Vermont Department of State's Attorneys

# Vermont Criminal Law Month

September - October 2020

## Vermont Supreme Court Slip Opinions: Full Court Rulings

*Includes three-justice bail appeals*

### EXTENDED HOLD WITHOUT BAIL DUE TO COVID DID NOT VIOLATE DUE PROCESS

State v. Labrecque, 2020 VT 81. HOLD WITHOUT BAIL: DUE PROCESS VIOLATION FROM EXCESSIVE LENGTH; EFFECT OF COVID.

Three justice bail appeal. Trial court's denial of defendant's motion to reconsider its decision to continue holding him without bail prior to trial affirmed. 1) Defendant's Article 10 argument claiming denial of due process under the Vermont Constitution would not be reached as it was inadequately briefed. 2) Under federal due process, pretrial detention is permissible only where its purpose is regulatory rather than punitive, and even then, when detention becomes excessively prolonged, it may no longer be reasonable in relation to the regulatory goals of a detention. The factors in making this determination are the strength of the evidence, the government's responsibility for the delay, and the length of the detention itself. This is a de novo question on appeal. 2) The strength of the evidence analysis is not directed at the strength of the State's case-in-chief, but calls on courts to analyze the strength of the evidence underlying the specific decision to detain the defendant prior to trial, i.e. the evidence concerning the risk of flight and danger to the safety of others. 3) Here, the court's decision was based on its continued lack of confidence that the defendant would abide by conditions of release intended to mitigate the risk of flight or protect the public, including the complainant. Although the defendant suggested that the evidence that he will not abide by conditions is weak, he bore the burden of overcoming the presumption in favor of detention and he affirmatively declined an evidentiary hearing on this issue. The court therefore looked to the evidence underlying the prior bail decisions during the case. And although each of these prior bail decisions built on the foundation laid in the trial court's initial bail determination, the defendant failed to order a transcript of this initial hearing, and the court's order is not memorialized in writing. Thus he failed to supply a sufficient record of a prior court hearing and order relied upon by the trial court that is necessary to review the decision, and on appeal the court cannot be found to have erred. 4) The delay in the trial caused by the defendant's substitution of counsel is attributable to the defendant. 5) Delay due to COVID is the government's responsibility,

even though there is no malfeasance or neglect, and the delay is due to a public health emergency. Note: the Court declines the defendant's request to take judicial notice that the federal government's response to the pandemic was inadequate and has inhibited Vermont's ability to resume jury trials. However, since the delay was neither intentional nor unwarranted, and the defendant too bears some responsibility, this factor also weighs against finding a due process violation. 6) Although the defendant's detention now exceeds twenty-five months, the trial court weighed the relevant considerations correctly in determining that there was no due process violation. Although the length of delay is not routine, neither is it excessive when viewed in light of the other factors. Doc. 2020-213, September 3, 2020. https://www.vermontjudiciary.org/sites/default/files/documents/eo20-213.pdf

## RESENTENCING REQUIRED ON REMAINING COUNTS WHEN ONE COUNT STRICKEN DUE TO PLEA VIOLATION

State v. Rillo, 2020 VT 82. GUILTY PLEAS: FACTUAL BASIS; RESENTENCING ON REMAINING PLEAS.

Guilty plea to dispensing a regulated drug, death resulting, reversed for lack of factual basis, and matter remanded for resentencing on other charges pled to in same proceeding. 1) The defendant pled guilty to one count of selling or dispensing heroin and fentanyl, death resulting, but stated at the change of plea proceeding that he hadn't known that there was fentanyl in the heroin. The defendant was charged in the conjunctive with knowingly dispensing heroin AND fentanyl, and therefore he had to admit to knowingly dispensing both in order for the plea to be valid. The fact that he knew at the time of the plea doesn't make any difference; the issue is what he knew at the time he committed the offense. 2) The defendant was sentenced at the same time, and as part of the same plea agreement, to three counts of sale of heroin. The defendant is entitled to be resentenced on these counts because the record suggests that these sentences were influenced by the reversed conviction. On remand, the court may impose a sentence of up to, but not exceeding, the aggregate sentence initially imposed. Doc. 2019-047, September 11, 2020. https://www.vermontjudiciary.org/sites/default/files/documents/op19-047.pdf

## CONSENT TO SEXUAL ACT OBTAINED THROUGH FRAUD DOES NOT SUPPORT FINDING OF LACK OF CONSENT

State v. Billington, 2020 VT 78. SEXUAL ASSAULT: CONSENT OBTAINED THROUGH FRAUD.

Trial court's finding of no probable cause for aggravated sexual assault affirmed. The defendant was charged with aggravated sexual assault based upon repeated nonconsensual acts. The complainant did consent to the acts but only after the defendant falsely told her that he was not HIV positive. The State alleged that this lie vitiated the complainant's consent during each of the three encounters. The statute is concerned with consent, not informed consent. Consent is not undermined because a person did not have an adequate understanding of the risks involved in engaging in the sexual act. The statute does not include consent obtained through fraud in the list of instances in which persons are deemed not to have consented. In addition,

inclusion of fraud as vitiating consent would involve void-for-vagueness concerns. Doc. 2019-402, September 18, 2020. https://www.vermontjudiciary.org/sites/default/files/documents/op19-402.pdf

## 180 DAY LIMIT ON DETAINERS REFERS TO START OF TRIAL, NOT SENTENCING

State v. Stephens, 2020 VT 87. Full court published opinion. DETAINERS: 180 DAY DEADLINE APPLIES TO START OF TRIAL. ATTEMPTED SEXUAL ASSAULT: SUFFICIENCY OF EVIDENCE; INSTRUCTION INCLUDING ALL DEFINTIONS OF SEXUAL ACT. FLIGHT EVIDENCE: ADMISSIBILITY AND LACK OF INSTRUCTION. PRIOR SEXUAL CONDUCT WITH COMPLAINANT. NEW TRIAL BASED ON NEWLY DISCOVERED EVIDENCE: IMPEACHMENT EVIDENCE; LACK OF RECORD.

Attempted sexual assault affirmed. 1) The Interstate Agreement on Detainers requires that a defendant be brought to trial within 180 days after he submits a proper request for a final disposition of the information. This does not mean that "final disposition," i.e. sentencing, occur within 180 days, merely that the trial begin within 180 days. 2) The evidence was sufficient to prove that the defendant attempted to put his penis in contact with the complainant's anus, where the complainant testified that the defendant pushed his erect penis up against her ass from behind. Ass is an informal word for buttocks or anus. 3) The trial court did not commit plain error when it instructed the jury as to all the definitions of "sexual act" when only one sexual act, penis – anus contact, was at issue here. To avoid any confusion, the court should have instructed the jury that penis-to-anus contact was the statutorily prohibited act charged by the State, but the instruction does not rise to the level of plain error in light of the evidence, the remainder of the instructions, and the defense attorney's closing argument. 4) The court did not err in excluding evidence that the complainant had, nine months before the charged encounter, engaged in consensual sexual intercourse with the defendant in exchange for crack cocaine, as it was not reasonably contemporaneous with the charged encounter and would have little probative value in determining whether the complainant had consented on this occasion. 5) The court did not err in admitting evidence that the defendant left his apartment in the middle of the night, hours after a police officer had told him that they would be back with an order to obtain a DNA sample. 6) There was no plain error in the court's failure to give a limiting instruction with respect to the flight evidence. 7) The trial court did not abuse its discretion in denying a motion for a new trial based upon a Facebook post by the complainant after her testimony where the post was at most only potential impeachment evidence containing mere inferences that would most likely have no impact on the outcome of any retrial, given the evidence presented by the State at trial. 8) On appeal the defendant sought a new trial on the grounds that the complainant was a victim or witness in a federal criminal proceeding involving prostitution. The Court declined to consider the argument because the defendant had not moved for a new trial in the trial court based on this proffered newly discovered evidence and review by this Court is not feasible because the record is not adequately developed. Doc. 2019-212, October 2, 2020. https://www.vermontjudiciary.org/sites/default/files/documents/op19-212.pdf

## ACT WAS OPEN FOR LEWD AND LASCIVIOUS STATUTE WHERE DONE IN PUBLIC AND ONLY WITNESS WAS COMPLAINANT

In re A.P., full court published opinion. 202 VT 86. LEWD AND LASCIVIOUS CONDUCT: OPENNESS; GROSSNESS; RULE OF LENITY; VAGUENESS.

Adjudication of delinquency based on open and gross lewdness and lascivious behavior affirmed. The defendant touched the complainant's breast in a school hallway. 1) The juvenile argued that for conduct to be open, it must have been witnessed by at least one person, not including the complainant. The act at issue here took place in a public place, a school hallway, during the school day, and was witnessed by the complainant. This was enough to render the act open under the meaning of the statute, even though no one other than the complainant witnessed it. The harm was intensified by the public nature of the act. 2) The court reasonably concluded that the act was "gross," i.e. patently offensive. The fact that it was an unwanted touching over clothing for approximately one second did not render the conduct not patently offensive. 3) The juvenile argued that he should have been charged with misdemeanor lewdness rather than felony lewdness and lascivious behavior under the rule of lenity because the two offenses are indistinguishable. The ordinary meaning of lewdness is sexualized behavior that is shocking or repulsive to the community, while lascivious connotes sexual desire or lust. While there is some overlap between these definitions, they are not identical and are sufficiently definite to give notice of what behavior is proscribed. The statute is not ambiguous and therefore the rule of lenity does not apply. Even if the elements were identical, the State is free to charge the more serious offense. 4) The statute reasonably informed the juvenile that groping a girl's breast without her consent in a school hallway would be a violation. It was not unduly vague with respect to the charged conduct. Robinson, dissenting: Would hold that Section 2601 is void for vagueness. Doc. 2019-245, October 2, 2020.
https://www.vermontjudiciary.org/sites/default/files/documents/op19-246.pdf

## REPEATEDLY DRIVING BY A HOUSE IS NOT SURVEILLANCE FOR PURPOSES OF STALKING LAW

Scheffler v. Harrington, 2020 VT 93. STALKING – SURVEILLANCE.

Full court published opinion. Issuance of relief-from-abuse order reversed. The defendant did not stalk the plaintiff within the meaning of 12 V.S.A. 5131 by driving by her home on multiple occasions and honking his horn, because this did not constitute "surveillance." The trial court found that the defendant's conduct did not constitute threatening, following, or monitoring, but did constitute surveilling because the defendant was "making it clear that he was going by, that he was sort of checking that she would know that he had just been there and had come by." But the plain meaning of surveillance requires, at a minimum, the intent to closely watch or carefully observe a person or place. Based on this plain meaning, the defendant did not surveil the plaintiff. The trial court found that the defendant did not intentionally drive past the plaintiff's home and did not necessarily know whether she was home when he drove by and honked. The trial court focused on the idea that by honking in front of the plaintiff's home, the defendant was sending a message that he had been there

and had come by, but this not does mean that he surveilled her. Whether this could have constituted some other form of stalking is not decided as not raised by this appeal. Doc. 2020-102, October 16, 2020. https://www.vermontjudiciary.org/sites/default/files/documents/op20-102.pdf

## EXPIRATION OF STATUTE OF LIMITATIONS RENDERED CONVICTION VOID BY LAW REGARDLESS OF INVITED ERROR CLAIM

State v. Caron, 2020 VT 96. STATUTE OF LIMITATIONS: INVITED ERROR.

Full court published opinion. Sexual assault reversed as having been filed beyond the statute of limitations. The defendant was convicted of sexual assault following a jury trial, based upon incidents which the State now concedes occurred outside of the applicable statute of limitations. Nor did the defendant execute a knowing waiver of the statute of limitations in writing, per 13 V.S.A. § 4503(b). The State argues that the conviction should be affirmed based on the doctrine of invited error, because the defendant agreed, on the eve of trial, to the State's amendment of the information from aggravated sexual assault to sexual assault. But the decision to amend the charge was made by the State, and the defendant was not involved in raising the concerns that led to the amendment or in selecting the amended charge. The defendant here did not attempt to induce the court to take any action. The defense merely agreed to the amended charge, and even if it was aware of the statute-of-limitations issue, was under no obligation to point it out to the State. Because the statute of limitations had expired, the prosecution was void by operation of law. Doc. 2020-057, October 16, 2020. https://www.vermontjudiciary.org/sites/default/files/documents/op20-057.pdf

## WARNING ABOUT ADVERSE CONSEQUENCES OF REFUSING BREATH TEST DID NOT RENDER CONSENT INVOLUNTARY

State v. Williams and Boissoneault, 2020 VT 91. BREATH TESTS: VALID CONSENT DESPITE WARNINGS OF ADVERSE CONSEQUENCES OF REFUSING.

Denial of motions to suppress evidentiary breath test results affirmed. The breath tests were taken pursuant to a valid exception to the Article 11 search warrant requirement, the consent exception. The defendants argued that the implied-consent form advising them of the potential consequences of test refusal rendered their consent involuntary. But an officer's accurate description of what will occur in the event of a refusal does not necessarily defeat voluntary consent so long as the officer does not overstate his authority. The information conveyed here was entirely consistent with those penalties authorized under the implied-consent statute. The election required by the implied-consent statute does not impair the essential policies underlying the warrant requirement to any appreciable extent. By exercising the privilege to drive on Vermont roads, the defendants voluntarily accepted the imposition of the choice between consenting to the breath test and incurring certain legal consequences for refusing to do so, when they drove under circumstances giving rise to probable cause to believe that they were intoxicated. Furthermore, a magistrate's intervention can do nothing to confine the scope of the requested search and can do little to provide an impartial and objective assessment of the circumstances, since the characterization of the indicia of impairment are largely the same from one drunk driving stop to another. Furthermore, because a

driver cannot be lawfully compelled to produce a breath sample, with or without a warrant, it is difficult to imagine how requiring an officer to obtain one would meaningfully impact a defendant who refuses an officer's reasonable request, except for simply delaying his own detention. Thus, the defendants were presented with an unpalatable, but not unconstitutional, choice. Docs. 2019-022 and 2019-023, October 16, 2020. [https://www.vermontjudiciary.org/sites/default/files/documents/op19-022.pdf](https://www.vermontjudiciary.org/sites/default/files/documents/op19-022.pdf)

## SEXUAL ASSAULT CONVICTIONS VIOLATED DOUBLE JEOPARDY

State v. Nelson, 2020 VT 94. DOUBLE JEOPARDY: BLOCKBURGER TEST APPLIED; REMEDY FOR VIOLATION. ENTRUSTMENT: SUFFICIENCY OF THE EVIDENCE; NOT NECESSARY TO SHOW AUTHORITY TO MAKE LEGAL DECISIONS FOR MINOR. UNANIMITY INSTRUCTION: PLAIN ERROR.

Full court published opinion. Aggravated sexual assault and sexual assault of a victim under 18 entrusted to the defendant's care affirmed; sexual exploitation of a minor stricken as duplicative of the sexual assault charge. 1) The defendant's convictions for repeated aggravated sexual assault and sexual assault of a person under 18 entrusted to his care, do not violate Double Jeopardy because each requires an element that the other does not – The first requires that the sexual acts have been nonconsensual, repeated, and part of a common scheme and plan; and the second requires that the complainant have been under 18 and entrusted to the defendant's care by authority of law. The fact that the predicate sexual act underlying the first charge is the same as the sexual act underlying the second charge does not affect the analysis. No basis appears to overcome the Blockburger presumption that the legislature intended both offenses to be punishable where each contains an element that the other does not. 2) The defendant's convictions for sexual assault/entrustment and sexual exploitation of a minor, do violate the Double Jeopardy Clause. Each of these offenses, as defined by statute, technically requires proof of a fact that the other does not, but as charged in this case, they required proof of the same set of facts and therefore constitute the same offense. The elements found in one but not the other, entrustment under authority of law and an undertaking to provide for the health and welfare of children, rested on the same factual allegation. The Court would not presume that the Legislature intended to allow for multiple convictions in circumstances such as this, where a defendant is both entrusted with the care of a complainant by authority of law and is in a position of power, authority, or supervision over the minor and abuses the position of power and authority. 3) As requested by the State, the sexual exploitation conviction is vacated. 4) The case is not remanded for resentencing in light of the vacation of the third count because the trial court made no mention of the count at the sentencing hearing with respect to increasing the defendant's minimum sentence, and the maximum sentence for the two remaining counts is life imprisonment. Given these circumstances, the Court is not persuaded that the trial court's sentence would change following the vacation of the sexual exploitation count. 5) The State presented sufficient evidence of the entrustment element for the sexual assault conviction. The trial court instructed the jury, over the State's objection, that "entrusted to the care of" means the authority to make legal decisions for the complainant. On appeal, the defendant argues that there is no evidence that the defendant's status as a Primary Caring Adult under New Hampshire law gave him any decision-making authority. The trial court erred in requiring that the

State prove that the defendant had decision-making authority over the complainant in order to prove that she was entrusted to his care by authority of law. Given this interpretation, there was sufficient evidence for the jury to convict the defendant of sexual assault/entrustment. 6) There was no plain error where the trial court failed to instruct the jury that it must be unanimous as to the repeated nonconsensual acts that made up one of the elements of the aggravated sexual assault charge because the defendant cannot show prejudice. Even though the State's evidence indicated differentiated events, specifying the context of each incident and the specific acts the defendant committed, and thus a unanimity instruction was required, there was no prejudice because the defendant's theory of the case was that the complainant's testimony was not credible, and he did not distinguish any of the specific allegations of sexual assault or deny them on an individualized basis. Thus, there is no reasonable probability that some members of the jury found the complainant credible as to certain instances of sexual assault while other members of the jury believed her credible as to different, exclusive instances. The defendant's theory was all or nothing, and the jury was either going to believe the complainant or not; and it is undisputed that the jurors were unanimous as to at least one instance of sexual assault because that was the predicate offense for which a unanimity instruction was given. It is highly unlikely that the jury believed the defendant committed exactly one assault in the bedroom but not more. There is no reasonable possibility that the jury would have returned a different verdict had they received a proper instruction. Robinson, dissenting: Believes that double jeopardy does not permit a conviction for the aggravated sexual assault and the sexual assault/entrustment based on a single act. The Blockburger presumption does apply here, but it is overcome because the Legislature did not intent to treat sexual assault based on lack of consent and sexual assault/entrustment as distinct offenses subject to separate punishments. Doc. 2018-333, Oct. 16, 2020. https://www.vermontjudiciary.org/sites/default/files/documents/op18-333.pdf

## 7553a HOLD WITHOUT BAIL VALID DESPITE NO POSSIBILITY OF JURY TRIAL WITHIN 60 DAYS; 60 DAYS RUNS FROM FIRST HOLD WITHOUT BAIL ORDER, NOT FROM WEIGHT OF THE EVIDENCE HEARING

State v. Downing, 2020 VT 101. NO-BAIL ORDER UNDER 7553a: NO REQUIREMENT THAT TRIAL BE POSSIBLE WITHIN 60 DAYS; TIME THAT 60 DAYS BEGINS TO RUN.

Full court bail appeal. This is an appeal from Justice Robinson's single justice bail ruling summarized below. The defendant does not challenge on this appeal Justice Robinson's finding that the evidence of guilt is great, but does appeal her ruling that Section 7553a should apply only where the trial court has the ability to bring the defendant to trial within sixty days, and that the sixty day period begins at the earliest point that a defendant is ordered to be held without bail. 1) The Court agrees that Section 7553a permits a defendant to be held without bail for sixty days even where there is no possibility that the trial could begin within that sixty-day period. 2) The sixty day period starts when the defendant is first held without bail, regardless of whether the trial court has made all of the findings in Section 7553a. While the trial court has discretion to hold a defendant without bail pending a weight of the evidence hearing. The previous decision on this point by a single specially assigned Justice, State v. Lontine, was decided incorrectly, and that decision is overruled. The statute and the constitutional provision entitles the defendant to trial or a bail

hearing within sixty days "after bail is denied," meaning when the defendant is first held without bail, regardless of whether the weight of the evidence hearing has been held. Doc. 2020-275, November 2, 2020. https://www.vermontjudiciary.org/sites/default/files/documents/op20-275.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."*

## CHILD'S 804a STATEMENTS WERE TRUSTWORTHY DESPITE QUESTIONS ASKED IN THE ALTERNATIVE

State v. Desjardin, three-justice entry order. VRE 804a: NECESSITY THAT CHILD'S TRIAL TESTIMONY BE INSUFFICIENT; FAILURE TO PRESERVE; TRUSTWORTHINESS OF STATEMENT: USE OF QUESTIONS WITH ALTERNATIVES.

Lewd and lascivious conduct with a child affirmed. 1) The defendant argued on appeal that the trial court should not have admitted the child's prior statements pursuant to V.R.E. 804a because the child herself testified at trial easily and fully about all the facts of the abuse, and therefore the prior statements were unnecessary. This argument was not preserved for appeal and the defendant did not show plain error, since the prior statements were merely cumulative of the trial testimony. 2) The trial court did not abuse its discretion in finding the hearsay statements sufficiently trustworthy to be admitted. The statements were made in response to general inquiries and were not the product of coercion or manipulation. None of the mother's suggestions involved criminal wrongdoing by the defendant or anyone else. The timing of the child's symptoms aligned generally with the alleged timing of the incident. The child was extremely upset as might be expected. The fact that the mother was involved in a custody dispute with the defendant's brother at the time was not raised below and in any event goes to the mother's credibility, not the trustworthiness of the child's statements, which was the proper focus of the court. The finding that the child's statements to the detective were trustworthy was also not clearly erroneous. Although the detective offered some options for the child's answers, these were in response to the child's requests for clarification after the detective first used open ended questions. The questions were balanced and did not suggest desired answers. Doc. 2019-414, November 6, 2020. https://www.vermontjudiciary.org/sites/default/files/documents/eo19-414.pdf

## ADVICE TO TESTIFY AT SENTENCING WAS NOT ATTORNEY ERROR

In re Daley, three-justice entry order. POST-CONVICTION RELIEF: STANDARD FOR FINDING PREJUDICE; HARMLESS ERROR; ADVICE TO TESTIFY AT SENTENCING: NOT UNPROFESSIONAL ERROR.

Denial of petition for post-conviction relief affirmed. 1) The defendant's claim that the trial court used an improper high standard of proof in determining whether he was prejudiced by his attorney's errors was not grounds for reversal because he did not challenge the court's conclusion that there had been no error in the first place. Therefore, any error in the PCR court's recitation of the prejudice standard was harmless. 2) The trial court's finding that the petitioner's trial attorney did not commit an unprofessional error by advising the defendant to testify at his sentencing hearing, thus opening himself up to cross-examination, was supported by the evidence. The court found that testifying could possibly humanize the petitioner to the court, and it allowed the attorney to lead the petitioner through positive testimony about his background and efforts at rehabilitation and to admit exhibits supporting these points. Doc. 2019-339, November 6, 2020. https://www.vermontjudiciary.org/sites/default/files/documents/eo19-339.pdf

## COURT NOT REQUIRED TO CONSIDER MOTION TO CONTINUE FILED PRO SE BY REPRESENTED DEFENDANT

State v. Demers, three-justice entry order. TRIAL CONTINUANCE: DUE PROCESS. HYBRID REPRESENTATION: COURT'S DISCRETION.

Driving under the influence affirmed. On the morning of trial the defendant told the court that he wanted a new attorney because his attorney had failed to secure a material witness, who was unavailable that day for the trial. The trial court interpreted this as a pro se motion to continue which it declined because the defendant was represented by an attorney and therefore it was the attorney who had to file motions. The court stated that it would consider whether the defendant had good grounds to replace his attorney and if not, then he could represent himself and the court would then consider the motion to continue. The defendant indicated that he preferred to keep his assigned counsel and the trial proceeded. On appeal he argues that the court should have treated this motion as an implied request for hybrid representation. 1) The court did not abuse its discretion in refusing to consider the motion to continue which had been filed by a represented defendant. 2) A continuance was not required as a matter of due process. The motion was not even close to complying with Rule 50. The motion was untimely and not supported by an affidavit, and the witness was not subpoenaed to attend. Doc. 2019-278, September 4, 2020. https://www.vermontjudiciary.org/sites/default/files/documents/eo19-278.pdf

## NOLO PLEAS DO NOT REQUIRE FACTUAL BASIS

In re Rivers, three-justice entry order. NOLO PLEAS: NO NEED FOR FINDING OF FACTUAL BASIS; VOLUNTARINESS IN LIGHT OF PAUCITY OF STATE'S EVIDENCE.

Summary judgment to the State in post-conviction relief proceeding affirmed. 1) Unlike a guilty plea, a nolo contendere plea does not require the defendant to admit to a factual basis supporting the charge. The court did not abuse its discretion in accepting the plea on the grounds that the evidence presented by the State was so insufficient it rendered the outcome of the case unfair. The court was not required to conduct a factual inquiry before accepting the nolo plea, and the evidence supporting the charge was not so deficient as to render

the plea unfair or to weaken public confidence in the judicial or law enforcement system. Although the State's evidence would be subject to challenge, the issues with the credibility of the witness did not affect the admissibility of his testimony. The State never indicates that it believed that the witness's testimony was false, merely that it would have challenges in proving its case at trial. 2) Nor was the plea rendered involuntary by the lack of credible evidence supporting the charges against the petitioner. The petitioner failed to show any facts demonstrating a lack of voluntariness. Doc. 2020-103, October 9, 2020. https://www.vermontjudiciary.org/sites/default/files/documents/eo20-103.pdf

## EVIDENCE WAS SUFFICIENT THAT GUN WAS OPERABLE

State v. Thomson, three-justice entry order. EXCITED UTTERANCES: SUFFICIENCY OF EVIDENCE OF FOUNDATION; ABSENCE OF EXPLICIT TESTIMONY CONCERNING DECLARANT'S DEMEANOR. SUFFICIENCY OF EVIDENCE OF OPERABLE WEAPON.

Aggravated domestic assault and reckless endangerment affirmed. 1) There was no abuse of discretion in the admission of the complainant's statements to the State Police dispatcher and trooper under the exception for excited utterances. The statements were made about half an hour after the events and the evidence indicated that the complainant was still upset at the time. 2) The defendant's son's hearsay statement, "are you fucking crazy? That gun's loaded" made to the defendant, was also admissible as an excited utterance despite the absence of explicit testimony concerning his demeanor. The circumstances surrounding the statement provided ample support for the court's ruling – the son witnessed the defendant put a gun to the back of the complainant's head while yelling that she wanted to blow his fucking brains out, and was hitting him on the head with the gun. After his utterance, the son lunged towards the complainant and grabbed the gun. It was reasonable to conclude from this evidence that the son's statement was made while under the stress of excitement caused by the event. 3) There was no plain error in the court's failure to grant a judgment of acquittal on the grounds of insufficient evidence that the gun was operable. The evidence on this point was not so tenuous that a conviction would be unconscionable. The evidence was that the defendant kept a gun in a drawer in her bedroom and on the day in question loaded it and threatened to shoot the complainant, who heard a clicking sound; the defendant's son reacted with alarm and cried out that the gun was loaded. The defendant told the police that it was a good thing that her son had come along or she did not know what might have happened. This was sufficient for the jury to conclude that the gun was operable. Doc. 2020-038, October 9, 2020. https://www.vermontjudiciary.org/sites/default/files/documents/eo20-038.pdf

## FINDING OF PRE-IMPACT FEAR BY DECEASED VICTIM WAS SUPPORTED BY THE EVIDENCE AT SENTENCING

State v. James, three-justice entry order. SENTENCING: SUFFICIENCY OF EVIDENCE OF PRE-IMPACT FEAR BY VICTIM; DISPROPORTIONALITY; ADEQUATE EXPLANATION OF BASIS OF SENTENCE.

Denial of motion to reconsider sentence for DUI death resulting affirmed. 1) The trial court did not abuse its discretion in relying

in part in sentencing on the fact that the victim felt pre-impact fear. There was sufficient evidence to support this finding, as the victim's car had slowed to a stop or near-stop just before being struck by the defendant's vehicle, and the accident reconstructionist opined that this showed that the victim had observed a hazard in his lane and slowed or stopped his vehicle in an attempt to avoid a collision. 2) The sentence was not arbitrary, excessive, and disproportionate to the underlying offense in violation of the state and federal constitutions. The defendant chose to drive with a blood alcohol content nearly three times the legal limit; he was traveling at seventy miles per hour in a forty-mile-per-hour zone when he crossed over the center line and struck the victim's vehicle, killing the victim instantly. The court found that the victim's death was random and needless and that he experienced pre-impact fear. Under these circumstances, the court's sentence of four years' imprisonment was not clearly out of all just proportion to the offense. 3) The court adequately explained the basis for its sentence. Docket 2019-313, October 9, 2020.
https://www.vermontjudiciary.org/sites/default/files/documents/eo19-313.pdf

**COURT DID NOT RELY ON PREVIOUSLY UNDISCLOSED EVIDENCE AT SENTENCING**

In re Brooks, three-justice entry order. SENTENCING: JUDGE'S RELIANCE ON INFORMATION NOT DISCLOSED IN ADVANCE.

Summary judgment for the State in a post-conviction relief proceeding affirmed. At sentencing the court stated that it had heard many times that personality disorders are very, very difficult to treat, and are not really amenable to treatment. In the petition the petitioner argues that the court relied upon outside information that was not properly disclosed to the parties in advance; that the source of the information was undisclosed; and that his expert could have testified differently at the sentencing had he known of the court's predisposed notions about personality disorders. The Court ruled that the sentencing court's statements were consistent with the testimony at the hearing, that personality disorders are not easy to treat; that the VTPSA program would not address those disorders; that the petitioner could get other needed treatment on an outpatient basis but that he had been in outpatient treatment any number of times already. The sentencing court did not violate Rule 32 by observing that the evidence was consistent with what the court had heard "many times" before. Doc. 2020-165, October 9, 2020.
https://www.vermontjudiciary.org/sites/default/files/documents/eo20-165.pdf

# Vermont Supreme Court Slip Opinions: Single Justice Bail Appeals

**NO-BAIL ORDERS WHERE TRIAL IS DELAYED DUE TO COVID**

State v. Downing, 2020 VT 97. NO-BAIL ORDER UNDER 7553a: SUFFICIENCY OF THE EVIDENCE; NO REQUIREMENT THAT TRIAL BE POSSIBLE WITHIN 60 DAYS; TIME THAT 60 DAYS BEGINS TO RUN.

Single justice bail appeal. 1) The defendant is being held without bail pursuant to Section 7553a. The weight of the evidence is great, as required for a no-bail order. The

State's evidence that the defendant punched the victim fifteen to twenty times in the head over the course of a minute, and slammed him to the ground, after forcibly entering the house by kicking in the door, and that afterwards he threatened to kill the victim, was sufficient to convince a jury beyond a reasonable doubt that the defendant attempted to cause a substantial impairment of the victim's health or the function of any bodily organ. The defendant's intent to inflict serious bodily injury, as opposed to simply bodily injury, can be inferred from this evidence, given the sheer number of punches and duration of the serial punching, and other evidence. 2) Under 7553a, the no-bail hold time is limited to sixty days. The fact that, as a result of the COVID pandemic, there cannot be a trial within those 60 days, does not mean that the defendant cannot be held without bail during that time period. The possibility, probability, or likelihood of a jury trial within sixty days is not a condition precedent to the constitutionally authorized preventive detention. 3) The sixty-day clock under Section 7553a begins when the trial court issued a hold-without-bail order following the evidentiary hearing required by Section 7553a. Although this means that different defendants may be held different lengths of time, at times exceeding the sixty days by, as here, 29 days, the Court concludes that it is bound by precedent on this point, and no matter how compelling the defendant's argument, his recourse must be through an appeal of this decision to a three-Justice panel. (Note: Justice Robinson was overruled on this point by the full court, as summarized above). Doc. 2020-258, October 19, 2020. https://www.vermontjudiciary.org/sites/default/files/documents/eo20-258.bail_.amend_.pdf

# Proposed Rule Change

Proposed Rule 11(a)(3) is added, consistent with the Court's direction in In re Benoit, 2020 VT 58, __ Vt. __, __ A.3d __. In Benoit, the Court held that with the State's agreement and the Court's approval, defendants may preserve a post-conviction relief (PCR) challenge to a predicate conviction when pleading guilty to an enhanced charge by stating on the record at the change-of-plea hearing 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 basis for the challenges. Under the proposed language, if a defendant pleads guilty or nolo contendere while preserving the PCR claim, with the consent of the state and the approval of the court, the plea will be analogous to a conditional plea under V.R.Cr.P. 11(a)(2). The present amendment prescribes the procedure by which a defendant may preserve such a challenge for post-conviction review.

Comments on this proposed amendment should be sent by **December 7, 2020**, to Hon. Thomas A. Zonay, Chair of the Advisory Committee on Rules of Criminal Procedure, at the following address:

Honorable Thomas A. Zonay, Chair
Advisory Committee on Rules of Criminal Procedure
Thomas.Zonay@vermont.gov

RULE 11. PLEAS (a) Alternatives. (1) In General. A defendant may plead not guilty, guilty or nolo contendere. If a defendant refuses to plead or a defendant corporation fails to appear, the court shall enter a plea of not guilty. (2) Conditional Pleas. With the approval of the court and the consent of the state, a defendant may enter a conditional plea of guilty or nolo contendere, reserving in writing the right, on appeal from the judgment, to review of the adverse determination of any specified pretrial motion. If the defendant prevails on appeal, he shall be allowed to withdraw his plea. (3) Reservation of Post-Conviction Challenges—Pursuant to Plea Agreement. With the approval of the court and the consent of the state, a defendant may preserve a post-conviction challenge to a predicate conviction when entering a plea of guilty or nolo contendere pursuant to a plea agreement with the state, by stating on the record at the change-of-plea hearing an intent to challenge one or more of the convictions through a post-conviction relief petition, specifically identifying the convictions the defendant intends to challenge, and stating the basis for the challenges.

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