Criminal Division
Vermont Attorney General's Office

Vermont Criminal Law Month

June - July 2016

Vermont Supreme Court Slip Opinions: Full Court Rulings

Includes three-justice bail appeals

MISTAKEN BUT REASONABLE BELIEF THAT COMMUNICATION WITH ATTORNEY WAS BEING RECORDED REQUIRED SUPPRESSION OF BREATH TEST

State v. Gagne, 2016 VT 68. COMMUNICATION WITH ATTORNEY RE BREATH TEST: PRIVACY. AGGRAVATED AND SIMPLE ASSAULT INSTRUCTIONS: OBJECTIVE STANDARD FOR THREATENING. DOUBLE JEOPARDY: AGGRAVATED ASSAULT AND RECKLESS ENDANGERMENT; REMEDY FOR VIOLATION.

Full court opinion. Denial of motion to suppress results of breath test reversed and conviction for DUI reversed; convictions for aggravated assault and reckless endangerment affirmed, and for simple assault vacated. 1) A reasonable person in the defendant's position would have understood that his communication with counsel was being recorded, where the defendant asked the officer if his processing was being recorded by either audio or video, and was told yes as to both; the officer dialed the public defender, left the room, and turned off the audio tape but not the video; and never told the defendant that the recording had been turned off. The defendant testified that he didn't feel comfortable discussing his situation with the attorney because he wasn't sure if there was something he would say that would be held against him. Therefore, the motion to suppress the alcohol breath test should have been granted, and the conviction for driving under the influence is reversed. 2) Taken as a whole, the jury instruction on aggravated assault adequately conveyed that the appropriate standard was whether the defendant's words or deeds constituted a threat using an objective standard, rather than the effect on the particular person. In any event, no reasonable jury could have concluded that a reasonable person would not have felt threatened by the defendant's actions, following a couple through town and pointing a gun at them while next to them at a stop light. 3) There was no plain error in the trial court's charge on simple assault by physical menace. Nothing in the instruction suggested that the threatening character of the defendant's conduct should be determined with referenced to the victims' subjective fear. In fact, the court clearly instructed the opposition. The instruction as a whole properly placed the focus on the objective character of the defendant's words or acts, rather than the

reaction of the specific targets of those words or acts. 4) In this case, the charges of aggravated assault and reckless endangerment each required proof of an element not required for the other, and therefore the convictions for both did not violate Double Jeopardy. The aggravated assault charge requires proof of an intent to threaten others, but does not require any proof that the defendant placed them in actual danger. A conviction for reckless endangerment requires proof that the defendant placed another person in actual danger of death or serious bodily injury, and does not require proof of a specific intent to threaten others. 5) The parties agreed that, as charged in this case, the simple assault count and the aggravated assault charge turn on the same elements, and that the defendant cannot therefore be convicted of both aggravated assault and simple assault. The defendant argued that the greater charge should be reversed, but the Court disagreed. The proper remedy is to vacate the lesser offense, assuming that is what the State wants. 6) A remand for resentencing on the affirmed counts is not required where, as here, separate sentences were imposed, and the convictions or sentences on the reversed convictions do not appear to have influenced the affirmed convictions. Doc. 2014-451, June 10, 2016. https://www.vermontjudiciary.org/LC/Supreme%20Court%20Published%20Decisions/op14-451.pdf

STATE'S ATTORNEY LACKS AUTHORITY TO SEEK CONTINUED MENTAL HEALTH TREATMENT ORDER

State v. B.C., and State v. D.H., 2016 VT 66. INSANE OR INCOMPETENT DEFENDANTS: STATES ATTORNEYS LACK JURISDICTION TO SEEK CONTINUED MENTAL HEALTH TREATMENT ORDERS.

Full court opinion. D.H. was charged with simple assault on a police officer and resisting arrest. The parties subsequently stipulated that D.H. was insane at the time of the offense, and to a ninety-day order of non-hospitalization based upon D.H. being a person in need of treatment. A few days before the expiration of the 90 day ONH, the State's Attorney filed a request for a hearing to continue treatment beyond the ninety-day order. The Department of Mental Health did not seek a further ONH by filing an application for continued treatment. B.C. was charged with simple assault and aggravated disorderly conduct. He was found to be incompetent to stand trial and a 90 day ONH was issued. The State subsequently filed a request for emergency hospitalization before the ONH expired. The Department of Mental Health did not seek an order extending treatment. In both cases the trial court correctly denied the State's motions, because the State's Attorney has no standing to seek continued treatment at the expiration of a mental health treatment order. Docs. 2015-254 and 263, June 17, 2016. https://www.vermontjudiciary.org/LC/Supreme%20Court%20Published%20Decisions/op15-254.pdf

JUVENILE FOUND DELINQUENT MAY FILE POST-CONVICTION RELIEF PROCEEDING

In re D.C., 2016 VT 72. DELINQUENCY PROCEEDINGS: AVAILABILITY OF POST CONVICTION RELIEF; MOOTNESS.

Full court opinion. Dismissal of post-conviction relief petition reversed and remanded. The petitioner was adjudicated delinquent based upon an admission of guilt

to a charge of simple assault. He subsequently filed a petition for post conviction relief, alleging that the change of plea hearing was constitutionally inadequate, as the colloquy pursuant to V.R.Cr.P. 11, made applicable to delinquency actions by Vermont Rule for Family Proceedings 1(a), failed to establish a factual basis for his admission of guilt. The trial court dismissed the petition on the grounds that a PCR proceeding is not available in a delinquency case. 1) The petitioner reached the age of majority shortly after filing his complaint. The State argued that the complaint was therefore moot, but when a petitioner filed a petition while still in custody for the challenged conviction, the expiration of the custodial term does not render the cause moot. 2) The PCR statute applies to juvenile delinquency proceedings. 3) The enactment of a statutory remedy, 33 VSA 5113, did not impliedly eliminate the availability of PCR relief. Doc. 2015-195, June 14, 2016. https://www.vermontjudiciary.org/LC/Supreme%20Court%20Published%20Decisions/op15-195.pdf

STATE REQUEST FOR LESSER-INCLUDED INSTRUCTION MUST BE GRANTED, EVEN OVER DEFENSE OBJECTION, IF WARRANTED BY THE EVIDENCE

State v. Bean, 2016 VT 73. LESSER-INCLUDED OFFENSES: DOMESTIC ASSAULT AND SIMPLE ASSAULT; INSTRUCTION OVER DEFENSE OBJECTION.

Full court opinion. Simple assault affirmed. The defendant was charged with domestic assault as the result of an altercation at a residential facility for persons with major mental illnesses. The defendant argued that the two people involved were not household members, as required by the domestic assault statute, under these living circumstances. After the State rested, but before the defense rested, the State asked that the jury be instructed on simple assault as a lesser included offense. The defense objected, but the court gave the instruction, and the defendant was convicted of simple assault. 1) Simple assault as instructed in this case is composed exclusively of elements shared with domestic assault. The defendant argued that simple assault has a proximate cause element that domestic assault does not – the jury was instructed on proximate cause of bodily injury for simple assault, but not for domestic assault. However, no reasonable juror could find that there was an efficient intervening cause between the defendant's punch and the complainant's head injury. Therefore the instruction was superfluous, and did not add an additional element to simple assault that domestic assault lacked. In addition, although he court used the term "willfully" to describe the intent element for domestic assault, and the term "purposely" to describe the intent element for simple assault, it explained both terms, and there was no relevant difference between the court's explanation of the two terms. The fact that the two terms are equivalent is consistent with the Court's case law. 2) The State may request a lesser-included instruction, even over the defendant's objections, and this request must be granted if supported by the evidence. In addition, the court may consider such an instruction absent a request from either party if supported by the evidence. Doc. 2015-118, July 1, 2016. https://www.vermontjudiciary.org/LC/Supreme%20Court%20Published%20Decisions/op15-118.pdf

STATEMENT OFFERED AS FALSE WAS NOT HEARSAY

State v. Haskins, 2016 VT 79. HEARSAY: STATEMENT OFFERED FOR ITS FALSITY. ERRONEOUSLY EXCLUDED EVIDENCE: HARMLESS ERROR. INSTRUCTIONS: DEFINITION OF HARMLESS ERROR; INFERENCE OF INTENT TO KILL.

Full court opinion. Attempted murder affirmed. 1) The trial court erred when it excluded as hearsay testimony from a police officer that a witness had told him he had overheard two other witnesses state that the defendant had done the stabbing. This was not hearsay because it was not offered for the truth of the matter stated, but for its falsity – to show that the witness had lied to the police about this matter, and thus to show that he was attempting to frame the defendant. 2) The error was harmless because the State's case that the defendant was the perpetrator was strong, and the excluded evidence not significant. 3) The trial court did not commit error by describing "beyond a reasonable doubt" as being convinced with "great certainty," instead of as "utmost certainty." 3) The court's instruction to the jury that it could, but was not required, to infer an intent to kill from evidence that a deadly weapon was used, and from the manner in which it was used, was not erroneous for failure to also advise the jury that they could instead also infer that the defendant merely intended to injure the victim. The instruction did not intimate to the jury that it should find only an intent to kill, as opposed to an intent to injure. 4) The court did not commit plain error where it failed to instruct the jury that it must find beyond a reasonable doubt the facts which it used to infer an intent to kill. The court specifically told the jury that it had to find each essential element beyond a reasonable doubt in order to convict. Robinson, with Skoglund, dissenting: The State's evidence of the identity of the perpetrator was not sufficiently strong, and the probative value of the excluded evidence not sufficiently weak, to support the finding of harmlessness beyond a reasonable doubt. Doc. 2014-299, July 15, 2016. https://www.vermontjudiciary.org/LC/Supreme%20Court%20Published%20Decisions/op14-299.pdf

CONVICTION MAY BE SEALED FOR LISTED CRIME; RESTRICTION ONLY APPLIES TO SUBSEQUENT CONVICTIONS

State v. Villeneuve, 2016 VT 80. SEALING RECORDS: CONVICTIONS WHICH MAY BE SEALED.

Full court opinion. Denial of motion to seal record of conviction reversed and remanded. The defendant pleaded guilty to lewd and lascivious conduct with a child in December, 2001. The underlying conduct took place in August, 2000, when the defendant was twenty years old. He was satisfactorily discharged from probation on June 22, 2004, and has had no subsequent convictions. In 2015 he filed a motion to seal his record pursuant to 33 VSA 5119(g), on the grounds that more than two years had passed since his discharge from probation, and that the event underlying his conviction occurred prior to his reaching the age of twenty-one. The statute provides that the record may be sealed, inter alia, if "the person has not been convicted of a listed crime as defined in 13 VSA 5301 …" The trial court denied the motion because the underlying offense is a listed crime. On appeal the defendant argues, and the State agrees, that this provision only applies to subsequent convictions, not to the original

conviction. The Court agrees. The matter is remanded for the trial court to make findings on the remaining criterion for sealing, whether the defendant has been rehabilitated. Doc. 2015-421, July 15, 2016.

https://www.vermontjudiciary.org/LC/Supreme%20Court%20Published%20Decisions/op15-421.pdf

ADVISING DEFENDANT OF HOSPITAL FEE FOR BREATH TEST DID NOT DETER DEFENDANT FROM OBTAINING INDEPENDENT TEST

State v. Richard, 2016 VT 75. SUPPRESSION OF BREATH RESULTS: FACTUAL FINDINGS SUPPORTED BY THE RECORD; ARREST WAS SUPPORTED BY PROBABLE CAUSE; TROOPER DID NOT DETER DEFENDANT FROM OBTAINING INDEPENDENT TEST; POSSIBLY IMPROPER DETENTION DID NOT REQUIRE SUPPRESSION OF BREATH TEST.

Full court opinion. DUI affirmed. 1) The defendant's challenges to various factual findings by the trial court are rejected, as they were not clearly erroneous, because the evidence supported them. For example, although the road did not have lanes, the phrase "fail[ed] to maintain his lane," may not have been the best terminology, the defendant did fail to stay to his side of the road. 2) The defendant's arrest was supported by probable cause. The defendant ignored the trooper's blue lights, drove to his home, further ignored the trooper's command to stay by his truck, and attempted to enter his home. His slurred speech was properly considered, despite the defendant's argument that the trooper had no way of knowing whether he always spoke with slurred speech. Finally, the trooper was not required to administer a preliminary breath test in order to have probable cause to arrest for DUI. The court also noted the trooper's great experience with drunk drivers as adding weight and credibility to his inferences. 3) The trooper did not deter the defendant from seeking an independent blood alcohol content test simply by advising the defendant that the hospital would not conduct the test without an upfront payment of seventy-five dollars. Any such interference stemmed from the hospital's policy, not the trooper. If the advice is inaccurate, it is the defendant's burden to so demonstrate, which did not occur here. 4) The defendant finally argues that the trooper prevented him from seeking an independent test by jailing him, when he should have been released. The trooper detained the defendant, and did not arrest him, as an incapacitated person. However, he also testified that if he is processing someone, and that person is difficult, the trooper will not "cut him a break." But even assuming that the detention was improper, he cannot demonstrate a connection between that and the breath test results he seeks to suppress. The alleged violation came after the breath test results were taken, not before. Therefore the evidence the defendant seeks to suppress did not result from the violation, so suppression would not be a proper application of the exclusionary rule. Skoglund, with Robinson, concurring: Expresses concern about the misuse of the incapacitated persons statutes, and about the quality and reliability of the so-called "screening" that took place. Doc. 2015-288, July 29, 2016.
https://www.vermontjudiciary.org/LC/Supreme%20Court%20Published%20Decisions/op15-288.pdf

COURT SETS RULES FOR JAILHOUSE LAWYERS

In re Serendipity Morales, 2016 VT 85. UNAUTHORIZED PRACTICE OF LAW: JAILHOUSE LAWYER.
Full court opinion. State's information charging defendant with practicing law without a license is dismissed for lack of probable cause. The provision of legal advice without charge, including the drafting of motions, by one prison inmate for another, is not the unauthorized practice of law, given the unique circumstances facing prison inmates. Trial courts are not compelled to accept pro se pleadings or motions when counsel of record has already entered an appearance, however. The trial court has discretion whether to allow hybrid representation, and may impose controls on the filing of pro se motions by represented litigants. Doc. 2016-043, August 5, 2016. https://www.vermontjudiciary.org/LC/Supreme%20Court%20Published%20Decisions/op16-043.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."

REVOCATION OF YOUTHFUL OFFENDER STATUS WAS WITHIN COURT'S DISCRETION

State v. Davey, three-justice entry order. YOUTHFUL OFFENDER STATUS: REVOCATION; DISCRETION. SENTENCING: DISCRETION. Revocation of youthful offender status with respect to two sexual assault convictions, and imposition of sentence on those offenses, affirmed. 1) The court did not abuse its discretion when it revoked the defendant's youthful offender status. It found that the defendant had engaged in a pattern of deceptions, that his actions placed the community at risk, and that his actions showed that he was no longer amenable to treatment or rehabilitation as a youthful offender. 2) The court has broad discretion in imposing sentence, and it did not abuse that discretion here. Doc. 2014-387, June Term, 2016. https://www.vermontjudiciary.org/UPEO2011Present/eo14-387.pdf

PCR DECISION REMANDED FOR CONSIDERATION OF CLAIMS NOT REACHED

In re Hicks, three-justice entry order. POST-CONVICTION RELIEF: FACTUAL DISPUTES; INSUFFICIENT RECORD.
Denial of post-conviction relief reversed and remanded for failure to address all of the issues in the petition. 1) The trial court was entitled to resolve a factual dispute against the petitioner, and to find that his attorney

gave accurate testimony when he testified that the petitioner had agreed to an earlier stipulation. 2) The trial court did not reach other claims asserted in the petitioner, which the court concluded were identical to claims asserted and resolved in an earlier petition. The record on appeal does not include the petitioner's earlier petition, and therefore the Supreme Court has no basis for reviewing the trial court's ruling on this point. The matter is therefore reversed and remanded for consideration of the remaining claims. Doc. 2014-443, June Term, 2016. https://www.vermontjudiciary.org/UPEO2011Present/eo14-443.pdf

VIOLATION OF RELIEF FROM ABUSE ORDER SUPPORTED BY EVIDENCE OF SERVICE OF ORDER

State v. Baird, three-justice entry order. VIOLATION OF RFA ORDER: EVIDENCE OF SERVICE; INABILITY TO ATTEND HEARING.

Appeal from thirty counts of violation of a relief-from-abuse order affirmed. 1) The evidence was sufficient for the jury to find beyond a reasonable doubt that the defendant was served with a final relief from abuse order, where the deputy sheriff testified that he did serve such an order, despite the fact that the return of service indicated a temporary order for relief from abuse. 2) The defendant was not denied due process where he did not participate in the hearing on the relief from abuse order because he was in jail. He could have participated by telephone, but he never requested that option of the Family Court. Doc. 2015-147, June Term, 2016. https://www.vermontjudiciary.org/UPEO2011Present/eo15-147.pdf

SENTENCE WHICH FOCUSED ON PUNISHMENT WAS WITHIN COURT'S DISCRETION

State v. Thomas, three-justice entry order. SENTENCING: DISCRETION.

Conditional plea of guilty to a charge of lewd-and-lascivious conduct with a child affirmed. The sentence in this case was not an abuse of discretion because it focused on punishment rather than rehabilitation. After considering the particular facts of the case and the legitimate goals of criminal justice, the court imposed a sentence within the statutory limits. Doc. 2015-367, June Term 2016. https://www.vermontjudiciary.org/UPEO2011Present/eo15-367.pdf

WIDE TURN DID NOT SUPPORT STOP ABSENT EVIDENCE OF PRACTICABILITY OF TIGHTER TURN

*State v. Barrell, three-justice entry order. MOTOR VEHICLE STOP: FAILURE TO STAY TO THE RIGHT DURING TURN.

State's appeal from grant of motion to suppress evidence following a motor-vehicle stop denied. The police officer observed a driver making a wide right hand turn, entering the unmarked area in front of the left-turning-lane stop line for on-coming traffic. The officer stopped the vehicle on suspicion of having violated a statute that

requires a driver to make a right hand turn "as close as practicable" to the curb. The State did not submit any evidence on the question whether it was practicable to drive any closer to the curb, such as the absence or presence of persons, obstacles, or other vehicles in the area between the defendant's vehicle and the curb. This was an important piece of the totality of the circumstances, and without it the court did not err in concluding that the officer's observations amount to an "inchoate and unparticularized suspicion." [Note conflict with State v. Colucci, 2015 WL 9307419 (December 2015 Entry Order), upholding motor vehicle stop based on failure to drive, as nearly as practicable, entirely within a single lane, despite absence of evidence that remaining in original lane was impracticable, because this was not pertinent to the reasonable suspicion determination.] https://www.vermontjudiciary.org/UPEO2011Present/eo15-461,%20eo15-470.pdf

RUTLAND COURT HAD JURISDICTION OVER SENTENCING DESPITE CHANGE OF TRIAL VENUE

*In re Bruyette, three-justice entry order. SENTENCING: JURISDICTION AND VENUE.

Dismissal of motion to vacate or correct an illegal sentence affirmed. The defendant's trial was moved from Rutland to Windham at the request of the defendant. Following his conviction, the matter was moved back from Windham to Rutland for sentencing. The defendant now claims that the Rutland court lacked jurisdiction over the matter. The venue transfer was not unlawful, as the rule permitted venue transfers on motion of the court, which is what happened here once the jury trial had concluded. As a result of the transfer back to Rutland, the same judge who presided over the trial sentenced the defendant, sitting in a Rutland courtroom rather than a Windham courtroom. Even if venue were properly in Windham, this in no way affected the general jurisdiction of the court. Doc. 2015-181, June Term, 2016. https://www.vermontjudiciary.org/UPEO2011Present/eo15-181.pdf

COURT WAS ENTITLED TO CREDIT OFFICER'S TESTIMONY DESPITE INCONCLUSIVE VIDEOTAPE OF ENCOUNTER

State v. Erikssen, 3 justice entry order. DUI: REASONABLE SUSPICION.

Denial of motion to suppress in civil suspension and DUI cases affirmed. The defendant was stopped for making an illegal right hand turn, and was found to have red and watery eyes. She said that she had been drinking earlier in the day, but that the eye condition was due to contact lenses. The officer concluded that she was not impaired, but after delivering her a warning, the defendant asked him a question, and her slurred speech gave him a reasonable basis to believe that she might be impaired. The defendant argues that because the court found the videotape of the encounter inconclusive on whether she had slurred her speech, it could not credit the officer's testimony on this point. The court was entitled to give great weight to the officer's testimony, even where the videotape was inconclusive. Based on the totality of the circumstances, the trooper had reasonable grounds to conclude that the defendant was DUI. Doc. 2015-464, July Term 2016. https://www.vermontjudiciary.org/UPEO2011Present/eo15-464.pdf

FACTS ADMITTED BY DEFENDANT AT COP WERE SUFFICIENT TO ESTABLISH FACTUAL BASIS FOR HAVING ACTED KNOWINGLY, I.E., PRACTICALLY CERTAIN TO CAUSE INJURY.

In re Dashno, 3 justice entry order. RULE 11: SUFFICIENCY OF FACTUAL BASIS FOR PLEA.

Order dismissing petition for post-conviction relief affirmed. The petitioner argued that the Rule 11 colloquy failed to establish a factual basis for the plea to aggravated assault with a deadly weapon. The petitioner admitted that he caused bodily injury to the victim by shooting at him with a gun, but denied that it was his intent to cause bodily injury to him, and stated that his intent was to get out of the situation and defend himself. He did admit that if the State presented the evidence outlined by the prosecutor, that a jury could find that it was his intent to cause bodily injury, and he did admit that the gun is a deadly weapon. This was sufficient to establish a factual basis for the plea. The requisite mental state was "knowingly." The facts admitted by the petitioner, that he shot a gun at the victim and caused the victim harm, were sufficient to establish that he was aware that his conduct was practically certain to cause the victim injury. The charge did not require a showing that he intended to injure the other person. Doc. 2015-266, July Term, 2016.
https://www.vermontjudiciary.org/UPEO2011Present/eo15-266.pdf

Criminal And Appellate Rule Changes

On December 21, 2015, Rules 5(d) and 11 were amended in an emergency order to conform the rules to provisions of the Uniform Collateral Consequences of Conviction Act, which is in pertinent part codified at 13 V.S.A. 8002-8005. The emergency amendments became effective January 1, 2016. Those amendments are now made permanent. The rules may be found at:
https://www.vermontjudiciary.org/LC/Statutes%20and%20Rules/PROMULGATEDVRCrP5and11EmergencyMadePermanent.pdf

United States Supreme Court Cases Of Interest

Thanks to NAAG for these summaries

Utah v. Strieff, 14-1371. This case involved evidence seized incident to a lawful arrest on an outstanding arrest warrant where the warrant was discovered during an investigatory stop later found to be unlawful (because the officer lacked reasonable suspicion to conduct the stop). By a 5-3 vote, the Court held that the evidence did not need to be suppressed "because the officer's discovery of the arrest warrant attenuated the connection between the unlawful stop and the evidence seized incident to arrest." In reaching that decision, the Court found "it especially significant" that the officer, in

initiating the unlawful stop, "was at most negligent"; "there is no evidence that [the] illegal stop reflected flagrantly unlawful police misconduct."

Birchfield v. North Dakota, 14-1468. The Court held that a state may, consistent with the Fourth Amendment, take a warrantless breath test incident to an arrest for drunk driving; but a state may not take a warrantless blood test incident to arrest. The Court explained that, to apply to these tests the search-incident-to-arrest exception to the warrant requirement, it needed to balance the intrusion upon an individual's privacy with the state's asserted need to take the tests. Finding that blood tests are significantly more intrusive than breath tests, the Court concluded that the balance supports the exception applying to the latter but not the former. Based on that conclusion, the Court ruled that motorists arrested for drunk driving may be criminally prosecuted for refusing to submit to a breath test, but may not be criminally prosecuted for refusing to submit to a blood test. (The Court stated, however, that nothing in its decision "should be read to cast doubt on" state implied-consent laws "that impose civil penalties and evidentiary consequences on motorists who refuse to" take blood tests.)

Legislative Update 2015-2016

Thanks to David Cahill

S.154: Stalking

The stalking offense is amended to eliminate the existing narrow definition of "stalk" that requires following, lying in wait, or threatening behavior, and focuses instead on a "course of conduct" that would cause a reasonable person to fear for his/her safety, or the safety of a family member, or substantial emotional distress.

"Substantial emotional distress" may now be evidenced by: significant modifications in the person's actions or routines; moving from an established residence; changes to daily routes to and from work; changes to employment schedule; and loss of a job or time from work.

S.154: Assault Penalty Enhancement

13 V.S.A. §1028 ("Assault on LEO, Firefighter, EMT…") now covers all "*protected professionals*," which includes DCF workers. Note the addition of an element that the assault must have been undertaken "*to prevent the protected professional from performing his or her lawful duty*."

S.154: Criminal Threatening

S.154 creates the new crime of criminal threatening:

13 V.S.A. § 1702. CRIMINAL THREATENING

(a) A person shall not by words or conduct knowingly:

(1) threaten another person; and

(2) as a result of the threat, place the other person in reasonable apprehension of death or serious bodily injury.

(f) It shall be an affirmative defense to a charge under this section that the person did not have the ability to carry out the threat. The burden shall be on the defendant to prove the affirmative defense by a preponderance of the evidence.

Note: All of S.154 is effective July 1, 2016.

Act 106 (H.854): Timber Trespass

The following offense, found at 13 VSA 3606a, is created:

(a) No person shall knowingly or recklessly:

(1) cut down, fell, destroy, remove, injure, damage, or carry away any timber or forest product placed or growing for any use or purpose whatsoever, or timber or forest product lying or growing belonging to another person, without permission from the owner of the timber or forest product; or

(2) deface the mark of a log, forest product, or other valuable timber in a river or other place.

H.571: Driver Restoration Program

This statute creates a "one time event" in the Judicial Bureau from September 1, 2016 – November 30, 2016, during which Judicial Bureau judgements accrued prior to July 1, 2012 can be settled for $30 apiece; all Judicial Bureau judgements are eligible for a payment plan capped at $100 per month; and n**o** reinstatement fee is required to get license back as part of the Program. SA's have no role in this process.

H.571: Elimination of Suspensions

The following non-driving suspensions are eliminated and cleared without payment of a reinstatement fee: underage alcohol; underage tobacco; false public alarm; underage marijuana; and non-payment of purchase and use tax.

H.571: Remedy for Failure to Pay Fine

In the event of non-payment of a traffic fine, the person's driver's license will be suspended for a period of 30 days or until the amount due is satisfied, whichever is earlier. This language does not retroactively clear pre-2014 "indefinite" suspensions for failure to pay fines.

H.571: The DLS/OSC fix

23 VSA 674(a) is amended as follows:

(3) Violations of section 676 of this title that occurred prior to the date a person successfully completes the DLS Diversion Program ~~or prior to the date that a person pays the amount due to the Judicial Bureau in accordance with subsection 2307(b) of this chapter~~ shall not be counted as prior offenses under subdivision (2) of this subsection. Effective 7/1/2016

H.571: Elimination of 5xOSC DLS

23 VSA 674(a) is amended:

(2) A person who violates section 676 of this title for the ~~sixth~~ third or subsequent time shall, if the five two prior offenses occurred within two years of the third offense and on or ~~after July 1, 2003~~ December 1, 2016, be imprisoned not more than two years or fined not more than $5,000.00, or both.
Effective 7/1/2016

H.571: New crime for License Required

23 VSA 601 (License Required) is amended to create a new crime:

(g) A person who violates this section commits a traffic violation, except that a person who violates this section after a previous conviction under this section within the prior two years shall be subject to imprisonment for not more than 60 days or a fine of not more than $5,000.00, or both.

H.571: Motorcycle Helmets

No points for motorcycle helmet violations.

H.876: Ignition Interlock Devices (IIDs)

The hard suspension period for refusal required before an IID may be used are: First offense: 30 days; Second offense: 90 days; Third offense: 1 year. A hard suspension of one year is required before an IID may be used if the offense involved death or SBI.

H.876: Vulnerable Users

Drivers must yield to vulnerable users when entering a roadway or turning left. The "recommended distance" is now "at least four feet" from a vulnerable user when passing. This also applies to vulnerable users in the oncoming lane and oncoming shoulder. Bicycles no longer have to follow many of the traffic laws when it would be unsafe to do so (e.g., hand signaling for at least 100 feet).

H.869: Judicial Masters

The position of Judicial Master is created. A Judicial Master may preside at treatment court; take part in family court except for contested hearings, and be appointed to serve as an acting judge.

H.869: Regional Venue

This provision permits regional venue blocks consisting of up to four counties apiece, only for TPR proceedings, and Essex/Grand Isle are exempted.

S.155: Electronic Privacy

VECPA, the Vermont Electronic Communications Privacy Act, deals with data in the possession of a third party electronic communication service (e.g., Google, Verizon, Fairpoint, Facebook, etc.). It creates three tiers of protection: warrants, super-subpoenas, and subpoenas.

A warrant is required for "protected user information," which means electronic communication content, including the subject line of e-mails, cellular tower-based location data, GPS or GPS-derived location data, the contents of files entrusted by a user to an electronic communication service pursuant to a contractual relationship for the storage of the files whether or not a fee is charged, data memorializing the content of information accessed or viewed by a user, and any other data for which a reasonable expectation of privacy exists. In other words, protected user information includes precision location (GPS or cell triangulation); files stored in the cloud; communication content; data summarizing communication content; and any other data for which there is a reasonable expectation of privacy

A regular (inquest) subpoena is required for "subscriber information," which means the name, names of additional account users, account number, billing address, physical address, e-mail address, telephone number, payment method, record of services used, and record of duration of service provided or kept by a service provider regarding a user or account.

A "super subpoena" is required for anything for which a warrant is not required. A super subpoena is a subpoena issued by a judicial officer, who shall issue the subpoena upon a finding that: (A) there is reasonable cause to believe that an offense has been committed; and (B) the information sought is relevant to the offense or appears reasonably calculated to lead to discovery of evidence of the alleged offense; or a subpoena issued by a grand jury; or a court order issued by a judicial officer upon a finding that the information sought is reasonably related to a pending investigation or pending case.

In addition, the statute provides extraterritorial authority for warrants and subpoenas; requires providers to provide a "Records Custodian Affidavit"; permits officers to request a "delay in notification to target" for periods of up to 90 days (renewable); and, in suppression proceedings, provides that the defendant cannot challenge personal jurisdiction over the provider and cannot invoke another person's privacy interest.

S.155: Plate Readers

ALPR data is available as follows:

When less than 6 months old, by written request of a law enforcement officer or other person setting reasonable and articulable facts that the data is relevant to an ongoing investigation, criminal case, missing person, or CMV enforcement action.

When more than 6 months old, by warrant, court order in pending criminal case, or CMV enforcement action.

S.155: Drones

A law enforcement agency may use a drone and may disclose or receive information acquired through the operation of a drone if the drone is operated:

(1) for a purpose other than the investigation, detection, or prosecution of crime,

(2) pursuant to: (A) a warrant obtained under Rule 41 of the Vermont Rules of Criminal Procedure; or (B) a judicially recognized exception to the warrant requirement.

(3)(A) If a law enforcement agency uses a drone in exigent circumstances pursuant to subdivision (2)(B), the agency shall obtain a search warrant for the use of the drone within 48 hours after the use commenced.

No person shall equip a drone with a dangerous or deadly weapon or fire a projectile from a drone. A person who violates this section shall be imprisoned not more than one year or fined not more than $1,000.00, or both

S.155: Effective Dates

ALPR: effective July 1, 2016

Electronic Privacy: effective October 1, 2016

Drones: effective October 1, 2016

H.95 – Juvenile Offenders

Provisions Effective July 1, 2016:

10-11 year olds must be treated as juveniles, even for "Big 12" offenses listed in 33 VSA 5204.

DCF may administer graduated sanctions for juvenile probationers.

The Family Court may transfer probation supervision to DOC with all the powers of DOC, including electronic monitoring and graduated sanctions.

DOC must provide (gradual rollout) segregated facilities for inmates under 25.

LEOs shall cite 16-17 year olds to Family Division except for the Big 12, Listed Crimes, DLS, ATE, LSA, and F&W.

Family Division jurisdiction is expanded to include all motor vehicle misdemeanors, and the statute provides that the Family Division shall forward MV offense convictions to the DMV for points/suspension application.

Provisions Effective July 1, 2017

Age 16 and younger misdemeanors must be charged and adjudicated in the Family Division.

Age 16 and younger felonies (not Big 12) must be charged in the Family Division, but may be transferred up.

Provisions Effective July 1, 2018

Age 17 and younger misdemeanors must be charged and adjudicated in Family Division.

Age 17 and younger felonies (not Big 12) must be charged in Family Division, but may be transferred up.

"Jurisdiction over a child who has been adjudicated delinquent may be extended until 6 months beyond the child's ~~18th~~ 19th birthday if the child was 16 or 17 years old when he or she committed the offense."

The Justice Oversight Committee is directed to study raising the juvenile delinquency age to 20; expanding youthful offender status to age 24; the creation of an Office of Youth Justice; and the resources necessary to achieve these.

H.95 – Youthful Offender Provisions - Effective July 1, 2018

The SA may directly file a YO petition in juvenile court. The defendant has right to a contested merits hearing. Eligible cases are those where the age is 16 – 22, and the case could be filed in the Criminal Division.

**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. For information contact David Tartter at david.tartter@vermont.gov.