
Vermont Criminal Law Month

October - November 2013



Vermont Supreme Court Slip Opinions: Full Court Rulings

Includes three justice bail appeals

“VICTIM” FOR PURPOSES OF SENTENCING STATUTE IS BROADER THAN FOR PURPOSES OF RESTITUTION

State v. Scott, 2013 VT 103. EXPERT
TESTIMONY: RELIABILITY.
SENTENCING: VICTIM TESTIMONY.

Negligent operation of a motor vehicle affirmed. 1) The court did not abuse its discretion in permitting an accident reconstruction expert to testify on behalf of the State. The expert's use of a drag sled to determine drag factor on a grassy surface, rather than over a dry, paved surface, went to the weight of the expert's testimony, and did not require exclusion under Daubert or Streich. 2) The court did not err in permitting the mother of the person who died in the car accident to testify at the sentencing as a family member of a victim, despite the fact that the defendant was not convicted of a crime

which required that he have caused injury. (He was acquitted of a charge of grossly negligent operation, death resulting). The trial court properly considered evidence that the defendant's negligence substantially caused a death under the preponderance of evidence standard at sentencing. This Court's decision in State v. Kenvin, interpreting the term "victim" as used in the victim restitution statute, does not require a different result. The term requires a more liberal construction in the statute permitting crime victims to testify at sentencing than in the victim restitution statute. Doc. 2012-186, October 18, 2013.

<http://info.libraries.vermont.gov/supct/current/op2012-186.html>

ALLEGED IRREGULARITIES IN APPOINTMENT OF STATE'S ATTORNEY NOT REACHED IN VIEW OF DE FACTO OFFICER DOCTRINE

*State v. Cuomo, 2013 VT 101.
STATE'S ATTORNEY: DE FACTO
OFFICER DOCTRINE.

Denial of motion to dismiss prosecutions on grounds that State's Attorney had been

invalidly appointed affirmed. Keith Flynn was re-elected as state's attorney on November 2, 2010, for a term to begin on February 1, 2011. Before that term began, he was appointed commissioner of public safety, and resigned as state's attorney.

The Governor appointed Alan Franklin to fill the remainder of Flynn's pending term, and to fill all of Flynn's new term beginning on February 1, 2011. The defendant argued that the Governor lacked authority to appoint Franklin to fill the new term, and that a special election was required to fill a vacancy in a term that has not yet begun when the vacancy is created. It is unnecessary to determine this question, because Franklin acted validly under the de facto officer doctrine, which provides that an person coming into possession of his office under the forms of law and assuming to act under a proper commission is a de facto

officer, whose acts are binding as to third persons, despite some infirmity in the qualification of the officer. The doctrine is not limited to mistakes like a scrivener's error. The defect asserted by the defendant, that Franklin was neither duly elected nor appointed, is not a surreptitious usurpation of or corrupt intrusion into the office. Having come into office in good faith and with the appropriate accoutrements, Franklin was acting as a de facto officer. Doc. 2012-438, October 18, 2013.

<http://info.libraries.vermont.gov/supct/current/op2012-438.html>

COURT CAN CONSIDER DEATH RESULTING FROM NEGLIGENT OPERATION WHEN SENTENCING DESPITE ACQUITTAL ON "DEATH RESULTING" COUNT

State v. Kenvin, 2013 VT 104.
SENTENCE RECONSIDERATION:
CONSIDERATION OF FACTS NOT
ESTABLISHED BY VERDICT. CREDIT
FOR TIME SERVED: HOME
CONFINEMENT.

Trial court's decision on motion for sentence reconsideration affirmed; credit given for some time in home confinement. The defendant had been charged with grossly negligent operation of a motor vehicle resulting in death, but had been convicted of careless and negligent operation. 1) The trial court did not err in its findings that the defendant was "very negligent," and that he caused the death of a motorcyclist, even though the defendant had been acquitted of the grossly negligent operation resulting in death charge. The acquittal on this charge did not preclude the trial court from arriving at these conclusions based on the facts and circumstances of the case. The court was

within its discretion to consider the defendant's negligence and the cause of the decedent's death in designing the defendant's sentence, which adhered to the statutory maximum for careless and negligent operation. 2) The defendant was not entitled to credit for time served on his sentence for time spent at home under conditions of release that permitted him to travel to a location where cell-phone service was available, to walk his dog to any place as long as the walks began and ended at his home and did not exceed an hour, to attend meetings with his attorney, and medical appointments. He was, however, entitled to credit for time served for a period of time in which the conditions of release required him to stay in his home at all times without exception. Doc. 2012-099, October 18, 2013.

<http://info.libraries.vermont.gov/supct/current/op2012-099.html>

COURT'S DEFINITION OF TERM "HARASSMENT" IN ABUSE-PREVENTION ORDER WAS PLAIN ERROR.

State v. Waters, 2013 VT 109. Full court opinion. HARASSMENT IN VOP ORDERS: DEFINITION. PLAIN ERROR.

Violation of abuse-prevention order reversed. 1) The trial court erred when it instructed the jury that the term "harassment" means to engage in conduct that would cause a reasonable person to be "annoyed, irritated, tormented or alarmed." Despite the fact that the Court found that the trial court "cannot be faulted for adopting a definition of 'harassment' that is consistent with some colloquial uses of the term," and despite the fact that the term "is susceptible of varying reasonable interpretations," and despite the fact that the Court's interpretation of the term "gives rise to redundancy," and despite the fact that the trial court "did its best to come up with an instruction to fill the gap this Court left open," the Court nonetheless found that this was plain error, and that the trial should have known that the correct definition was that definition used in an entirely

different statute, that which prohibits stalking. Under that definition, harassment consists of actions that would cause a reasonable person to fear unlawful sexual conduct, unlawful restraint, bodily injury, or death. 2) The defendant was significantly prejudiced by the instruction, because the conviction and the State's case, rested squarely on the overly broad definition of harassment used in the trial court's jury instructions. Dooley, concurring: Writes to suggest a solution to definitional difficulties such as this, by revising the form. Burgess, with Reiber, dissenting: Disagrees that the definition was erroneous, or plain error. The term harassment is not so esoteric as to require term-of-art refinements beyond the trial court's instructions. The stalking statute definition is inapposite, unnecessarily narrow, and contravenes the general purpose of the abuse-prevention statute. Doc. 2011-319, November 15, 2013.

<http://info.libraries.vermont.gov/supct/curent/op2011-319.html>

EXISTENCE OF ONGOING BOUNDARY DISPUTE DID NOT UNDERMINE TRESPASS CHARGE; DEFENSE WAS NOT ENTITLED TO INSTRUCTION CONCERNING DISPUTE

State v. Gillard, 2013-108. TRESPASS: SUFFICIENCY OF THE EVIDENCE OF LAWFUL POSSESSION; EFFECT OF ONGOING BOUNDARY DISPUTE; DISMISSAL IN THE INTERESTS OF JUSTICE.

Full court opinion. Unlawful trespass affirmed. 1) Proof of ownership is not an element required for an unlawful trespass

conviction, so long as lawful possession is established. The evidence was sufficient to establish this element. 2) The defendants were not entitled to an instruction telling the jury that the defendant should be acquitted if they had some good faith color of right to remain on the property, despite their claim that otherwise their constitutional right to defend themselves would be violated. The requested instruction would have been error. Although there was an ongoing

boundary dispute, the mere initiation of a suit does nothing to alter the status quo, nor does the law permit parties to press their as-yet-unresolved possessory claims by extra-judicial occupation. Unless and until the civil court altered the status quo, lawful possession remains unchanged. 3) The trial court did not abuse its discretion for refusing to dismiss the case in the interests of justice. Dooley, dissenting: The trial

court should have addressed the ownership issue in its instructions, after the jury heard evidence focusing almost exclusively on who owned the land in question and whether the defendants had permission to be on that land. Doc. 2012-433, November 22, 2013.

<http://info.libraries.vermont.gov/supct/current/op2012-433.html>

EVIDENCE WAS SUFFICIENT TO SUPPORT FINDING OF DEFENDANT'S INTENT TO KILL

**State v. Johnson*, 2013 VT 116.
EXTRANEOUS INFLUENCE ON JURY PANEL: REFERENCE TO DEFENDANT'S CRIMINAL RECORD. SUFFICIENCY OF THE EVIDENCE OF IDENTITY AND INTENT TO KILL; PRESERVATION.

Attempted aggravated murder, kidnapping, lewd and lascivious conduct, unlawful trespass, and enhancement under the habitual offender statute, affirmed. 1) The trial court did not abuse its discretion in denying a motion for mistrial after a potential juror stated to the panel that she knew that defendant was involved in another case. While the comment did constitute an irregularity, the circumstances did not show a danger that extraneous influences affected the jury verdict. The court took corrective action by dismissing the juror from the panel; the comments were isolated, lacking in detail, and vague enough so as to bear no relevance on the issues in the case at hand; the court gave an adequate instruction to the jury concerning consideration only of the testimony and the exhibits; and the defendant declined a more specific instruction. 2) The evidence was sufficient to prove his identity as the perpetrator, and

that he intended to kill the victim. This claim was made in a timely fashion below even though the defendant did not move for judgment of acquittal at the close of the State's case, but waited instead until the charge conference. The jury considered direct and circumstantial evidence regarding the defendant's identity, and his arguments on appeal simply rehash the inconsistencies in the evidence and the credibility of the witnesses. The evidence of intent to kill was sufficient as well, despite the defendant's claim that his statement to the victim that he would be back "to finish the job" indicated that he only intended to kill her later. A reasonable jury could find that a two-inch laceration to the neck that exposed the trachea and required ten stitches, was sufficiently serious as to prove specific intent to kill regardless of what the perpetrator said at the time. In addition, a jury could reasonably find that the defendant's words meant that, because he had not succeeded in killing the victim during the encounter, he would be back later to consummate the act. Doc. 2012-303, November 27, 2013.

<http://info.libraries.vermont.gov/supct/current/op2012-303.html>

DEFENDANT ENTITLED TO CREDIT FOR TIME SERVED WHILE TAKING PART IN DRUG TREATMENT COURT

*State v. LeClair, 2013 VT 114.
CREDIT FOR TIME SERVED: DRUG COURT.

Denial of motion to modify sentence reversed. Pursuant to State v. Blondin, when a defendant is incarcerated on conduct that leads both to revocation of probation or parole and to conviction on new charges, the time spent in jail before the second sentence is imposed should be credited towards both sentences if the second sentence is imposed concurrently. Here, the defendant was not on probation or parole, but was participating in the

Chittenden County Adult Drug Treatment Court. The constraints of ADTC is sufficiently analogous to probation or parole to warrant application of the Blondin holding. This result is required under the former version of 13 V.S.A. sec. 7031(b), which applies in this case, and the Court does not reach whether the amended version of the statute would require the same outcome. Docs. 2012-049 and 2013-040, November 27, 2013.

<http://info.libraries.vermont.gov/supct/current/op2013-049.html>

BAIL REVIEW ON VIOLATION OF PROBATION CHARGE MUST OCCUR WITHIN FIVE DAYS

State v. Houle, full court unpublished entry order. BAIL REVIEW HEARING FOR PROBATIONER ACCUSED OF VIOLATION OF PROBATION: MUST OCCUR WITHIN FIVE DAYS.

Denial of bail review hearing reversed. The defendant was on probation for lewd and lascivious conduct with a child, when he was arraigned for a violation of a condition of probation and held without bail. The defendant requested an immediate bail review hearing, but the trial court scheduled one for two weeks later. The defendant then filed a petition for extraordinary relief in the Civil Division, seeking an order that the Criminal Division hold the bail review hearing immediately. The petition was denied, and this appeal followed. The bail

procedures detailed in 13 V.S.A. sec. 7554 are incorporated by reference in the statute concerning detention pending hearing for probationers, at 28 V.S.A. sec. 301(4). V.R.Cr.P. 32.1(a)(3)(A) also incorporates section 7554. Section 7554 requires a bail review hearing within five days of the date of the original denial of bail. That time has already expired, and the petitioner is entitled to immediate relief. The matter is therefore remanded, and the Criminal Division shall hold a bail review hearing as soon as possible, and decide the motion as soon as possible thereafter. Doc. 2013-331, September Term, 2013.

<https://www.vermontjudiciary.org/UPEO2011Present/eo13-331.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.”

INSUFFICIENT EVIDENCE OF INTENT TO SEXUALLY ASSAULT

In re C.B., three justice entry order. ATTEMPTED SEXUAL ASSAULT: SUFFICIENCY OF EVIDENCE OF INTENT.

Adjudication of delinquency based upon attempted sexual assault reversed. Where the juvenile told his school services clinician that he wanted a physical relationship with her, and, when she refused, told her that he would tell people that they did have the relationship so that she would lose her job, and where he then placed his right hand over her mouth and attempted to push her to the floor, told her not to yell for help, and said take off your clothes, the evidence was insufficient to prove beyond a reasonable

doubt that the juvenile intended to commit the offense of attempted sexual assault. There was no evidence that he reached for the victim’s crotch, moved to unbutton his own pants, or touched the victim’s breasts. The evidence that he said he wanted a physical relationship, and that he told her to remove her clothes, may have been sufficient to establish an attempt generally to commit a sexually motivated offense like lewd and lascivious conduct, but it falls short of establishing an intent to commit the more specific misconduct outlined in the sexual assault statute. Doc. 2012-430.

<https://www.vermontjudiciary.org/UPEO2011Present/eo12-430.pdf>

INTEREST AWARDS PROHIBITED IN RESTITUTION ORDERS

State v. Marcotte, three-justice entry order. RESTITUTION ORDERS: INTEREST AWARD PROHIBITED; EVIDENTIARY SUPPORT.

Restitution order affirmed, but provision imposing interest is stricken. The defendant pleaded guilty to simple assault after throwing a hot cappuccino through a car window at a driver and her passenger. The driver sought \$90 for cleaning the front interior, and \$92.95 to replace a pair of jeans. The court awarded the restitution, and set two payment dates and imposed interest if the amounts were not timely paid.

1) The restitution statute prohibits the imposition of interest. 2) The defendant

was properly held liable for the cost of cleaning the entire front section of the interior of the car, despite her claim that she was only liable for cleaning the stains she caused with the cappuccino. The victim testified that the stains were throughout the front of the car, and therefore the loss was supported by the evidence. Doc. 2012-130, October Term, 2013.

<https://www.vermontjudiciary.org/UPEO2011Present/eo13-130.pdf>

PCR PETITION BASED ON DOUBLE JEOPARDY WAS WITHOUT MERIT

In re Jones, three-justice entry order.
PCR: DOUBLE JEOPARDY CLAIM
WAS WITHOUT MERIT.

Summary judgment on petitioner's double jeopardy claim affirmed; the remainder of the claims remanded. The petitioner was convicted of assaulting and murdering his domestic partner. The petitioner's attorneys were not ineffective for failing to raise a double jeopardy claim, because his two

convictions were based upon separate acts. The matter is remanded for consideration of the petitioner's other ineffective-assistance claims, which the trial court did not realize were incorporated by reference into the amended petition. Doc. 2013-148, November Term, 2013.

<https://www.vermontjudiciary.org/UPEO2011Present/eo13-148.pdf>

MOTION TO RECONSIDER SENTENCE WAS TIMELY

State v. Shepard, three-justice entry order. MOTION FOR SENTENCE RECONSIDERATION: TIMELINESS.

Denial of motion for sentence reduction as untimely reversed and remanded for consideration on the merits. The defendant first filed a motion for sentence reduction while his appeal of a restitution order was pending, and this motion was correctly denied as premature. The defendant's

subsequent motion, filed within 90 days after the Court's decision on appeal affirming the restitution order, was timely. The trial court found that the appeal was on a collateral matter, but there was no final judgment in this case entered by this Court before that appeal was decided. Doc. 2012-098, November Term, 2013.

<https://www.vermontjudiciary.org/UPEO2011Present/eo13-098.pdf>

POST CONVICTION RELIEF PETITIONER FAILED TO SHOW GROUNDS FOR RELIEF

In re Brink, three-justice entry order. POST-CONVICTION RELIEF FOR INEFFECTIVE ASSISTANCE: FAILURE OF PROOF.

Denial of petition for post-conviction relief affirmed. The petitioner claimed that the prosecution failed to disclose a police interview of the complainant allegedly showing that the offense occurred while petitioner was incarcerated. The record does not support this, as trial counsel cross-

examined the complainant on this point, referring accurately to the interviews at issue, and made the argument in closing. That the jury was unpersuaded by the argument does not demonstrate prosecutorial misconduct or ineffective assistance of counsel. Doc. 2012-034, November Term, 2013.

<https://www.vermontjudiciary.org/UPEO2011Present/eo13-034.pdf>

REQUEST TO CONSULT WITH ATTORNEY BEFORE TAKING BAC TEST CAME TOO LATE

*State v. Wallace, three-justice entry order. BAC TEST: RIGHT TO CONSULT WITH AN ATTORNEY. MOTOR VEHICLE STOP: TOUCHING CENTER LINE.

DUI affirmed. 1) The defendant was given a reasonable amount of time to consult with an attorney before deciding whether to give a breath sample, even though it was not a full thirty minutes. His decision to contact the public defender came too late to permit him to contact and consult with the attorney before the maximum thirty-minute period expired, and in any event he did not plainly articulate a desire to speak to a public

defender, and the officer did not explicitly deny such a request. 2) The motor vehicle stop was legal based upon the officer's observation that the defendant's vehicle had touched the yellow center line on several occasions for the one or two miles that the officer followed the vehicle, and the officer's testimony that touching the centerline is a sign of impairment based on his experience and training. The stop was thus justified even if touching the centerline was not itself a traffic violation. Doc. 2013-129, October 11, 2013.

<https://www.vermontjudiciary.org/UPEO2011Present/eo13-129.pdf>

Vermont Supreme Court Slip Opinions: Single Justice Rulings

LEGAL CHALLENGE TO UNDERLYING SENTENCE DID NOT OUTWEIGH OTHER FACTORS IN BAIL REVIEW

State v. Houle, single justice bail review. DENIAL OF BAIL IN VOP MATTER AFFIRMED DESPITE LEGAL CHALLENGE TO UNDERLYING SENTENCE.

Order that defendant be held without bail is affirmed. The defendant argued that the trial court failed to give adequate weight to his challenge to the legality of the underlying sentence, which was imposed despite the absence of a pre-sentence investigation report, statutorily required for the offense for which the defendant was convicted. The single justice reviewing this decision was reluctant to jettison the trial court's thoughtful weighing of various factors based on sufficient evidence in the record on the ground that an untested legal

argument renders those other factors irrelevant. The trial court did note that the absence of a PSI tends to undermine the strength of the State's probation violation case, but declined to resolve the question on the briefing then before it. Based on all of the factors considered, the trial court's decision was supported by the proceedings below, and is therefore affirmed. In any event, even if the defendant is right on this legal point, his status would then become a convicted sex offender awaiting sentencing, and the trial court would be required to conduct virtually the same analysis it had just conducted. 2013-363, September Term 2013.

<https://www.vermontjudiciary.org/UPEO2011Present/eo13-363.bail.pdf>

Criminal And Appellate Rule Changes

Order Promulgating Emergency Amendment to the Vermont Rules of Criminal Procedure by the addition of Rule 11.1

Rule 11.1 is promulgated consistent with Act No. 76, § 1, effective July 1, 2013, which amended various provisions of 18 V.S.A. § 4230, and directs the court to engage in specific additional colloquy with a defendant entering a plea of guilty or no contest as to the potential collateral consequences of a conviction for subject offenses, extending to such consequences as loss of education financial aid, suspension or revocation of professional licenses, and restricted access to public benefits such as housing. The statute upon which the rule is based requires that the advisement be provided to the defendant personally in open court, thus requiring presence of the defendant and a record of proceeding in each such case, in contrast to the provisions of Rule 11(c) and (d), amended effective May 13, 2013, which authorize pleas by waiver pursuant to Rule 43, without appearance in open court.

This emergency Order, promulgated on November 13, 2013, is effective immediately, and can be found at the following address:

<https://www.vermontjudiciary.org/LC/Statutes%20and%20Rules/PROMULGATEDEMERGENCYAMENDMENTVRCrP11.1.pdf>

United States Supreme Court Case Of Interest

Thanks to NAAG for this summary

Kansas v. Cheever, 12-609. The Court unanimously held that the Fifth Amendment's self-incrimination clause does not "prohibit[] the government from introducing evidence from a court-ordered mental evaluation of a criminal defendant to rebut the defendant's presentation of expert testimony in support of a defense of voluntary intoxication." The Court concluded that, just as a defendant who testifies opens himself up to cross-examination, so too does a defendant who "presents evidence through a psychological expert who has examined him" open the door to "the only effective means" the government has to "challeng[e] that evidence: testimony from an expert who has also examined him."

http://www.supremecourt.gov/opinions/13pdf/12-609_g314.pdf

Cases marked with an asterisk were handled by the AGO.

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