Vermont Department of State's Attorneys

Vermont Criminal Law Month

March - April 2020

Vermont Supreme Court Slip Opinions: Full Court Rulings

Includes three-justice bail appeals

DEFENDANT'S KNOWLEDGE OF AMOUNT OF DRUGS NEED NOT BE PROVEN; STATE MAY RELY ON STATISTICAL SAMPLING TO PROVE WEIGHT

State v. Davis, 2020 VT 20. Full court published opinion. MOTION FOR JUDGMENT OF ACQUITTAL: PRESERVATION; SUFFICIENCY OF EVIDENCE OF WEIGHT OF DRUGS – USE OF STATISTICAL EVIDENCE AND EXTRAPOLATION. HEARSAY: EXCEPTION FOR CO-CONSPIRATORS. KNOWLEDGE OF WEIGHT OF DRUGS – NOT AN ELEMENT.

Heroin trafficking and conspiracy to commit heroin trafficking affirmed. 1) The Court first declined the defendant's invitation to hold that a renewed motion for judgment of acquittal after the close of the defendant's case is not necessary where the defendant's limited evidence did not bear on the argument she raised in her motion for judgment of acquittal. Therefore, her appeal from the denial of the motion for judgment of acquittal, made at the close of the State's case, is reviewed only for plain error. 2) The evidence was sufficient to prove beyond a reasonable doubt the threshold weights of the drug required for conviction, where the State's chemist relied upon a statistically significant sample in conducted his tests, rather than weighing each individual packet. The court does recommend that such challenges to the evidence be reviewed through pre-trial motions to determine if the selection of the samples was truly random or sufficient. 3) The court did not err in admitting out-of-court statements by a person who was deceased at the time of trial pursuant to the exception for statements by a co-conspirator. A conspiracy for such purposes does not need to satisfy criminal conspiracy standards, but instead contemplates a joint venture. The court may consider the statement itself in determining whether it was made in the course of a conspiracy, although it cannot rely solely on the statement for that purpose. The evidence here was sufficient to show that the rule's requirements were satisfied. 4) Where the amount of a drug which is possessed, sold, or trafficked in is an element of the offense, the defendant's knowledge of that amount need not be proven. The State must prove that the defendant possessed a certain type of drug, and that the defendant knew that he

possessed, sold, or trafficked that drug, but it need only then prove the amount of the drug, not that the defendant knew what the amount was. Docket 2018-319, March 13, 2020.
https://www.vermontjudiciary.org/sites/default/files/documents/op18-319_1.pdf

COURT MAY NOT GRANT IMMUNITY TO WITNESS OVER STATE OBJECTION; FACTS DID NOT SHOW PROSECUTORIAL MISCONDUCT JUSTIFYING DISMISSAL OF PROSECUTION ABSENT STATE GRANTING IMMUNITY

State v. Gates, 2020 VT 21. Full court published opinion. JUDICIAL GRANT OF IMMUNITY: NO AUTHORITY TO DO SO. JUDICIAL COMPELLING OF IMMUNITY. JURY CHARGE TO DEADLOCKED JURY.

First degree aggravated domestic assault affirmed. 1) A court may not, without the State's consent, extend immunity to a third-party witness who invokes the right against self-incrimination. 2) Some courts have ruled that, while a court may not itself extend immunity to a witness, it can force the prosecution to choose between granting immunity itself, or face dismissal of the prosecution. The Court does not decide whether to endorse this practice, because under neither of the two tests used to determine whether the remedy is warranted does the situation here merit forcing that choice on the prosecution. 3) The first test is whether prosecutorial misconduct has deliberately distorted the factfinding process. The defendant argued here that that occurred when the State improperly threatened to charge the witness with either perjury or escape (since his proffered testimony would be that he had slipped out of a monitoring bracelet, and had been with the defendant at the time of the alleged crime despite GPS data indicating otherwise). But the evidence fails to demonstrate that the State's action threatened or intimidated the witness into not testifying. 4) The second test looks at whether, among other things, the proffered testimony was truly exculpatory. The defendant has not met that burden here, since the proffer was vague, overly speculative, and lacking in credibility. 5) The supplemental instruction given to the jury after they indicated they were deadlocked was not error, let alone plain error. It did not emphasize the jurors' duty to reach a verdict or urge them to sacrifice their convictions to do so. It did not single out the minority jurors and pressure them to reconsider their position. Robinson, dissenting: would find that the proffered testimony was truly exculpatory, and therefore that the court should have compelled statutory immunity. Doc. 2018-116, March 13, 2020.
https://www.vermontjudiciary.org/sites/default/files/documents/op18-116.pdf

DOC IMPERMISSIBLY MODIFIED CONDITION OF PROBATION BY REQUIRING THAT SEX OFFENDER TREATMENT BE COMPLETED DURING INCARCERATION

State v. Galloway, 2020 VT 29. Full court published opinion. CONDITION OF PROBATION: PLAIN LANGUAGE OF CONDITION.

Violation of condition of release reversed. The defendant argues on appeal that the State modified the probation condition by requiring that he complete sex offender treatment while incarcerated, a requirement not contained in the plain language of the condition. This claim was not made below, and the defendant can prevail only if he shows plain error. The defendant did show

plain error, because the trial court's finding of a violation rests on a DOC interpretation of the condition that is inconsistent with its plain language, and thus amounts to an impermissible modification by DOC. While DOC retains a measure of flexibility and discretion, it may not interpret a condition inconsistently with the condition's plain language. The condition here requires the defendant to successfully enroll, participate in, and complete a program for sex offenders approved by DOC. DOC's interpretation of this to require the defendant to complete the VTPSA high-intensity program while incarcerated constitutes an impermissible modification of the condition. The condition does not specify a particular program, and uses the word "approved," not "direct,", "mandated," or "assigned." The State's interpretation is also inconsistent with the requirement that the defendant pay for the treatment, which contemplates that the defendant can satisfy the condition in the community. Finally, when read as a whole, the condition indicates that the defendant has a choice of programs, a choice subject to DOC approval. DOC is granted discretion to approve or reject the program the defendant chooses. Carroll, dissenting: The term "approve" is broad enough to encompass the interpretation DOC gave it. Doc. 2019-110, March 20, 2020. https://www.vermontjudiciary.org/sites/default/files/documents/op19-110.pdf

EVIDENCE WAS INSUFFICIENT TO ESTABLISH PROBABLE CAUSE TO SEARCH CAR

State v. Clinton-Aimable, 202 VT 30. Full court published opinion. PROBABLE CAUSE: SEARCH OF CAR FOR DRUGS.

Knowing and unlawful possession of more than one ounce of cocaine reversed. The seizure of the defendant's car was not supported by probable cause and therefore the evidence seized from the defendant's car was not admissible. The odor of raw marijuana; the fact that the defendant was smoking a cigarette and had aerosol cans in the car, and had reported he was coming from Pittsfield, Massachusetts, was on his way to Albany, New York, and had stopped in Bennington to see a girl but did not, however, respond to questions about where the girl lived or where they were meeting and, when he was stopped, he was traveling in the opposite direction, going away from his announced destination of Albany, New York; the defendant's extreme nervousness; his voluntarily handing over a clear plastic bag containing evidence marijuana; defendant's admission he was smoking a cigarette to mask the odor of marijuana, taken together were insufficient to provide probable cause that the vehicle contained drugs and to seize it. The tip received by the police did not meet the standards of V.R.Cr.P. 41, failed to match the actual driver of the vehicle, and was so vague and general that it was of limited value. Smoking and the use of air fresheners are commonplace. The defendant's vague travel plan was not wholly irrelevant, but of limited weight in determining probable cause. The defendant's nervousness had minimal relevance, since it is not uncommon for citizens to be nervous when confronted by law enforcement. With respect to the smell of marijuana, there was no evidence that the vehicle contained more marijuana than what the defendant had voluntarily surrendered such that the total amount could have exceeded the one-ounce limit. The State's argument that drug dealers often possess recreation amounts of drugs on their person to seek to end police investigations is not convincing. Although this case is similar in many respects to State v. Tetreault, that case involved

reasonable suspicion, not probable cause. In addition, the suspicion in that case was supported in part on information from a confidential informant. Reiber, concurring. Questions whether nervous behavior exhibited by a person of color should ever be used as a factor in determining whether police have reasonable suspicion or probable cause. Doc. 2018-355, March 20, 2020.
https://www.vermontjudiciary.org/sites/default/files/documents/op18-355.pdf

POLICE IMPERMISSIBLY EXPANDED TRAFFIC STOP INTO DRUG INVESTIGATION

State v. Nagle, 202 VT 31. Full court published opinion. MOTOR VEHICLE STOP: PROLONGATION OF STOP FOR DRUG INVESTIGATION.

Denial of motion to suppress and dismiss reversed. The police lawfully stopped the defendant's vehicle based on a reasonable suspicion that he was driving with a suspended license. 1) The officers prolonged the stop for a drug investigation without reasonable suspicion justifying the prolongation. One of the officers had recently seen defendant's car outside a house suspected of criminal activity, and another officer said he smelled marijuana that had been smoked in the vehicle by someone in the past thirty days. These facts were insufficient to support a reasonable, articulable suspicion that the defendant was engaged in drug-related activity at the time of the stop. 2) The drug-related investigation was not within the scope and duration of the initial stop. The officer asked the defendant for his license, checked the validity of the license, learned that the defendant was driving with a suspended license, talked with the defendant about the offense, and told him he would release him with a citation, and prepared paperwork for the citation. These activities were reasonably related in scope to the suspended license offense and did not prolong the stop beyond the time reasonably required to complete the mission of the stop. However, before issuing the citation or returning the defendant's license, the defendant was asked to exit his vehicle and patted down, repeatedly asked to consent to a search of the car, and questioned about his contacts with persons and places associated with drug-related crime. He was told, incorrectly, that the police had authority to seize his car, and that a canine unit would be requested to search the car. This inquiry was not reasonably within the scope of the suspended-license offense. 3) The fact that the deputy had not yet completed the tasks associated with the suspended-license offense did not bring the drug investigation within the lawful limits of the initial stop, as those tasks should reasonably have been completed by then. Moreover, the record shows that the officers here had failed to complete the tasks associated with the offense only because they had chosen not to complete them. 4) Nor was the extended stop justified because the officer had probable cause to arrest the defendant for driving with a criminally suspended license. The fact that the officers chose not to arrest the defendant does not mean that whatever time they would have used to arrest the defendant can now be spent on an unrelated purpose. Probable cause to arrest a defendant for one offense does not justify detention to investigate a different offense. 5) The defendant's subsequent consent to the search of his car was rendered involuntary by the unlawfully prolonged detention, and the State did not show by clear and positive evidence that the consent was nonetheless voluntary. Doc. 2019-101, March 20, 2020.
https://www.vermontjudiciary.org/sites/default/files/documents/op19-101.pdf

DEFENDANT WAS NOT ON NOTICE THAT VIOLATION OF FACILITY RULE, WHICH LED TO EXPULSION FROM PROGRAMMING, WAS A VIOLATION OF A CONDITION OF PROBATION THAT HE PARTICIPATE FULLY IN PROGRAMMING

State v. Burnett, 2020 VT 28. Full court published opinion. VIOLATION OF CONDITION OF PROBATION: NOTICE THAT ACT WILL VIOLATE CONDITION.

Violation of condition of probation reversed. As a condition of probation the defendant was required to participate fully in the Vermont Treatment Program for Sexual Abusers during the course of his unsuspended sentence. The defendant subsequently was removed from the program because he had been convicted of a major disciplinary report, for picking a lock on his cell door (to get in, not out). Testimony at the hearing indicated that the VTPSA requires that participants not disobey orders given by treatment providers or facility staff, and that the defendant had disobeyed an order by a correctional guard to wait to be let into his cell while she checked other cells, and instead picked the lock in order to enter his cell on his own. The State did not prove that the defendant's conduct amounted to a violation of the condition requiring him to participate fully in the VTPSA, because when the State seeks to revoke probation on account of a probationer's expulsion from court-ordered programming, the court must independently assess whether the conduct that gave rise to the expulsion amounts to a violation of the probation condition. In making that determination, the court must construe probation conditions such that they give fair notice to a probationer of what conduct will give rise to revocation. In this case, the condition requiring defendant to participate fully in and complete the VTPSA program did not give him notice that the conduct that triggered the VOP complaint violated the terms of his probation. The court must look beyond the fact of a probationer's termination from a program to the reasons for that termination because the court, not the treatment provider or probation officer, is the ultimate judge of whether the defendant has violated a probation condition. The defendant's insubordinate act could not be reasonably understood as a violation of the probation condition requiring him to complete VTPSA. Based on this logic, failure to maintain good hygiene or to follow television guidelines would be probation violations as well. This does not mean that violating a rule of VTPSA that regulates conduct outside of the treatment sessions themselves cannot constitute a violation of the conditions requiring full participation in VTPSA. Many of the rules of VTPSA, such as rules prohibiting sexual contact with others, or propositioning others for sexual contact, are clearly designed to advance the core objectives of VTPSA. Evidence that the defendant was on notice of these program rules would likely suffice to establish the defendant's notice that violation of the rules would constitute a probation violation. The same is true where the State presents evidence that a probationer has received clear notice that a program rule governing behavior throughout the facility is intrinsic to participation in the program and may lead to termination, for example violation of a cardinal rule against physical violence or threats of physical violence, as in State v. Cavett. Here the State presented no evidence that the disobedience rule was a cardinal rule of VTPSA, and its evidence that the defendant was even advised of the rule is thin. This might be a different case if the defendant had picked a lock to exit his room at a time when he was supposed to be confined, or if he had picked a lock to enter another inmate's room without authorization. But not any act of insubordination, because it violates the VTPSA rules, constitutes a probation violation. The Court is not

questioning whether the defendant was properly terminated from the VTPSA program, but if the State seeks a probation condition pursuant to which any act of disobedience to facility staff amounts to a violation of probation, it must do so expressly. Doc. 2018-240 March 20, 2020. https://www.vermontjudiciary.org/sites/default/files/documents/op18-240.pdf

HOLD WITHOUT BAIL ORDER WAS NOT ABUSE OF DISCRETION

State v. Auclair, 2020 VT 26. HOLD WITHOUT BAIL: TRIAL COURT'S EXERCISE OF DISCRETION.

Three justice bail appeal. Hold without bail order affirmed. The charges are aiding in the commission of first-degree murder and obstruction of justice. The defendant did not dispute that the evidence of guilt was great but argued that the court should exercise its discretion to return her to the community. There was no abuse of discretion in the denial of bail. 1) Although the defendant had remained in the community during the investigation, the trial court noted that the circumstances changed after she was charged with a life sentence crime, creating an impetus for flight not present before her arrest. 2) The court properly relied upon the defendant's violations of a court order not to contact certain individuals, even though these violations had not been proven in a separate proceeding, and the violations demonstrated the defendant's willingness to engage in deceptive behavior designed to circumvent the court's orders. 3) The court did not abuse its discretion in finding that the defendant's mother was not an acceptable responsible adult, since her mother showed little ability to control what occurs at her home and on her property, and was actually uncertain about the number and identity of individuals living in her home. Moreover, the defendant's mother had helped facilitate the defendant's contact with a person, despite knowing that they were not supposed to be in contact, and did not report the contact to the police. 4) The court did not abuse its discretion in failing to determine that the State's case was weak, and that the defendant should therefore be released on bail. 5) The court was not required to explicitly consider the remaining factors cited by the defendant on appeal, although it may be best practice to do so. The court made it clear that its decision was based primarily on the lack of an acceptable adult who could supervise the defendant, and the court's finding that the defendant would not abide by any conditions of release. 6) The court did not err in relying upon testimony from two witnesses that they feared the defendant. The State was not required to prove this to a clear-and-convincing standard, which is only required when revoking bail or when denying bail for a crime involving acts of violence, 13 V.S.A. 7553a. In this case, involving a possible life sentence and where the evidence of guilt is great, the burden Is on the defendant to persuade the court that discretionary release is warranted. Doc. 2020-054, March 10, 2020. https://www.vermontjudiciary.org/sites/default/files/documents/eo20-054.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 NOT ENTITLED TO CREDIT FOR TIME SERVED WHERE HIS PLEA AGREEMENT PROVIDED OTHERWISE

State v. Houle, three-justice entry order. CREDIT FOR TIME SERVED: EFFECT OF PLEA AGREEMENT.

Denial of motion to correct sentence to provide credit for time served out-of-state affirmed. The defendant was serving a sentence in Massachusetts, and was denied parole because of the pendency of the proceeding in Vermont. He was subsequently extradited to Vermont and entered into a plea agreement providing for 9 days of credit for time spent in Massachusetts after that sentence expired and while awaiting extradition, plus "credit as allowed by law." The defendant argued that he was entitled to credit for all time spent in Massachusetts after being denied parole because at that point he remained in prison solely because of the pending Vermont case. The Court held that the plea agreement indicated that the defendant would receive nine days of credit for time served in Massachusetts. The defendant's attempt to obtain additional credit for time served in Massachusetts, whether or not he otherwise would have been entitled to that credit under law, violated the plea agreement and therefore was properly denied. Doc. 2019-295, April 3, 2020. https://www.vermontjudiciary.org/sites/default/files/documents/eo19-295.pdf

DELINQUENT JUVENILE NOT ENTITLED TO DISMISSAL IN THE INTERESTS OF JUSTICE

In re W.C., three-justice entry order. JUVENILE DELINQUENCY: DISMISSAL IN THE INTERESTS OF JUSTICE.

Denial of motion to dismiss in the interests of justice affirmed. The appellant was adjudicated delinquent based on having committed open and gross lewdness. He asked the court to dismiss the case in the interests of justice on a variety of grounds. The court's finding that the juvenile would not have had an incentive to complete the Balanced and Restorative Justice program were the matter to be dismissed was accurate, and in any event, this was not the primary reason for denying the motion. The juvenile's argument that he would potentially have to register as a sex offender were he to travel to other states was speculative, because, although he had shown that it is possible that at some time in the future he might have to do so, he did not demonstrate that he will have to do so. The other factors the juvenile cited were not found by the trial court to constitute extraordinary circumstances sufficient to warrant dismissal in the interests of justice, and this was not an abuse of discretion. Doc. 2019-191, April 3, 2020. https://www.vermontjudiciary.org/sites/default/files/documents/eo19-191.pdf

RULE 11 CHALLENGES TO PLEAS UNDERLYING ENHANCED SENTENCE DENIED

In re Beaudoin, three-justice entry order. POST-CONVICTION RELIEF: CHALLENGE TO CHANGES OF PLEA UNDERLYING ENHANCED

SENTENCE.

Summary judgment for the State in post-conviction relief proceeding affirmed (underlying offense is lewd and lascivious conduct with a child). The petitioner challenged the validity of two of the three underlying convictions pursuant to which the sentence in this case was enhanced. 1) The first conviction was for aggravated assault. The trial court at that change of plea explained twice that the petitioner was charged with acting in a manner that demonstrated extreme indifference to the value of the victim's life. The trial court added that, "in other words, that did something dangerous to her." There is no indication that this statement undermined the petitioner's understanding that the State had to prove the extreme indifference element. Furthermore, the evidence supported the plea where it showed that the petitioner struck the victim in the area of her eye with such force that she had blurred vision for the next three days. 2) The petitioner's later guilty plea to lewd and lascivious conduct need not be vacated because the court did not specifically inquire if the plea was voluntary. The totality of the circumstances support the court's determination that the plea was voluntary. Nor has the petitioner shown actual prejudice, i.e., that he would not have entered his plea if the court had inquired directly about voluntariness. Doc. 2019-260, April 3, 2020.
https://www.vermontjudiciary.org/sites/default/files/documents/eo19-260.pdf

DEFENDANT FAILED TO SHOW GOOD CAUSE TO WITHDRAW GUILTY PLEA

State v. Perky, three-justice entry order. MOTION TO WITHDRAW PLEA: FAILURE TO SHOW GOOD CAUSE.

Denial of motion to withdraw plea of guilty to one count of lewd and lascivious conduct with a child affirmed. The defendant did not claim that he was impaired in any way or did not understand the terms or consequences of the plea agreement. Nor is there any evidence that the defendant was coerced into pleading guilty. He did not file his motion to withdraw until nearly eight months after he pleaded guilty. Under these circumstances, the trial court did not abuse its discretion in finding that the defendant's justification for the withdrawal, that he was in fact innocent, was unreasonable, even if the State did not claim it would be prejudiced by the withdraw. Doc. 2019-168, April 3, 2020.
https://www.vermontjudiciary.org/sites/default/files/documents/eo19-168.pdf

JURY INSTRUCTION PROPERLY REQUIRED UNANIMITY ON THEORY OF GUILT

State v. Powers, three-justice entry order. JURY INSTRUCTION: UNANIMITY.

Obstruction of justice affirmed. The State charged the defendant with alternative methods of committing the offense: either by threats or by threatening communication, intimidated any witness in any court of the state, or by endeavoring to obstruct the due administration of justice. On appeal the defendant claimed plain error in the trial court's instructions, in that they failed to require that the jury unanimously agree on which theory the State had proven. But the court instructed the jury that if the State had proven "all of the essential elements beyond a reasonable doubt for one or both methods the State may use to prove its case, you must return a verdict of guilt." This instruction properly required unanimity as to

both the facts and the law. Doc. 2019-289, May 1, 2020.

TRIAL COURT FAILED TO CONSIDER ALL THE EVIDENCE IN FINDING PROBABLE CAUSE FOR DUI

State v. Bushey, three justice entry order. PROBABLE CAUSE FOR DUI: FAILURE TO CONSIDER ALL THE EVIDENCE.

Civil suspension of driver's license reversed and remanded for further proceedings. 1) The trial court erroneously concluded that this Court's decision in State v. Mara, 186 Vt. 389, supported the conclusion that probable cause existed here for an arrest for DUI. But Mara involved reasonable suspicion, not probable cause. 2) The trial court also improperly declined to consider conflicting evidence in conducting its probable-cause analysis. The court must consider the totality of the circumstances to determine whether probable cause to conduct a warrantless arrest exists. The court instead relied solely upon a few bare stipulations, that the defendant made an illegal turn, emitted a moderate odor of alcohol, had watery and bloodshot eyes, and admitted to drinking two beers approximately two hours earlier in the evening. The court declined to consider the proffered claim that the defendant performed well on the field sobriety tests, or to view the video of the encounter, or to give the defendant an opportunity to cross-examine the State's witnesses. Doc. 2019-235, May 1, 2020.

PRIOR BAD ACTS INSTRUCTION WAS PROPER

State v. Jarvis, three-justice entry order. JURY INSTRUCTIONS: PRIOR BAD ACTS. CLOSING ARGUMENT: APPEAL TO EMOTIONS.

Reckless endangerment and simple assault affirmed. 1) The trial court did not commit plain error when it instructed the jury that "evidence of other acts cannot by themselves sufficiently prove that she committed the alleged acts for which she is on trial." The defendant argued that this permitted the jury to use the prior acts to conclude that the defendant had committed the charged offense, not just for purposes of determining intent or motive. But the court instructed the jury that the prior-act evidence was relevant for the limited purposes of proving intent or motive, that it could not be used to conclude that the defendant had a propensity to commit a crime, and that the prior act could not alone prove the charged offense. The instruction, when viewed in its entirety, accurately reflected the law and did not amount to plain error. 2) The court did not err in sustaining an objection to the defense closing argument, in which defense counsel asked the jury, "are you brave enough to tell the State …" The trial court did not abuse its discretion in construing this as an impermissible attempt to appeal to the jurors' emotions instead of the evidence. Nor did the court err, in response to an objection to the argument that, "just even one doubt in your mind and it's reasonable, you must acquit," by instructing the jury that it would read to the jury what the burden of proof is and to depend upon its instructions. Docs. 2019-062 and 140, March 20, 2020. https://www.vermontjudiciary.org/sites/default/files/documents/eo19-062.pdf

PLEA WAS NOT INVOLUNTARY WHERE NO ONE GUARANTEED THE DEFENDANT EARLY RELEASE, DESPITE EXPECTATION OF PROGRAMMING AVAILABILITY

In re Porter, three-justice entry order. POST-CONVICTION RELIEF: PLEA ENTERED IN MISUNDERSTANDING OF ELIGIBILITY FOR PROGRAMMING THAT COULD LEAD TO EARLY RELEASE.

Denial of post-conviction relief petition affirmed. The petitioner claimed that his guilty plea to an attempted kidnapping charge was involuntary because he was misinformed regarding in-prison program eligibility that could lead to his early release. 1) The State did not breach the plea agreement, which did not contain any express terms concerning programming or release upon completion of the minimum. The only terms expressly stated in the agreement were that the petitioner plead guilty to attempted kidnapping and serve an eight-to-thirty-year sentence. There is no evidence of any promise made at the change-of-plea hearing that the petitioner would be released at his minimum. 2) Defense counsel, prosecutor, and trial court, all expected that the petitioner would have an opportunity to participate in sex-offender programming that, if successfully completed, could lead to the petitioner's early release. But no one guaranteed that the petitioner would be accepted into such programming, that he would successfully complete the programming, or that he would be released in two years even if he successfully completed the programming. The petitioner knew that only a split sentence, which the prosecutor rejected, would guarantee release at the minimum, and that DOC would evaluate what, if any, programming was appropriate, and that DOC ultimately had the discretion whether to offer programming. Therefore, the petitioner could not have reasonably relied upon a belief that he was guaranteed acceptance into sex-offender programming. Doc. 2019-098, March 20, 2020. https://www.vermontjudiciary.org/sites/default/files/documents/eo19-098.pdf

COMMUNITY CARETAKING EXCEPTION DID NOT JUSTIFY MOTOR VEHICLE STOP

State v. Zarvis, three-justice entry order. MOTOR VEHICLE STOP: COMMUNITY CARETAKING EXCEPTION.

Conditional plea to DUI reversed. The motor vehicle stop here was not justified under the community caretaking doctrine, where a convenience store clerk reported that a couple were in the parking lot arguing and slamming car doors, and then that the man had left on foot and the woman had left separately in a car. There was no indication that the woman had been injured and therefore posed a danger to others using the highway. She was operating the vehicle while obeying traffic laws and showed no signs of impairment, and made no attempt to seek assistance. Doc. 2019-143, March 20, 2020. https://www.vermontjudiciary.org/sites/default/files/documents/eo19-143.pdf

EVIDENCE DID NOT JUSTIFY SELF-DEFENSE INSTRUCTION

States v. Gibbs, three-justice entry order. SELF-DEFENSE INSTRUCTION: NOT WARRANTED BY THE EVIDENCE.

Aggravated assault affirmed. The defendant

was not entitled to an instruction on self-defense where, based on the evidence at trial, no reasonable jury could conclude that the defendant had an honest and reasonable belief that he faced imminent peril of bodily harm or that the use of a firearm was reasonable. There was limited evidence that the defendant believed himself to be in immediate danger of unlawful bodily harm, where even after the complainant allegedly raised his fists and tried to block the door from closing, the defendant was able to close the door, took time to put his holster on when he got his gun, and later came back outside onto his porch. Even if the defendant subjectively felt fearful, the facts do not demonstrate that his belief of imminent bodily harm was based in reason. The actions of the complainant, even as described by the defendant, did not create a reasonable belief of imminent bodily harm and the use of a firearm in response was not reasonable under the circumstances. Doc. 2019-194, March 20, 2020.
https://www.vermontjudiciary.org/sites/default/files/documents/eo19-194.pdf

DEFENDANT NOT ENTITLED TO HEARING ON SENTENCE RECONSIDERATION IN ORDER TO PRESENT LIVE TESTIMONY INITIALLY PRESENTED BY WRITTEN STATEMENTS

State v. Kebbie, three-justice entry order. SENTENCE RECONSIDERATION: NECESSITY OF HEARING.

Denial of motion for sentence reconsideration without a hearing affirmed. The defendant sought to present live testimony by witnesses who, at the original sentencing, had only submitted written statements. The defendant's change of heart about presenting live testimony did not entitle him to a second hearing. In any event, the trial court effectively accepted as true the assertions by the defendant's friends and family members. Doc. 2019-203, March 20, 2020.
https://www.vermontjudiciary.org/sites/default/files/documents/eo19-203.pdf

COURT ADEQUATELY JUSTIFIED PROBATION TERM EXCEEDING TWO YEARS ON A MISDEMEANOR

State v. Phillips, three-justice entry order. SENTENCING: PROBATION EXCEEDING TWO YEARS ON A MISDEMEANOR.

Sentence on two counts of prohibited acts affirmed. The defendant argued that the court had failed to sufficiently justify its imposition of an eight-year term of probation, as required by statute when the term of probation for a misdemeanor exceeds two years. The court adequately explained the basis of its sentence. The court was concerned by defendant's minimization of the offenses and his misrepresentation of the criminal case against him; wanted to protect the community from the defendant and concluded that probation was, in some ways, the only way to do so. The court found that probation would ensure that the community had notice about defendant's convictions, which was important given defendant's minimization behavior and the fact that he was not required to register as a sexual offender. The terms of probation were designed to protect the community and to further the defendant's rehabilitation. The court found that ending supervision of the defendant after two years "was not in the community's best interests" or "in [defendant's] best interests." Its findings show why it concluded that a longer term of

probation served the interests of justice. The defendant's belief that his behavior warranted a shorter term of probation does not demonstrate an abuse of discretion.

Doc. 2019-284, March 20, 2020. https://www.vermontjudiciary.org/sites/default/files/documents/eo19-284.pdf

FACTUAL BASIS WAS SUFFICIENT AT RULE 11 HEARING

In re Thompson, three-justice entry order. CHANGE OF PLEA: FACTUAL BASIS.

Summary judgment for the State in post-conviction relief proceeding affirmed. The factual basis was adequate with respect to the defendant acknowledging having damaged a natural tooth of the victim, and not just a partial, when he stated at the change of plea, "if it did, it did. I didn't realize it was a natural tooth." Doc. 2019-294, March 20, 2020. https://www.vermontjudiciary.org/sites/default/files/documents/eo19-294.pdf

Vermont Supreme Court Slip Opinions: Single Justice Bail Rulings

ORAL SWORN STATEMENT SUFFICES AS AFFIDAVIT FOR PURPOSES OF HWOB HEARING

State v. Lohr, single-justice bail appeal. HOLD WITHOUT BAIL ORDER AFFIRMED.

Hold-without-bail order affirmed. The defendant challenged the admissibility of a video of the complaining witness being interviewed by two police officers, on the grounds that the complainant's statement is not sufficient to be considered an affidavit and because the complainant was intoxicated at the time she gave her statement. An oral sworn statement may be used as an affidavit for purposes of evaluating evidence under 13 V.S.A. 7553a. At the end of the statement the complainant swore to the truth of what she had said under the pains and penalties of perjury. Nor does the complainant's intoxication during the interview render her statement inadmissible. In any event the statement was admissible as an excited utterance. The court concluded from the statement that the evidence of guilt was great. The fact that the defendant returned to the complainant's home upon his release, despite a condition not to do so, as well as his criminal history, including violations of an abuse prevention order and prior conditions of release, establish by clear and convincing evidence the defendant's release would pose a substantial threat of physical violence to the complainant, and that no condition or combination of conditions of release would reasonably prevent the physical violence. Finally, the factors set forth under 13 VSA 7554 do not favor release, in light of the absence of ties to the community, the defendant's history of criminal conviction, the weight of the evidence, and the immediate violation of a condition of release. Doc. 2020-078, March 17, 2020. Elizabeth Mann, J., specially assigned. https://www.vermontjudiciary.org/sites/default/files/documents/eo20-078_0.pdf

Rule Amendments

Rule 32(c)(4) is amended consistent with the decisions in 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 in presentence investigation reports, in addition to factual assertions pertinent to sentence, on grounds that the conditions are not reasonably related to the offense of conviction and thus overly harsh or excessive. The amendment is 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.

Subparagraph (c)(4)(A) is amended, consistent with the Court's direction in Lumumba, to require advance written objection to any recommendations for probation conditions set forth in the presentence investigation report. As reflected in the existing rule, the amendment is intended to provide advance notice of any such objections to enable the parties to secure and present any evidence that would serve to provide record basis either for inclusion of the recommended conditions in the sentence given, or rejection of them by the court.

Subparagraph (c)(4)(A) is also amended to require that written objections to PSI content be submitted to the court at least 7 days prior to sentencing (unless good cause is shown for later objection), rather than the 5 days prescribed by the existing rule. This amendment is intended to render the rule consistent with the "day is a day" method of calculation of time periods of V.R.Cr.P. 45.

Finally, the subparagraph is amended to include an express requirement that copies of any written objections be provided to the opposing party. Timely notice of any objections enables the party opponent to secure and present any evidence necessary to support inclusion or rejection of any factual assertion or recommended probation condition set forth in the PSI.

Part of former (c)(4)(A) has been made into new subparagraph (B). New subparagraph (c)(4)(C) requires that before pronouncing sentence and concluding the sentencing hearing, the sentencing court must provide opportunity for comment and objection to what are in effect any "unnoticed" conditions of probation. This includes conditions not included in a signed plea agreement acknowledged by the defendant or the subject of request or argument by the parties, that the court, in its discretion, nonetheless determines to be warranted on the sentencing record. This 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. 4 Existing subparagraph (B) is relettered as subparagraph (D).

https://www.vermontjudiciary.org/sites/default/files/documents/PROMULGATEDVRCrP32%28c%29%284%29.pdf

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