Vermont Department of State's Attorneys

Vermont Criminal Law Month

September - October 2019

Vermont Supreme Court Slip Opinions: Full Court Rulings

Includes three-justice bail appeals

GUILTY PLEA TO ENHANCED SENTENCE WAIVED PCR CHALLENGE TO CONVICTIONS USED TO ENHANCE

In re Gay, 2019 VT 67. Full court published opinion. PCR CHALLENGE TO PLEAS UNDERLYING ENHANCED SENTENCE: PLEA TO ENHANCED CHARGE WAIVES ANY CHALLENGE TO UNDERLYING CONVICTIONS.

Summary judgment to the State in a post-conviction relief proceeding affirmed. The defendant pleaded guilty to obstruction of justice, with a habitual-offender enhancement. He then filed this PCR petition, arguing that the convictions underlying his enhanced sentence were invalid, because the pleas he had entered to them were not made knowingly and voluntarily. The petitioner's voluntary plea of guilty to the obstruction charge waived all non-jurisdictional defects in the prior proceedings, with limited exceptions that are inherent in the requirement that pleas be made knowingly and voluntarily. Thus, a guilty plea or plea of no contest waives most appellate challenges to a defendant's conviction, with few exceptions. The petitioner's plea to obstruction knowingly, voluntarily, and expressly waived his right to appeal, including the right to appeal all nonjurisdictional defects in his obstruction charge, and this includes the existence of any underlying convictions that made him eligible for a sentencing enhancement.Doc. 2018-323, September 20, 2019. https://www.vermontjudiciary.org/sites/default/files/documents/op18-323_0.pdf

ACTION WHICH HINDERS A POLICE OFFICER MUST ITSELF BE UNLAWFUL, BUT VIOLATION OF A CIVIL TRAFFIC LAW ISN'T UNLAWFUL ENOUGH.

State v. Berard, 2019 VT 65. HINDERING A POLICE OFFICER: MAY NOT BE BASED UPON AN INTENTIONAL VIOLATION OF A CIVIL TRAFFIC LAW.

Full court published opinion. Conviction for impeding or hindering a police officer

reversed and vacated. The hindering statute is violated if the defendant takes an action that the defendant had no legal right to take, and that action actually results in impeding an officer in the lawful execution of his duties. Here, the action the defendant took was to refuse to provide her driver's license, registration, and proof of insurance, during a valid motor vehicle stop. There is no question that this refusal was unlawful, as the statutes require her to provide these documents, and penalize them as civil violations. But the Court finds the statute ambiguous because including such refusals would criminalize any unlawful actions, no matter how slight or brief, that for any moment delays or interferes with the lawful execution of an officer's duties, which would be inconsistent with the penalties provided for the civil violations, especially in light of the other provisions of the hindering statute, which concern much more serious actions such as taking an officer's weapon. Therefore, the Court interprets the hindering statute narrowly (again) and holds that a civil violation of the motor vehicle code, on its own, may not provide the basis for an impeding-officer offense, even when that violation is intentional. Carroll, dissenting: The statute is unambiguous, and therefore there is no support for anything other than using the plain meaning of the statutory language. Doc. 2018-180, September 27, 2019. https://www.vermontjudiciary.org/sites/default/files/documents/op18-180_0.pdf

ADMISSION OF HGN RESULTS WITHOUT EXPERT TESTIMONY AND REFUSAL TO TAKE PBT, BOTH TO SHOW OFFICER'S REASONABLE BELIEF OF INTOXICATION IN REFUSAL CASE, WAS HARMLESS

State v. Alzaga, 2019 VT 75. Full court published opinion. ADMISSION OF HGN RESULTS AND PBT REFUSAL: HARMLESS ERROR. FAILURE TO DEFINE "REASONABLE GROUNDS" IN JURY INSTRUCTION OR TO INCLUDE AFFIRMATIVE DEFENSE IN VERDICT FORM: NO PLAIN ERROR. FAILURE TO HAVE JURY RETURN FINAL VERDICT AFTER DEFENDANT STIPULATED TO PRIOR CONVICTION: INVITED ERROR.

Criminal refusal of an evidentiary breath test for DUI affirmed. 1) The trial court's admission of evidence that the defendant refused to take the preliminary breath test, and of the officer's testimony describing the Horizontal Gaze Nystagmus test, was, if error, harmless beyond a reasonable doubt. Neither piece of evidence formed a central part of the State's case, and neither were mentioned during the State's closing argument. The evidence was cumulative to the State's other unchallenged evidence showing that the officer had reasonable grounds to believe that the defendant was driving while impaired, including that the vehicle had been driven the wrong way down a one-way street, and that the defendant had watery eyes and slurred speech, smelled of alcohol, admitted to drinking alcohol, and exhibited signed of intoxication while attempting to perform a field-sobriety test. Moreover, the defense theory at trial was not that he was not impaired, but that he was not the driver of the vehicle. 2) There was no plain error in the trial court's failure to define the term "reasonable grounds," as the existence of reasonable grounds was not a focus of the defense, and the term is not highly technical. Nor was there plain error in the trial court's failure to include the defendant's affirmative defense, that he was not operating the vehicle, in the verdict form. The court instructed the jury regarding the affirmative defense and explained that if they were persuaded that the defendant did not drive that night and was not intending to drive, then the answer to the first question,

whether he operated or was in actual physical control, should be no. 3) The trial was bifurcated, and after the initial deliberations, the court explained to the jury that they would now be asked to find beyond a reasonable doubt whether the defendant had a prior conviction. Defense counsel then approached the bench and stated that the defendant had agreed to stipulate to the prior conviction. The court dismissed the jury and engaged in a colloquy with the defendant to ensure that he was voluntarily and knowingly waiving his right to have the jury decide this issue. The court questioned whether it was necessary to bring the jury back and both parties agreed it was not. The defendant's claim on appeal that this was error would not be considered because the defendant invited any error below by affirmatively agreeing to the process. Having specifically agreed to the process below, the defendant has waived the argument now raised on appeal. Doc. 2018-149, October 4, 2019. https://www.vermontjudiciary.org/sites/default/files/documents/op18-149.pdf

COURT MUST DECIDE IF AMENDED PCR SHOULD BE REVIEWED BY DEFENDER GENERAL AGAIN, WHERE DEFENDER GENERAL REFUSED REPRESENTATION ON ORIGINAL PETITION.

In re Dow, 2019 VT 72. PCR PETITION REVIEW BY DEFENDER GENERAL: COURT SHOULD DETERMINE WHETHER AMENDED PETITION SHOULD BE REVIEWED AGAIN.

Full court published opinion. Grant of summary judgment to the State in post-conviction relief proceeding reversed. The Defender General reviewed the petitioner's initial PCR petition and declined assignment of the case on the grounds that it would require an attorney to advance frivolous claims. The petitioner then filed an amended PCR petition which included additional arguments for relief, on which the court granted the State summary judgment. When the petitioner filed the amended PCR, the trial court should have considered whether to reappoint counsel to reevaluate the case. If it determines that there may be substance and merit to a PCR petition which has been amended to include substantively different claims than the petition which was earlier reviewed, then the court should order a second review. Doc. 2018-366, October 4, 2019. https://www.vermontjudiciary.org/sites/default/files/documents/op18-366_0.pdf

DRUG-RELATED PROBATION CONDITIONS DID NOT RELATE TO OFFENSE OR OFFENDER.

State v. Nash, 2019 Vt. 73. Full court opinion. DRUG-RELATED PROBATION CONDITIONS: RELATIONSHIP TO OFFENSE OR OFFENDER.

Probation conditions affirmed except for random drug screening. The defendant was convicted of grossly negligent operation of a motor vehicle, and appealed from the imposition of drug- and alcohol-related probation conditions. 1) The defendant's constitutional challenges to the alcohol and drug testing conditions are not reached on appeal because this objection to them was not made below, the defendant did not argue for plain error analysis, and the factual record on the issue of the reasonableness of the conditions is insufficiently developed to conduct a plain-error analysis. The defendant also did not

object to the alcohol-related conditions on any ground in the trial court, and did not argue plain error on appeal. The Court therefore does not reach these claims as well. Furthermore, the facts that the defendant had four convictions for DUI, his driver's license had been suspended for ten years and only reinstated one month before the crash, and had admitted to consuming several beers on the day of the crash, reasonably supported the imposition of conditions prohibiting the defendant's use of alcohol and requiring that he submit to random testing for alcohol. 2) The condition prohibiting the purchase or possession of regulated drugs without a valid prescription is upheld, because a probation condition that prohibits criminal conduct is valid. It is not required that drugs have been involved in the offense, or that the defendant have had a history of drug abuse. 3) The conditions which concern randomized drug testing are stricken because they are not reasonably related to the offense or to the defendant's history or characteristics. There is no evidence that the defendant was impaired by drugs on the day of the incident. Although the defendant admitted to having used antibiotics on the day of the crash, there is no indication in the record that antibiotics cause drowsiness or that the defendant was under the influence of them to such an extent that they played a role in the crash. Furthermore, it is undisputed that the defendant had no history of abusing regulated drugs. Robinson, concurring: Disagrees that where an appellant has raised an error as if it were preserved and has not expressly asked the Court to review for plain error, there is a reason to decline to review a plain error that affects substantial rights. In such cases, the Court should decide whether to exercise its discretion to decline plain-error review. Doc. 2019-73, October 25, 2019.

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 SUSPICIOUS ACTIVITY AND OFFICER'S KNOWLEDGE OF DRUG ACTIVITY IN AREA GAVE OFFICER REASONABLE SUSPICION.

State v. Bullis, three-justice entry order. REASONABLE SUSPICION: ILLEGAL DRUG ACTIVITY.

Conditional nolo contendere plea to possessing heroin affirmed. The officer here had reasonable and articulable grounds to suspect that the defendant was engaged in criminal activity, and thus was justified in detaining the defendant. The defendant subsequently consented to a search of his person which resulted in the discovery of a fold of heroin. The officer was aware of drug activity in the area, and had personal and collective knowledge regarding drug cases at a nearby location known as the Allen House. He had been involved in five to ten drug cases involving the Allen House and he knew that other officers had been involved in drug cases involving the Allen House as well. He also had specific recent information from cooperating informants that drugs were being sold out of an apartment in the Allen House. He had made a car stop involving an individual who told him that he had obtained marijuana from J.P. at the Allen House. On the evening in question, the officer saw J.P. exiting the Allen House.

The officer drove around the block and returned to see J.P. leaving the side of a pickup truck that was stopped on the side of the road. The officer watched the truck pull out and then pull into a parking lot approximately 100 feet from where the truck was originally stopped. The defendant, the driver of the truck, exited the vehicle and began walking across the parking lot. The officer met the defendant on foot in the parking lot, and asked the defendant about meeting with J.P. The defendant said he had given J.P. a ride from a bar in Winooski, and that he was now "just walking down the road." The officer learned from the defendant's identification that the defendant lived in Grand Isle. Asked the name of the person he had dropped off, the defendant said the person's name was Brian and that he had met him for the first time at the bar. Having just seen J.P. leave the Allen House, the officer questioned the defendant's honesty, told defendant that he knew who J.P. was and what he did, and asked the defendant if he bought anything from J.P, "even if it was just weed." Eventually, the defendant admitted to having a pot pipe in his truck, and, later, to having marijuana in his truck. He eventually consented to a search that disclosed heroin. The totality of the circumstances, including the officer's knowledge about drug activity in the area, the recent tip about J.P. and the officer's observation of J.P., including a brief roadside meeting with the defendant, the defendant's lies to the officer and his implausible description of the evening's events, including that he was taking a walk on a November evening with no particular destination, gave rise to a reasonable suspicion. Doc. 2018-336, October 4, 2019. https://www.vermontjudiciary.org/sites/default/files/documents/eo18-336.pdf

DEFENDANT'S PRIOR PARTICIPATION IN DRUG COURT WAS PROPERLY CONSIDERED AT SENTENCING

State v. Dickson, three-justice entry order. SENTENCING: PERMISSIBLE FACTORS.

Sentencing in assault and robbery with a deadly weapon, and providing false information to a police officer, affirmed. The defendant entered into a plea pursuant to which the State agreed not to ask for more than six to twelve years. At sentencing, the State asked for five to twelve years, which the court imposed. 1) The court properly weighed the fact that the defendant had had a number of criminal charges dismissed after graduating from a drug treatment court program, and therefore had been on ample notice that he had a significant drug issue, and that if he engaged in any behaviors, that it may result in severe consequences. This does not indicate, as the defendant argued, that the court considered the defendant's prior successful completion of a drug treatment program to be an aggravating factor. 2) Nor did the court abuse its discretion by relying on the need for specific and general deterrence absent any support in the record demonstrating that a longer term of incarceration would achieve the desired deterrent effects. Doc. 2018-245, October 4, 2019. https://www.vermontjudiciary.org/sites/default/files/documents/eo18-245.pdf

HABEAS PETITIONS ARE COUNTED IN DETERMINING IF PCR PETITION IS SUCCESSIVE

In re Rheaume, three-justice entry order. FRAUD ON THE COURT DOCTRINE: NO FRAUD IN MAKING SUCCESSFUL LEGAL ARGUMENT.

SUCCESSIVE PCR PETITIONS: HABEAS PETITIONS ARE INCLUDED.

Denial of petitions to vacate conviction for lewd and lascivious conduct affirmed. 1) The trial court properly denied the defendant's Rule 60(b) motion alleging that the State committed a fraud upon the court by arguing that the open element is the same as the public element for lewd and lascivious conduct. The fraud upon the court doctrine is reserved for only the most egregious misconduct evidencing an unconscionable and calculated design to improperly influence the court. The trial court properly denied relief based upon the fact that it and the Vermont Supreme Court agreed with the State's argument concerning the elements of the offense. 2) The trial court properly denied the habeas corpus petition as successive, even though the earlier petition was a PCR petition, and not a habeas petition. The two are treated the same for purposes of successive petitions. Although the earlier petition did not raise the exact issue raised by the habeas petition, both concerned the validity of the Rule 11(f) proceeding. In any event, the habeas petition was premised on an assumption already rejected by the Court, that the offense of lewd and lascivious behavior requires proof that the behavior occurred in a public place. Doc.s 2018-331, 2018-337 & 2019-052, October 4, 2019. https://www.vermontjudiciary.org/sites/default/files/documents/eo18-331.pdf

NO ABUSE OF DISCRETION IN DENIAL OF COUNSEL'S MOTION TO WITHDRAW ON MORNING OF TRIAL

State v. Austin, three-justice entry order. MOTION TO WITHDRAW: ABUSE OF DISCRETION.

Domestic assault affirmed. Defense counsel moved to withdraw on the morning of trial, stating that the defendant no longer wanted her as counsel and that there had been a breakdown in the attorney-client relationship. The court denied the motion, stating that the jury had been drawn and was present, and the case was ready to go to trial that day. The court permitted the defendant to make a record of what witnesses, if any, he would have liked to call, which his attorney was not allowing him to do. The trial court did not abuse its discretion in finding that the defendant had not made the required showing of good cause for counsel's withdrawal. While the defendant would have preferred to speak more frequently with his counsel over the course of her representation, there was no evidence of a complete breakdown in communication. The court reasonably concluded that counsel was prepared to go forward with the trial as scheduled. Doc. 2019-059, October 4, 2019. https://www.vermontjudiciary.org/sites/default/files/documents/eo19-059.pdf

FACTUAL BASIS DOES NOT APPLY TO NOLO PLEAS

In re Herrick, three-justice entry order. CHALLENGE TO RULE 11 PROCEEDING TAKING NOLO PLEAS.

Dismissal of petition for post-conviction relief affirmed. Underlying convictions are for three counts of aggravated sexual assault, two counts of lewd and lascivious conduct with a child, two counts of lewd and lascivious conduct, and one count of disseminating indecent materials to a minor. The convictions were entered pursuant to a plea agreement, and the defendant pleaded nolo contendere to the offenses. 1) Although the court did not explicitly ask the defendant if he understood the nature of each charge, the record provided a

sufficient basis for the court to conclude that Rule 11(c)(1) was satisfied, where each element was described to the defendant, the defendant pleaded nolo contender to each count, and the court then asked the petitioner, "Do you agree that, in each of those cases, that the affidavit of the detective in each of the eight counts sets forth the specific element of each of those crimes?" and the defendant responded, "Yes, I do, Your Honor." 2) The defendant's claim that the exchange was insufficient to satisfy Rule 11(c)(1) because he has a learning disability is rejected because he did not mention the disability at the change-of-plea hearing, and there is no indication from the record that his disability affected the voluntariness of his plea. 3) The court was not required to inquire into the factual basis for the pleas of nolo contendere. Rule 11(f) does not apply to pleas of nolo contendere. 4) When the court asked the defendant if he had any questions, the defendant asked if his Vermont sentence would begin after he had served his minimum New York sentence. The court responded that it did not know. A break was taken so the defendant could speak with his attorney. After the break, counsel stated that there were no guarantees being made about when his Vermont sentence would begin, and the defendant was willing to go forward despite the uncertainty about how the sentences would be calculated. The defendant stated that he understood that there was no set time when the time may start running. The court asked if the defendant understood that the sentencing hearing could be delayed so that the defendant could find out when the sentence would begin, and the defendant said he was willing to continue today with the plea. The court asked, "are you sure about that?" The defendant replied that he wanted to make the plea today. This record does not support the defendant's claim that his plea was rendered involuntary by the uncertainty regarding when his sentence would begin. 5) The record shows that the defendant had the sentences explained to him, as required by Rule 11(c)(2). 6) The records shows that the trial court complied with V.R.Cr.P. 11(d), requiring the court to ensure, by addressing the defendant personally in open court, that the plea is voluntary and not the result of force or threats or of promises apart from a plea agreement. The defendant answered yes to the question whether he had signed the plea agreement freely and voluntary. Although the court did not specifically ask about coercion, threats, or promises, it offered the defendant numerous opportunities to tell the court that he was under improper pressure. The short amount of time between the charges and the plea do not support his claim of coercion. The court's failure to explicitly inquire as to threats or promises did not amount to fundamental error requiring reversal without proof of prejudice, and the petitioner here failed to show that but for this alleged defect, he would not have pleaded nolo contendere. Doc. 2019-084, October 4, 2019.
https://www.vermontjudiciary.org/sites/default/files/documents/eo19-084.pdf

Vermont Supreme Court Slip Opinions: Single Justice Bail Appeals

BAIL CONDITIONS WERE SUPPORTED BY THE RECORD

State v. Landry, single justice bail appeal. BAIL APPEAL: CONDITIONS SUPPORTED BY THE RECORD.

Denial of motion to review bail affirmed. 1) The court would not consider additional evidence offered on appeal, as the appeal from conditions of release is on the record created in the trial court. 2) The trial court's finding that release into the defendant's mother's custody was unsuitable because she had a felony conviction and there was another felon on parole in the household, and that the defendant's extensive criminal record showed he was a high risk defendant was supported by the record. 3) The defendant's challenge to the monetary bail amount is not heard on appeal because he did not challenge the bail amount in the bail-review hearing, so there is no record on that matter for the Court to review. Doc. 2019-308, September 18, 2019. Reiber, J. https://www.vermontjudiciary.org/sites/default/files/documents/eo19-308.pdf

PROPOSED RULE AMENDMENT

(NOTE: THE FOLLOWING AMENDMENT HAS BEEN PROPOSED AND HAS NOT BEEN APPROVED BY THE SUPREME COURT.)

a. Proposed Order Amending Rule 32(c)(4) of the Vermont Rules of Criminal Procedure

The proposal amends Rule 32(c)(4) for consistency with State v. Lumumba, 2018 VT 40, 207 Vt. 254, 187 A.3d 353, State v. Bostwick, 2014 VT 97, 197 Vt. 345, 103 A.3d 476, and State v. Cornell, 2014 VT 82, 197 Vt. 294, 103 A.3d 469. These decisions address the necessity for procedures requiring parties to object to recommended probation conditions. The proposed amendment makes the rule consistent with, yet not as expansive as, the provisions of Federal Rule of Criminal Procedure 32(f)(1), which requires specific written objection not only to factual assertions pertinent to sentence, but to all material information, sentencing guideline ranges, and policy statements in presentence investigation reports.

The proposal amends subparagraph (c)(4)(A) to require written objections to PSI content in 7 instead of 5 days. The proposed amendment also includes an express requirement that copies of any written objections be provided to the opposing party.

The proposal adds new subparagraph (c)(4)(C), which requires that before pronouncing sentence and concluding the sentencing hearing, the sentencing judge must provide opportunity for comment and objection to what are in effect any "unnoticed" conditions of probation. This proposed amendment is intended to expressly provide a defendant with an opportunity to articulate objection to conditions of probation that may not have reasonably featured at all in the course of the sentencing record, and thus to preserve claims of error as to purportedly unnoticed or "surprise" conditions, without the necessity of filing a motion for correction of sentence under V.R.Cr.P. 35.

Comments on this proposed amendment should be sent by **January 6, 2020,** to Hon. Thomas A. Zonay, Chair of the Advisory Committee on Rules of Criminal Procedure, at the following address:

Honorable Thomas A. Zonay, Chair
Advisory Committee on Rules of Criminal Procedure
Vermont Superior Court
Orange Unit
5 Court Street
Orange, VT 05038
Thomas.zonay@vermont.gov

The proposed changes are as follows:

RULE 32. SENTENCE AND JUDGMENT

(4) *Right to Comment and Offer Evidence.*

(A) Prior to imposing sentence, the court shall afford the state, the defendant and his or her attorney an opportunity to comment upon any and all information submitted to the court for sentencing. Any objection to facts contained in the presentence investigation report or to any recommended probation conditions contained therein, shall be submitted, in writing, to the court at least five seven days prior to the sentencing hearing, unless good cause is shown for later objection. A copy of any objections must be provided to the opposing party.

(B) Either party may offer evidence, including hearsay, specifically on any disputed factual issues in open court with full rights of cross-examination, confrontation, and representation. When a defendant objects to factual information submitted to the court or otherwise taken into account by the court in connection with sentencing, the court shall not consider such information unless, after hearing, the court makes a specific finding as to each fact objected to that the fact has been shown to be reliable by a preponderance of the evidence, including reliable hearsay. If the court does not find the alleged fact to be reliable, the court shall either make a finding that the allegation is unreliable or make a determination that no such finding is necessary because the matter controverted will not be taken into account in sentencing. A written record of such findings and determinations shall be appended to and accompany any copy of the presentence investigation report or other controverted document thereafter made available by the court to the Department of Corrections.

(C) Prior to concluding the hearing and before imposing a sentence, the court must provide opportunity for comment and objection to any probation conditions that it intends to impose that have not been previously noticed in the presentence investigation report or in the written or oral record requests of the parties, or the court's own statements in the course of the sentencing hearing.

(~~B~~D) Prior to the sentencing proceeding, the prosecutor shall give notice to the victim by the method provided in Rule 49(a)(2). At sentencing, the court shall ask if the victim is present and, if so, whether the victim would like to be heard regarding sentencing. In imposing sentence, the court shall

consider any views offered at the hearing by the victim. If the victim is not present, the court shall ask whether the victim has expressed, either orally or in writing, views regarding sentencing. If so, the state may present such views through oral or written statements attributed to the victim, and the court shall take those views into consideration in imposing sentence. Upon request of the prosecutor or defendant, for good cause shown, the court may permit the victim to appear by telephone with safeguards appropriate to preserve the record and assure full participation by interested parties. The defendant, the defendant's attorney and the state may comment on the information provided by or on behalf of the victim. In this subparagraph, if the victim is a minor, incapacitated, incompetent, or deceased, "victim" means family members of the victim as defined in 13 V.S.A. § 5301(2) and, if necessary, designated by the court as provided in 13 V.S.A. § 5318.

Vermont Criminal Law Month is published bi-monthly by the Vermont Department of State's Attorneys. For information contact David Tartter at david.tartter@vermont.gov.