



Vermont Department of State's Attorneys

Vermont Criminal Law Month

November - December 2020



Vermont Supreme Court Slip Opinions: Full Court Rulings

Includes three-justice bail appeals

FAILURE TO USE TURN SIGNAL SUPPORTED REASONABLE SUSPICION EVEN ABSENT EVIDENCE CONCERNING USE OF ARM SIGNAL

State v. Brunetta, 2020 VT 109. Full court published opinion. REASONABLE SUSPICION: FAILURE TO USE TURN SIGNAL.

Civil suspension of driver's license affirmed. The trial court correctly denied the defendant's motion to suppress based upon the motor vehicle stop. The police officer had reasonable suspicion to suspect that the defendant had violated the motor vehicle code provision requiring motorists to use a turn signal or a hand signal before turning, where the officer observed the defendant making a turn without using his turn signal, despite the fact that the officer

was unable to see whether the defendant had used a hand signal or not. The defendant's failure to use his turn signal gave the officer reasonable suspicion, even though the defendant might have used a hand signal. Reiber, with Robinson, dissenting: Since the officer had no evidence one way or the other whether the defendant had used a hand signal, he could not have had a reasonable suspicion of a violation. His belief that the defendant did not use a hand signal could only have been a hunch or unparticularized suspicion. Doc. 2020-034, December 18, 2020.

<https://www.vermontjudiciary.org/sites/default/files/documents/op20-034.pdf>.

EVIDENCE OF GUILT IS GREAT DETERMINATION: USE BY DEFENSE OF EVIDENCE GOING TO CREDIBILITY

State v. Blow, 2020 VT 106. DENIAL OF BAIL: EVIDENCE OF GUILT IS GREAT DETERMINATION: MODIFYING EVIDENCE. EXERCISE OF DISCRETION: WEIGHT OF THE EVIDENCE.

Three-justice bail appeal. Trial court's denial of motion to reconsider hold-without-bail order affirmed. The defendant asked the trial court to reconsider its finding that the evidence of guilt was great, in light of statements later made by the complainant which were inconsistent with the

defendant's guilt. 1) In making this determination, the court does not consider modifying evidence. Modifying evidence is testimonial evidence introduced by the defense in contravention to the State's evidence, the credibility or weight of which is ultimately for the factfinder's determination. Modifying evidence may also be "nontestimonial evidence," that which does not derive and depend on the observation, recollection, reliability, or veracity of witnesses, whether in the form of live testimony or a sworn statement, including DNA analysis, photographs, or other physical evidence. Whether nontestimonial evidence constitutes modifying evidence depends on whether its validity is disputed. Where the validity of nontestimonial evidence is not disputed, such as with an indisputably valid DNA result, the evidence is not modifying evidence and may be considered in a Section 7553 analysis. However, where the validity of the evidence is at issue, such as when a photograph may have been

doctored, the evidence is modifying evidence, because it raises a factual question that must be left for the jury at trial. The true inquiry is whether the evidence raises a factual dispute more appropriate for the jury to determine. 2) The evidence here was rightly excluded from the 7553 analysis for two reasons. First, at least some of the evidence is testimonial evidence, without which the other evidence is not conclusive. Second, even if all of the evidence is accepted in the analysis, it only serves to undermine the complainant's credibility, precisely the type of inquiry removed from judicial determination at the bail stage of criminal proceedings. 3) The discretionary decision to refuse bail is also upheld. The weight of the evidence is a valid factor in the analysis, but in light of all of the relevant factors, the court did not abuse its discretion in declining to set bail. Doc. 2020-276, November 25, 2020.

<https://www.vermontjudiciary.org/sites/default/files/documents/eo20-276.pdf>

APPEAL NOT AVAILABLE TO FUGITIVES HELD WITHOUT BAIL

State v. Navarre. Full court entry order. HOLD WITHOUT BAIL APPEAL: NOT AVAILABLE FOR FUGITIVES FROM JUSTICE.

Appeal of hold without bail order denied because the defendant is not being held without bail "prior to trial," per 13 V.S.A. §

7556(e), the bail appeal statute, because he is being held on a fugitive from justice petition based on an outstanding Nevada arrest warrant. His only remedy is to file a petition for a writ of habeas corpus. Doc. 2020-317, December 23, 2020.

<https://www.vermontjudiciary.org/sites/default/files/documents/eo20-317.pdf>

STATE IS ENTITLED TO MORE THAN ONE MENTAL EXAMINATION OF DEFENDANT CLAIMING INSANITY

State v. Gurung, 2020 VT 108. Full court opinion. MENTAL EXAMINATION BY STATE WHERE DEFENSE CLAIMS INSANITY: STATE NOT LIMITED TO ONE EXAMINATION WHERE SECOND EXAMINATION IS REASONABLE; COURT'S REFUSAL TO TAKE

EVIDENCE ON REASONABLENESS OF SUBSEQUENT EXAMINATION: ABUSE OF DISCRETION.

Denial of motion for mental examination of defendant reversed. The defendant was charged with first-degree murder and

attempted second-degree murder by the Chittenden County State's Attorney. A court-appointed examiner concluded that the defendant was competent to stand trial but was insane at the time of the attack. The parties stipulated to competency. The court subsequently approved the State's motion for a mental-health evaluation by another psychiatrist. That psychiatrist also opined that the defendant was insane at the time of the attack. The Chittenden County State's Attorney then filed a notice of dismissal without prejudice. The Office of Attorney General, after an independent review, filed charges of first-degree murder and attempted first-degree murder against the defendant and the court found probable cause. The defendant again provided notice of an insanity defense. The Attorney General filed a motion for mental examination, arguing that its prosecution of the defendant was a new prosecution and that Rule 16.1(a)(1)(I) does not limit the number of reasonable examinations the court may order. The trial court held that Rule 16.1 provides that "the prosecution" is entitled to "a" mental health evaluation, and that this permits only one evaluation by the State. The court found it irrelevant that it was the Attorney General's Office, not the Chittenden County State's Attorney's Office, as both were "the state." 1) The trial court erred as a matter of law in determining that Rule 16.1 limits the state to only one mental-health examination of a defendant in a criminal proceeding. It is a rule of statutory construction, and one set out at 1 VSA 175, that words importing the singular number may extend and be applied to more than one person or thing. There is no evidence of contrary legislative intent, and there are many situations in which a second

evaluation might be reasonable and necessary. The State must show that it is reasonably necessary to have a second examination, for example because the original evaluator has become physically unavailable, or a conflict has subsequently been discovered which would preclude the evaluator from participating in the case. In light of this ruling, the Court need not decide if the State's Attorney and the Attorney General are considered to be separate entities. The Court also criticized the "tone" of the trial court's opinion on this point, noting that It contained personal observations and opinions that were not necessary for the resolution of the issues before it, and the Court stated that judges should act with "calm reflection." 2) The trial court abused its discretion when it declined to allow the State's expert witness to testify at the hearing on the motion as to why it was necessary for the State to conduct a second examination. The matter is therefore remanded for a new hearing on this point. The task before the court at the hearing was to decide whether to allow a reasonable mental examination, yet it precluded the State from presenting evidence on this very issue. The State had given notice prior to the hearing that it intended to call its expert on the reasons it would be reasonable and necessary for her to conduct her own examination, and the State alerted the court to concerns about the methodologies used by the original evaluator. Despite this, the court refused to grant the State's request for another hearing. There was no reasonable basis for this decision and it amounted to an abuse of discretion. Doc. 2020-042, December 31, 2020.
<https://www.vermontjudiciary.org/sites/default/files/documents/op20-042.pdf>

REARGUMENT DENIED DESPITE CRITICISM BY US SUPREME COURT JUSTICES

State v. Bovat, full court entry order.
MOTION TO REARGUE: CRITICISM
OF DECISION BY JUSTICES OF U.S.
SUPREME COURT.

Motion for reargument denied. The defendant's renewed motion for reargument follows the U.S. Supreme Court's order

denying defendant's petition for certiorari, which contained a statement in which three members of the Supreme Court criticized this Court's majority opinion. The U.S. Supreme Court's denial of certiorari, and the accompanying statement, do not provide a sound basis for this Court to consider defendant's renewed motion for reargument, which essentially seeks reargument on the same legal grounds as in

his first motion for reargument. The Court also denied defendant's petition for extraordinary relief, insofar as petitioner has failed to demonstrate that no other adequate remedy was available for him to raise his claims of error. Doc. 2018-362, November 17, 2020.

https://www.vermontjudiciary.org/sites/default/files/documents/eo18-362_0.pdf



Vermont Supreme Court Slip Opinions: Single Justice Appeals

DEFENDANT HELD WITHOUT BAIL ON VOP CHARGE HAS RIGHT TO HAVE COURT CONSIDER 7554 FACTORS RELATING TO DISCRETIONARY RELEASE

State v. Bessette, Single justice bail appeal. HOLD WITHOUT BAIL PENDING VOP HEARING: COURT MUST CONSIDER 7554 FACTORS.

The defendant was ordered to be held without bail pending a hearing on a charge of violation of conditions of probation. A defendant held in custody pending a merits decision on a VOP has no right to bail or release, unless the person is on probation for a nonviolent misdemeanor or nonviolent felony. 28 VSA 301(4). A court may, however, exercise its discretion to release a defendant. The statute, in conjunction with

Rule 32.1(a)(3)(A), expressly requires courts to consider the Section 7554(b) factors when determining conditions of release for probationers. Here, the trial court abused its discretion because it did not consider the Section 7554 factors, but simply stated that the defendant would be held without bail for the time being. The matter is therefore remanded for the trial court to consider those factors and make additional factual findings. Doc. 2020-254 (Carroll, J.), November 12, 2020.

<https://www.vermontjudiciary.org/sites/default/files/documents/eo20-254.pdf>

COURT ERRED IN RELYING ON ABILITY TO PAY IN DETERMINING THAT DEFENDANT WAS NOT A NEEDY PERSON

State v. Sheltra, single justice review of denial of public defender services. QUALIFICATION AS A NEEDY PERSON FOR PUBLIC DEFENDER SERVICES.

The trial court improperly applied the law with respect to determining if the defendant qualified as a needy person. The trial court erroneously first considered the defendant's

ability to pay in determining if he was a needy person. Ability to pay is only one factor in the needy person determination. Other factors include income, property owned, outstanding obligations, and the number and ages of dependents. Only if a court determines that an applicant is needy does it then consider ability to pay for all or part of the defender services. The defendant's annual income was 200% over

the federal poverty guidelines, and therefore he would be required to reimburse the state for the entire cost of defender services, but that did not mean that he was not a needy person. The matter is therefore remanded for a hearing to determine if the defendant is

a needy person. Doc. 2020-303, December 18, 2020.

<https://www.vermontjudiciary.org/sites/default/files/documents/eo20-303.pdf>

Vermont Criminal Law Month is published bi-monthly by the Vermont Department of State's Attorneys. For information contact David Tartter at david.tartter@vermont.gov.