Vermont Department of State's Attorneys

# Vermont Criminal Law Month

January – February 2020

## Vermont Supreme Court Slip Opinions: Full Court Rulings

*Includes three-justice bail appeals*

### SCIENTIFIC TESTIMONY REQUIRED TO ADMIT HGN TESTIMONY

State v. Sarkisian-Kenney, 2020 VT 6. Full court published opinion. HGN TEST EVIDENCE: SCIENTIFIC TESTIMONY REQUIRED TO ESTABLISH FOUNDATION; LIMITING INSTRUCTION: EFFECTIVENESS; EVIDENCE OF PBT REFUSAL AS EVIDENCE OF INTOXICATION: HARMLESSNESS.

DUI, second offense, affirmed, and criminal refusal of an evidentiary breath test reversed and remanded. 1) Before the State may use horizontal gaze nystagmus (HGN) evidence, the State must lay a scientific foundation for the use of the evidence. At this point, at least, the scientific validity of the test has not been established as a matter of law. The State must lay such a foundation even when the evidence is only being used to support an officer's reasonable belief in the defendant's intoxication, as opposed to being used to show that the defendant was actually intoxicated. 2) The admission of this evidence was not harmless, since the officer testified that the HGN test formed the majority of the basis for his opinion that the defendant was impaired. Therefore, the conviction for refusal is reversed. 3) The trial court instructed the jury not to consider the HGN evidence with respect to the DUI charge, only with respect to the refusal charge. The circumstances here do not justify departure from the presumption that juries follow courts' instructions, and therefore the admission of the HGN evidence does not require reversal of the DUI conviction. The limiting instruction was effective: it was clear and straightforward, prompt and decisive. The court was not required to explain to the jury the reason for the instruction. 4) The trial court admitted evidence that the defendant refused the preliminary breath test as relevant to the issue of guilty conscience, and thus to whether the defendant was intoxicated. The Court does not reach the issue of whether admission of this evidence was error, because if so, it was harmless beyond a reasonable doubt in light of all of the other evidence, including the fact that the defendant also refused an evidentiary breath test. Robinson and Skoglund, dissenting in part: Agrees that HGN test evidence requires expert testimony to establish a scientific foundation, but

disagrees that the limiting instruction was sufficient to preclude the jury from using the evidence with respect to the DUI charge, and therefore would reverse the DUI conviction as well. Doc. 2018-368, January 24, 2020. https://www.vermontjudiciary.org/sites/default/files/documents/op18-368.pdf

## BAIL APPEAL WAS PREMATURE

State v. Cornelius, full court entry order. BAIL APPEAL: PREMATURE. INTERLOCUTORY APPEAL: DISCRETIONARY DENIAL.

The defendant's pro se notice of appeal from an order that he be held without bail is dismissed. To the extent that the defendant is seeking to appeal the court's decision related to bail, the appeal is premature, because the trial court granted the defendant's motion to reconsider and has indicated that it will set a hearing to review the hold-without-bail order. To the extent that the defendant is seeking to bring an interlocutory appeal, the Court declines to accept it. The trial court declined permission to appeal, concluding that the issue did not present a controlling question of law and that there was not substantial ground for difference of opinion. The defendant did not file a motion containing the elements required by the rule to explain why the interlocutory appeal should be permitted. Therefore the court did not abuse its discretion in declining to grant an interlocutory appeal. Doc. 2020-001, January 27, 2020. https://www.vermontjudiciary.org/sites/default/files/documents/eo20-001.pdf

## SEX OFFENDER SPECIAL CONDITIONS REVIEWED

State v. Bouchard, 202 VT 10. SPECIAL CONDITIONS OF PROBATION FOR SEX OFFENDERS: VALIDITY.

Full court published opinion. Challenges to special sex-offender conditions of probation affirmed in part and stricken in part. 1) A condition prohibiting pornography was not supported by any evidence that such a restriction was necessary, either in light of the defendant's individual history and behaviors, or generally for the rehabilitation of sex offenders. The fact that it is a part of the required sex offender treatment program did not justify making it a free-standing condition, not connected to the duration of the treatment program. 2) A condition permitting warrantless searches upon reasonable suspicion of a violation of a probation condition for drugs, pornography, erotic digital media, or any other item which may constitute a violation of conditions, is stricken, as not sufficiently narrowly tailored. None of the specific items named in the condition are contraband, since the pornography condition has been stricken. There is no prohibition of the defendant using legal drugs, and there is no evidence that the risk of his using illegal drugs outweighed his privacy interests. There is no prohibition on the possession of computers or digital media. The remaining item, any other item which may constitute a violation of conditions, is overbroad and unsupported by any evidence of its necessity. 3) A condition that the defendant allow his probation officer to monitor his computer internet usage, including through software, is stricken as overbroad. The term "monitor" is so general as to encompass monitoring of the defendant's computer use that is excessively intrusive. The condition must specify what digital materials the officer may monitor and how. Although the State has demonstrated some basis for

monitoring some of the defendant's online activity, the condition is not narrowly tailored to that need. 4) The matter is remanded to clarify whether the restrictions on contact with minors refers to minors under the age of sixteen, or under the age of eighteen. If it applies to all minors under the age of 18, the court must state its rationale for imposing this condition. 5) A condition that the defendant not work or volunteer for any organization that primarily provides services to persons under the age of 16 years is not fatally vague and does not over-delegate authority to the probation officer. 6) A requirement that the defendant notify his probation officer of any changes in his address within 48 hours, although more difficult than usual for the defendant to comply with because he is homeless, was within the trial court's discretion. 7) A condition prohibiting the defendant from accessing or loitering in places where children congregate, i.e., parks, playgrounds, schools, etc. unless approved in advance by his probation officer, was not rendered fatally vague by the trial court's statement that it did not mean that he had to stay out of all parks. That was an accurate description of the condition. Doc. 2018-347, January 31, 2020. https://www.vermontjudiciary.org/sites/default/files/documents/op18-347.pdf

## MATERIAL MISUNDERSTANDING CONCERNING EFFECT OF SENTENCE RENDERED PLEA INVOLUNTARY

In re Jones, 2020 VT 9. POST-CONVICTION RELIEF: INVOLUNTARY PLEA: REASONABLE BELIEF IN ELIGIBILITY FOR PAROLE AND/OR DEPORTATION IN LIEU OF LIFE SENTENCE.

Full court published opinion. Denial of post-conviction relief petition reversed. The petitioner's plea was not voluntary because it was based upon a material misunderstanding as to the sentence that he was agreeing to. The petitioner had a reasonable belief that if he pled guilty to the charge and was sentenced to twelve years to life, that he would be eligible for rehabilitation programming, and that if he was not deported soon after sentencing, he could eventually undergo treatment and become eligible for parole. However, he would not be eligible for treatment because of an ICE detainer on him, and ICE would not deport him because he was serving a life sentence and therefore there was no need to do so. He was therefore facing a life sentence without parole eligibility, since without programming he would never qualify for parole. Doc. 2019-129, January 31, 2020. https://www.vermontjudiciary.org/sites/default/files/documents/op19-129.pdf

## COMPELLING EVIDENCE OF GUILT OVERCAME ATTORNEY ERRORS IN POST-CONVICTION RELIEF PROCEEDING

In re Fitzgerald, 2020 VT 14. POST-CONVICTION RELIEF PETITION: ISSUES CONSIDERED ON REMAND; ABSENCE OF EXPERT TESTIMONY ON QUESTION OF ATTORNEY ERROR; FAILURE TO SHOW PREJUDICE IN LIGHT OF STRENGTH OF EVIDENCE. PRESENTATION OF FALSE TESTIMONY: FAILURE TO SHOW STATE'S AND WITNESS'S KNOWLEDGE OF FALSITY.

Full court published opinion. Summary judgment for the State in post-conviction

relief proceeding affirmed. 1) The petitioner's claim that his attorney failed accurately to convey a plea offer from the State was not properly before the Superior Court because the matter was on remand from the Supreme Court to consider certain limited issues, and this was not among them. One of the issues on remand was whether defense counsel failed to prepare a defense, but this is a separate issue from whether defense counsel adequately conveyed a plea offer. 2) The petitioner's claim that counsel was ineffective in cross-examining a detective was properly denied because his expert did not testify that counsel was ineffective in this respect. 3) The petitioner argued on appeal that defense counsel was ineffective in cross-examination of the petitioner's brother at trial by failing to question him concerning police notes suggesting an inconsistency in his testimony. However, this specific argument was not made in the trial court, and there was no expert testimony that the cross-examination was deficient for this reason. 3) The petitioner's claims that defense counsel made errors in opening statements and jury draw, failed to adequately cross-examine a key State witness, and failed to present a theory of the defense, do not require grant of the petition given the overwhelming evidence of guilt, precluding the petitioner from showing that he was prejudiced by these errors. 4) When a conviction is challenged on the grounds of the State having presented false evidence, the standard of review for a due process violation is whether the State knew the evidence was false, not whether it should have known. 5) The petitioner failed to show that the State knowingly used false evidence when it presented hair comparison expert testimony by an FBI witness, since the trial took place in 1994, and the National Academy of Sciences did not issue its report criticizing such evidence until 2009. Assuming without deciding that the State can be charged with a witness's knowledge that his testimony is false, the same is true of the witness himself – the petitioner did not present any evidence that the witness knew that his testimony was false. 6) The trial court correctly ruled that the petitioner had failed to demonstrate any prejudice from defense counsel's alleged errors in failing to mount an effective challenge to the hair comparison evidence. The evidence did not, as the petitioner argued, prevent him from mounting a defense, because the defense presented an explanation for the defendant's hair having been found at the scene that was consistent with innocence (he was married to the victim and had visited her about four weeks earlier). In any event, whatever prejudicial effect the evidence had was outweighed by the totality of the evidence before the jury. Doc. 2015-437, February 28, 2020. https://www.vermontjudiciary.org/sites/default/files/documents/op15-437.pdf

## ABSENT DEFENSE REQUEST, COURT MAY GIVE BOTH HARD AND SOFT TRANSITIONAL INSTRUCTIONS

State v. Rolls, 2020 VT 18. LESSER INCLUDED OFFENSES: TRANSITIONAL INSTRUCTION. DEADLOCKED JURY: NONCOERCIVE CHARGE.

Full court published opinion. Sexual assault affirmed. 1) The trial court's instruction to the jury on considering the lesser-included offense, for which the defendant was convicted, instructed the jury to consider the lesser-included offense if they decided that the State had not proven all of the elements of the greater offense, or if they were unable to agree on the greater offense. In other words, the court gave both a hard and a soft transition instruction. The defendant did not object to the instruction at trial. The court did not err in providing both instructions, rather than one or the other, in the absence

of a request from the defense. Either transition instruction is correct as a matter of law, and the defendant has the right to choose which will be given. Where the defendant does not choose either, it is within the discretion of the trial court to decide which instruction to give. Given the defendant's failure to request either, it was within the court's discretion to give both. In doing so, the court accurately stated the law and did not mislead the jury. There was no error, and therefore no plain error. 2) A trial court may issue a supplemental jury instruction to encourage a jury to continue deliberations when they cannot agree on a verdict. Providing such an instruction is within the court's sound discretion. However, the court may not issue a supplemental instruction to continue deliberations that coerces the jury into arriving at a verdict. The court may not issue a traditional Allen charge or any charge that substantially deviates from ABA Standard 15-5.4. An instruction that adheres to this standard will not be inherently coercive. Whether such an instruction is coercive in a particular case will depend upon the facts of that case. The instruction here was not a traditional Allen charge, but rather was a permissible, noncoercive charge that mirrored the ABA standards. The circumstances did not render this instruction coercive. The fact that the jury was deadlocked is not a factor, since the instruction is only given when a jury is deadlocked. The jury had only deliberated for two hours, reviewing evidence from a four-day trial; the deliverance of a verdict the following day after one hour's deliberation did not suggest coercion. Doc. 2018-274, February 28, 2020. https://www.vermontjudiciary.org/sites/default/files/documents/op18-274.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."*

## PRIOR BAD ACTS WERE ADMISSIBLE TO SHOW MOTIVE TO LIE UNDER OATH

State v. Wheelock, three-justice entry order. PRIOR BAD ACTS: ADMISSIBLE TO SHOW MOTIVE TO COMMIT PERJURY.

Perjury, subornation of perjury, and obstruction of justice, affirmed. The charges arose out of false statements the defendant made at a relief-from-abuse hearing, in which he denied having been at the victim's house and having thrown a rock through the windshield of the victim's vehicle, and also out of the defendant's procuring a witness to lie at the hearing as well. The trial court did not err in finding evidence of the rock-throwing relevant to show the defendant's motive for lying at the RFA hearing, nor did it abuse its discretion in finding that the prejudicial effect of the evidence did not substantially outweigh the probative value. The evidence was therefore properly admitted as a prior bad act pursuant to V.R.E. 404(b). Doc. 2019-138, January 6, 2020. https://www.vermontjudiciary.org/sites/default/files/documents/eo19-138.pdf

## DEFENDANT DIDN'T PRESERVE CHALLENGE TO REQUIREMENT THAT PCR PETITIONER PRESENT EXPERT TESTIMONY

In re George Murphy, three-justice entry order. POST-CONVICTION RELIEF: NEED FOR EXPERT TO ESTABLISH INEFFECTIVE ASSISTANCE: WAIVER.

Trial court's dismissal of petition for post-conviction relief affirmed. The defendant was convicted of first-degree aggravated domestic assault. He then filed a PCR petition arguing that his appellate counsel was ineffective because she failed to challenge the trial court's admission of certain hearsay statements as excited utterances. He filed a motion for summary judgment, arguing that this was one of those rare situations where no expert testimony was required to support the claim of ineffective assistance. The State asked the court to dismiss the petition for failure to present expert testimony, which the court did. The court declined the petitioner's request that it act as the expert itself. On appeal the petitioner argued that In re Grega, requiring expert testimony, was wrongly decided, and that other jurisdictions have overwhelmingly held that expert testimony is not required to establish ineffective assistance of counsel. However, the petitioner did not make this argument below, but merely argued that pursuant to Grega, this was one of those rare cases not requiring an expert. He did not ask below that Grega be overruled, and therefore this argument will not be reached on appeal. Doc. 2019-309, February 7, 2020. https://www.vermontjudiciary.org/sites/default/files/documents/eo19-309.pdf

## COURT'S IMPOSITION OF SENTENCE WAS WITHIN ITS DISCRETION

State v. Windoloski, three-justice entry order. SENTENCING: PLAIN ERROR; COURT'S DISCRETION.

Sentence of ten years-to-life for attempted sexual assault affirmed. The challenges the defendant now raises to his sentence were not raised below, and therefore are considered on appeal only for plain error. No such plain error appears here. The trial court had discretion to make its own assessment of the risk posed by the defendant and the appropriate sentence based on the facts presented to it. Where the PSI and the PSE indicated that the defendant had not yet taken responsibility for the offense, and the defendant's apology at trial was brief and vague, the court's finding that he had not yet taken responsibility was not clearly erroneous. The court's assessment of the PSI and the PSE's information on risk factors was within its discretion. The court also appropriately considered a number of other factors; the sentence was within the statutory limits; and was based on legitimate goals of criminal justice. Doc. 2019-173, February 7, 2020. https://www.vermontjudiciary.org/sites/default/files/documents/eo19-173.pdf

## TRIAL DELAYS WERE ATTRIBUTABLE TO DEFENDANT

State v. Bartshe, three-justice entry order. SPEEDY TRIAL; PRO SE MOTIONS BY REPRESENTED DEFENDANT.

Lewd and lascivious conduct with a child

affirmed. 1) The defendant's right to a speedy trial was not violated where there were no delays caused by the State's deliberate action and the majority of the delay was from causes attributable to the defendant, such as his request for a new attorney, his attorney's unavailability, and his motion to recuse the court; where the defendant did not make a formal assertion of his right to a speedy trial until almost two years after his arraignment; and where the defendant's specific claims of prejudice were not raised in the trial court, and in any event were too vague to demonstrate prejudice. 2) The trial court did not abuse its discretion when it failed to rule on a motion for a new trial which was filed pro se at a time when the defendant was represented by counsel. Doc. 2019-161, February 7, 2020. https://www.vermontjudiciary.org/sites/default/files/documents/eo19-161.pdf

# Vermont Supreme Court Slip Opinions: Single Justice Bail Rulings

## CONDITIONS OF RELEASE AFFIRMED

State v. Torrey, single justice bail appeal. CONDITIONS OF RELEASE: ABUSE OF DISCRETION.

Condition of release limiting contact with complainant and prohibiting the defendant from going to their residence without a third-party present affirmed. There was no abuse of discretion in the imposition of these conditions, despite the fact that the defendant has no prior criminal record, there is no history of violence between the couple, and the existing condition prohibiting defendant from abusing or harassing complainant would remain in effect. The trial court found that the parties were involved in a very recent incident that resulted in complainant seeking a relief-from-abuse order that the defendant allegedly violated by contacting the complainant within hours of service of the order. Furthermore, the fact that a judge had reviewed the relief-from-abuse petition and found that abuse had occurred, coupled with the current tension, stress, and instability caused by the defendant's violation of the order, provided the court with a sufficient basis to impose the modified conditions, which are reasonably related to the conduct underlying the charge of violation of the relief from abuse order. Doc. 2020-016, January 28, 2020. https://www.vermontjudiciary.org/sites/default/files/documents/eo20-016.bail_.pdf

*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.*