Vermont Department of State's Attorneys

Vermont Criminal Law Month

July - August 2020

Vermont Supreme Court Slip Opinions: Full Court Rulings

Includes three-justice bail appeals

AUTHENTICATING SOCIAL MEDIA DOESN'T REQUIRE HIGHER STANDARD THAN USUAL

State v. Allcock, 2020 VT 60. Full court published opinion. AUTHENTICATION: SOCIAL MEDIA; SUFFICIENCY. AMENDMENT OF INFORMATION: PREJUDICE.

Simple assault on a police officer and impeding a police officer affirmed; aggravated assault on a police officer reversed. 1) The Court declines an invitation to adopt a stricter authentication standard for social media postings than for other evidence. The standard remains the same – whether there is sufficient evidence to support a finding that the matter in question is what its proponent claims. VRE 901. 2) However, in this case, even that standard was not met as to messages alleged by the State to have been sent by the defendant on Facebook. The State relied upon five facts: the messages were sent from a Facebook page associated with someone with the defendant's name; the Facebook account is registered to someone with the defendant's name; the purported recipient contacted the police; the police reviewed the account and concluded it belonged to the defendant; and the messages contained information about the case. It is relatively common for someone to set up a social media account purporting to belong to someone else; the recipient of the messages did not testify about his basis for believing that the messages did, in fact, come from the defendant, and there is not even any record evidence that he did so believe; and there was no testimony concerning why the police concluded that the account belonged to the defendant. The record is mixed as to whether the messages themselves showed that the author was intimately familiar with the events at issue. There was no evidence about whether the facts referenced in the messages were at that time in the public record or not. The State could have authenticated the records by calling the recipient and asking him how he knew the messages were from the defendant; or by showing that the Facebook page had distinct information or personal photos not in the public domain; or could have connected to the defendant the IP address associated with the messages; or presented evidence that the messages contained information about the events that were not yet in the public domain. 3) The jury's difficulty with the question of intent makes it clear that the error was not

harmless, as the messages that were admitted into evidence include an inculpatory statement concerning the defendant burning the officer with a lighter, the act on which the aggravated assault was based. Therefore the aggravated assault conviction is reversed. 4) The court did not err in allowing the State to alter the impeding charge after the evidence was closed to base the charge on slapping the officer as an alternative to, as in the charging documents, scratching or punching the officer. This amendment to conform to the evidence did not prejudice the defendant. The change was negligible and the defendant had sufficient notice of what the State alleged and had an opportunity to cross-examine the officer regarding the alleged slapping. Reiber with Eaton dissenting: would find that the trial court did not abuse its discretion in admitting the Facebook messages, which were sufficiently authenticated. The State made a prima facie case that the messages were the defendant's; that was all it was required to do. Doc. 2019-015, July 10, 2020. https://www.vermontjudiciary.org/sites/default/files/documents/op19-015.pdf

PROCEDURE FOR CHALLENGING PRIOR CONVICTIONS USED TO ENHANCE THROUGH A CONDITIONAL PLEA

In re Benoit, 2020 VT 58.
CHALLENGES TO PRIOR CONVICTIONS USED TO ENHANCE LATER CHARGE: PROCEDURE FOR CONDITIONAL PLEA.

Full court published opinion. Denial of summary judgment in post-conviction relief proceeding affirmed. The petitioner pled guilty to DUI-3 pursuant to a plea agreement. At that time he did not raise any challenges to the prior convictions. The petitioner then filed two PCR petitions, challenging his two earlier convictions, claiming that one was compromised by ineffective assistance of counsel, and that the other was based upon a plea colloquy that did not comply with Rule 11. The PCR court denied the State's motion for summary judgment, but permitted an interlocutory appeal on the question: Does a defendant who pleads guilty to a DUI-3 waive the right to raise a PCR challenge to the predicate DUIs for purposes of striking the enhanced sentence based upon those predicate convictions? In one line of cases, this Court has held that defendants must challenge predicate convictions through PCR petitioners rather than at sentencing for the enhanced charge. In another line of cases, the Court held that defendants who plead guilty to a charge predicated on a prior conviction waive any nonjurisdictional challenges, including challenges to the validity of the prior conviction. Recently, in State v. Gay, the Court held that the second line of cases controls in cases where defendants plead guilty to an enhanced charge. But that case left unresolved whether a defendant who is prepared to plead guilty has any means to challenge a prior, enhancing conviction without contesting the merits of the enhanced charge. Such defendants are forced to choose between going to trial on the current charge in order to contest the prior conviction, or pleading guilty to an enhanced charge and foregoing any challenges to an underlying conviction. 1) This anomaly is resolved as follows: defendants can specifically preserve post-conviction challenges to prior enhancing convictions by entering something akin to a conditional plea to the enhanced charge. However, a defendant may not accept the benefit of a plea bargain, expressly waive the right to collaterally attack a predicate conviction, then attempt to make a collateral attack anyway. This would defeat the purpose and integrity of the plea agreement and a defendant's waiver. This must be done with the State's agreement and the court's approval. It is done by stating on the

record at the change-of-plea proceeding an intent to challenge one or more of the convictions through a PCR petition, specifically identifying the convictions they intend to challenge and stating the bases for the challenges. Alternatively, the State and the defendant can take into account a potentially meritorious challenge to a prior conviction when crafting a plea agreement; in those cases, in which a defendant pleads guilty without preserving challenges to predicate convictions, those challenges are waived. 2) In this case, the petitioner did not provide such notice, as he did not anticipate this ruling. However, defense counsel here had identified the potential challenges to his prior convictions in a letter to the prosecutor, and that he was prevented from formally challenging his predicate convictions during the pendency of the DUI-3 charge. It may be that the petitioner here pled guilty pursuant to advice from counsel that he would be able to pursue his PCR claims after sentencing. The matter is therefore remanded to determine if the plea was entered in reliance on a material misunderstanding resulting from misinformation provided by counsel. Doc. 2019-072, July 10, 2020. https://www.vermontjudiciary.org/sites/default/files/documents/op19-072.pdf

COURT HAS DISCRETION TO RELEASE UNDER SECTION 7553a EVEN WHERE ALL FACTORS ARE MET

State v. White, 2020 VT 62, three-justice published bail appeal. BAIL: 7553A HOLDS: DISCRETION TO RELEASE.

The defendant is being held without bail pursuant to 13 VSA 7553a, which is subject to a 60 day hold limit. He moved for release on conditions in light of his imminent release, and his father's burial service five days before the 60 day period ends. The trial court held that it did not have discretion to consider the motion under State v. Lohr, which stated that if the factors under 7553a are found to be present, "there is a manifest need for incarceration" and an analysis under 7554 is unnecessary. In other words, the trial court held, once the State meets its burden, the Court doesn't have discretion about whether or not to release the defendant. 1) Normally a bail appeal of this sort would first be heard de novo by a single Justice of the Supreme Court, which can then be reviewed by a panel of three Supreme Court Justices. In this case, the single justice review can be skipped because this case involves a purely legal question. The parties offered no new evidence and stipulated to the facts contained in the record, and the trial court denied the motion to modify or terminate the order on purely legal grounds, without taking evidence or exercising discretion. 2) A trial court does have discretion to review bail and set conditions of release prior to the end of the 7553 sixty-day period. Lohr only held that when a trial court concludes under 7553a that a defendant poses a substantial threat of physical violence that no conditions will reasonably prevent, it does not need to engage in an *additional* risk of flight analysis under 7554. But Lohr did not hold that a trial court is limited to consideration of only those factors, or that consideration of other factors would necessarily exceed the trial court's discretion. Given the findings of risk of harm required under 7553a, a court's discretion to nonetheless release a defendant on bail or conditions may be narrow, but under the constitutional and statutory framework it is not nonexistent. The defendant has no right to such a review without presenting an adequate basis for review, and there are limits to the bases on which a court can conduct such a review. In this case, the Court cannot conclude as a matter of law that the defendant presented an inadequate basis on which a court could review bail and conditions of release. He wishes to be released in time for his father's

burial service on July 13, a Monday, which is an extremely important event. More importantly, there is no dispute that defendant will be released on conditions by July 18, at the end of the same week. The State has acknowledged that defendant does not present a risk of flight warranting cash bail, and defendant and the State have agreed to conditions of release. The matter is remanded to the trial court to exercise its discretion. Doc. 2020-179, July 17, 2020. https://www.vermontjudiciary.org/sites/default/files/documents/eo20-179.pdf

SEX OFFENDER REPORTING REQUIREMENT APPLIES TO PRISONERS ON FURLOUGH

State v. Gauthier, 2020 VT 66. SEX OFFENDER REPORTING REQUIREMENT WHILE ON FURLOUGH.

Full court opinion. Violation of Sex Offender Registration Act affirmed. The defendant argued that furlough is a form of incarceration, and therefore that he fell under the exception to the reporting requirement for "periods of incarceration." The ordinary definition of incarceration is confinement in a prison. The statutory scheme also supports this understanding of the term. Doc. 2019-233, July 24, 2020. https://www.vermontjudiciary.org/sites/default/files/documents/op19-233_0.pdf

THREATENING BEHAVIOR CAN BE WORDS ALONE IN CONTEXT OF PROBATION CONDITIONS

State v. Harwood, 2020 VT 65. CONDITION OF PROBATION: THREATENING BEHAVIOR: WORDS ONLY.

Violation of condition of probation affirmed. The trial court found that the defendant violated a condition of probation that he not engage in threatening behavior when he verbally threatened a guard in the correctional facility. He argued that pursuant to the decision in Schenk, the State was required to prove that the threatening behavior involved physical force or physical conduct which is immediately likely to produce the use of such force. 1) The Schenk case concerning only the definition of threatening behavior in the context of the disorderly-conduct statute based on specific considerations that are inapplicable to the probation context. First, Schenk relied on First Amendment concerns, which are not present in the probation context. Second, the disorderly conduct statute is intended to protect the public from breaches of the public order, not so much about protecting individuals from threats. 2) In the probation context, verbal statements constitute threatening behavior when the statements are intended to put another in fear of harm or to convey a message of actual intent to harm a third party. 3) The defendant's statements met this definition – he yelled that he would stab somebody if his release date was extended, after the officer warned him that if he continued his behavior that could happen. He told the officer that he would have his gang go to the officer's house and "get it done just like they do in New York," and that the officer could be found easily because correctional officers are dumb and put their names on reports. 4) The defendant had fair notice that verbal threats could violate this condition of probation. The fact that common terms may have multiple definitions does not mean that a defendant did not receive fair notice. Considering the entire context of the

defendant's underlying guilty plea, the other probation conditions, and the warnings provided by the employees at the correctional facility, the defendant received fair notice that verbal statements could constitute threatening behavior. He was originally charged with disturbing the peace by sending threatening messages, which informed him that threatening behavior does not necessarily accompanying conduct, and the fact that these charges were later dismissed pursuant to the plea agreement "is of no moment." The nature of the other conditions of probation also put him on notice – no reasonable defendant could have thought that the trial court would require him to attend mental-health and violence counseling and then at the same time permit him to make threats of violence so long as there was no physical conduct. Finally, whatever uncertainty he may have had was resolved by the warnings he received directly before he threatened the officer. Warnings from a corrections officer may put a defendant on notice of the conduct that can cause a probation violation. And his responses indicated that he understood that his behavior could affect his release date. Doc. 2019-034, July 24, 2020. https://www.vermontjudiciary.org/sites/default/files/documents/op19-034_0.pdf

DECRIMINALIZATION OF ESCAPE FROM FURLOUGH DOES NOT APPLY RETROACTIVELY

State v. Hinton, 2020 VT 68. ESCAPE FROM FURLOUGH: RETROACTIVITY OF DECRIMINALIZATION. SENTENCING: ABUSE OF DISCRETION.

Escape from furlough affirmed. 1) While the defendant's appeal was pending the Legislature decriminalized the conduct giving rise to the conviction. He argued that this change in the law should be applied retroactively to his conviction. The general rule is that statutory amendments or repeals only apply prospectively. 1 V.S.A. 214. The only exception is where the penalty or punishment for any offense is reduced, in which case the new penalty should be applied unless imposed prior to the date of the amendment. The decision here assumes without deciding that this exception applies here. The defendant was sentenced before the statute was amended. The defendant argues that a sentence is not "imposed" until resolution of the appeal. The Court rejects this proposed meaning as inconsistent with the plain language of the statute. 2) The trial court did not abuse its discretion when it imposed a consecutive sentence for this charge. Doc. 2019-097, July 31, 2020. https://www.vermontjudiciary.org/sites/default/files/documents/op19-097.pdf

REPEATED PHONE CALLS ALONE DID NOT CONSTITUTE STALKING

Hinkson v. Stevens, 2020 Vt. 69. Full court published opinion. STALKING: DEFINITION; THREATS OR MONITORING.

A civil case, but discusses the definition of stalking as used in both the civil and the criminal statutes. As a general matter the essential components of "stalking" are the same under the criminal and civil statutes, except for the definition of emotional distress, which is not at issue in this appeal. 1) In order to be acts constituting part of a course of conduct, the defendant's repeated phone calls must have been a form of following, monitoring, surveilling, threatening, or making threats about plaintiff, or interfering with plaintiff's

property. Monitoring involves tracking or collecting some form of information about the person being monitored or their activities. Here, the court made no findings that the defendant's phone calls allowed him to track the plaintiff's whereabouts. Although this might be done by calling a landline to see if someone is home, there is no explanation as to the calls here could have been monitoring. Nor could the calls be considered to be threats. The plaintiff testified that the phone calls made her feel afraid, but she did not testify that she understood the defendant to be communicating a threat against her, or what the implied threat would be. Although there may be contexts in which repeated masked calls could constitute threats, here the plaintiff failed to show that these masked calls were threats. 2) The defendant's sending several shipments of books concerning rape was not threatening conduct for purposes of the statute. The statute is limited to true threats because the civil statute excludes constitutionally protected activity from the definition of "course of conduct." Further, it must be an expression of an intent to inflict harm, particularly physical harm, on another person. The trial court did not find that the shipments were meant to communicate an intent to physically harm the plaintiff, and these facts could not support such a finding. The shipments could be construed as threatening social retribution against the plaintiff, but such threats cannot constitute predicate acts establishing a course of conduct under the statute. 3) Finally, the three emails sent by the defendant cannot be construed to threaten physical harm. They may be construed to threaten social retribution, but not physical harm. 4) Finally, the defendant's alleged sitting in a coffee shop and staring at the plaintiff cannot support the order because it was only a single incident, and therefore not part of a course of conduct. The court notes that the decision does not establish a rule that repeated phone calls, book deliveries to a person's home, or email communications could never be a part of a course of conduct. The court also agrees that a fixation on someone could be shown to imply more serious threats of harm. However in this case the evidence was insufficient to show that the defendant monitored or threatened her on more than one occasion. The civil stalking order is therefore reversed. C.J. Reiber and J. Howard dissent. Doc. 2019-049, August 7, 2020.
https://www.vermontjudiciary.org/sites/default/files/documents/op19-049_0.pdf

BEST PRACTICES JURY INSTRUCTION FOR FLIGHT EVIDENCE SPELLED OUT BY COURT

State v. Welch, 2020 VT 74. Full court published decision. FLIGHT EVIDENCE: PLAIN ERROR; BEST PRACTICES.

Lewd and lascivious conduct affirmed. The court did not commit plain error when it instructed the jury that it could give evidence of flight such weight as they think it deserves. The court instructed the jury that flight evidence does not raise any presumption of guilt, has limited probative value, and is consistent with innocent behavior. Omitting that flight evidence alone is insufficient to support a guilty verdict falls within the trial court's sound discretion in choosing the degree of elaboration when instructing lay persons on the law. However, more specificity is needed in this language in the future, as without more nuance, this language could cause some or all jurors to assign flight evidence undue weight and return a guilty verdict on that basis alone. Best practice is to instruct the jury that evidence of flight does not raise a presumption of guilt and has very limited probative value because flight is also

consistent with innocent behavior, such as fear, panic, unwillingness to confront the police, and reluctance to appear as a witness. The court should then instruct jurors that they should weigh flight evidence along with all other evidence in the case and assign the flight evidence and the other evidence the relative weights they think appropriate, but that flight evidence is not sufficient by itself to return a guilty verdict. This is only a best-practice example and trial courts retain discretion in instructing jurors using language lay persons in our communities will best understand. Doc. 2019-255, August 14, 2020. https://www.vermontjudiciary.org/sites/default/files/documents/op19-255.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."

PETITIONER DID NOT SHOW INEFFECTIVE ASSISTANCE OF PCR COUNSEL

In re Fellows, three-justice entry order. POST-CONVICTION RELIEF: SUCCESSIVE PETITIONS; INEFFECTIVE ASSISTANCE OF PCR COUNSEL.

Dismissal of second petition for post-conviction relief affirmed. 1) The petitioner specifically asserted in response to the court's inquiry that the eleven claims he had identified, ten against appellate counsel and one against trial counsel, were the ones he wished to pursue. The trial court therefore properly limited it consideration to these claims, and not considering claims against PCR counsel in the first PCR proceeding. 2) The petitioner had failed to include any of these claims in his first PCR but claimed that he had cause for failing to do so, because his first PCR attorney was ineffective. While it is true that the US Supreme Court has recognized that ineffective assistance of PCR counsel in arguing ineffective assistance of trial counsel during a petitioner's initial state PCR proceeding can constitute cause, under this rule the petitioner must show that the first PCR counsel was ineffective under the Strickland standard, and that the underling ineffective assistance of trial counsel claim is a substantial one, that is, that it has some merit. The Court declined to extend this rule to claims of ineffective assistance of appellate counsel, since this rule is principally concerned about trial errors – a criminal trial enjoys pride of place in our criminal justice system in a way that an appeal from that trial does not. 3) Even if this Court were to adopt this standard, the petitioner failed to meet his burden to show cause. He raised very general allegations of ineffectiveness against PCR counsel that are refuted by the record. Therefore, because the petitioner failed to show cause to overcome the State's assertion that he has abused the writ, the Court does not examine the merits of his claims against appellate counsel. Doc. 2020-051. https://www.vermontjudiciary.org/sites/default/files/documents/eo20-051.pdf

DEFENDANT DIDN'T SHOW THAT JUROR WAS BIASED AS A RESULT OF NEWSPAPER ARTICLE

State v. Peters, three-justice entry order. JUROR: EXPOSURE TO NEWSPAPER ARTICLE. SENTENCING ERROR: RESENTENCING ON SOME BUT NOT ALL COUNTS.

Aggravated sexual assault, lewd and lascivious conduct, lewd or lascivious conduct with a child, and voyeurism, affirmed. 1) The defendant failed to show bias or prejudice from exposure to a newspaper article about the case, where he stated that he did not recall the substance of the article and that he only glanced over it. Nothing in the record indicated that the jury had a fixed bias or harbored preconceived notions. The juror said that it would not affect his ability to impartially judge the case, and that he understood the defendant was innocent until proven guilty. There was no abuse of discretion in the trial court's failure to strike the juror. 2) The sentences for lewd and lascivious conduct and lewd or lascivious conduct with a child exceeded the sentences allowed by statute. Because the sentences were not interdependent with the other sentences, the matter is remanded for resentencing on these counts only. Doc. 2019-362, July 17, 2020. https://www.vermontjudiciary.org/sites/default/files/documents/eo19-362.pdf

POST-TRIAL CLARIFICATION OF 807 RULING TO CONFORM TO BERGQUIST DECISION AFFIRMED

State v. McLauchlan, three-justice entry order. VRE 807: CLARIFICATION OF RULING AFTER BERGQUIST DECISION.

Aggravated sexual assault and aggravated sexual assault of a child affirmed. The victim in this case was permitted to testify outside the presence of the defendant pursuant to V.R.E. 807. After conviction but before sentencing this Court issued its decision in State v. Bergquist, finding that VRE 807 did not on its face comply with the constitutional requirement that the child's inability to testify be a result of the defendant's presence. The State asked the trial court to clarify its earlier ruling in light of Bergquist, which the court did, issuing a second decision clarifying that a preponderance of the evidence showed that the child would have been traumatized by the defendant's presence and the trauma would have impaired her ability to communicate. On appeal, the defendant argued that the evidence and the findings did not support the trial court's conclusion. But the child's therapist testified that the child would be traumatized by testifying in the defendant's presence, and she explained the basis of her opinion. The trial court also relied upon its review of the child's forensic interviews, which showed her to be upset and afraid of the defendant. There was no error in the trial court's ruling. Doc. 2019-325, July 17, 2020. https://www.vermontjudiciary.org/sites/default/files/documents/eo19-325.pdf

DEFENDANT DID NOT SHOW REASONABLE FEAR SO WAS NOT ENTITLED TO SELF-DEFENSE INSTRUCTION

State v. Wedge, three-justice entry order. SELF-DEFENSE INSTRUCTION:

DEFENDANT NOT ENTITLED.

Aggravated assault with a deadly weapon affirmed. The defendant was not entitled to a self-defense instruction. While the evidence could conceivably have supported a reasonable juror's determination that the defendant subjectively feared for his safety when he came at the complainant with a knife, it could not have supported a determination that any such belief was reasonable under the circumstances. Even assuming that the evidence could support an inference that the defendant had previously heard through a third party that the complainant had threatened to hurt him, there was no evidence that the defendant knew who the complainant was at the time he attacked the complainant with a knife, or that the defendant could reasonably perceive the complainant to pose an imminent threat of bodily harm to the defendant at the time the defendant began charging the complainant with a knife. Doc. 2019-310, July 17, 2020. https://www.vermontjudiciary.org/sites/default/files/documents/eo19-310.pdf

JUROR'S LATE RECOLLECTION OF ACQUAINTANCE WITH WITNESS DID NOT PREJUDICE DEFENDANT

State v. Deberville, three-justice entry order. JUROR PREJUDICE: ACQUAINTANCE WITH WITNESS.

Aggravated domestic assault affirmed. After the jury was selected, a juror contacted the court and indicated that she had since recalled that one of the witnesses, the defendant's mother, had been her hairdresser, but that she had not seen or had contact with the witness in about nine years. On questioning by defense counsel, she said that she may have had conversations with the witness about the defendant, but she did not remember them because it was long ago. Neither party objected to the juror remaining on the jury. Following trial, the defendant indicated that he now recalled that the juror had sent him a letter and a photograph when he was previously incarcerated in 2010-2011. The juror testified that she had a vague recollection of talking about the defendant with his mother but did not recall ever learning that he was incarcerated. She remembered someone had written her from jail ten years earlier but did not remember that the person was the defendant. She had no recollection of sending the defendant her photograph and did not recollect speaking to the defendant on the telephone. The defendant testified that she had sent him two letters, one with a photograph, and that they spoke for a few seconds on the phone in 2012 or 2013. He said he did not recognize her name or appearance until two to four weeks after the trial when his mother told him that she thought the juror was "her." The trial court did not abuse its discretion in denying the defendant's motion for a new trial. The only irregularity that occurred was some possible limited historical contact between the juror and the defendant, although it could not be definitively found that there was ever such contact. Neither one recognized the other by name or appearance during the jury selection and trial, and neither had a memory of any communication. Even assuming some limited contact in the past, this fact had no capacity to affect the jury's verdict because during the juror's participation in the trial the juror did not remember having contact with the defendant or knowing about his prior incarceration. Doc. 2019-411, August 14, 2020. https://www.vermontjudiciary.org/sites/default/files/documents/eo19-411.pdf

HABEAS CORPUS PETITION WAS PREMATURE WHEN PCR WAS STILL PENDING

In re Fellows, unpublished entry order. HABEAS CORPUS: FAILURE TO EXHAUST PCR REMEDY.

Dismissal of petition for habeas corpus affirmed. The petition was prematurely filed because at the time of the court's decision there had been no final decision on the petitioner's second post-conviction relief petition, and thus the court could not evaluate if the PCR remedy was "inadequate or ineffective to test the legality of his detention," a threshold requirement under the statute for filing a habeas petition. Doc. 2020-136, August 14, 2020. https://www.vermontjudiciary.org/sites/default/files/documents/eo20-136.pdf

TRIAL COURT LACKED BASIS FOR IMPOSING NO BAIL ORDER

State v. Booker, 2020 VT 67. Three-justice bail appeal. BAIL: NO BAIL ORDER: LACK OF BASIS FOR ORDER.

Denial of motion for release on conditions reversed. The defendant was ordered held without bail on misdemeanor charges on the grounds that the court did not believe that there were any conditions that could be set that would reasonably assure public safety, given that the defendant had violated conditions of release and incurred additional charges less than twenty-four hours after his release on conditions in another docket. The court also ordered the defendant held without bail based upon there being a criminal contempt proceeding. There was no basis for holding the defendant without bail – he was not being held pursuant to 7553 or 7553a (life imprisonment, or crime of violence) and his right to bail had not been revoked pursuant to Section 7575. Nor can the defendant be held without bail under Section 7559e ("Upon commencement of a prosecution for criminal contempt, the court shall review, in accordance with section 7554 of this title, and may continue or modify conditions of release or terminate release of the person") because no criminal contempt proceeding was commenced against the defendant. In addition, Section 7559e cannot provide a basis for holding a defendant without bail independent from that already contained in Section 7554. Doc. 202-189, July 24, 2020. https://www.vermontjudiciary.org/sites/default/files/documents/op20-189.pdf

Vermont Supreme Court Slip Opinions: Single Justice Bail Appeals

DEFENDANT'S REPEATED VIOLATION OF COURT ORDERS SUPPORTED DENIAL OF MODIFICATION OF CONDITIONS OF RELEASE

State v. Simpson, single justice bail appeal. MOTION TO MODIFY: REPEATED VIOLATIONS.

The defendant failed to preserve his argument that the court erred by requiring him to post a $2500 appearance bond. In

his motion to modify conditions of release, defendant argued that he did not present a risk of flight from prosecution. However, when this motion was heard on June 8, defendant made no mention of the appearance bond, nor did he make any argument supporting the issue he raised in the motion to modify with respect to the appearance bond. Instead, counsel focused exclusively on the other conditions of release contested in the motion. The defendant also failed to preserve the argument that the court erred when it released him into his father's custody. At the arraignment defense counsel stated, "[w]e have no objection to those conditions, Your Honor." Where defendant was originally charged with violating a relief-from-abuse order within hours of its issuance, then was arrested for violating subsequent conditions of release, the court did not abuse its discretion in concluding that it would not amend conditions further. Doc. 202-161, July 7, 2020. https://www.vermontjudiciary.org/sites/default/files/documents/eo20-161.pdf

TRIAL COURT'S DENIAL OF STIPULATED MOTION TO MODIFY CONDITIONS WAS NOT SUPPORTED BY A REASONABLE BASIS

State v. Brown, single justice bail appeal. MOTION TO MODIFY: FAILURE TO HOLD HEARING, SHOW REASONABLE BASIS TO DENY.

Trial court's denial of stipulated motion to modify conditions of release to permit defendant to engage in couples counseling with the complainant reversed and the matter is remanded. The trial court denied the defendant a hearing when the statute unambiguously provides that a person seeking modification is entitled to a hearing. And once the parties stipulated that the counseling would take place remotely with no physical contact, the court failed to explain why the categorical no-contact condition continued to be a necessary part of the "least restrictive combinations" of conditions that will "reasonably ensure protection of the public." If the court was concerned that even remote contact could result in emotional harm to complainant, the court did not state so, nor did it identify a basis for the concern. Finally, the court failed to explain the basis for its finding that defendant has "a long history of violating court orders and of engaging in violence." The court did not discuss when the offenses took place or which among them involved violence. On remand the court must hold a hearing, consider the motion to amend anew, and if the condition is not amended, set forth a reasonable basis therefor. Doc. 2020-177, July 10, 2020. https://www.vermontjudiciary.org/sites/default/files/documents/eo20-177.pdf

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