Criminal Division
Vermont Attorney General's Office

Vermont Criminal Law Month

October - November 2011

Vermont Supreme Court Slip Opinions: Full Court Rulings

Includes three justice bail appeals

DECEDENT IN NEGLIGANT OPERATION WAS NOT HOMICIDE VICTIM FOR PURPOSES OF RESTITUTION STATUTE

State v. Kenvin, 2011 VT 123. VICTIM RESTITUTION: FUNERAL EXPENSES; FAMILY MEMBERS OF HOMICIDE; REIMBURSEMENT OF VICTIM'S COMPENSATION FUND. FIXED SENTENCES: LEGISLATIVE AMENDMENT – RETROACTIVE APPLICATION.

Appeal from restitution order and sentencing for conviction of negligent operation of a motor vehicle. 1) Travel expenses for family members of the person who was killed in the accident to attend the funeral, and the cost of storing the decedent's motorcycle are not compensable losses under the restitution statute, because they are not financial injuries that are a "direct result" of the crime. Nor are the family members compensable under the statute as family members of a homicide victim, since the defendant here was convicted of negligent operation, not homicide. Thus, the decedent was the sole victim of the defendant's crime for consideration of restitution, and any restitution award must be limited to the material losses that the decedent incurred as a direct result of the defendant's crime. 2) The restitution order requiring reimbursement of the victims' compensation fund is also improper, because it does not indicate that the reimbursement is for payments by the fund for material losses suffered by the victim. Not all payments by the fund are compensable through restitution. 3) The trial court failed to make findings concerning the defendant's ability to pay. These findings were required even absent an objection below. On remand, the court must make findings on the defendant's ability to pay any restitution ordered. 4) The defendant argued that the one month gap between the minimum and maximum of his sentence of eleven to twelve months was a fixed sentence in violation of 13 V.S.A. § 7031(a), as established in State v. Delaoz. The legislature since amended the sentencing statute to permit any minimum and maximum terms as long as they are not identical. The legislative history indicates that this legislation was intended as a clarification of, and not a change in, the law. Therefore the change in the law would be applied retroactively. State v. Kenvin (2010-138) (04-Nov-2011).

CONSENT TO PRELIMINARY BREATH TEST NOT CONSTITUTIONALLY REQUIRED; STATUTORY VIOLATION WAS HARMLESS ERROR.

State v. Therrien, 2011 VT 120. PRELIMINARY BREATH TEST: CONSENT NOT CONSTITUTIONALLY REQUIRED; FAILURE TO OBTAIN REQUEST PURSUANT TO STATUTE: HARMLESSNESS.

Civil suspension and conviction for driving under the influence affirmed. The police were not constitutionally required to obtain the defendant's consent before administering a preliminary breath test, where the administration of the test was supported by reasonable suspicion that the defendant had been operating a vehicle while intoxicated. The PBT statute states that where an officer has reason to believe that a person has committed DUI, the officer "may request the person to provide a sample of breath for a preliminary screening test." The statute thus states that the officer may request a PBT, but may not order such a test. In this case, the officer did not ask the defendant to submit to a PBT. However, the error was harmless, because the officer had strong evidence in addition to the PBT that the defendant was impaired. This evidence provided a reasonable suspicion that permitted the officer to conduct field sobriety tests which, in turn, provided probable cause to arrest the defendant for DUI. Therefore, suppression is inappropriate. State v. Therrien, Jr. (2010-401) (04-Nov-2011)

HOME IMPROVEMENT FRAUD INSTRUCTIONS ERROR ON BURDEN OF PROOF REQUIRED REVERSAL

*State v. Amidon, 2011 VT 126. HOME IMPROVEMENT FRAUD: INSTRUCTION CONCERNING BURDENOF PROOF AND PERMISSIVE INFERENCE.

Full court published entry order. Home improvement fraud reversed based on stipulation of the parties. The jury instruction contained identical language to the faulty instruction in State v. Rounds, concerning the permissive inference that impermissibly lowered the State's burden of proof. As in Rounds, because the instruction allowed the jury to improperly infer the defendant's intent based on facts not proven beyond a reasonable doubt, the conviction is vacated and the matter remanded for a new trial. State v. Amidon (2010-270) (08-Nov-2011)

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."

CONTRIBUTING TO THE DELINQUINCY OFA MINOR DOES NOT REQUIRE DELINQUENT ACT BY MINOR

State v. Everett, three justice entry order. CONTRIBUTING TO THE DELINQUINCY OFA MINOR: DOES NOT REQUIRE DELINQUENT ACT BY MINOR. ASSAULT AND ROBBERY INSTRUCTION: REFERENCE TO BODILY INJURY RATHER THAN IMMINENT SERIOUS BODILY INJURY WAS NOT PLAIN ERROR.

Assault and robbery with a dangerous weapon and contributing to the delinquency of a minor affirmed. 1) It is not necessary that the minor have actually committed a delinquent act in order for the defendant to be convicted of contributing to the delinquency of a minor. The evidence was sufficient to support the conviction for contributing to the delinquency of a minor where the defendant planned the robbery in her hearing, asked her to buy gloves and a ski mask for him, and asked that she drive him to the site of the robbery (although she declined to drive). Thus, he encouraged her to aid in the robbery and therefore contributed to the delinquency of a minor, even though the State did not prove that she actually committed a delinquent act. 2) There was no plain error in the court's jury instruction on assault and robbery. At three points the court instructed the jury that it must find that the defendant had placed the clerk in fear of imminent serious bodily injury. That the court also twice referred simply to bodily injury is insufficient to undermine confidence in the verdict. http://www.vermontjudiciary.org/d-upeo/eo10-461.pdf.

SEVERANCE NOT REQUIRED DUE TO SIMILARITY OF OFFENSES AND POSSIBLE JUROR CONFUSION

State v. Johnson, three justice entry order. SEVERANCE: SUFFICIENTLY DISTINGUISHABLE ACTS. HABITUAL OFFENDER: INSTRUCTION CONCERNING PRIOR FELONIES.

Two counts of lewd and lascivious conduct affirmed. 1) The court did not err in declining to sever the two counts, which were based upon two separate, but similar, acts of public masturbation. The defendant argued that the complainants' stories were so similar that it was impossible for the jury to distinguish the two events, creating an unacceptable risk of spillover or accumulation of the evidence. The defendant was only charged with two incidents, and they were sufficiently distinct that the jury could readily distinguish the evidence as to each count. The court also instructed the jury to consider the evidence as to each offense individually. 2) There was no error, much less plain error, in the alleged failure of the trial court to instruct the jury that, with respect to the habitual offender charge, it had to find the alleged prior convictions were felonies. Even assuming that such an instruction was necessary or proper, the court did instruct the jury that it had to find that the defendant had been convicted of at least three previous felonies. http://www.vermontjudiciary.org/d-upeo/eo10-480.pdf.

OFFICER'S REASONABLE BELIEF OF OPERATION OVER CENTER LINE JUSTIFIED MV STOP

State v. Bedell, three justice entry order. MOTOR VEHICLE STOP: REASONABLE BASIS TO BELIEF TRAFFIC OFFENSE.

Conditional plea to DUI, second offense, affirmed. The motor vehicle stop was justified by the officer's reasonable and articulable suspicion of illegal activity, here, the officer's belief that the defendant had driven over the center line. The court need not decide if the defendant actually violated the traffic ordinance, merely whether the officer had a reasonable basis to suspect that he had. The officer testified that he observed the defendant cross the centerline of the road, and, based upon this testimony and the videotape from the cruiser, the court found that the officer reasonably believed that the defendant violated the ordinance. The defendant's explanation for why he was driving over the line does not undermine the court's conclusion on this point. http://www.vermontjudiciary.org/d-upeo/eo11-069.pdf

Vermont Supreme Court Slip Opinions: Single Justice Rulings

FIRST AMENDMENT DOESN'T REQUIRE CONDITION OF RELEASE PERMITTING PARTICIPATION IN LITURGICAL DANCING OUT OF STATE

State v. Johnson, single justice bail appeal. CONDITION OF RELEASE DID NOT VIOLATE FIRST AMENDMENT.

Defendant was charged with aggravated domestic assault with a deadly weapon and was released on conditions, including that she not leave Bennington County, and that she observe a 10 p.m. curfew. She sought to modify the conditions of release to allow her to travel with her liturgical dance group. She is not a U.S. citizen, is charged with a felony, and faces potential deportation if she is convicted. She is also charged with violation of a condition of release. She seeks to be permitted to travel without restrictions around New York and New England. The Court finds that under these circumstances, the trial court's decision to deny the motion to amend to be supported by the record, given the very substantial risk that the defendant will not fully abide by less restrictive and open-ended conditions of release and will flee to avoid the consequences of conviction. The limitations do not violate her First Amendment right to the free exercise of religion. Doc. 2011-324, September 2011 term, Dooley, J. http://www.vermontjudiciary.org/d-upeo/eo11-324.pdf

PROPOSED RULE AMENDMENTS

(NOTE: THE FOLLOWING PROPOSED AMENDMENTS ARE PROPOSED BY THE RULES COMMITTEES AND HAVE NOT BEEN REVIEWED BY THE SUPREME COURT.)

Proposed Amendments to 16.2, 18, 26, 30 and 41 of the Vermont Rules of Criminal Procedure

RULE 16. REGULATION OF DISCOVERY

Subsection (c) would be amended to remove the limitation that materials furnished pursuant to these rules remain in the attorney's exclusive custody and control. Pursuant to the proposed change, an attorney may disclose such materials to third parties as long as such disclosure is in furtherance of the preparation of the defense. Under subsection (d) of this rule, the prosecution could seek a protective order for good cause as to any materials whose disclosure to or possession by third parties would create a risk of harm to other persons, other prosecutions or the public. As provided for in Rule 54, a pro se defendant would be treated as an attorney for purposes of receiving discovery and complying with discovery restrictions. The court would retain authority under subsection (d) to limit disclosure of material produced in discovery or to authorize broader disclosure as may be requested.

RULE 18. PLACE OF PROSECUTION AND TRIAL

This amendment would revise the nomenclature used to refer to the place of prosecution and trial in order to conform to changes made by the Judicial Restructuring Act, Act 154 of 2009 (Adj. Sess.). This term "unit," as used in this amendment, would means and would be coterminous with the territorial reach of each Vermont county. Additionally, this amendment would provide for broadened venue for initial appearance and arraignment under Rules 5 and 10 and preliminary hearings under Rule 32.1(a)(1).

RULE 26. EVIDENCE

This amendment would increase to thirty days before trial the notice required of an intent to introduce evidence of other acts or offenses. The current seven day notice requirement is said not to allow sufficient time for the opposing party to investigate the proposed evidence and gives rise to requests to continue the trial with the potential of requiring a new jury selection. The increased notice time should reduce or eliminate such problems. The amendment would also make express the court's authority to require earlier disclosure. The court would retains its authority under the existing rule to authorize later disclosure for the reasons specified in the rule.

RULE 30. INSTRUCTIONS

This amendment contemplates that the court would have discretion to give preliminary instructions prior to the taking of evidence, as well as to give some instructions after the close of evidence but prior to argument. The proposed amendment is not intended to change the court's existing practice of instructing the jury on the elements of the charged crime and on all other major and contested issues of the case after argument.

RULE 41. SEARCH AND SEIZURE

Rule 41 would be amended to provide procedures for the issuance of search warrants for the use of tracking devices. The amended rule would govern the process for obtaining a search warrant for all tracking devices and information when required by Vermont law. Rule 41(b)(4) would authorize the issuance of a search warrant to install or use a tracking device to track a person or property for the purpose of obtaining evidence of the commission of a crime. "Premises" as used in this portion of the rule refers to any place in which an individual has an expectation of privacy. Rule 41(c)(2)(C) would require that a warrant to authorize use of a tracking device specify the premises to be entered for installation of a tracking device but would recognize that electronic tracking may occur without installation of a device. In such cases, the warrant, if required, would be required to specify the tracking method to be used and the person or property to be tracked. Rule 41(c)(5)(C) similarly would recognize the possibility that tracking may occur with or without installation of a device and would limit the time that a device may be used to 15 days unless extended for one or more 30 day period for good cause and probable cause. The directions to the officer if a device is to be 12 installed would be similar to those for monitoring a conversation under Rule 41(c)(5)(B). Proposed Rule 41(d)(5) is similar to the provisions for execution and return of a warrant for monitoring a conversation under Rule 41(d)(4) in that it provides for service of the warrant at the time the return is made. The definition of "tracking device" in Rule 41(g)(3) is broadly conceived to incorporate technological advances in the ability to track persons or property.

The proposed changes can be viewed at:

http://www.vermontjudiciary.org/LC/Statutes%20and%20Rules/PROPOSEDVRCrP16_18_26_30_41.pdf

Comments on these proposed amendments should be sent to the Chair of the Advisory Committee on the Rules of Criminal Procedure by January 31, 2012. The Chair can be reached by at the following addresses:

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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 dtartter@atg.state.vt.us.