Vermont Department of State's Attorneys

Vermont Criminal Law Month

May - June 2019

Vermont Supreme Court Slip Opinions: Full Court Rulings

Includes three-justice bail appeals

POST-CONVICTION RELIEF DENIED: DEFENSE ATTORNEY HAD NO CONFLICT OF INTEREST AND BREAKDOWN IN COMMUNICATIONS WAS FAULT OF PETITIONER

In re Burke, 2019 VT 28. POST-CONVICTION RELIEF: STANDARD WHERE CLAIM IS CONFLICT OF INTEREST; NECESSITY OF EXPERT OPINION; SHOWING OF PREJUDICE; ATTORNEY-CLIENT ANIMOSITY; FAILURE TO OFFER EVIDENCE; DENIAL OF PERMISSION TO AMEND PETITION.

Summary judgment to the State in post-conviction relief proceeding affirmed. 1) In assessing the petitioner's claim of ineffective assistance of counsel stemming from a conflict of interest, the Court would use the usual Strickland standard, rather than the standard proposed by the petitioner, which would do away with the requirement of a showing of actual prejudice, where an actual conflict of interest is shown to exist, and that some plausible alternative defense strategy or tactic might have been pursued but was not, and that the alternative defense was inherently in conflict with or not undertaken due to the attorney's other loyalties or interests. In this case, neither standard has been met by the petitioner. 2) Summary judgment for the State was appropriate on the question of ineffective representation during jury selection, where the petitioner's expert testified that counsel's assistance at this stage was not ineffective. 3) The claim that counsel was ineffective for failing to pursue a voluntary intoxication or diminished capacity defense, and to request instructions on those defenses, is without merit because the petitioner failed to show that he was prejudiced by the failure to pursue those defenses. 4) The claim that the personal conflict and animosity between counsel and the petitioner resulted in ineffective assistance is also without merit. Despite the animosity between attorney and client, the trial record shows that counsel provided an adequate defense. Nor is there any evidence that a breakdown in communication prejudiced the petitioner, by affecting counsel's performance at trial or resulting in a lapse of representation or failure to pursue a plausible strategy or tactic. Counsel never conveyed his personal animosity for the petitioner to the jury at any time. Finally, it was the petitioner's own behavior that caused the breakdown in the

attorney-client relationship. The Court adopts a four-prong test to determine if a complete breakdown in communication resulted in ineffective assistance of counsel: a) whether the petitioner made a timely motion requesting new counsel or leave to proceed pro se; b) whether the trial court adequately inquired into the matter; c) whether the conflict was so great that it resulted in a total lack of communication preventing an adequate defense; and d) whether the petitioner substantially and unjustifiably contributed to the breakdown in communication. All four prongs, most critically the fourth, support the conclusion in this case that there was no ineffective assistance. 5) There was no ineffective assistance of counsel in counsel's failure to introduce certain evidence at trial concerning the complainant, as there was no showing that such evidence would actually have been admitted. 6) The PCR court did not err in denying the petitioner's motion to amend the original petition after nearly three years of extensive litigation, including an expert's review and depositions. The State requested that the petitioner explain the specific amendments in the proposed amended petition, which was 34 pages long and contained 96 numbered paragraphs. The petitioner did not respond to this request. The petitioner was entitled to amend the pleading, after twenty one days following the original service, only by leave of the court. V.R.C.P. 15(a). The court's decision on this issue is reviewed only for abuse of discretion. There was no abuse of discretion where after nearly three years of litigation, and nearly one hundred motions, hours of depositions, and hours more spent interpreting and responding to the petitioner's extensive motion practice, permitting the amendment would have required the State to determine the exact nature of the proposed changes and then respond to those changes, which would have been an undue burden and would have resulted in further delay in the already extended litigation. Given the petitioner's history, it cannot be said that the proposed amendment was not obviously frivolous nor made as a dilatory maneuver in bad faith. Doc. 2017-261, April 19, 2019. https://www.vermontjudiciary.org/sites/default/files/documents/op17-261.pdf

LIFE WITHOUT PAROLE SENTENCE UPHELD IN HERRING

State v. Herring, 2019 VT 33. SENTENCING: MENTAL ILLNESS AS AN AGGRAVATING FACTOR; CONSIDERATION OF PUBLIC SAFETY DESPITE PAROLE REVIEW PROCESS.

Sentence of life without parole for first-degree murder, entered pursuant to a plea agreement permitting the defendant and the State to each argue for any lawful sentence, affirmed. (The defendant was also sentenced to three concurrent sentences of twenty-years to life for another three murders). 1) The trial court did not improperly rely upon the defendant's history of trauma and resulting anxiety disorder as aggravating rather than mitigating factors. The court actually relied upon her history as a mitigating factor. The court's finding that the defendant's decision to murder four people was not a manifestation of her mental illness but rather was motivated by rage is supported by the evidence. 2) The trial court legitimately considered the risk to public safety the defendant might pose in the future, even though this risk was rooted in the defendant's history of trauma and resulting mental-health challenges. 3) The court was not required to defer any consideration of public safety to a future parole board, and it was not prohibited from considering the public-safety impact of a convicted offender's potential future release because, short of the maximum sentence, a parole board must determine that it is

reasonably safe to release the defendant. While a court may fashion a sentence that defers to the parole-review process to address public-safety concerns, it is not precluded from including its own assessment of public-safety risk in the sentencing decision. In any event, the sentence was intended to reflect the enormity of the crime, not to ensure public safety. Doc. 2017-424, May 10, 2019. https://www.vermontjudiciary.org/sites/default/files/documents/op17-424.pdf

REFUSAL TO SUBMIT TO PBT ADMISSIBLE TO SHOW REASONABLE GROUNDS TO SUSPECT DUI, IN REFUSAL PROSECUTION

State v. Schapp, 2019 Vt. 27. REFUSAL: ADMISSION OF REFUSAL TO SUBMIT TO PBT; SUFFICIENCY OF THE EVIDENCE OF REASONABLE GROUNDS; INSTRUCTIONAL DEFINITION OF "REASONABLE GROUNDS."

Full court published decision. Refusal to submit to an evidentiary test affirmed. 1) A defendant's refusal to submit to a PBT is admissible in a refusal case in order to show an element of the refusal charge – that the officer had reasonable grounds to believe that the defendant was driving under the influence when he asked for the evidentiary test. The Court does not reach the question of whether such a refusal would be admissible to prove consciousness of guilt, and thus guilt, in a DUI trial. 2) The trial court properly instructed the jury that "reasonable grounds" means that the officer had made specific observations reasonably supporting "an inference that [defendant] had been operating a motor vehicle while she was under the influence of intoxicating liquor." 3) The evidence was sufficient to support the jury verdict that the officer had reasonable grounds to believe the defendant committed a DUI where the defendant, who was coming from the direction of a bar, drove over the speed limit, had watery eyes and slurred speech, had a faint odor of alcohol, exhibited clues of intoxication during field sobriety tests, and refused to take a PBT. 4) The defendant claimed that the State failed to prove that the defendant's belated offer to take the evidentiary test after her initial refusal was made beyond the thirty-minute period. This argument was not preserved for appeal, and the defendant did not argue plain error on appeal. Robinson, with Skoglund, dissenting: The PBT is a search for purposes of the Fourth Amendment, and an individual's refusal to waive a constitutional right cannot be used against them in a criminal prosecution. Doc. 2018-003, May 17, 2019. https://www.vermontjudiciary.org/sites/default/files/documents/op18-003.pdf

CROSS-EXAMINATION OF PROSECUTION WITNESS CONCERNING HIS PLEA AGREEMENT WAS NOT UNDULY RESTRICTED

State v. Robitille, 2019 VT 36. CROSS-EXAMINATION: NATURE OF PLEA AGREEMENT; INVOLUNTARY MANSLAUGHTER: SUFFICIENCY OF THE EVIDENCE. UNANIMITY INSTRUCTION: PLAIN ERROR.

Full court published opinion. Involuntary manslaughter affirmed. 1) The defendant wanted to cross-examine a witness against the defendant on the grounds that he had reached a plea deal at a time when he

faced a charge of second-degree murder. However, the trial court did not err in finding that the State had amended the charge to which he pled of its own volition, and not in connection with the plea deal, to involuntary manslaughter. 2) The defendant's claim that he should have been able to cross-examine this witness concerning his understanding of what his exposure was, not his actual exposure, was not preserved for appeal. 3) The defendant's constitutional right to confront witnesses against her was satisfied by the opportunity to cross-examine this witness on the fact that he received a reduced sentence in exchange for his agreement to testify, and where the witness testified that he actually received a sentence of four to fifteen years in prison, split to serve three, thus informing the jury that he was facing fifteen years. 4) The evidence was sufficient to prove causation and criminal negligence. The evidence permitted the jury to conclude that the defendant gave the victim more than one ounce of alcohol and that, in doing so, she caused his death. Given the evidence concerning the victim's vulnerable condition, his diabetes insipidus, the lack of research on the effects of alcohol for someone with holoprosencephaly, and the statements by his doctors that no one would or should give him any amount of alcohol, plus evidence that the defendant was intimately involved in the victim's care and fully understood his vulnerable condition, particularly the importance of maintaining his fluid balance and the dangers posed by dehydration, and her failure to advise the police that she had given the victim alcohol on the night that he died, and the fact that she turned on his baby monitor full blast because of the alcohol, indicate her awareness that alcohol could cause risks for her son. 5) The defendant argues that because the evidence presented two viable theories regarding causation (that defendant administered all of the alcohol, and that the defendant administered some of it, and that the cooperating witness added more, which the defendant knew or should have known about, and together the doses killed the victim), the court was required to specifically instruct the jury that they must decide unanimously on which set of facts supported the conviction. This objection was not preserved below, and its omission was not plain error. The State did not seek conviction based on multiple distinct acts but alleged that the defendant gave the victim enough alcohol to cause his death. The alternative theory to which the defendant refers was suggested by the defendant, and not the State – that it was the cooperating witness who administered sufficient alcohol to kill the victim. This is not an alternative theory of prosecution, it is a defense. Doc. 2017-403, May 17, 2019. https://www.vermontjudiciary.org/sites/default/files/documents/op17-403.pdf

STATE MAY COMMENT ON TESTIFYING DEFENDANT'S INCONSISTENT ACCOUNTS, EVEN IF NOT LITERALLY CONTRADICTORY

State v. Fischer, 2019 VT 39.
COMMENT ON DEFENDANT'S RIGHT TO SILENCE: WHERE DEFENDANT GIVES INCONSISTENT ACCOUNTS.

Sexual assault of a minor affirmed. 1) The State did not impermissibly comment upon the defendant's exercise of his right to remain silent when it noted that he testified that the victim had pursued him, whereas he did not mention this to the police when they spoke to him, merely stating that he did not assault the complainant and that he would never do anything sexual with her because she was nasty and a child. The State was free to impeach the defendant with having omitted to tell the police that the victim was pursuing him. Although the defendant argued that the two accounts were not inconsistent with each other, and although

the two explanations could conceivably work in conjunction, the fact that the defendant offered two independent explanations at two distinct times raises the question of his credibility, a question that was fairly brought to the jury's attention. 2) The State did not, as the defendant claims, impermissibly raise the issue of what he failed to say as substantive evidence of guilt in its case in chief – it was used only to impeach him after he testified at the trial. The State did not argue that only a guilty person would have failed to offer police an exculpatory explanation. 3) This is not a case of "partial silence," where the defendant answers some questions in response to police questioning and refuses to answer others. The defendant here did not refuse to answer any specific questions by the police. Doc. 2017-371, May 24, 2019. https://www.vermontjudiciary.org/sites/default/files/documents/op17-371_0.pdf

EVIDENCE OF DISORDERLY CONDUCT WAS INSUFFICIENT

State v. McEachin, 2019 VT 37. DISORDERLY CONDUCT: SUFFICIENCY OF THE EVIDENCE. ASSAULT OF A POLICE OFFICER: NEXUS WITH UNLAWFUL DETENTION.

Disorderly conduct conviction and resisting arrest reversed; simple assault on a police officer affirmed. 1) The charge of resisting arrest is reversed, where the State confessed error because the defendant was not arrested, but taken into protective custody. 2) The evidence supporting the charge of disorderly conduct was that the defendant approached an officer too closely, and the officer pushed him back. This was not fighting or violent, tumultuous, or threatening behavior. Fighting means to contend in battle or physical combat, such as punching another person. Nor did he engage in violent behavior. Violent means using unjust and improper force. There is no evidence that the defendant used any amount of force on the officer, let alone unjust or improper force. Nor did the defendant engage in tumultuous behavior. He did not agitate a crowd or engage in a violent outburst, or otherwise behave in a tumultuous manner. The defendant's arms were not swinging, he was not kicking, and his gait was normal. Besides yelling and being very angry he did not clench his fists or engage in any behavior that would indicate that he was physically threatening anyone. Because the trial court appears to have suppressed both the fact and content of the defendant's yelling, the only evidence to support the disorderly-conduct charge is the evidence of the defendant's conduct in walking toward the officer, which the officer said did not indicate intent to injure or become violent. Even if the court had not suppressed the fact of the defendant's subsequent yelling, the evidence would still not fairly and reasonably tend to show the defendant engaged in tumultuous conduct. Finally, he did not engage in threatening behavior, although this is the closest question. Threatening behavior must convey the intent to do harm to another person. The standard is objective. Walking at a normal gait to within four feet of an officer, without any accompanying threatening words or gestures, does not communicate an intent to harm the officer. 3) Even assuming that the officers unlawfully prolonged their encounter with the defendant by ordering him to go around a bar instead of in front of it, and that his action of kicking an officer later that night would not have happened but for the prolonged encounter, the assault on the officer is so causally distinct that the evidence of it could not be characterized as fruit of the poisonous tree. Doc. 2017-365, May 24, 2019. https://www.vermontjudiciary.org/sites/default/files/documents/op17-365.pdf

VICTIM MUST HAVE HAD REASONABLE EXPECTATION OF PRIVACY IN REVENGE PORN PROSECUTION

State v. VanBuren, 2018-95, full court opinion. REVENGE PORN: REASONABLE EXPECTATION OF PRIVACY IN IMAGES.

Dismissal of charge under statute banning disclosure of nonconsensual pornography (revenge porn) affirmed. This is a follow up to an earlier ruling, which held that Vermont's revenge porn statute was constitutional under the First Amendment, assuming that the person depicted had a reasonable expectation of privacy in the images. The Court now finds that the person in this case did not have such a reasonable expectation because she forwarded the images electronically to another person with whom she was not then in a relationship which would have engendered a reasonable expectation of privacy. June 7, 2019. https://www.vermontjudiciary.org/sites/default/files/documents/op16-253_1.pdf

CAN PCRs BE SETTLED BY BARE AGREEMENTS TO LOWER SENTENCES? MAYBE NOT.

Palmer v. Furlan, 2019 VT 42. SETTLEMENTS OF PCR PETITIONS THROUGH STIPULATIONS TO RESENTENCING CALLED INTO QUESTION.

Full court published opinion. Summary judgment for defendant in civil suit affirmed. The appellant filed a petition for post-conviction relief and was represented by Defendant attorney Furlan. The parties agreed to settle, arriving at a proposed stipulation to modify the appellant's sentence. The stipulation did not address the merits of the PCR claim. Attorney Furlan filed the stipulated motion with the PCR court on November 16, 2015. Two days later the PCR court entered an order stating that it would hold a status conference with counsel for the parties before entering a decision and order. The next day the court clerk issued a notice of hearing for December 17. The status conference was held as scheduled. Six days later, on December 23, the PCR court granted the parties' stipulated motion; the entry order was immediately emailed to the criminal division; the criminal division issued an amended mittimus to the Commissioner of Corrections the same day; and the following day the Department of Corrections received the amended mittimus and recalculated the appellant's sentence and released the appellant on that day. The appellant then filed a civil action against attorney Furlan, alleging legal malpractice, in that attorney Furlan did not make clear that the sentence modification would result in the appellant's immediate release from prison upon approval by the PCR court and amendment of the mittimus by the criminal division. Not knowing that immediate release was at stake, the PCR court took more time than it would have otherwise in scheduling a hearing and approving the stipulation, according to this claim. The appellant claimed that the additional time he spent incarcerated as a result of this delay was wrongful and the basis for his damages. Even assuming that attorney Furlan was under a duty to ask the PCR court to expedite its consideration of the parties' stipulation, he has not established that this alleged breach was the proximate cause of

his alleged damages. The appellant has not proffered any evidence to establish that the PCR court would have, had attorney Furlan proposed an expedited timeline due to the case's circumstances, moved the hearing to an earlier date or rendered a speedier decision. Footnote 3 notes that the trial court also questioned whether the PCR court had jurisdiction and authority to grant the stipulated motion, since the relief was not tethered to the violation of rights asserted. The Court does not reach this issue. Eaton, with Carrol, concurring: The stipulation was essentially nothing more than an agreement to resentence the appellant. A PCR court is authorized to resentence a defendant if the court finds that the judgment was made without jurisdiction, the sentence imposed was not authorized by law, or is otherwise open to collateral attack or there has been such a denial or infringement of constitutional rights of the defendant so as to make the judgment vulnerable to collateral attack. The stipulation agreed to here established none of those avenues. PCR statutes are not intended as general sentence review statutes, and they do not permit a successful attack on a valid sentence. Because the stipulation does not provide the basis for the necessary findings under 13 VSA 7133, the court lacked the ability to resentence the appellant pursuant to that statute. Doc. 2018-271, June 21, 2019. https://www.vermontjudiciary.org/sites/default/files/documents/op18-271_0.pdf

DEFENDANT NEED NOT SHOW THAT A CONDITIONAL PLEA WAS UNAVAILABLE IN ORDER TO TAKE INTERLOCUTORY APPEAL

State v. Haynes, et al., 2019 VT 44. INTERLOCUTORY APPEALS: NO NEED TO SHOW CONDITIONAL PLEA UNAVAILABLE.

Full court published opinion. The defendants were granted permission by the trial court to take interlocutory appeals from denials of their motions to suppress. The Supreme Court initially dismissed those interlocutory appeals because they had failed to show that a conditional guilty plea was not practicable or available before seeking interlocutory appeal, as required by the Court's decision in State v. Lyford, 203 Vt. 648. Upon motion for reconsideration, the Court overrules Lyford to the extent that it holds that a defendant is precluded from seeking interlocutory appeal through Appellate Rule 5 if a conditional guilty plea is available. That rule permits an interlocutory appeal when the order concerns a controlling question of law about which there exists substantial ground for difference of opinion, and an intermediate appeal may materially advance the termination of the litigation. If that showing is made, and the trial court allows an interlocutory appeal, no further showing is required. The Supreme Court still retains the authority to dismiss an appeal if the trial court abused its discretion in allowing it. In this case, the trial court did not identify which issues raised by the defendants were controlling questions of law about which there exists substantial ground for difference of opinion and did not find that an immediate appeal would materially advance the termination of the litigation. The trial court must provide at least some basis for the Supreme Court to determine how it exercised its discretion in permitting the interlocutory appeal. Therefore, the appeals are dismissed to allow the trial court to issue a new decision providing the grounds for its decision on the motion for interlocutory appeal. Docs. 2019-006, 009, and 010, June 28, 2019. https://www.vermontjudiciary.org/sites/default/files/documents/op19-006_1.pdf

PUBLIC ACCESS TO AFFIDAVITS OF PROBABLE CASE WHERE PROBABLE CAUSE DENIED: COURT MUST CONSIDER EXCEPTION FOR GOOD CAUSE WHEN DENYING ACCESS

In re Affidavit of Probable Cause (Jacob Oblak, Appellant), 2019 VT 43. PUBLIC ACCESS TO PROBABLE CAUSE AFFIDAVITS WHERE COURT HAS DENIED FINDING OF PROBABLE CAUSE.

Full court published opinion. Decision denying appellant access to an affidavit of probable cause in a case in which no probable cause was found, reversed for consideration of the petition in light of the "Exceptions" provisions of Rule 7. The rules concerning access to public records provide that records filed in court in connection with the initiation of a criminal proceeding, if the judicial officer does not find probable cause, are excluded from public access, Rule 6(b)(24), and the trial court relied upon this provision in denying the petition. However, the court did not consider Rule 7, which provides that the court may grant public access to records which are otherwise closed, upon a finding of good cause specific to the case and exceptional circumstances. Doc. 2019-005, June 28, 2019. https://www.vermontjudiciary.org/sites/default/files/documents/op19-005_0.pdf

Vermont Supreme Court Slip Opinions: 3 Justice Panel Rulings

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."

DEFENDANT'S FAILURE TO DENY COMMITTING OFFENSE WHEN CONFRONTED BY NON-LAW ENFORCEMENT WITNESSES WAS RELEVANT TO GUILT

State v. Joseph, three-justice entry order. TAKING WITH INTENT TO PERMANENTLY DEPRIVE: SUFFICIENCY OF THE EVIDENCE. IDENTITY OF PERSON TAKING PROPERTY: SUFFICIENCY OF THE EVIDENCE. RELEVANCE: FAILURE TO DENY WHEN CONFRONTED.

Taking a parcel of realty, three counts, affirmed. 1) Assuming the evidence was sufficient to demonstrate that the defendant was the one who took the trees at issue, there was plainly sufficient evidence for the jury to infer that the defendant took the trees with an intent to steal them. Undisputed testimony revealed that on multiple occasions the defendant was shown clearly marked property lines, and that although he absolutely understood where those property lines were, trees were taken on the properties beyond those property lines without notice or permission. The most egregious example was the taking of an oak tree from a property after the neighbor

explicitly told the defendant he could not take it. 2) The evidence was sufficient to support the jury's finding that it was the defendant who took the trees, and not a member of his logging crew. The defendant argues that the State had to prove that the defendant was the one who actually cut the trees, but the information mirrored the language of the statute, alleging that he "took and carried away" the trees. The court told the jury that the State was alleging that the defendant "took and carried away" the trees; and in opening statement the prosecutor stated that the defendant "took" the trees. In moving for judgment of acquittal, the defense argued there was no evidence that the defendant entered the property with the intent to "carry off" the trees. The prosecutor argued that it did not matter if he was the one who used the chainsaw, because he took the trees after being shown the boundary lines. In closing argument, the prosecutor spoke exclusively in terms of the defendant taking the trees. The jury instructions told the jury that they had to find that the defendant was the one who took and carried away the trees in order to convict. This record does not demonstrate that the State's theory of the case required the State to prove that the defendant personally cut each of the trees itself. Rather, its theory was that the defendant took and carried away the trees. Taking a tree is not synonymous with personally sawing down that tree. The statute focuses on taking anything that is parcel of the realty, in contrast to the timber trespass statue, that specifically refers to cutting down, felling, etc. trees. The State was not required to prove beyond a reasonable doubt that the defendant personally felled each tree in question. The circumstantial evidence was sufficient for the jury to reasonably infer that the defendant took the trees. He was the person who held himself out to the property owners as in control of the logging operation. He and he alone walked the boundary lines. The defendant indicated that he wanted a particular oak tree, and the tree was taken even after the owner explicitly told him that he could not take that tree or any other tree. She testified at trial that the defendant tried to convince her to take a cord and a half of wood "for the trees he had cut." When questioned about the trees taken, he did not indicate that they had been accidently cut by others, or taken by those working for him without his permission or participation, but instead verbally threatened the neighbors. Although these conversations certainly did not amount to a confession of guilt, they provided further support for the reasonable inference that the defendant had taken the trees. Doc. 2018-234, June 3, 2019. https://www.vermontjudiciary.org/sites/default/files/documents/eo18-234.pdf

STATE NEED NOT SHOW CAUSATION OF DEATH IN SIMPLE NEGLIGENT OPERATION CHARGE, BUT EVIDENCE THAT PEDESTRIAN DIED WAS TOO PREJUDICIAL

State v. Buxton, three-justice entry order. NEGLIGENT OPERATION: ELEMENTS. RELEVANCE: DEATH OF PEDESTRIAN IN ACCIDENT.

Operating a motor vehicle on a public highway in a negligent manner reversed for retrial. 1) The defendant was not entitled to a judgment of acquittal on the grounds that the State had failed to prove that the pedestrian with whom the defendant collided would have been visible to the defendant. The State was only required to show that the defendant operated his vehicle in a negligent manner, incorporating an ordinary negligence standard. The State was not required to prove that had the defendant not been distracted, he could have avoided the collision. The evidence of negligence was sufficient where the

defendant accelerated quickly into an intersection that included a pedestrian crosswalk; he diverted his eyes and attention away from the road to adjust his radio while entering the intersection; he did not slow down at all before colliding with the pedestrian; the pedestrian was walking in a cross walk; other operators were able to see the pedestrian crossing the road; and the defendant's vehicle hit the pedestrian with sufficient force to knock the pedestrian over forty feet from the point of impact. 2) The trial court abused its discretion in admitting evidence that after the collision the pedestrian died as the result of the injuries he suffered in the accident. The pedestrian's death was not relevant to any fact that was of consequence at trial. The injuries the pedestrian sustained were relevant to demonstrating the force of the collision and the acceleration of the defendant's vehicle. Given, however, that the pedestrian was not killed at the scene, the fact of his subsequent death did not add further relevant information. And this was not a charge where death resulting from the accident was an element the State was required to prove. The court's concern about the jury's possible confusion as to the pedestrian's absence at trial could have been cured with an instruction. Even assuming some relevance, any limited probative value was outweighed by the danger of unfair prejudice. The fact of the death was so inflammatory that it cannot be said that the error was harmless beyond a reasonable doubt. Doc. 2018-248, June 3, 2019.
https://www.vermontjudiciary.org/sites/default/files/documents/eo18-248.pdf

YOUTHFUL OFFENDER STATUS PROPERLY DENIED TO 21-YEAR-OLD YOUTH

In re L.L., three-justice entry order. YOUTHFUL OFFENDER STATUS: DENIAL BASED ON INSUFFICIENT TIME TO COMPLETE SERVICES BEFORE REACHING AGE 22.

Denial of request for youthful offender status affirmed. The juvenile was charged with first-degree aggravated domestic assault, second-degree unlawful restraint, and domestic assault. Following a hearing, the court found that L.L. was not a risk to public safety, and that he was amenable to treatment, but also found that there was insufficient time to ensure that all the necessary programming would be completed before he turned 22 and became ineligible for services as a youthful offender. The court therefore concluded that there were insufficient services in the juvenile system to provide for rehabilitation and treatment and denied the motion for YO status. L.L. is 21 years old and there was less than a year before his twenty-second birthday. If the court granted the motion, there would still have to be a merits hearing and a disposition order before programming could begin, leaving even less time for programming to be completed. Therefore, the court acted within its discretion in finding that L.L. did not meet his burden of showing that there were sufficient services available to him. Doc. 2018-396, June 3, 2019.
https://www.vermontjudiciary.org/sites/default/files/documents/eo18-396.pdf

FAILURE TO OBJECT TO ALLEGED GOLDEN RULE VIOLATION DID NOT SUPPORT INEFFECTIVE ASSISTANCE CLAIM

In re Penn, three-justice entry order. INEFFECTIVE ASSISTANCE: FAILURE TO OBJECT TO PROSECUTOR'S CLOSING ARGUMENT.

Denial of petition for post-conviction relief affirmed. The underlying conviction is for four counts of sexual assault of multiple victims under the age of ten. The prosecutor invited the jurors to think about how difficult it was for the victims to testify but did not explicitly ask them to put themselves in the place of the victims. It was a reasonable strategy on the part of defense counsel not to object to this argument and thus draw more attention to it. Even if the comments were improper, and defense counsel's failure to object ineffective assistance, there is no showing of a reasonably probable different outcome had he objected. Doc. 2018-379, June 3, 2019. https://www.vermontjudiciary.org/sites/default/files/documents/eo18-379.pdf

JUDGE WHO TOOK PLEA NEED NOT PRESIDE OVER SENTENCING

State v. Pecor, three-justice entry order. SENTENCING: CONTINUITY OF JUDGES; CONSIDERATION OF MITIGATING FACTORS; CHARACTERIZATION OF CRIME.

Sentence imposed for aggravated assault with a deadly weapon, unlawful trespass of an occupied residence, and DUI 4th, affirmed. 1) Nothing in Vermont law requires, or presumes, that the judge who held the change-of-plea hearing must conduct the sentencing. In cases such as this one, where a defendant pleads guilty, the need for continuity is minimal. There is no support for the defendant's assertion that the sentencing court was unfamiliar with the record evidence. 2) The court did not ignore the defendant's mitigating evidence, it simply did not give it the weight that the defendant wished it to. 3) The trial court's reference to the defendant's conduct as a "home invasion" did not somehow reflect its unfamiliarity with the record. The record here plainly shows that the defendant did invade the victims' home. The court was not suggesting that the defendant committed the crime of "home invasion," and the fact that "home invasion" is not a crime in Vermont is immaterial. The court properly considered the circumstances of the offense, which here included the defendant entering the victims' home, pointing a rifle at them, and demanding food and a vehicle. 4) The trial court's observation that the victims would have been legally justified in killing the defendant has no bearing on the appropriateness of the sentence in this case, and the Court does not address this hypothetical. Doc. 2018-129, May 6, 2019. https://www.vermontjudiciary.org/sites/default/files/documents/eo18-129.pdf

Vermont Supreme Court Slip Opinions: Single Justice Bail Appeals

BAIL WHILE AWAITING EXTRADITION AFFIRMED

State v. Hoisington, single justice entry order bail appeal. BAIL AWAITING EXTRADITION UPHELD.

$10,000 bail while awaiting fugitive warrant was not an abuse of discretion given the seriousness of the offense for which the defendant is being extradited (criminal

threatening with a deadly weapon), evidence that the defendant came to Vermont to avoid the charges in New Hampshire, and the defendant's minimal ties to the State. Doc. 14-2-19 CnCm, April 23, 2019, Eaton, Justice. https://www.vermontjudiciary.org/sites/default/files/documents/eo19-120.bail_.pdf

Rule Changes

The Vermont Supreme Court has adopted new rules concerning the possession and use of recording and transmitting devices. The rules can be found at *Order Abrogating and Replacing Rule 79.2 of the Vermont Rules of Civil Procedure, Rule 53 of the Vermont Rules of Criminal Procedure, and Rule 79.2 of the Vermont Rules of Probate Procedure, and Abrogating Vermont Supreme Court Administrative Directive No. 28*.

The rules do not apply to use of such devices by people with disabilities, in order to accommodate their disabilities. Devices may be used non-disruptively anywhere in a courthouse and do not require initial registration or specific authorization; if the recording is of an individual outside the courtroom, that person's express consent must be obtained. There is also a limit with respect to sequestered witnesses. There are provisions for media to register with the court in order to record proceedings, and participants in the matter (e.g., attorneys) may orally but not visually record the proceedings. Nonparticipants may possess devices in the courtroom but may not use them during evidentiary proceedings or any time a jury or jury pool is present.

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