Criminal Division
Vermont Attorney General's Office

Vermont Criminal Law Month

October - November 2012

Vermont Supreme Court Slip Opinions: Full Court Rulings

Includes three justice bail appeals

INNOCENCE PROTECTION ACT DOES NOT PERMIT COLLECTION OF DNA FROM THIRD PARTY

*In re Wiley, 2012 VT 76. Full court opinion. INNOCENCE PROTECTION ACT: THIRD PARTY DNA TESTING.

Denial of request for DNA testing pursuant to Innocence Protection Act affirmed. The defendant was convicted of repeated sexual assaults against a minor. The defendant's DNA was found on a bed sheet from the victim's bed, as well as a partial DNA profile for female skin cells that could neither confirm nor deny the victim as the source. The defense claimed that the defendant's DNA on the bed sheet was from a consensual encounter with the victim's mother on one occasion on the victim's bed. (Mother testified to this effect, but taped prison conversations revealed the defendant encouraging her to lie under oath on this point when she repeatedly told him she did not remember such an occurrence). The defendant sought to have mother's DNA tested, arguing that if it matched the partial DNA profile form the sheet, it would strongly support his defense theory. Although the trial court found that the requested testing would not have created a reasonable probability of acquittal, as it would not disprove the victim's allegations, on appeal the result is affirmed for a different reason. The Innocence Protection Act is limited to the testing of evidence already extant from the underlying case – evidence that was "obtained during the investigation or prosecution of the crime." The Act does not extend to testing material not in evidence and yet to be collected. The DNA of the mother was not evidence obtained during the investigation and prosecution of the crimes underlying the defendant's convictions, and therefore he is not entitled to the DNA testing he requested. The Legislature included nothing in the Act to compel seizure of a new evidentiary sample from a nonparty for DNA testing. Doc. 2011-206, October 12, 2012.

http://info.libraries.vermont.gov/supct/current/op2011-206.html

MV STOP JUSTIFIED BY KNOWLEDGE THAT VEHICLE'S OWNER IS UNDER LICENSE SUSPENSION, AND OFFICER NOT AWARE OF ANY REASON TO BELIEVE DRIVER IS NOT OWNER

State v. Edmonds and State v. Cobb, 2012 VT 81. MOTOR VEHICLE STOP: OWNER OF VEHICLE HAVING SUSPENDED LICENSE.

Full court opinion. Conditional pleas to driving with a suspended license affirmed. The defendants were the subject of investigative stops after police officers, running random license plate checks, determined that the owners of the vehicles were under license suspensions. Under both the Fourth Amendment and the Vermont Constitution, there was reasonable suspicion to stop the motor vehicle where the owner for the vehicle was under suspension and there was no assertion that the officer was aware of information, such as the operator's gender, ethnicity, or age, inconsistent with the identity of the known registered owner. Docs. 2011-426 and 427, October 12, 2012.

http://info.libraries.vermont.gov/supct/current/op2011-426.html

FATAL ERROR MESSAGE DOOMED SECOND BREATH TEST AND THUS CIVIL LICENSE SUSPENSION

State v. Spooner, 2012 VT 90. CIVIL SUSPENSION: DATAMASTER – EFFECT OF FATAL ERROR MESSAGE; NECESSITY OF VALID SECOND TEST.

Dismissal of civil driver's license suspension affirmed. 1) The civil suspension statutes require that a person who undergoes BAC testing, on election, to have a second infrared test administered immediately after receiving the results of the first test. This second test must be as reliable as the first in order for it to serve its purpose of verifying the accuracy of the first. Thus, the availability of a reliable second test is an element of the State's case in a civil license suspension matter (although not in a DUI criminal case). 2) The trial court found that the second test here was not reliable, because a fatal error message was given after the first test, and the manual for the device states that the device should be placed out of service when that occurs. This finding is affirmed despite testimony from a forensic chemist that if the machine gives a valid reading when it is tried again, it is "fine." The court was not required to accept her testimony, which contradicted the Department of Health's own manual. Doc. 2011-312, October 19, 2012.

http://info.libraries.vermont.gov/supct/current/op2011-312.html

PRIOR PCR STATUTE CREATED UNCONDITIONAL RIGHT TO PUBLIC REPRESENTATION

In re Crannell, 2012 VT 85. PCR: RIGHT TO APPOINTED ATTORNEY.

Order that petitioner in PCR case is not entitled to an appointed attorney because

his case lacks legal merit is reversed. Although 13 VSA § 5233(a)(3) provides that a PCR petitioner has no statutory right to assigned counsel at public expense if the defender general determines that the PCR claim is frivolous for lack of merit, this case is governed by the previous version of Section 5233, pursuant to which the petitioner is entitled to public representation as long as either counsel or the petitioner considered it appropriate. This PCR was filed in 2001, and the statute was not amended until 2004. The fact that the mandate in In re Gould, which interpreted the original Section 5233 to create an unconditional right to representation was not issued until four days after the amendment to Section 5233 does not change the result. The court decision did not create the right, but merely held that the right was created by the statute. Dooley, concurring: Would reverse on the grounds stated in the majority opinion, and also because the Defender General waived his ability to claim the unreviewable right to label this case as frivolous by the actions and inactions that occurred during the nine years the PCR case was pending and the Defender General was under court orders to provide representation or fund its provision. Doc. 2011-039, October 19, 2012.

http://info.libraries.vermont.gov/supct/current/op2011-039.html

DEFENDANT CAN BE REQUIRED TO PAY RESTITUTION FOR COSTS OF RESETTLING CHILD SEX ABUSE VICTIM

State v. Shepherd, 2012 VT 91. RESTITUTION: COST OF RELOCATION.

Restitution order requiring reimbursement for relocation costs for family of sexual abuse victim affirmed. The court ordered restitution of $13,887.78 for costs associated with the family moving from South Hero to Hawaii after it became known in the town that one of the children had been the victim of sexual abuse, and he and his family were ostracized. They moved to Hawaii because of family there, and because of favorable disability assistance, since another child in the family suffered from autism and kidney disease, and mother suffered from fibromyalgia. The victim's emotional injury and ostracization in a small town where the natural and probable consequences of the defendant's sexual assaults. The choice of Hawaii was reasonable in light of the unique circumstances of the case. The fact that the move was necessitated by emotional injury does not mean that the relocation costs are comparable to damages for pain and suffering or emotional trauma, which are not proper subjects of restitution. The relocation expenses were readily ascertainable, and not based on subjective emotional harm. Skoglund, with Burgess, dissenting: Relocation is more akin to pain and suffering, emotional trauma, loss of earning capacity, and wrongful death awards, not proper subjects of restitution under 13 V.S.A. § 7043. The impetus for relocating was the result, not of the sexual assault, but of the ensuing publicity and the revelation of the victim's identity. Doc. 2010-336, October 26, 2012.

http://info.libraries.vermont.gov/supct/current/op2010-336.html

STATE'S REASONS FOR SEALING SEARCH WARRANTS SATISFIED SEALED DOCUMENTS CRITERIA

*In re Essex Search Warrants, full court opinion. 2012 VT 92. MOOTNESS. PUBLIC DISCLOSURE OF SEARCH WARRANT DOCUMENTS.

Trial court's determination that the State had failed to cite sufficiently specific reasons to seal the warrant information reversed. The State appealed from a trial court order requiring disclosure of documents underlying the issuance of search warrants in a case involving the disappearance of a couple, arguing that such documents should not be made public pre-arrest. While the case was pending on appeal, an arrest was made in the case, and the State consented to release of the documents. 1) The Court would reach the issues raised by the appeal despite the mooting of the issue by the arrest, since the situation under review is capable of repetition, yet evades review. 2) Because the issues were not raised below, the Court declines to reach the question whether the First Amendment or the common law create a right of access to search warrant materials while an investigation is active and no arrests have been made, or the question whether Sealed Documents, 172 Vt. 152 (2001), should not apply in active, pre-arrest investigations. The Court decides only whether the Sealed Documents standard for sealing was satisfied in this case. 3) The trial court abused its discretion in concluding that the State's proffer and argument failed to meet the specificity requirements of Sealed Documents. The State indicated that disclosure of search warrant materials would frustrate police evaluation for the credibility of citizen reports by comparison against information known only to the police; it would significantly hamper the investigation by allowing a suspect to easily avoid detection and/or respond to police questioning, unduly influencing the recollection of true witnesses, or allowing any false witness to tailor information to fit with what is already known by police. This meets the Sealed Documents requirement that the State show a substantial threat exists to the interests of effective law enforcement, with the requisite showing of harm demonstrated with specificity as to each document, without reliance on general allegations of harm. The fact that the showing of harm must be specific does not require that it be unique. The same type of harm might be present in many cases. Skoglund concurrence: Would expand the Sealed Documents factors to take into account the status of the investigation as a factor to consider when deciding whether to seal the documents. Dooley, with Johnson, dissenting: The rationales provided by the State for sealing could be applied to any information in any investigation that has yet to be concluded; they are entirely general. Doc. 2011-228, November 9, 2012.

http://info.libraries.vermont.gov/supct/current/op2011-228.html

Vermont Supreme Court Slip Opinions: 3 Justice Panel Rulings

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

EVIDENCE OF SHARED INTENT TO STEAL WAS SUFFICIENT

State v. Guyette, three-justice entry order. ASSAULT AND ROBBERY: SUFFICIENCY OF EVIDENCE OF INTENT.

Accessory to assault and robbery. The evidence was sufficient to show that the defendant shared the requisite intent to steal from the victim where he pulled out a box cutter, waved it in front for the victim's face, and said, "what do you got kid?," after which another man said, "just give it to him," and he was struck in the head from behind, then struck in the head by the defendant with his fist, and awoke to find he was missing a watch and knife. The evidence here was sufficient to support an inference beyond a reasonable doubt that the defendant meant to take what the victim "got." Doc. 2011-323, November 2012 term.

http://www.vermontjudiciary.org/d-upeo/Microsoft%20Word%20-%20eo11-323.pdf

EVIDENCE OF PHYSICAL ASSAULT SUFFICIENT EVEN WITHOUT WITNESS TO THE ACTUAL BLOW

State v. Thorpe, three-justice entry order. SIMPLE ASSAULT: SUFFICIENCY OF THE EVIDENCE.

Simple assault affirmed. The evidence revealed that defendant had angrily expressed a desire to confront the complainant, that she confronted complainant shortly thereafter, that the confrontation was accompanied by sounds and sights associated with a physical attack, and that the complainant appeared to have suffered injuries to her face in the process. The fact that no witness actually observed a punch being thrown does not demonstrate that the evidence was insufficient to support a simple assault conviction. Doc. 2012-014, November Term, 2012.

http://www.vermontjudiciary.org/d-upeo/Microsoft%20Word%20-%20eo12-014.pdf

REVOCATION OF PROBATION FOR FAILURE TO ADMIT OFFENSE WAS CONSTITUTIONAL

State v. LaMotte, three justice entry order. REVOCATION OF PROBATION FOR FAILURE TO ADMIT OFFENSE IN COUNSELING: CONSTITUTIONALITY.

Revocation of probation affirmed. The defendant's probation was revoked because he refused to admit to the conduct for which he was convicted while in sex offender counseling which was mandated as a condition of probation. 1) The defendant's punishment was not augmented based on his failure to admit guilt. There was no increase in sentence due to the defendant's failure to admit guilt; his failure to comply with the terms of his probation resulted in imposition of the underlying sentence. 2) The grant of immunity for any statements made during therapy and at the probation revocation hearing precluded any violation of the defendant's Fifth Amendment right not to incriminate himself. Doc. 2012-035, November Term, 2012.

http://www.vermontjudiciary.org/d-upeo/Microsoft%20Word%20-%20eo12-035.pdf

STRAIGHT SENTENCE WAS WITHIN TRIAL COURT'S SENTENCING DISCRETION

State v. Smith, three-justice entry order. SENTENCING: STRAIGHT SENTENCE RATHER THAN PROBATION.

Sexual assault and unlawful restraint affirmed. The trial court did not err when it imposed an unsuspended sentence, despite the defendant's argument that probation was necessary to accomplish the court's rehabilitative goals and to provide the defendant with the lifetime services she needs. The sentencing decision was firmly based on testimony, and the court's considered judgment, that a straight sentence would provide the intensive supervision and structure that the public safety and the defendant's rehabilitative needs required. November Term 2012.

http://www.vermontjudiciary.org/d-upeo/Microsoft%20Word%20-%20eo12-044.pdf

SEXUAL ASSAULT AND BURGLARY CONVICTIONS NOT BARRED BY DOUBLE JEOPARDY

*State v. Bruyette, three-justice entry order. DOUBLE JEOPARDY – BURGLARY AND SEXUAL ASSAULT.

Denial of motion for sentence reconsideration affirmed. The trial court's determination that the defendant's Double Jeopardy challenge to his sentence could not be brought in a sentence reconsideration proceeding, because such a challenge was to the underlying convictions, and not the sentence, is not reached on appeal, because the trial court was correct that, in any event, there is no merit to the defendant's double jeopardy argument. The defendant's offenses of sexual assault and

burglary each contain an element that the other does not. Although the defendant's intent to commit the sexual assault for which he was convicted supplied the intent element required for the burglary (entry of a building with an intent to commit a felony), the burglary charge did not require an actual sexual assault. The sexual assault charge did not require entry into an occupied dwelling without license. Therefore, each offense contained a unique element. Doc. 2012-188, November Term, 2012.

http://www.vermontjudiciary.org/d-upeo/Microsoft%20Word%20-%20eo12-188.pdf

NEW EVIDENCE TO BE REVIEWED BY DEFENDER GENERAL TO DETERMINE IF PCR HAS ANY MERIT

In re Brink, three-justice entry order. POST-CONVICTION RELIEF: REVIEW BY DEFENDER GENERAL.

Denial of post-conviction relief remanded for review by the Defender General's Office. The petitioner's initial PCR petition was reviewed by the DG, and deemed meritless. The petitioner subsequently obtained a recording of a police interview with the complainant which he claims demonstrates that the alleged crime was committed during a period of time when he was incarcerated. The DG reviewed the petition a second time, and declined to represent the petitioner, stating that he had reviewed the "petition and transcript" and concluded that the claim would not be successful. Following a hearing, the petition was denied. On appeal, the petitioner argues that the second DG review was improper because it did not include a review of the interview recording. Both the State and the DG, appearing as amicus, agree to a further review, including the interview recording, and the matter is remanded for such a review. If the DG determines that the matter is frivolous, the denial of the petition will stand; otherwise, the denial shall be stricken and the merits of the petition considered anew. Doc. 2012-029, October Term, 2012.

http://www.vermontjudiciary.org/d-upeo/Microsoft%20Word%20-%20eo12-029.pdf

Vermont Supreme Court Slip Opinions: Single Justice Rulings

NO CONDITIONS WOULD REASONABLY PREVENT VIOLENCE WHERE COMPLAINANT WISHES TO END RELATIONSHIP, BOTH PARTIES LIVE IN ISOLATED AREAS, AND THERE IS A LONG HISTORY VIOLENCE IN RELATIONSHIP

State v. Watson, single justice bail appeal. BAIL APPEAL: THREAT OF PHYSICAL VIOLENCE.

The defendant is charged with using a deadly weapon on a family or household member, and willfully causing a family or

household member to fear imminent serious bodily injury, while having a prior conviction for domestic assault. He was ordered held without bail pursuant to 13 VSA § 7553. The defendant is charged with a felony, which contains an act of violence as an element of the offense. The evidence of guilt is great. Given the long history of violence by the defendant towards the victim, and in light of the present circumstances, there are no combination of conditions which would ensure the safety of the victim. The victim lives in an isolated area, and the defendant's proposed residence is also isolated. The victim wishes to end the parties' relationship, a dangerous time in light of the significant history of violence. One of the assaults for which the defendant has been convicted occurred while he was subject to an abuse prevention order. A daily or twice daily alcohol monitoring requirement would not prevent a significant period of time elapsing between a violation of the no alcohol condition, attempted contact with the victim in an isolated location, and discovery of such a violation. The hold without bail motion is granted. Crucitti, specially assigned. Doc. 2012-308, September Term, 2012.

http://www.vermontjudiciary.org/d-upeo/eo12-308.bail.pdf

NO CONDITIONS OF RELEASE WOULD REASONABLY PREVENT VIOLENCE WHERE DEFENDANT CONTINUED TO TRY TO STRANGLE VICTIM AFTER POLICE ARRIVED

State v. Steuerwald, single justice bail appeal. 2012 VT 98. BAIL APPEAL:

PREVENTION OF VIOLENCE.
Defendant to be continued to be held without bail. The defendant was charged with aggravated domestic assault, furnishing alcohol to a minor, and violating conditions of release. The sole issue was whether the proposed conditions of release, release to the custody of the defendant's mother, who resides in a Buddhist Monastery in Calais, Vermont, would reasonable prevent the defendant's threat of physical violence of any person. The defendant's charged act of strangling complainant was violent in the extreme, and the police believed that had they responded a few moments later she would have been killed. He continued to strangle the complainant even after police arrived and ordered him to stop. The defendant was highly intoxicated at the time, despite a court-ordered condition of release prohibiting his possession or consumption of alcohol. No condition or combination of conditions of release would reasonably prevent the defendant's threat of physical violence. Doc. 2012-378, November 14, 2012, Burgess, J.

http://info.libraries.vermont.gov/supct/current/eo2012-378.html

COMPLAINANT'S TESTIMONY RE NO FEAR OF DEFENDANT SUPPORTED TRIAL COURT'S DENIAL OF NO BAIL ORDER

State v. Knight, single justice bail appeal. DENIAL OF BAIL: FAILURE TO SHOW NO CONDITIONS WOULD PREVENT VIOLENCE.

Denial of motion to hold without bail affirmed. The defendant was charged with first-degree aggravated domestic assault and two counts of second-degree aggravated domestic assault. There was no abuse of discretion in the trial court's ruling. The complainant's testimony that she did not fear the defendant and believed that he would follow conditions of release did not appear to be a case of a victim shielding the abuser, as she did not recant, but clearly and matter-of-factly detailed the events, but went on to indicate that, given the proper set of conditions, she believed that the defendant would not pose a danger to her. This, coupled with the probation officer's testimony that she could not be certain that the defendant would follow conditions, demonstrated that it was not an abuse of discretion for the trial court to conclude that the State had not met its burden to prove by clear and convincing evidence that no condition or combination of conditions of release would reasonably prevent violence. Doc. 2012-425, November Term, 2012. Reiber, Justice.

http://www.vermontjudiciary.org/d-upeo/Microsoft%20Word%20-%20eo12-425.bail.pdf

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.