Criminal Division
Vermont Attorney General's Office

Vermont Criminal Law Month

October - November 2014

Vermont Supreme Court Slip Opinions: Full Court Rulings

Includes three justice bail appeals

DEFENDANT'S UNCONTROLLED BEHAVIOR WHILE UNDER ABUSE PREVENTION ORDER SUPPORTED FINDING THAT NO CONDITIONS OF RELEASE WOULD AVOID DANGER TO COMPLAINANT

State v. Hughes, 2014 VT 112. DENIAL OF BAIL: DANGER TO ANOTHER. Single justice bail review. Order that defendant be held without bail affirmed.

The denial of release on conditions was supported by clear and convincing evidence that the defendant's release posed an unavoidable threat of violence. The defendant's controlling behavior perpetrated while under an abuse prevention order, culminating in a recent vicious assault against the complaining witness, demonstrates that offers of supervision by relatives and friends, no matter how earnest, afford inadequate protection against further danger to the complaining witness. The defendant's short-lived abstinence from alcohol, imposed as a result of his incarceration, also offers little assurance that he can maintain his sobriety if released, especially since he was unable to do so while under the prior relief from abuse order. The defendant's ill-advised efforts to contact the complaining witness, after being issued another relief from abuse order and conditions of release, strongly contradict the claim that he will conform his behavior to a judge's order. Therefore, the court cannot conclude that any conditions will safeguard the complaining witness against the defendant's impulse to control her, which has up until now been so resistant to judicial restraint. Doc. 2014-356, October 3, 2014. http://info.libraries.vermont.gov/supct/current/eo2014-356.html

FAILURE TO HOLD BAIL REVIEW HEARING WITHIN FIVE DAYS OF DENIAL OF BAIL WAS ERROR

State v. Campbell, 2014 VT 113. BAIL REVIEW PENDING VOP HEARING. Three justice bail appeal.

The defendant was held without bail pending a merits hearing on his alleged probation violations. The merits hearing was continued until October 31, 2014. The defendant asked the court to review his denial of bail, but the court declined.

Although the defendant is not entitled to bail as a matter of right, as this court held in State v. Houle, he is entitled to a hearing within five working days of the date bail originally was denied. Doc. 2014-350, October Term, 2014. http://info.libraries.vermont.gov/supct/current/eo2014-350.html

ERRORS IN ADMISSION OF TESTIMONY CONCERNING HGN TEST WERE HARMLESS

State v. Wilt, 2014 VT 114. DUI: TESTIMONY CONCERNING HGN TEST: HARMLESS ERROR.

DUI affirmed. 1) The trooper's testimony that the results of his administration of the HGN test indicated that the defendant's BAC was .10 was error, as there was no basis for this estimation. However, it was harmless error, because the case did not turn on her BAC at the time that she was stopped while a passenger in her car. Her actual BAC was later determined, and was related back to the time that she actually was operating the car. The issue in the case was how much alcohol she had consumed after operating the car and before the BAC was tested. 2) Assuming that it was error for the court to allow the trooper to testify concerning the HGN test despite the fact that, by the trooper's own admission, he did not follow protocols for conducting such a test on someone with a head injury, the jury was aware of this fact. In any event, the key issue in the case was how much the defendant drank after operation, not her condition when tested by the trooper. Robinson dissenting: It cannot be said beyond a reasonable doubt that there is no reasonable possibility that the jury relied upon the trooper's estimate of the defendant's BAC in order to convict, because there was a factual dispute concerning how much she drank after operating the vehicle, and the jury could easily have relied upon the trooper's testimony to resolve the conflict.Doc. 2013-119, October 24, 2014. http://info.libraries.vermont.gov/supct/current/op2013-119.html

SEARCH CONDITION OF CONDITIONAL-REENTRY AGREEMENT DID NOT VIOLATE ARTICLE 11

State v. Bogert, 2013 VT 13a. Denial of motion to suppress in violation of probation proceeding affirmed.

The defendant's Fourth Amendment rights were not violated by a conditional-reentry agreement requiring him to a search at any time. The result is reached under Article 11 of the Vermont Constitution. Both constitutions permit such searches under the "special needs" rubric. Note: this opinion was issued following a motion to reargue. The original opinion was issued in February, 2014, and that opinion has now been withdrawn. Doc. 2011-253, October 10, 2014. http://info.libraries.vermont.gov/supct/current/op2011-253A.html

WITNESS'S TESTIMONY DID NOT OPEN THE DOOR TO HIS OPINION OF DEFENDANT'S GUILT

*State v. Groce, 2014 VT 122. HEARSAY: OPENING THE DOOR; HARMLESS ERROR. CLOSING ARGUMENT: INAPPROPRIATE ARGUMENT.

Sexual assault reversed. The complainant testified that after the assault she entered another person's bedroom and attempted to awaken him, then left. On cross-examination, the complainant's boyfriend was asked, and testified, that that person had said to him that he did not believe the complainant had entered his room on the night of the incident. The State then asked the boyfriend whether this person had indicated that he thought that the defendant had probably done it, and he testified, "Yes, he did." He added that the person said that he "thought that it was not beyond the realm of possibility that [defendant] had done this." The defense was that this was a consensual sexual encounter, motivated by the complainant's fight with her boyfriend that night. In rebuttal closing, the State argued that the defendant's version would require the jury to believe that the complainant would "go off and be a slut." The trial court ruled that the hearsay statement was admissible because the defense had opened the door by asking about hearsay statements concerning whether complainant had entered the bedroom that night. Opening the door occurs when one of the parties deliberately elicits testimony presenting a misleading picture of the facts, and the other party is permitted to elicit other inadmissible evidence for the limited purpose of rebutting the inaccurate portrayal. The defendant's questions did not present a misleading depiction of the facts. Even if it had, the State's question did not serve to rebut the defendant's portrayal, but went beyond the limited issues and one specific detail about the person's memory of the night of the incident, to ask about the person's view of the ultimate issue, the defendant's guilt. Even if the substance of the statement was offered in a non-hearsay form, it would likely not have been admissible, as it was not based on personal knowledge (other than character). The error was not harmless. Only the defendant and the complainant testified as to what happened during the alleged sexual encounter. Without more, this evidence is not strong enough to conclude that the jury would have convicted beyond a reasonable doubt without the erroneously admitted hearsay evidence. The fact that the trial nearly resulted in a hung jury suggests the error may have impacted the jury verdict. The court also notes that the use of the term "slut" by the State during closing argument was inappropriate, misleading, and inaccurate. The defendant did not improperly malign complainant's character; the State did, by drawing sexist inferences from the defendant's version of events (that is, if the encounter was consensual and motivated by complainant's fight with her boyfriend, then she must be a slut.). Doc. 2012-479, November 14, 2014. http://info.libraries.vermont.gov/supct/current/op2012-479.html

DOH BLANKET APPROVAL OF DATAMASTER MACHINES UPHELD

State v. Grenier and Harris, 2014 VT 121. DEPARTMENT OF HEALTH APPROVAL OF DATAMASTER MACHINES.

Denial of motions to suppress results of breath-alcohol tests taken by the DataMaster DMT machine affirmed. 1) The trial court did not abuse its discretion in denying an evidentiary hearing because there were no disputed issues of relevant fact. The court took defendants' allegations as true for purposes of its decision, and resolved their claims on purely legal grounds. Factual disputes related to allegations of incompetence and unethical behavior within the Department of Health did not specifically relate to the ability of the actual DMT machines used in defendants' cases to meet the performance standards promulgated by the DOH at the time their breath-alcohol was measured, as required by statute to establish the admissibility of the evidence at trial. In other words, these allegations did not contest the foundational facts justifying admission of the test results; their arguments went solely to the weight of the evidence. 2) The DOH regulations for approval of blood alcohol analysis devices was interpreted by DOH to not require approval of specific models, such as the BA or DMT, and therefore the DOH could issue one approval for all instruments using infrared spectrophotometry. This interpretation was reasonable, and therefore would be upheld. 3) The DOH used due diligence in issuing its approval. Docs. 2013-224 and 2013-300, November 14, 2014.
http://info.libraries.vermont.gov/supct/current/op2013-224.html

DEFENDANT'S TOUCHING OF COMPLAINANT'S GENITAL AREA SUPPORTED FINDING OF LEWD OR LASCIVIOUS INTENT

State v. Allard, three-justice entry order. LEWD AND LASCIVIOUS CONDUCT: SUFFICIENCY OF THE EVIDENCE OF INTENT. DEPOSITION OF MINOR IN SEXUAL OFFENSE. MISTRIAL.

Sexual assault, three counts of lewd or lascivious conduct with a child, furnishing alcohol to a minor, and contributing to the delinquency of a minor, affirmed. 1) The evidence was sufficient to show that the defendant possessed the requisite intent for lewd or lascivious conduct where it showed that the defendant touched the victim's genital area skin to skin, and did it even after she said she felt uncomfortable, and that on other occasions defendant asked to touch and feel her breasts so that he could "get hard." 2) The court did not err in denying the defendant's request to depose the victim prior to trial. The court did not abuse its discretion when it ruled that the potential harm to the victim, as testified to at a hearing, was not outweighed by the defendant's reasons for deposing the victim, which were general and would be present in almost every sexual assault case. 3) The defendant was not entitled to a mistrial after the victim testified that she had decided to report the oral sex incident after seeing the defendant's Facebook page and realizing that she "wasn't the only person." The court instructed the jury to disregard the answer, took a recess to hear further argument, then gave a longer instruction to the jury to disregard the answer, stating that it was "unreliable speculation." In the context of the entire trial, it was not error to deny a mistrial. The remark was vague, did not directly state that there were other victims, or that the victim believed that the defendant had assaulted other girls. It was an isolated statement that was not repeated or used in a prejudicial manner by the prosecution. Therefore, the possibility of prejudice was minimal. Doc. 2013-462, October Term, 2014.
https://www.vermontjudiciary.org/UPEO2011Present/eo13-462.pdf

DIMINISHED CAPACITY DOES NOT MITIGATE MURDER TO MANSLAUGHTER

State v. Congress, 2014 VT 129. MURDER: NOT MITIGATED TO MANSLAUGHTER BY DIMINISHED CAPACITY. EXTRINSIC EVIDENCE TO IMPEACH ON COLLATERAL ISSUE. BARRING UNLISTED WITNESS. EXCLUSION OF EXPERT TESTIMONY RE UNDERLYING INFORMATION HE RELIED UPON.

Second degree murder affirmed. 1) The Court declined to hold that a serious psychological condition that does not rise to the level of insanity and does not negate the defendant's specific intent to kill operates to mitigate the offense of murder to the offense of voluntary manslaughter. Voluntary manslaughter is an intentional killing mitigated by extenuating circumstances such as a sudden passion or provocation that would cause a reasonable person to lose control. A psychological condition resulting in "diminished capacity" that neither negates the specific intent required for murder and voluntary manslaughter, nor rises to the level of insanity does not permit conviction of voluntary manslaughter instead of second degree murder. Cases which suggest otherwise are overruled. 2) The defense was not entitled to call a witness who would have contradicted a state's witness on collateral issues, such as whether the state's witness needed glasses to read the police statement shown her at trial, had attended special classes in high school or was abused by her brother. A witness may not be impeached by extrinsic evidence on a collateral issue. 3) The court did not abuse its discretion when it declined to permit the defense to call a character witness who had not been listed. The need for this witness should have been clear from the inception of the case, so there was no reason for the delay in noticing him. In any event, the defense did not make an offer of proof concerning the witness's testimony. 4) The court did not err in precluding the defense expert from testifying to statements made to him by the defendant and others concerning abuse of the defendant by her husband pursuant to VRE 703. It is reasonably clear that the trial court weighed the probative value of the information and concluded that it did not outweigh the potential prejudice of admitting the evidence through the expert, without affording the state an opportunity to test that evidence through cross-examination of the actual witnesses. In any event, on appeal the defense has not identified any specific information on which the expert relied in forming his opinions that was not admitted through other witnesses anyway. Reiber, dissenting: the correct result, consistent with prior case law, would be to allow diminished capacity which does not amount to insanity nor negate the specific intent to kill to mitigate murder to voluntary manslaughter. Doc. 2011-307, December 5, 2014. http://info.libraries.vermont.gov/supct/current/op2011-307.html

APPROACHING VEHICLE TO WARN OF DOWNED TREE WAS PERMISSIBLE PURSUANT TO COMMUNITY CARETAKING EXCEPTION

State v. Hinton, 2014 VT 131. COMMUNITY CARETAKING EXCEPTION.

Civil suspension and conditional guilty plea to DUI affirmed. A police officer stationed his cruiser one or two miles from a downed tree which partially blocked the road. While waiting for the highway crew to arrive, he would activate his blue lights when a car approached, and then advise the driver to take an alternate route if his destination was beyond the downed tree. The defendant stopped about 150 feet away from the

cruiser when the officer activated his blue lights, and did not approach when the officer waived him on. The officer approached the defendant's truck to explain what was going on. The defendant offered to remove the tree with a hatchet, and did not accept the officer's explanation that this was not practical. The officer noticed that the defendant's eyes were bloodshot and watery, and he seemed confused by the officer's explanation of the alternate route. He also observed what appeared to be a wine or liquor bottle on the passenger seat, which the defendant tried to hide by covering with a paper bag. The officer asked the defendant to exit his truck and perform field-sobriety exercises, which led in turn to a DUI processing. Assuming that these facts indicate that a stop occurred, it was justified under the community-caretaking doctrine and did not violate the Fourth Amendment. The exception does not only apply when it is the defendant who was in need of assistance, but whenever an officer is reasonably and legitimately exercising a community-caretaking function, and not a criminal investigation, and happens to obtain evidence of a crime. The officer was not required to stay by the downed tree and direct motorists to turn around without stopping or talking with them. The court will not second-guess how an officer chooses to respond to an emergency situation if, as here, the response is reasonable. Doc. 2014-163, December 12, 2014. http://info.libraries.vermont.gov/supct/current/op2014-163.html

EVIDENCE OF MURDER WAS SUFFICIENT TO SUPPORT DENIAL OF BAIL

State v. Theriault, 2014 VT 119. BAIL: SUFFICIENCY OF EVIDENCE TO SUPPORT FINDING THAT EVIDENCE OF GUILT IS GREAT.

Three-justice bail appeal. Appeal from trial court order holding that evidence of defendant's guilt was great for purposes of holding him without bail pursuant to 13 V.S.A. 7553. Although there is no direct evidence that the defendant killed the victim with a physical blow, the circumstantial evidence shows great evidence of guilt. The child died from trauma to his abdomen, commonly seen after motor vehicle accidents. Few types of plausible impacts could produce the force necessary to inflict the child's injury, the two most reasonable being falls onto a protruding object from a great height or blows to the abdomen. The injury occurred between three to thirty-six hours before death, and no period of that was unaccounted for except certain hours when the victim and his mother were sleeping. During this window of time, the victim suffered no blunt-force collisions capable of causing his death, and showed no symptoms of abdominal injury until the morning. The defendant's claim that he had gone to bed early was not supported by the child's mother. In addition, the court made a specific finding that the evidence was sufficient to prove the necessary state of mind. This finding was supported by the evidence – if the jury believes the defendant committed the alleged wrongful act, striking a two year old in the stomach with a forceful blow, the jury could also find that the defendant's act was sufficiently serious to prove intent to do great bodily harm or wanton disregard that such harm would result. Doc. 2014-359, November 4, 2014. http://info.libraries.vermont.gov/supct/current/eo2014-359.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."

AFFIDAVIT ESTABLISHED TRIABLE FACT IN POST CONVICTION RELIEF PROCEEDING

In re Brown, three justice entry order. POST CONVICTION RELIEF: SUMMARY JUDGMENT; ESTABLISHMENT OF A TRIABLE FACT.

Dismissal of petition for post-conviction relief reversed and remanded for further proceedings. The petitioner's expert's affidavit created a triable issue of fact when he asserted that trial counsel erred in presenting evidence of the distinctive appearance of the petitioner's penis, which description, arguably, matched that given by the victim. This is true despite a competing affidavit from trial counsel indicating that petitioner made an informed decision to pursue this defense despite the possible dangers. If further discovery indicates that the expert's opinion has changed as a result of this information, then the analysis might be different. Doc. 2014-028, September Term 2014. https://www.vermontjudiciary.org/UPEO2011Present/eo14-028.pdf

UNPRESERVED ARGUMENT WOULD NOT BE CONSIDERED ON APPEAL IN CHALLENGE TO EXTRADITION WARRANT

Dodge v. Shumlin, three-justice entry order. EXTRADITION WARRANT: WAIVER OF GROUNDS FOR CHALLENGE.

Denial of the petitioner's habeas corpus petition affirmed. The petitioner challenged an extradition warrant on the grounds that the State failed to show that the New Hampshire indictment was lawfully amended to change the person indicted from "Brad Smith" to "Jonathan H. Dodge." This argument was not raised below, and therefore would not be addressed on appeal. Doc. 2014-007, October Term, 2014. https://www.vermontjudiciary.org/UPEO2011Present/eo14-007.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 david.tartter@state.vt.us.