



Vermont Department of State's Attorneys

Vermont Criminal Law Month

May - June 2020



Vermont Supreme Court Slip Opinions: Full Court Rulings

Includes three-justice bail appeals

FAILURE TO ENSURE UNANIMITY IN JURY INSTRUCTIONS WAS PLAIN ERROR

State v. Redmond, 202 VT 36. NO PLAIN ERROR IN FAILURE TO DISMISS BASED ON SUFFICIENCY OF THE EVIDENCE; FALSE INFORMATION TO POLICE INSTRUCTION WAS PLAIN ERROR IN FAILING TO ENSURE UNANIMITY; REASONABLE DOUBT AND UNANIMITY INSTRUCTIONS WERE CORRECT; OMISSION OF PRESUMPTION OF INNOCENCE INSTRUCTION FROM FINAL INSTRUCTIONS NOT DENIAL OF DUE PROCESS; NO ERROR IN SUBMISSION OF WRITTEN INSTRUCTIONS.

Full court published decision. Reckless endangerment and unlawful mischief affirmed, providing false information to a law enforcement officer reversed and remanded. 1) The defendant did not file a motion for judgment of acquittal, and therefore his claim on appeal of insufficient evidence is reviewed only for plain error. The evidence was sufficient to prove that the defendant threw a prybar, as opposed to a different object, at the victim's windshield (assuming that the State had to prove what

the object was). 2) The trial court committed plain error in giving instructions on false information to a law enforcement officer that did not ensure unanimity as to which statements were false. The State presented evidence about a variety of statements that the defendant made to police. The instructions did not indicate if the jury had to limit its inquiry to the statement identified by the prosecutor in closing as the false statement, or if it could find that any of the statements satisfied the requirements of the statute. Nor did the instructions tell the jury that they must be unanimous with respect to the purpose element – and they were given two purposes, either to implicate another or to deflect an investigation from the person. Finally, even assuming that the jury found, as argued by the State, that the false statement was the defendant's statement that he didn't throw anything, that statement alone would be insufficient to deflect an investigation. Simply saying no to an incriminatory question in no way deflects the investigation. 3) The court's reasonable doubt instruction was not plain error. It instructed the jury multiple times that the State must prove the defendant's guilt beyond a reasonable doubt, and it had no obligation to further define this term. 4) The

court's instructions on unanimity were also not erroneous, where it instructed the jury that they must all unanimously agree on each issue. 5) Omission of a presumption-of-innocence instruction from the court's final instructions does not in and of itself require reversal. Such a failure must be evaluated in light of the totality of the circumstances. The circumstances here do not show a denial of due process, where the court addressed the presumption of innocence in detail at the outset of the trial, and the closing instructions were delivered only six hours later, and the jury was provided with a copy of the opening instructions. Finally, the weight of the evidence overwhelmingly supported the victim's version of events, not the defendant's. While the instruction should

have been repeated as part of the closing instructions, the omission did not deprive the defendant of due process. 6) There was no support for the defendant's claim that the written instructions in the court's file differed from those provided to the jury, nor does he identify any specific or meaningful conflict between the written and the oral instructions. Nor was the defendant deprived of his due process right to be present during the critical stages of the trial when the written instructions were given to the jury, since he was present when the court delivered its preliminary and closing instructions, and the written instructions were the same as the oral instructions. Doc. 2018-226, May 15, 2020.

<https://www.vermontjudiciary.org/sites/default/files/documents/op18-226.pdf>

COURT'S FAILURE TO INVESTIGATE JURY TAIN CLAIM WAS PLAIN ERROR

State v. Kandzior, 2020 VT 37. JUROR TAIN: FAILURE TO INVESTIGATE; PLAIN ERROR.

Full court published opinion. Sexual assault conviction reversed. Although the defendant failed to timely move for a mistrial, this is one of the rare and extraordinary cases where plain error occurred. The issue was not preserved for appeal where the defendant did not move for a mistrial when he learned that the jury may have overheard various bench conferences throughout the trial. But the failure to investigate possible jury taint and establish an evidentiary basis for determining if the jury was fair and unbiased amounts to plain error, because this Court cannot assess whether or how a jury was affected if the trial court does not investigate and establish such an evidentiary basis. In such a case, plain error occurs regardless of any prejudice. Structural error, that is an error that affects the framework in which the trial court proceeded, and thus prevented the trial from serving its function as a vehicle for determining the guilt or innocence of the

defendant, as opposed to mere trial error, which is error that occurs during the presentation of the case to the jury, and which may therefore be quantitatively assessed in the context of other evidence presented in order to determine whether its admission was harmless, necessarily affects substantial rights. A trial court's failure to voir dire the jury after learning of the possibility of jury taint amounts to a structural error that affects substantial rights without regard to prejudice. If the trial court investigates possible jury taint, then the jury-irregularity framework applies because the trial court has established an evidentiary basis for reviewing whether prejudice occurred. When a trial court fails to investigate upon discovering the possibility of jury taint, however, plain error occurs because there is no basis for determining whether or how the jury was affected. This only occurs when the trial court discovers the possibility of jury taint; and trial courts retain broad discretion in how they choose to investigate possible jury taint. The method and scope of investigation depends on the circumstances. The court's two

rather confusing questions about whether the jury had been able to hear the bench conferences throughout the trial was inadequate, and as the trial court itself stated, it was not clear what the jury heard.

The matter is therefore remanded for a new trial. Doc. 2020 VT 37, May 29, 2020.
https://www.vermontjudiciary.org/sites/default/files/documents/op19-069_0.pdf

AFFIDAVIT SUPPORTED SEARCH WARRANT EVEN AFTER EXCISION OF HEARSAY

State v. Ferguson, 2020 VT 39.
SEARCH WARRANT: EXCISION OF UNLAWFULLY OBTAINED EVIDENCE. FORFEITURE OF ANIMALS: RELIANCE ON HEARSAY WITHIN ANIMAL CONTROL OFFICER'S AFFIDAVIT.

Full court published opinion. Animal cruelty convictions affirmed; forfeiture order reversed. 1) An animal control officer made an initial entry into the home without a warrant, and obtained a search warrant relying in part upon observations made during this entry. However, the information in the affidavit in support of the search warrant other than the observations made during the initial warrantless entry were sufficient to support a finding of probable cause. Therefore the motion to suppress was properly denied. 2) The forfeiture order is reversed because the trial court relied

upon hearsay contained within the officer's affidavit in support of forfeiture. While the forfeiture statute permits the court to rely upon affidavits of police officers, the statute does not permit the court to rely upon hearsay within the affidavit itself. The statute does not create a blanket exception to the hearsay rule for all statements contained in the affidavit. This was not harmless error because in ordering forfeiture the court relied upon the duration of the animals' treatment, and the duration was only established by hearsay statements within the animal control officer's affidavit – she had no first-hand knowledge of this issue. The matter is remanded for the trial court to determine if it would order forfeiture based upon the evidence in the affidavit without the hearsay statements. Doc. 2020 VT 39, May 29, 2020.

<https://www.vermontjudiciary.org/sites/default/files/documents/op18-061.pdf>

COURT MAY RELEASE DEFENDANT WITHOUT SETTING BAIL WHEN RELEASED DUE TO EXPIRATION OF 60 DAYS OF BEING HELD WITHOUT BAIL

State v. Lohr, 2020 VT 41. DENIAL OF BAIL: EXPIRATION OF 60 DAY TIME LIMIT. RELEASE ON CONDITIONS: ABUSE OF DISCRETION.

Full court published opinion. The defendant was held without bail pursuant to 13 VSA 7553a (felony act of violence, evidence of guilt is great, no conditions will present physical violence) and therefore was entitled to a bail hearing and to have bail set if the trial was not commenced within 60

days, 13 VSA 7553b. When the trial did not occur within that timeframe, the trial court released the defendant on conditions under 13 VSA 7554 without imposing bail. The State appealed. 1) The language in Section 7553b that the court "shall set bail" if trial does not begin in 60 days does not mean that the court must actually impose bail. Through a chain of reasoning too tortured to summarize here, the Court concludes that it just means that the court has to think about setting bail, but doesn't necessarily have to

set bail. It means that the trial court should conduct a hearing and engage in the usual Section 7554 analysis. In sum, if a defendant has been held without bail pursuant to 7553a, and sixty days expire, and he does not present a risk of flight, or if bail is not among the least restrictive conditions required to reasonably mitigate the risk of flight, the court may essentially set bail at \$0, or no bail at all. 2) The trial court's decision to release the defendant without bail under 7554 is affirmed. The court found that defendant has a criminal history in several states, including noncompliance with court orders and failures to appear, but observed that the failures to appear were in 2012 and 2015. It

noted that defendant could reside at the proposed motel under staff supervision, and that he would not have to leave the motel. The court thus found that conditions of release without the imposition of bail would be sufficient to mitigate the risk of flight. It imposed the original conditions but made explicit that defendant had to remain away from complainant's apartment building and imposed a twenty-four-hour curfew at the motel. The court's decision was supported by the proceedings and the Supreme Court found no abuse of discretion. Doc. 2020-118, June 5, 2020.

<https://www.vermontjudiciary.org/sites/default/files/documents/op20-118.pdf>

TRIAL COURT'S SUPPRESSION OF EVIDENCE WAS UNSUPPORTED BY ADEQUATE FINDINGS OF FACT

State v. Huston, 2020 VT 46. CIVIL SUSPENSION, SUPPRESSION, EXIT ORDER: INSUFFICIENT FINDINGS BY TRIAL COURT.

Dismissal of civil license suspension reversed and remanded. The trial court failed to make any findings on evidence which was essential to the disposition of an issue before the court, whether the officer had a reasonable suspicion that the defendant was operating a motor vehicle while under the influence of a drug, justifying an exit order. The only witness to the hearing gave extensive testimony outlining his credentials in detecting impairment, describing the factors which, in his training and experience, are signs of impairment, and explaining which of those signs were present in the defendant's case. He testified that, in his opinion, the defendant was impaired from the use of

marijuana while operating her vehicle. This evidence was largely unchallenged. The trial court failed to make even one finding from this testimony. Instead, the court found only that the defendant "exhibited no signs of impairment." The lack of findings as to the substance of this testimony, the credibility assigned to it, and the weight the court chose to give it hampers this Court's ability to resolve the issue before it. The trial court did not consider the testimony and reject it – there is no indication in the court's findings that it did so. If the court had engaged in this analysis, it had the duty to articulate it. The matter is remanded to the trial court for it to make findings on the evidence that is essential to the disposition of the issue before it and to reconsider its conclusion if necessary. Doc. 2019-361, June 19, 2020.

https://www.vermontjudiciary.org/sites/default/files/documents/op19-361_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.”

STATE’S REBUTTAL EVIDENCE PROPERLY ADMITTED

State v. Jones, three-justice entry order.
REBUTTAL EVIDENCE:
ADMISSIBILITY, CONTINUANCE TO
FIND SUR-REBUTTAL EVIDENCE;
NOTICE OF REBUTTAL EVIDENCE.
ELUDING THE POLICE –
SUFFICIENCY OF THE EVIDENCE.
PROBATION CONDITIONS RELATING
TO NON-ALCOHOL SUBSTANCE
ABUSE – NOT SUPPORTED BY THE
RECORD.

DUI and eluding a police officer affirmed; remanded for trial court to reconsider certain probation conditions. 1) The defendant testified that she did not drink any alcohol on the day of the incident and did not believe that the blood sample tested was her own. To rebut this testimony, the State recalled its chemist to testify that the DataMaster breath test results indicated the presence of a volatile chemical that was likely alcohol. The court did not abuse its discretion in admitting this evidence, as it rebutted the inference created by the defendant’s testimony that her blood did not contain alcohol. (The breath sample was insufficient to get a BAC reading, but sufficient to indicate the presence of a volatile chemical). 2) Nor was there a discovery violation in the State’s failure to give notice of its intent to use this evidence. The State disclosed the DataMaster test results to the defendant prior to trial. Once the defendant testified that she did not drink alcohol and believed the blood sample did

not belong to her, the State notified the defense of its intent to recall the chemist to provide the rebutting testimony. The defendant has failed to show that the timing of the disclosure was unreasonable under the circumstances, or that the outcome of the trial would have been different if she had known of the State’s plan and therefore would have prepared her defense differently. 3) The court did not abuse its discretion in denying the defense motion to continue the trial so that she could obtain an expert. The trial was nearly over, and there was only the possibility of finding an additional witness. Nor has the defendant explained what additional evidence she would have provided if the continuance had been granted. 4) The defendant was not entitled to a judgment of acquittal on the eluding charge on the grounds that she proved by a preponderance of the evidence that she brought her vehicle to a stop in a manner, time, and distance that was reasonable under the circumstances. The defendant admitted that she saw the blue lights yet continued to drive for three or four miles. The jury could fairly conclude from this evidence that she did not stop within a reasonable time or distance after first being signaled to do so. 5) The State conceded that the court committed plain error by imposing probation conditions related to substances other than alcohol, which were not supported by the record. Doc. 2019-200, June 5, 2020.

<https://www.vermontjudiciary.org/sites/default/files/documents/eo19-200.pdf>

PCR PETITION PROPERLY DISMISSED AS SUCCESSIVE

In re Day, three-justice entry order.
POST-CONVICTION RELIEF: ABUSE
OF THE WRIT; PREJUDICE.

Dismissal of second petition for post-conviction relief as an abuse of the writ affirmed. In his second PCR petition, the petitioner argued that his DUI-3 conviction should be vacated because the plea colloquy supporting the predicate conviction in 1991 did not comply with V.R.Cr.P. 11(f), and a record of that colloquy was not preserved as required by Rule 11(g). He did not make this argument in his original or amended petitions in his first PCR, nor in his federal habeas corpus petition. In answer to the State's motion to dismiss, the petitioner argued that his PCR counsel rendered ineffective assistance of counsel. 1) The State met its initial burden of pleading abuse of the writ by setting forth petitioner's writ history, identifying his new claims, and alleging he abused the writ. The burden then shifted to the petitioner to show cause for not raising the new claim earlier, and actual prejudice from the failure to do so. 2) Even putting aside the issue of cause, the petitioner cannot show prejudice,

because he waived any challenge to the DUI 3 conviction by pleading guilty to it. By pleading guilty in 2011, the petitioner waived all challenges to the validity of the predicate offenses used to enhance his sentence, including the 1991 conviction. 3) Alternatively, any ineffective assistance claim would fail, because the DUI-3 conviction was entered as the result of a guilty plea, and the petitioner has not claimed that he would not have entered into the plea agreement if the DUI-3 charge had been successfully challenged. The State had other charges, which it dismissed in connection with the plea agreement, which it could have reinstated in order to obtain the life sentence enhancement which it obtained with the DUI 3 conviction. 4) In light of this ruling, the Court need not consider whether it should adopt the rule of *Martinez v. Ryan*, which holds that ineffective assistance of counsel in a PCR may establish cause for a procedural default of a claim of ineffective assistance of counsel at trial. Doc. 2019-329, June 5, 2020.

<https://www.vermontjudiciary.org/sites/default/files/documents/eo19-329.pdf>

NO INEFFECTIVE ASSISTANCE OF COUNSEL WHERE THEORY DEFENSE ATTORNEY FAILED TO PRESENT WAS BOUND TO FAIL

In re Davis, three-justice entry order.
PETITION FOR POST-CONVICTION
RELIEF: FAILURE TO SHOW
PREJUDICE.

Denial of petition for post-conviction relief affirmed. The petitioner was convicted of financial exploitation of a vulnerable adult. He argues that his attorney was ineffective for failing to argue that the word "willfully" in 13 VSA 1380(a) applies to all the elements of the offense, particularly the element of acting "without or in excess of legal authority." In support of his argument that there is a reasonable probability of a

different outcome without the alleged error, the petitioner claimed that the trial court found, based on the evidence at trial, that the petitioner believed he was acting lawfully when he used his mother's funds for himself without paying her rent. But that is not accurate. The trial court only said that the petitioner "expressed" that he thought he had that right. The jury was not compelled to believe the petitioner on this point, and the evidence at the trial showed that he never professed this belief during the investigation. The petitioner failed to show a reasonable probability of a different outcome. Such a defense would require the

jury to believe that the petitioner, because he possessed a power of attorney, believed he was allowed to use his mother's money for his own nonessential expenses, including a BMW, golf clubs, and guns, while not paying her rent, nearly leading to her eviction. In addition, if the petitioner had

pursued this argument, the court might have included an instruction on his fiduciary duty, which could have done more harm than good. Doc. 2019-307, June 12, 2020.
<https://www.vermontjudiciary.org/sites/default/files/documents/eo19-307.pdf>