Criminal Justice Division
Vermont Attorney General's Office

Vermont Criminal Law Month

October - November 2010

Vermont Supreme Court Slip Opinions: Full Court Rulings

Includes three justice bail appeals

CONFIDENTIAL INFORMANT'S RELIABILITY WAS ESTABLISHED FOR PURPOSES OF SEARCH WARRANT

State v. Arrington, 2010 VT 87. Full court published opinion. PROBABLE CAUSE TO ARREST: INFORMATION FROM CONFIDENTIAL INFORMANT.

Sale of cocaine, conspiracy to sell cocaine, possession of cocaine, and possession of marijuana, affirmed. The police had probable cause to make a warrantless arrest where an informant admitted to working with a drug supplier, informed the police where and when the supplier would be arriving in Rutland, described the supplier's car, and identified the supplier upon his arrival. Assuming that the Aguilar-Spinelli test applies in warrantless-arrest cases, its requirements were met here. The first prong of the test, that the informant have a basis of knowledge, was satisfied because the informant provided first-hand information. The second prong, that the information be reliable on this occasion (or that the informant be inherently credible) is also satisfied because 1) there was strong evidence that the informant actually was selling drugs in the area (cash and scales on her person, and crack cocaine in the police cruiser where she had been sitting); 2) the informant correctly predicted the supplier's time and route of arrival into Rutland and accurately described his vehicle (although this alone would be insufficient); 3) the identity of the informant was known to the police, and she gave a statement under oath describing her past involvement with the defendant, thus exposing herself to retaliation and to a possible perjury prosecution; and 4) the informant provided information that implicated herself in the commission of a crime. Doc. 2009-242, October 1, 2010.

COURT'S EX PARTE COMMUNICATIONS WITH WITNESSES CAST ASIDE MANTLE OF IMPARTIALITY

State v. Gokey, 2010 VT 89. Full court published opinion. EX PARTE COMMUNICATIONS; JUDGE AS WITNESS.

Lewd and lascivious conduct with a child reversed. During the trial, the defendant became ill and was taken to the emergency room and treated with a drug. The following morning he reported that he had taken a

second dose of the drug, and that he was unable to continue with the trial due to its side effect of sleepiness. Citing, in part, information the judge had learned from a pharmacist during a phone call, and conversations with the defendant's transporting officers, the judge concluded that the defendant was malingering and ordered that the trial continue. The judge violated V.R.E. 605 by conducting ex parte communications with the transporting officers and a pharmacist and inserting the information gathered into the proceeding. (Rule 605 prohibits a judge from appearing as a witness in a trial over which he or she is presiding). This rule is not limited to statements formally given from the witness stand, but can be brought into the proceedings through other means. The defendant is not required to show any prejudice: "Where, as here, a judge has cast aside the mantle of impartiality and given a criminal defendant substantial reason to doubt her even-handed ruling in his case by engaging in her own fact-finding – even where the ultimate issue of guilt or innocence was not in her hands – we cannot abide by some ex post factor weighing of prejudice." The court also noted that the trial judge's refusal to permit defense counsel to submit a list of the defendant's medications and to present a doctor's testimony concerning their potential impact upon the defendant, also denied the defendant the opportunity for an adversarial hearing on his competency. Reiber and Burgess dissent: The defense waived this issue by failing to raise it before the trial court. Although Rule 605 explicitly states that no contemporaneous objection need be made, the conduct here did not violate Rule 605, but rather VRCrP 26(a), requiring that the testimony of witnesses be taken orally in court. Because the judge did not testify, there was no violation of Rule 605. Doc. 2009-131, October 8, 2010.

OFFICER WAS ENTITLED TO SEIZE DEFENDANT WHO PULLED CAR INTO OFFICER'S OWN DRIVEWAY

State v. Young, 2010 VT 97. Full court published opinion. SEIZURE: OFFICER ACTING IN PRIVATE CAPACITY. EXIT ORDER: SUFFICIENCY OF EVIDENCE TO JUSTIFY.

Conditional plea to DUI affirmed. The defendant pulled into a driveway to allow another vehicle to pass him. Unfortunately it turned out to be the other driver's house, and the other driver was an off-duty police officer. There was some dispute as to whether the officer then blocked him in the driveway or not, but after the officer spoke to the defendant, the defendant was processed for DUI. 1) Even assuming that the officer blocked the driveway, there was no unlawful seizure. The officer was off duty and was acting in his private capacity as a home owner when he allegedly blocked the defendant's exit -- he was seeking to determine why a strange vehicle had pulled into his driveway while his wife and children were inside the home. The officer did seize the defendant at some point after noting his slurred speech and smelling the strong odor of alcohol, and before ordering him out of the car. By that time, grounds for the seizure had already emerged from the officer's interactions with the defendant. 2) The exit order was supported by a reasonable and articulable suspicion based upon the odor of alcohol emanating from the defendant's truck and the officer's observation that the defendant's speech was slurred. The fact that the odor came from inside the vehicle, as opposed to from the defendant, is a meaningless distinction. 3) The trial court's finding that the officer observed the defendant's watery and bloodshot eyes only after the exit order does not require a different outcome, as even without this factor, the officer had grounds to order him to exit the vehicle.

Other facts cited by the defendant were not ignored by the court, but were simply given less weight than other facts. Doc. 2009-252, October 29, 2010.

DEFENDANT WAS IN CUSTODY DURING STATIONHOUSE INTERVIEW

*State v. Muntean, 2010 VT 88. Full court published opinion. CUSTODIAL INTERROGATION.

Trial court's suppression of defendant's statements on Miranda grounds affirmed. The trial court correctly determined that the defendant was in custody for the duration of the interview, where the following factors were present: the interview was conducted in a secure part of the police barracks, in a room with a closed door; the defendant was not told that he was free to leave whenever he so desired (he was told that he would be going home "today" but that was insufficient to overcome the other factors); the defendant was confronted almost immediately, and continuing throughout the interrogation, with evidence of guilt of a serious crime, and the detective insisted throughout the interview that he "knew" the defendant was guilty; and the defendant had confessed to some of the allegations made against him. Since the defendant was not given the Miranda warnings, his statements were properly suppressed. Reiber and Burgess dissenting: The defendant was told that he was not under arrest, that he was going to go home that day, and that he was there of his own free will. These statements effectively informed the defendant that he was free to leave. Furthermore, the defendant appeared at the barracks on his own, by invitation and at a time of his choosing. Doc. 2009-241, November 5, 2010.

PHYSICAL DISCIPLINE OF CHILD ADMISSIBLE TO EXPLAIN DELAY IN REPORTING LEWD AND LASCIVIOUS CONDUCT

State v. Brown, 2010 VT 103. Full court published opinion. PRIOR BAD ACTS: RELEVANCE; UNDUE PREJUDICE; LIMITING INSTRUCTION – FAILURE TO OBJECT OR ARGUE PLAIN ERROR ON APPEAL.

Lewd and lascivious conduct with a child affirmed. 1) Evidence that the defendant used a paddle to discipline the victim, his step-granddaughter, was relevant to help explain the three year delay between the sexual assault and the child's report of the incident. This is true even though she also stated that she didn't report because as a young child she felt that no one would believe her. The defendant argued that since she had given an alternative, non-prejudicial, reason for her failure to disclose, the second reason, her fear of the defendant, was irrelevant and unnecessary surplusage. However, her statement that "when she was younger," she feared no one would believe her does not sufficiently explain why the delay lasted into later years. 2) No plain error occurred in the admission of the evidence in the face of Rule 403. Although evidence of paddling may cast the defendant in a negative light, the evidence is not horrific. Further, the defendant himself elicited evidence which tended to show he was violent towards the child and others in the family. 3) The trial court's limiting instruction on this evidence was not objected to, and the defendant did not claim plain error on appeal. Doc. 2009-293, November 19, 2010.

Vermont Supreme Court Slip Opinions: 3 Justice Panel Rulings

Note: The precedential value of decisions by 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."

"RECKLESS" INSTRUCTION SUFFICIENTLY CONVEYED DEFENSE THAT BLOW WAS AN INSTINCTUAL REACTION

*State v. Rollins, three-justice entry order. VIOLATION OF EVIDENTIARY STIPULATION: FAILURE TO OBJECT. INSTRUCTIONS: MENTAL STATE OF RECKLESSNESS. SENTENCING: DISCRETION.

Domestic assault affirmed. 1) The defendant's claim that the State violated a pre-trial stipulation that certain evidence would not be admitted would not be considered because there was no contemporaneous objection. Since there was no objection, the State was entitled to refer to the evidence in its closing argument. 2) The trial court's instruction on the mental state required for domestic assault adequately apprised the jury that had the defendant acted instinctually, he would not be guilty. The court was not required to use the language the defendant proposed. 3) The trial court did not abuse its discretion by requiring in sentencing that the defendant complete the Alternatives program. Doc. 2009-482, October 21, 2010.

COURT LACKED JURISDICTION TO CONSIDER MOTION TO WITHDRAW PLEA

State v. Mumley, three-justice entry order. MOTION TO WITHDRAW PLEA: TIMELINESS.

Denial of motion to withdraw no-contest plea to receiving stolen property affirmed. The defendant was in custody under sentence at the time that he filed the motion, and therefore, although the trial court considered the merits of the motion, it should have just dismissed for lack of jurisdiction. The judgment is affirmed on that basis. Doc. 2009-413, October Term 2010.

GUILTY PLEA WAIVED DOUBLE JEOPARDY CLAIM

In re Mouliert, three-justice entry order. DOUBLE JEOPARDY: PLEA TO TWO COUNTS ARISING FROM SINGLE INCIDENT.

Summary judgment for the State in post-conviction relief petition affirmed. The defendant was originally charged with one count of sexual assault. Pursuant to a plea agreement, that charge was amended to two counts of lewd and lascivious conduct, based upon touching the victim's breast and inserting a finger into her vagina during the same incident. His PCR petition claimed

that only a single act of misconduct had occurred and there had been no express waiver of double jeopardy. A guilty plea to two counts is a concession that the defendant has committed two separate crimes, and constitutes an implicit waiver of any double jeopardy claim unless the charges on their face create a double jeopardy violation. Since the court could not conclusively determine, based on the record at the change of plea, that the two charges were so factually duplicative that the State could not constitutionally prosecute them both, the defendant cannot meet the requisite standard. Doc. 2009-463, October Term 2010.

DUI ON PRIVATELY MAINTAINED ROAD UPHELD

State v. Waters, three-justice entry order. OPERATION WHILE INTOXICATED: PUBLIC HIGHWAY.

Civil suspension affirmed. The defendant was correctly found to have been operating on a public highway despite the fact that the road was privately maintained, and had a sign at the entrance stating that it was a private way for property owners, and adding, "do not enter." The road was used by members of the general public, and the do-not-enter sign was not enforced. Doc. 2010-044, October Term 2010.

OFFICER CAN TESTIFY TO BELIEF OF INTOXICATION AS A LAY WITNESS

State v. Walsh, three-justice entry order. REASONABLE BELIEF OF DUI: LAY OPINION.

Civil suspension based on refusal affirmed. The officer's affidavit, introduced at the hearing, established that the defendant was tailgating and speeding, smelled of intoxicants, had slurred and confused speech, and had bloodshot and watery eyes. The defendant also admitted to having two beers at a local bar, and after submitting to field sobriety tests, the officer opined that the defendant's intoxication level was "extreme." The defendant argues that the State failed to prove that the officer had a reasonable basis to request an evidentiary breath test because the officer did not testify or specify in his affidavit that his belief of the defendant's intoxication was based on his training and experience. The facts supporting the officer's reasonable belief of defendant's intoxication were evidence even to a lay person and did not require any special training or experience. Doc. 2010-046, October Term 2010.

TIME IS NOT OF THE ESSENCE TO A VOP

State v. Perry, three-justice entry order. VAPO: TIME OF OFFENSE. JURY INSTRUCTION: PRESERVATION.

Violation of abuse prevention order affirmed. 1) The court was not required to add the date of the offense to the jury verdict form, because time was not an essential element. 2) The court also told the jury, in response to a question, that the defendant's former attorney's alleged advice that she could drive near her ex-husband's shop could not alter the terms of the abuse-prevention order, and noted that the offense is not a specific intent crime. The defendant's claim that this somehow constituted an impermissible comment on the evidence was not raised below, and therefore would not be considered on appeal. Doc. 2010-072, October Term 2010.

EVIDENCE OF INTENT SUFFICIENT IN ACCESSORY AFTER THE FACT CONVICTION

State v. Wilson, three-justice entry order. ACCESSORY AFTER THE FACT: EVIDENCE OF REQUISITE INTENT.

Accessory after the fact affirmed. The defendant encouraged her granddaughter to lie to the police about the extent of the defendant's boyfriend's unlawful sexual touching. On appeal, she argued that there was insufficient evidence that she acted with the conscious purpose of helping her boyfriend avoid punishment. Because the motion for judgment of acquittal at trial was made on different grounds, to prevail here she must show that the evidence of her intent to help her boyfriend was so thin that a conviction would be unconscionable. The facts here were sufficient to permit a reasonable jury to find that the defendant acted with the necessary intent. Doc. 2010-073, October Term 2010.

Consular Notification: Further Information

An e-mail was recently sent to the law enforcement community concerning consular notification. In a very abridged version, here are the requirements: when a foreign national is arrested or detained, if he is a national of certain countries (the "list" countries"), the consulate of that country **must** be informed of the detention, and the detainee **must** be informed that he may communicate with the consulate and that you are going to notify the consulate. If he is a national of a country not on the list, he **must** be informed that he has the right to have his consulate notified. The consulate **must** also be informed of the death, and should be informed of the serious illness or injury, of any foreign national.

Here are the answers to some frequently asked questions on this topic. Contact information for further information is provided at the end. As always, the Criminal Division is happy to provide assistance as well: 828-5512.

Q. What is a "consular officer"?
A. A consular officer is an official of a foreign government accredited by the U.S. Department of State and authorized to provide assistance on behalf of that government to its citizens in another country. The term "consul" should not be confused with "counsel," which means an attorney-at-law authorized to provide legal counsel and advice. A foreign consular officer is not authorized to practice law in the United States.

Q. Who is a "foreign national"?
A. A "foreign national" is any person who is not a U.S. citizen. This includes persons holding a "green card," or lawful permanent resident aliens.

Q. Do I have to ask everyone I arrest or detain whether he or she is a foreign national?
A. Routinely asking every person arrested or detained whether he or she is a U.S. citizen is highly recommended and is done

by many law enforcement entities. Asking this question is the most effective way to ensure that you are complying with consular notification requirements. Moreover, asking everyone this question will reduce concerns about discrimination based on national origin or ethnicity. If a detainee claims to be a U.S. citizen in response to such a question, you generally can rely on that assertion and assume that consular notification requirements are not relevant. If you have reason to doubt that the person you are arresting or detaining is a U.S. citizen, however, you should inquire further about nationality so as to determine whether any consular notification obligations apply. You should keep a written record of whether the individual claimed to be a U.S. citizen and of any additional steps you took to determine the individual's nationality.

Q. Short of asking all detainees about their nationality, how might I know that someone is a foreign national?
A. If you do not routinely ask each person you arrest whether he or she is a U.S. citizen, you will need to develop other procedures for determining whether you have arrested or detained a foreign national and for complying with consular notification requirements. Neither a driver's license issued in the United States nor a social security number will indicate that the holder is a U.S. citizen. A foreign national may present as identification a foreign passport or consular identity card issued by his government or an alien registration document issued by the U.S. Government. If the person presents a document that indicates birth outside the United States, or claims to have been born outside the United States, he or she may be a foreign national. (Most, but not all, persons born in the United States are U.S. citizens; most, but not all, persons born outside the United States are not U.S. citizens, but a person born outside the United States whose mother or father is a U.S. citizen may be a U.S. citizen, as will a person born outside the United States who has become naturalized as a U.S. citizen.) In all cases where an arrestee claims to be a non-U.S. citizen, arresting officers should follow the appropriate consular notification procedures, even if the arrestee's claim cannot be verified by documentation.

Q. Should I ask persons I arrest whether they are in the United States legally? Should I treat undocumented and "illegal" aliens differently than aliens lawfully present in the United States?
A. Consular notification and access requirements apply regardless of immigration status. There is no reason, for purposes of consular notification, to inquire into a person's legal status in the United States. For purposes of consular notification you should make no distinctions based on whether the foreign national is in the United States "legally" or "illegally."

Q. What about dual nationals?
A. A person who is a U.S. citizen and a national of another country may be treated exclusively as a U.S. citizen. As a matter of discretion, however, the Department of State suggests that, when possible, you permit a visit from the consular officers of the detainee's other country of nationality, as long as the detainee requests a visit.

Q. Why are state and local government officials expected to provide such notification?
A. State and local governments must comply with consular notification and access obligations because these obligations are embodied in treaties that are the law of the land under the Supremacy Clause in Article VI of the U.S. Constitution.

Q. What kinds of detentions create consular notification obligations?
A. Under Article 36, the VCCR's requirements apply when a foreign national is "arrested or committed to prison or to custody pending trial or is detained in any other manner." The Department of State believes that "detention" generally should be understood to cover any situation in which a foreign national's ability to communicate

with or visit consular officers is impeded as a result of actions by government officials limiting the foreign national's freedom. The Department of State would not consider a "detention" to include a brief traffic stop or similar event in which a foreign national is questioned and then allowed to resume his or her activities. While there are no specific exceptions for short detentions, potentially lasting less than 24 hours, compliance with consular notification requirements may not be practicable. For example:

_ A foreign national is arrested on misdemeanor charges and is released several hours later after the booking process is completed.

_ A foreign national is arrested while intoxicated, is unable to understand consular notification information, and is held overnight and then released.

_ A foreign national is detained for several hours of questioning and then released.

Q. How quickly do I need to inform the foreign national of the option to have his or her consular officers notified of the arrest or detention?

A. The VCCR requires that a foreign national be informed "without delay" of the option to have a consular officer notified of the arrest or detention. Ordinarily, you must inform a foreign national of the possibility of consular notification by or at the time the foreign national is booked for detention, which is a time when identity and foreign nationality can be confirmed in a safe and orderly way. If the identity and foreign nationality of a person are confirmed during a custodial interrogation that precedes booking, consular information should be provided at that time. (Note, however, that there is no requirement to stop the interrogation if the foreign national requests that consular officers be notified of the detention, but nevertheless agrees to provide a statement voluntarily.)

If the fact that the person is a foreign national only becomes known after arrest, booking, or arraignment, the required procedures must be followed at that time.

Q. If I failed to go through consular notification procedures when I should have and the foreign national is still in detention, what should I do?

A. Consular notification is always "better late than never." If the appropriate consular notification procedures were not followed at the time of the initial arrest or detention, you should follow the instructions in this manual as soon as you become aware that a foreign national is in your custody. You should go through consular notification procedures even if a different government entity (e.g., the police, where you are the prosecutor or a prison official) failed to provide consular notification initially.

Q. What remedy might the foreign national or his or her country have if I failed to go through consular notification procedures?

A. Foreign nationals have sought money damages for alleged violations, though such suits are rarely successful. Some foreign nationals have also sought review of their convictions or sentences, claiming trial counsel provided ineffective assistance by not raising the consular notification violation at trial. The most significant consequence, however, is that the United States will be seen as a country that does not take its international legal obligations seriously.

Q. Do I have to notify consular officers if a foreign national is seriously injured or ill?

A. Although serious injuries and illnesses are not specifically covered in the VCCR, the Department of State encourages U.S. officials to consider notifying consular officers if a foreign national is in such a critical condition that contacting the consular officers would be in that person's best interest (e.g., if the foreign national is in the hospital with a life-threatening injury).

Q. Do I need to notify the Department of State whenever I arrest or detain a foreign national?

A. No. Your obligations are to notify the detainee's consular officers if the foreign national so requests or if the national is from a "mandatory notification" ("list") country.

You do not need to inform the Department of State about the detention. In fact, the Department generally prefers that you not inform it (e.g., through courtesy copies or faxed notifications), since informing the Department often causes confusion about whether the foreign consulate has been informed properly and in a timely manner. On the other hand, it may be appropriate to inform the Department of unusual cases or anomalous situations not addressed in this manual, provided that you also simultaneously notify the detained individual and the appropriate foreign consulate when required to do so.

Q. How can I get answers to other questions?

A. Additional inquiries may be directed to the Office of Policy Coordination and Public Affairs (CA/P), Bureau of Consular Affairs, U.S. Department of State, 2100 C St. NW, Room 4800, Washington, D.C., 20520; telephone: (202) 647-4415; fax: (202) 736-7559; email: consnot@state.gov. Urgent telephone inquiries after regular business hours (8 a.m. to 5 p.m. Eastern) may be directed to the Department's Operations Center at (202) 647-1512.

Further information on this topic, including updates and training resources, can be found on the Consular Notification and Access website: *http://travel.state.gov/consularnotification.*

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