Vermont Department of State's Attorneys

Vermont Criminal Law Month

June - July 2017

Vermont Supreme Court Slip Opinions: Full Court Rulings

Includes three-justice bail appeals

JUROR WITH UNDISCLOSED CRIMINAL CONVICTION DID NOT REQUIRE REVERSAL

State v. Perrault, 2017 VT 67. JURIES: JUROR WITH CRIMINAL CONVICTION. SUFFIENCY OF THE EVIDENCE: KNOWLEDGE OF NATURE OF PILLS.

Full court published opinion. Conviction of possessing marijuana, and possessing a depressant or stimulant, affirmed. 1) A juror failed to disclose a felony conviction, but testified at a post-trial hearing that her prior conviction had no bearing on her deliberations during the proceedings and that she remained impartial throughout the defendant's trial. 4 V.S.A. § 962(a) disqualifies a person from jury service who has served a term of imprisonment in this state after conviction of a felony. The juror here was convicted in Nevada federal court and imprisoned in Nevada. Although part of her post-release supervision occurred in Vermont, no part of her confinement happened in Vermont. Therefore, the plain language of the statute does not disqualify her from service. Her post-arrest supervision in Vermont did not constitute serving a term of imprisonment in Vermont. 2) Section 962(a) aside, the felon-juror's mere presence did not taint the conviction, where the defendant failed to establish actual prejudice from her participation. The trial court correctly barred any questioning of the juror about the actual deliberations, but did permit questioning fo the juror as to any role her conviction might have played in compromising her ability to objectively and impartially receive the evidence and deliberate. 3) Nor did the defendant establish that the juror dishonestly answered a material question and that a correct response to the question would have revealed possible bias and provided a valid basis to challenge the juror for cause, which is an alternative standard used by some courts in this situation. The juror's testimony at the hearing established that she did not understand the question on the questionnaire and that her incorrect answer was an honest mistake. 4) The evidence was sufficient to show that the defendant knowingly possessed a depressant or stimulant, where the mixture of different pills in a single bottle and the pills' packaging, in a plastic bag consistent with practices for selling drugs, and the defendant's evasiveness when confronted by the police, provided sufficient evidence for the jury to

rationally infer that the defendant knew the pills were regulated drugs and that he unlawfully possessed them. The defendant's countervailing testimony at trial is disregarded when deciding a question of sufficiency of the evidence. Doc. 2015-462, July 28, 2017. https://www.vermontjudiciary.org/sites/default/files/documents/op15-462.pdf

DEFENDANT DENIED CREDIT FOR TIME SERVED BEFORE THE CRIME WAS COMMITTED

Fleming-Pancione v. Menard, 2017 VT 59. CONCURRENT SENTENCES: OVERLAPPING TIME IN CUSTODY.

Full court published opinion. Denial of reduction in Vermont sentence for time spent serving an earlier sentence in Massachusetts is affirmed. The defendant received a sentence in Vermont which was to run concurrently with a sentence he had received in Massachusetts, the majority of which he had already served at the time of the second sentencing. He argued that he was entitled to credit towards the second sentence for all of the time spent serving the first sentence – in other words, that the two sentences should be treated as though they began on the same date, the earlier start date. However, 13 V.S.A. § 7032(c)(1) states that concurrent sentences "each shall run from its respective date of commitment after sentence." The defendant is entitled for credit only for the period of time that the two sentences overlapped. Doc. 2016-186, July 7, 2017. https://www.vermontjudiciary.org/sites/default/files/documents/op16-186.pdf

COURT MAY NOT SHORTEN TERM OF DEFERRED SENTENCE AGREEMENT BETWEEN DEFENDANT AND STATE

State v. Love, 2017 VT 66. DEFERRED SENTENCE AGREEMENTS: EARLY DISCHARGE OVER STATE'S OBJECTION.

Decision denying defendant's request to have probation obligations terminated and criminal convictions expunged halfway through his stipulated deferred-sentence term affirmed. The defendant and the State entered into a deferred sentence agreement pursuant to 13 V.S.A. § 7041(a), pursuant to which the defendant was placed on probation, and the term of the deferred sentence was agreed to be four years. Two years later the defendant sought early discharge from probation, and for reduction of the deferment period. The statutes do not provide the trial court with the authority to reduce the term of deferment once the agreement has been entered into. The deferred-sentence agreement is a contract in which the defendant has agreed to the burden of a term of deferment in return for the large benefit of avoiding a sentencing and obtaining expungement of the criminal conviction. Permitting a discretionary reduction of the term of deferment over the State's objection would be inconsistent with the statutory scheme. Nor could the court reduce the period of probation pursuant to 28 V.S.A. § 251, which allows the court to reduce the term of probation if it is warranted by the conduct of the offender and the ends of justice. This provision conflicts with the deferred-sentencing statute, and given the defendant's agreement to the four year deferred sentence term and the accompanying probation conditions and duration, and his obtaining a significant benefit from the

agreement, it is fundamentally unfair to allow him to escape the agreement's burden, and would not advance the ends of justice. Finally, the wording of the order placing the defendant on probation "until further order of the court" does not permit a different result, as such an order would be illegal. Such language can only apply to lawful orders, not to any orders. In conclusion, early termination of probation conditions without the State's consent conflicts with the provisions of Section 7041 and violates the defendant's contractual obligations. Doc. 2016-195, July 21, 2017. https://www.vermontjudiciary.org/sites/default/files/documents/op16-195.pdf

Vermont Supreme Court Slip Opinions: 3 Justice Panel Rulings

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."

DEFENDANT WAS NOT ENTRAPPED INTO LURING A CHILD WHERE OFFICER POSED ON-LINE AS 13 YEAR OLD

State v. Atwood, three-justice entry order. ENTRAPMENT.

Luring a child affirmed. The defendant argues on appeal that he was entrapped into committing the crime where a police officer answered his personal ad seeking a young submissive female, in the persona of a 13-year-old girl. Vermont has adopted an objective test for entrapment, which asks whether the officer induces or encourages another person to engage in conduct by employing methods of persuasion or inducement that create a substantial risk that such an offense will be committed by persons other than those who are ready to commit it. The test does not look at the defendant's own subjective predisposition to commit the offense. However, in applying the objective test, the courts may examine a defendant's communications and conduct while interacting with government acts, which is what the court did here. The court examined the on-line communications between the officer and the defendant. In her initial response to the ad, the officer indicated that she was 13 years old. That did not deter the defendant from pursuing a sexual encounter with her. He was the principal initiator of discussions about sex and when they could meet to have sex. Immediately upon being contacted by the officer, the defendant pursued his desire to have sex with her, despite his belief that she was underaged. Doc. 2016-203, June 26, 2017.

EXTRADITION CHALLENGE MOOT AFTER STATE WITHDREW WARRANT AND SERVED A NEW ONE

In re Large, three-justice entry order. PETITION FOR WRIT OF HABEAS CORPUS: MOOTNESS.

Appeal from denial of petition for writ of habeas corpus, challenging extradition warrant, dismissed as moot. On appeal, the

petitioner argued that the warrant was invalid because it purported to be based on a mandatory fugitive extradition demand when in fact the Governor of Pennsylvania had sought discretionary extradition. While the appeal was pending the petitioner was served with a new warrant, based on a discretionary extradition demand. The original warrant has been withdrawn and the State no longer relies upon it. The new warrant is the subject of litigation in a separate proceeding in the trial court. The challenge to the old warrant is therefore moot, and does not meet the exception to the mootness doctrine suggested by the petitioner, since there is no reasonable expectation that the petitioner will find himself in the same action again. Doc. 17-042, June 26, 2017.

ADMISSION OF RELIABLE HEARSAY AT SENTENCING WAS PERMISSIBLE; COURT'S FAILING TO MAKE FINDING OF RELIABILITY WAS HARMLESS

State v. Ploof, three-justice entry order. SENTENCING: USE OF HEARSAY; OTHER CRIMINAL ACTS.

Sentence for two misdemeanor counts of false pretenses affirmed. 1) The court did not err in admitting hearsay statements concerning the defendant's financial exploitation of the victim, her father, at the sentencing where the defense was notified at least three weeks prior to the sentencing hearing of these allegations and she had an opportunity to rebut the testimony. The rules of evidence, which prohibit hearsay testimony, do not apply at sentencings. 2) The trial court did not improperly rely upon the disputed testimony without making findings as to the reliability of the testimony as required by Criminal Rule 32(c). There is no indication in the record that the court relied upon the disputed statements in deciding the defendant's sentence. Even if it did, there is sufficient evidence in the record to support a finding that the disputed testimony was reliable. Any error in the lack of findings was therefore harmless. 3) The defendant argued that the court improperly based its sentence on the unproven financial exploitation allegations generally. A sentencing court may consider evidence of other criminal acts by a defendant, and any other information, so long as the information is factual, reliable, and not materially untrue. The defendant here had ample opportunity to object to the factual information presented by the State's witnesses, or present rebuttal evidence regarding the financial exploitation allegations. Doc. 2016-218, July 24, 2017.

COURT SHOULD HAVE CONSIDERED IF HABEAS CORPUS PETITIONER WAS ENTITLED TO AN ATTORNEY

Dunavin v. Menard, three-justice entry order. HABEAS CORPUS: DENIAL OF ATTORNEY.

Denial of petition for writ of habeas corpus remanded for additional proceedings. After indicating several times that he wanted to proceed pro se, the petitioner changed his mind and made multiple requests for counsel. Because the petitioner might be entitled to counsel, the matter is remanded for the trial court to consider the request for counsel, and to determine whether a new hearing is warranted after doing so. Doc. 2016-370, July 24, 2017. https://www.vermontjudiciary.org/sites/default/files/documents/eo16-370.pdf

Rule Amendments

V.R.Cr.P. 32(g) – Procedures for Conduct of Restitution Hearings

Subdivision (g) is added to V.R.Cr.P. 32, prescribing the procedure in restitution hearings generally, including allocation of the burden of proof and the admission of hearsay evidence deemed to be reliable. It also sets out the prehearing disclosures required of each side. The rule takes effect September 18, 2017. The text is set out below:

RULE 32. SENTENCE AND JUDGMENT

(g) **Restitution.** In every case in which a victim has suffered a material loss, the court must determine the amount of restitution, if any, which the defendant must pay.

(1) *Hearing; General Procedures*. Unless the amount of restitution is agreed to by the parties, a restitution hearing must be held. The court must issue findings either on the record or in writing as to any matters of factual dispute in the determination of the amount of restitution or the defendant's current ability to pay restitution. The state has the burden of establishing the amount of restitution and a defendant's ability to pay by a preponderance of the evidence. The court must enter a restitution judgment order establishing the defendant's restitution obligation. The provisions of subparagraph (c)(4)(A) apply in the conduct of restitution hearings.

(2) *Prehearing Disclosures*. At least 14 days prior to the restitution hearing, the prosecuting attorney must provide to the defendant a written statement of the amount of restitution claimed and copies of any documents that the state intends to offer in evidence to establish a victim's material loss and support the claim for restitution. The prosecuting attorney must disclose in writing to the defendant the existence and terms, if known after reasonable inquiry, of any policy of insurance for the losses in issue that would serve to compensate the victim for all or any portion of material loss held by the victim or a party other than the defendant. The disclosure must include uninsured motorist coverage, if applicable, and it must be made to the defendant at least 14 days prior to the restitution hearing. If the defendant claims that a victim's losses are not uninsured by reason of the existence of defendant's own or a third party's insurance coverage for the losses in issue, he or she must disclose to the prosecuting attorney in writing the existence and terms of this liability insurance coverage, if known after reasonable inquiry, at least 14 days prior to the restitution hearing.

(3) *Ability to Pay*. If the defendant intends to raise the issue of inability to pay the amount claimed, either at the time of the restitution hearing or in a restitution payment schedule or both, he or she must disclose such intent in writing to the court and prosecuting attorney at least 14 days prior to the restitution hearing.