quite a bit to produce. 2) The evidence was sufficient to show that the defendant was in constructive possession of these items where, during the search of his home, he informed the officers that he could assist in located some items, made some telephone calls, and the items appeared outside his apartment. Doc. 2014-306, June Term, 2015. https://www.vermontjudiciary.org/UPEO2011Present/eo14-306.pdf

TIP SUPPORTED STOP EVEN WITHOUT REPORT OF ERRATIC DRIVING

State v. Fay, three-justice entry order. ARTICLE 11: PRESERVATION. MOTOR VEHICLE STOP: RELIANCE ON TIP. PROBABLE CAUSE: EVIDENCE OF DWI.

Denial of motion to suppress in DWI matter affirmed. 1) The defendant's Article 11 claim was not preserved for appeal nor adequately briefed where his analysis amounts to nothing more than a request that the Court adopt the reasoning of the dissenters in a recent U.S. Supreme Court case, and did not demonstrate why Article 11 afforded greater protection than the United States Constitution on this issue. 2) The motor vehicle stop here was supported by reasonable suspicion of criminal activity where a person reported that a man who had drunk quite a bit of alcohol and was acting intoxicated had left a restaurant and gotten behind the wheel of a specifically identified vehicle, and where that vehicle appeared at an intersection through which the owner would be expected to travel if he were heading home that evening from the restaurant, at around the expected time given the distance from the restaurant. The information was specific, corroborated in part by the officer, and involved an allegation of drunk driving, which poses a danger to the public. The fact that the tipster did not witness any erratic driving does not require a different result, where she reported that the defendant had drunk quite a bit and was acting intoxicated. The police need not wait for erratic driving, or a report of erratic driving, before stopping a person for DWI, as long as the stop is based on a reasonable suspicion of commission of the offense. 3) There was sufficient probable cause to arrest the defendant for DWI. Although the evidence in the record is equivocal on this point, there is sufficient evidence for the court to have found that the defendant agreed to submit to the preliminary breath test. Even if that were not the case, the officer had probable cause to make the arrest without the PBT result. In addition to the information from the tip, the officer noticed a strong odor of alcohol emanating from the defendant and observed furtive actions on the defendant's part to avoid detection (turning away when speaking to the officer). Furthermore, the

defendant's performance of the field sobriety tests was mixed, but sufficient to support the finding of probable cause. Docs. 2014-332 and 2014-357, June Term, 2015.
https://www.vermontjudiciary.org/UPEO2011Present/eo14-332.pdf

RIGHT TO SECOND INFRA-RED BREATH TEST WAS RESPECTED

State v. Curylo, three-justice entry order. INFRA-RED BREATH TEST: RIGHT TO SECOND TEST.

Civil suspension of driver's license affirmed. The defendant argued that the officer failed to comply with 23 VSA 1202(d)(5), which provides that a person who is requires to submit to an infrared breath test may elect to have a second infrared test administered immediately after receiving the results of the first test, by not informing the defendant of this right after he received the results of the first test. The statute does not explicitly require that the processing officer offer a second breath test, only that the defendant may elect to have such a test. To the extent that the statute implies that the officer must inform the person of this right, in this case the officer did inform him that he had a right to a second test, before the defendant took the first breath test. In addition, during the processing when the defendant struggled to submit a sample, he repeatedly referred to this right, albeit in the context of claiming that he had already submitted two samples; and before submitting his first complete sample after several failed attempts, he stated unequivocally, "I will do it one more time." The trial court relied upon this evidence to find that the defendant was determined not to attempt to produce another sample. Doc. 2014-429, June Term, 2015.
https://www.vermontjudiciary.org/UPEO2011Present/eo14-429.pdf

EVIDENCE OF CUSTODIAL INTERFERENCE WAS SUFFICIENT TO SUPPORT VERDICT

*State v. Allcock, three-justice entry order. CUSTODIAL INTERFERENCE: SUFFICIENCY OF THE EVIDENCE.

Custodial interference affirmed. The evidence was sufficient to establish that the defendant intended to keep her daughter from DCF, which had lawful custody. When told of the order granting DCF custody, the defendant refused to comply with it and lied about the child's whereabouts. Even after receiving a copy of the order and having it explained to her, the defendant refused to comply. Although the defendant claims that she merely conditioned her compliance on several requirements, her actions could reasonably be interpreted by the jury as deliberate measures to delay the transfer of custody, and thus to keep her child out of DCF's lawful custody. Doc. 2014-290, July 24, 2015.

https://www.vermontjudiciary.org/UPEO2011Present/eo14-290.pdf

FAILURE TO OBJECT TO ADMISSION OF EVIDENCE FOUND NOT TO BE PREJUDICIAL IN PCR

In re Babson, three-justice entry order. POST-CONVICTION RELIEF: LACK OF

PREJUDICE WHERE ADMISSION OF EVIDENCE TRIAL COUNSEL FAILED TO OBJECT TO WAS HARMLESS; ATTORNEY ERROR: FAILURE TO OBJECT TO ADMISSIBLE EVIDENCE; TACTICAL REASON FOR FAILING TO OBJECT.

Denial of petitioner for post-conviction relief affirmed. Underlying offense was aggravated sexual assault and sexual assault against a child. 1) The PCR court did not err in finding that trial counsel's failure to object to a question eliciting hearsay testimony from a physician was not prejudicial, where on direct appeal this Court found that the error was harmless in light of overwhelming independent evidence of the defendant's guilt. 2) The PCR court did not err in finding that trial counsel did not err when he failed to object to testimony by witnesses about whether the defendant's wife had told them that he had confessed to her. These statements were not excludable under VRE 613 as the defense expert claimed, and in any event defense counsel had objected to the testimony of the first of the witnesses and had been overruled. Further, the PCR court did not abuse its discretion in finding that there were credible tactical reasons for deciding not to object. The statements by the witnesses were essentially consistent with the defense theory of the case, which was that the "confession" was made sarcastically in the heat of an argument and not as a credible admission of guilt. Doc. 2014-344, July Term 2015.
https://www.vermontjudiciary.org/UPEO2011Present/eo14-344.pdf

ANONYMOUS NOTE WAS INSUFFICIENT NOTICE TO AVOID LEAVING SCENE OF ACCIDENT CHARGE

State v. Marabito, three-justice entry order. LEAVING THE SCENE OF AN ACCIDENT: REASONABLE TIME TO CONTACT OWNER AND POLICE.

Leaving the scene of an accident affirmed. The defendant argues that he acted reasonably under the circumstances by knocking on the door of the residence whose lawn he had damaged, and by leaving a note on his truck, which he left nearby. However, the evidence does not support the defendant's claim that the note contained his contact information. Moreover, in the hours between the accident and the officer's arrival at his door, the defendant took no further action to contact the property owner or law enforcement. The trial court was therefore within its discretion in finding that the defendant failed to take reasonable steps to contact the property owner and the police as soon as reasonably possible. Doc. 2014-401, July Term, 2015.
https://www.vermontjudiciary.org/UPEO2011Present/eo14-401.pdf

DEFENDANT'S REASONS FOR WANTING TO WITHDRAW PLEA REJECTED AS NOT CREDIBLE

State v. Shannon, three-justice entry order. MOTION TO WITHDRAW PLEA: FAILURE TO SHOW FAIR AND JUST REASON; PREJUDICE TO STATE. MOTION FOR SUBSTITUTE COUNSEL: FAILURE TO SHOW COMPLETE BREAKDOWN IN COMMUNICATIONS AFTER GOOD FAITH EFFORTS.

Denial of motions to withdraw pleas and for substitute counsel prior to sentencing affirmed. 1) The defendant did not show a fair and just reason to withdraw his plea where his claim that his lawyer told him that no programming would be required was contradicted by his lawyer and by the plea colloquy. The reason for withdrawal did not substantially outweigh any prejudice to the State, because a witness for the State had died in the meantime. 2) The trial court did not abuse its discretion in denying the defendant's motion to appoint substitute counsel where the defendant did not show a complete breakdown in communication after exhaustion of good faith efforts to work with counsel. The defendant sought to have substitute counsel appointed on the grounds that his lawyer could not ethically represent him at a sentencing for acts that he did not commit. The defendant's pro se claims raised on appeal were inadequately briefed and raise ineffective assistance claims that generally cannot be raised on direct appeal. Docs. 2014-404 and 405, July Term, 2015.

https://www.vermontjudiciary.org/UPEO2011Present/eo14-404,%2014-405.pdf

RETAIL THEFT CONVICTION WAS SUPPORTED BY THE EVIDENCE

State v. Benware, three-justice entry order. RETAIL THEFT: SUFFICIENCY OF THE EVIDENCE.

Retail theft affirmed. The evidence was sufficient to support the conviction where a videotape showed the defendant stuffing materials into her purse; there were empty hangers in the area where the defendant had been crouching down, which had not been there earlier; the defendant did not pay for the items in question; and the defendant asked a police officer if she could go back in the store and pay for the items. Doc. 2014-415, July Term 2015.
https://www.vermontjudiciary.org/UPEO2011Present/eo14-415.pdf

PCR AND HABEAS ARE THE SAME FOR PURPOSES OF SUCCESSIVE PETITION ANALYSIS

In re Yandow, three-justice entry order. POST-CONVICTION RELIEF: SUCCESSIVE PETITION.

Dismissal of petition for post-conviction relief affirmed. The trial court correctly dismissed the petition as successive where the petitioner could have brought the claims in an earlier PCR but did not do so. There is no distinction between an earlier PCR and a complaint for habeas corpus. The petitioner failed to show good cause for failure to raise the claims earlier, nor any prejudice from the alleged errors. Doc. 2015-074, July Term, 2015.
https://www.vermontjudiciary.org/UPEO2011Present/eo15-074.pdf

MOTION TO RECONSIDER DID NOT STAY TIME FOR FILING APPEAL

State v. Durham, three-justice entry order. APPEAL DEADLINE: EFFECT OF FILING MOTION TO RECONSIDER BELOW.

Denial of motion for sentence reconsideration affirmed as appeal was untimely filed. The trial court erred in finding that the defendant's motion for sentence reconsideration was untimely filed,

where the defendant sent a letter within the deadline indicating his intention to file such a motion and asking that his letter be considered as such. This was sufficient to preserve the timely filing of the motion even though it did not state the grounds for the motion, as required by the rule. However, the appeal from the trial court's ruling was untimely filed as it was filed well beyond the thirty day filing time. The defendant's filing of a motion to reconsider in the trial court did not extend or toll the appeal period. Doc. 2015-106, July Term 2015. https://www.vermontjudiciary.org/UPEO2011Present/eo15-106.pdf

Vermont Supreme Court Slip Opinions: Single Justice Rulings

DEFENDANT'S DISCUSSION OF FLEEING THE STATE SUPPORTED BAIL AMOUNT

State v. Fregeau, single justice bail appeal. BAIL: SUPPORT IN PROCEEDINGS BELOW.

The trial court's setting of bail at $50,000 in an attempted manslaughter case, in which the defendant later admitted having stabbed the victim in the back with a knife, and in which she discussed fleeing the state with her codefendant, was supported by the proceedings below, the seriousness of the offense and the risk of flight. Doc. 454-5-15 Frcr, May Term, 2015. https://www.vermontjudiciary.org/UPEO2011Present/eo15-189.bail.pdf

EVIDENCE OF THREAT SUFFICIENT TO UPHOLD NO BAIL ORDER

State v. LaFountain, single justice bail appeal. NO BAIL ORDER: SUFFICIENCY OF EVIDENCE; THREAT OF VIOLENCE; SUFFICIENCY OF CONDITIONS OF RELEASE TO PREVENT VIOLENCE.

Hold without bail order in aggravated domestic assault case affirmed. The evidence of the defendant's intent to threaten the putative victim with a knife is great, despite his argument that the witnesses viewed events from a great distance and therefore did not understand the context of his actions, and that the victim has stated that she did not at any time feel threatened by the defendant. A reasonable jury could find beyond a reasonable doubt that the defendant was threatening the putative victim with a knife, based upon the testimony of two disinterested witnesses who saw the defendant circling the putative victim with a knife pointed at her, and saw that the defendant was upset. The putative victim was crying when the police arrived. In addition, there is clear and convincing evidence that the defendant poses a substantial threat of physical violence to a person, and there is no condition or combination of conditions of release that can reasonably prevent the physical violence. The defendant is only nineteen but already has two serious felony convictions; has failed to appear in court; and has twice violated the conditions of his probation. He has established a pattern of repeated violations of the law and has demonstrated a pattern of behavior inconsistent with the ability to comply with

court orders. The eyewitness testimony depicts an unstable and tense individual who, even from a great distance, appears to be using the threat of violence to intimidate the putative victim. The defendant's proposed release into the custody of his aunt would result in his being unsupervised between 7:15 and 2:30 daily due to his aunt's and her partner's work schedules. Given the allegations against the defendant, the court is not convinced that the aunt will be able to exercise adequate supervision over him. Doc. 2015-215, June Term, 2015.

https://www.vermontjudiciary.org/UPEO2011Present/eo15-215.bail.pdf

United States Supreme Court Cases Of Interest

Thanks to NAAG for these summaries

City of Los Angeles, CA v. Patel, 13-1175. By a 5-4 vote, the Court affirmed a Ninth Circuit decision holding that a Los Angeles ordinance that requires hotels to make their guest registries subject to police inspection is facially invalid under the Fourth Amendment. The Court first held that facial challenges to laws are permitted under the Fourth Amendment. The Court then upheld this facial challenge because "in order for an administrative search to be constitutional, the subject of the search must be afforded an opportunity to obtain precompliance review before a neutral decisionmaker" — a procedure not afforded by the Los Angeles ordinance. The Court declined to apply the exception to that rule for "closely regulated industries," holding that the exception is a narrow and inapplicable here.

Ohio v. Clark, 13-1352. Without dissent, the Court held that a three-year-old child's statement to his teacher stating who caused the bruises on his face was not testimonial, which means the introduction of that statement did not violate the Confrontation Clause. The Court declined to adopt a categorical rule that statements made to persons who are not law enforcement officers are *never* testimonial; but it agreed that "such statements are less likely to be testimonial." The Court went on to conclude that the statement here was not testimonial because its primary purpose was not to create evidence for trial, which is "a necessary, but not always sufficient, condition for the exclusion of out-of-court statements under the Confrontation Clause." It failed the "primary purpose" test, held the Court, because the teachers were concerned about possible child abuse; the exchange "was informal and spontaneous"; "it is extremely unlikely that a 3-year-old child . . . would intend his statements to be a substitute for trial testimony"; and history does not support exclusion of the statements.

Legislative Update

Lewd and Lascivious conduct with a child has been added to those crimes for which bail may be denied under chapter 229 of Title 13.

When determining conditions of release, placing the defendant in the custody of a designated person or organization is now only an option if the defendant is charged with an offense that is not a nonviolent misdemeanor or nonviolent felony as defined in 28 V.S.A. sec. 301. In other

words, a defendant charged with nonviolent offenses can no longer be held solely because the court is requiring supervision, and the defendant cannot find someone to supervise him. On the other hand, if the court thinks that this defendant can only safely be released if he is under supervision, he will continue to be held because that option is no longer available, whereas another defendant, charged with a violent offense, could be released under supervision. Act No. 43 (S.7), 2015.

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.