Vermont Department of State's Attorneys

Vermont Criminal Law Month

March – April - May 2021

Vermont Supreme Court Slip Opinions: Full Court Rulings

Includes three-justice bail appeals

COURT CLARIFIES ELEMENTS OF HINDERING THE POLICE – ACT MUST BE ILLEGAL AND HINDERING EFFECT MUST NOT BE INTRINSIC TO THE UNDERLYING OFFENSE

State v. Blanchard, 2021 VT 13. Full court written opinion. CRIMINAL THREATENING: TRUE THREATS; FIRST AMENDMENT; THREATS TO POLICE. HINDERING THE POLICE: JURY INSTRUCTIONS; ACTUAL HINDERING; TRAFFIC OFFENSES AS THE HINDERING ACT; SUFFICIENCY OF THE EVIDENCE.

Convictions for criminal threatening and impeding a public officer affirmed. 1) The defendant argued that his statements to the police during a traffic stop, during which they stated they would be towing his car, that he would defend himself and that he had an AR-15 in his vehicle, did not rise to the level of threatening under the criminal threatening statute, and were constitutionally protected. The defendant's statements amounted to "true threats," subject to prosecution, and they were not protected political hyperbole. Speech need not be unequivocal, unconditional, immediate and specific to qualify as a true threat. Here, a jury could find that the statement, "I have an AR-15 right fucking here. Do we need that?" would cause a reasonable person to fear unlawful violence. The defendant was becoming increasingly agitated; he was standing directly next to his car and was pointing to the back seat of his car; and the statement followed a long, drawn-out interaction lasting over an hour during which the defendant was adamant that the officers had no right to tow his car. He made it clear multiple times that he would defend himself if the officers sought to tow his car. He did not appear to be joking and the officer testified that he believed he was in jeopardy. 2) Nor was this political speech challenging police authority. While the defendant may have expressed political viewpoints at other times during the prolonged roadside encounter, his reference to his A-15 was not part of any debate on public issues. A jury could conclude that the defendant made this statement in order to dissuade officers from towing his car because they feared violence would result otherwise. 3) Nor is communication to the police fundamentally different compared with other cases involving threats. The fact that the target of the communication was a police officer must be considered as part of

the context of the communication, but it does not heighten the standard for what constitutes a threat. 4) The trial court's definition of "hinder" in the jury instructions on the hindering a police officer charge was not plain error. The State need not prove that the defendant actually hindered the officer rather than merely delayed him. Hinder means to slow down or to make more difficult, exactly the definition used by the trial court here. The defendant's actions must actually hinder the officer, but actual hindering can be accomplished by slowing down the officer's progress. The court was not required sua sponte to include an instruction concerning the need for substantial interference as this was not a case of momentary and inconsequential interference. 5) The court's instruction that the defendant had no right to engage in conduct in defiance of a command that interferes with the officer's ability to complete his lawful duty was not plain error since the court also instructed the jury that an essential element of hindering is that the defendant "had no legal right to engage in the acts alleged to have hindered" the officer, and that "a failure to follow an officer's command by itself is not a crime." In addition, the defendant did not argue to the jury that he had a legal right to disregard any of the officers' instructions. He argued instead that his references to his AR-15 was lawful and did not hinder the officers, and that his other conduct did not actually hinder anything because the officers were able to maintain safety on the scene and tow the car. 6) The jury instruction properly required the jury to be unanimous as to the facts that formed the basis for any guilty verdict on the impeding count. 7) The defendant argued that the unlawful act here did not rise to the same level as attempting to disarm an officer, which, he says, this Court required the State to prove in its decision in Berard. The court held that it did not impose that requirement in Berard. There, the court held that the hindering that results from a motor vehicle violation must be something not intrinsic to the motor vehicle violation itself. Where the hindering effect of the violation, as in Berard, is part and parcel of the violation itself, then the Legislature intended to assess the civil penalties rather than criminal liability for impeding. But even a parking violation could conceivably lead to a hindering conviction if a person parked illegally at a crime scene to interfere with the officers' investigation. 8) The evidence was sufficient to show that the defendant committed an unlawful act which hindered the officers when he threatened them with his AR-15. 9) The evidence was also sufficient for the alternative method which with the State charged the defendant for hindering – attempting to enter his car for the purpose of continuing to drive an unregistered, uninsured car that was lacking a headlight. The defendant attempted to enter his car to drive away, something he had no right to do. This hindered the police in the lawful execution of their duties, beyond whatever hindrance is intrinsic to the violation itself. 10) A reasonable jury could find that the defendant's actions hindered the officers' ability to secure the vehicle for purposes of having it towed and maintaining officer safety. It need not have made the officer's performance of his duties impossible, it just must intentionally interfere with the officer's ability to accomplish the task. Doc. 2019-320, March 5, 2021. https://www.vermontjudiciary.org/sites/default/files/documents/op19-320.pdf

DRIVING THE WRONG WAY ON THE INTERSTATE SUFFICIENT TO SHOW WANTON DISREGARD FOR SECOND-DEGREE MURDER

State v. Bourgoin, full court published opinion. 2021 VT 15. WANTON DISREGARD: SUFFICIENCY OF THE EVIDENCE; CONSIDERATION OF SANITY EVIDENCE; ABSENCE OF JURY INSTRUCTION TO DISREGARD

SUCH EVIDENCE ON DIMINISHED CAPACITY. LATE DISCLOSURE OF EXPERT OPINION. LATE DISCLOSURE OF DEFENDANT'S STATEMENT TO WITNESS.

Five counts of second-degree murder, one count of grossly negligent operation, and one count of operating a vehicle without the owner's consent, affirmed. 1) The court did not err in denying the defendant's motion for judgment of acquittal on the grounds that the State failed to prove that at the time of the crashes his mental state satisfied the intent required – wanton disregard of the likelihood that death or great bodily harm would result from his actions. The evidence was sufficient where it showed that the defendant initially entered the interstate going in the proper direction, but then abruptly turned his vehicle around, headed north in the southbound lawns, and, before crashing into the victims' vehicle, passed at speeds approaching ninety miles per hour several drivers who honked horns, flashed lights, or took evasive action. In addition, the evidence does not indicate that the defendant actively attempted to avoid hitting the victims' vehicle where the crash reconstruction indicated that the defendant's vehicle moved from the southbound passing lane into the southbound travel lane and struck the victims' vehicle near the centerline, as the speed of the defendant's vehicle increased. 2) The evidence that the defendant had engaged in delusional thinking around the time of the crash does not require a different result. The State's expert did not concede this point, but testified that the delusional thinking occurred after the crash and as a result of that event. In any event, the jury was not required to accept any expert's testimony on this point, which were undercut by testimony of people who spoke or met with the defendant before and after the accident. Even if the defendant did, as claimed, believe that he was driving in the wrong direction on the highway on a government mission, that does not mean that he wantonly disregarded his subjective awareness of the deadly risk his actions posed to others. 3) Finally, the trial court's allegedly erroneous understanding of the State's expert's opinion on sanity, and its reliance on that opinion in finding that the defendant possessed the necessary mental state, was not reversible error. First, appeals challenging the sufficiency of the evidence are conducted without deference to the trial court. Second, unlike in State v. Webster, cited by the defendant, the expert's testimony on sanity was relevant to the intent issue because the sanity issue overlapped with the intent issue. 4) The trial court did not commit plain error by failing to instruct the jury that it could not consider the State's expert's sanity opinion with respect to his diminished capacity claim, for the same reasons as noted above. 5) The court did not err in permitting the State's expert to testify to his opinion that the defendant's mental condition did not constitute a mental disease or defect for purposes of the insanity statute, despite its allegedly late disclosure. Defense counsel was able to cross-examine him on his opinion and to elicit his recognition that other experts would disagree with his conclusion. Following that, the defendant neither sought a continuance to recall his expert, nor explained why his expert was unavailable to present any needed testimony. Nor did the defense make a specific proffer as to what their expert would say were she given the opportunity to respond to the allegedly new opinion by the State's expert. 6) The trial court did not abuse its discretion in denying a mistrial after a witness testified to a statement made to her by the defendant, not previously disclosed, that undermined his claim of amnesia as to the events in question. The court's curative instruction, telling the jury to disregard the testimony, was sufficient to cure any prejudice. The Court will assume that the jury heeded the instruction, and the prejudicial impact of the statement was not great. Doc. 2019-319, March 13, 2021. https://www.vermontjudiciary.org/sites/default/files/documents/op19-319_1.pdf

DEFENDANT DID NOT PRESERVE CLAIM THAT COVID-RELATED DELAY IN TRIALS SHOULD BE A FACTOR IN HOLD WITHOUT BAIL ORDER

State v. Boyer, three justice published bail appeal. 2021 VT 19. COVID-RELATED TRIAL DELAYS AS FACTOR IN HWOB ORDER: LACK OF PRESERVATION.

The defendant is being held without bail pending trial on an offense punishable by life imprisonment. He argued that the trial court abused its discretion by failing to consider the indefinite suspension of jury trials due to COVID-19 in determining whether continuation of the order was the least-restrictive measure available to ensure his appearance at future court proceedings. 1) The court would not consider, as not preserved for appeal, the defendant's argument that the trial court should have considered the impact of the pandemic with regard to public safety and risk of flight when it weighed the Section 7554(b) factors in determining whether to release the defendant in its discretion. Doc. 2021-043, March 15, 2021. https://www.vermontjudiciary.org/sites/default/files/documents/eo21-043.pdf

EVIDENCE SUPPORTED FINDING THAT DEFENDANT POSSESSED BRASS KNUCKLES "WITH INTENT TO USE"

State v. Hale, 2021 VT 18. Full court published opinion. POSSESSION OF BRASS KNUCKLES: SUFFICIENCY OF THE EVIDENCE OF INTENT TO USE.

The evidence was sufficient to show that the defendant possessed brass knuckles "with the intent to use them," where the defendant was found to be in possession of them while sitting in his vehicle in front of an apartment complex where he did not live, with one and a half ounces of marijuana in his possession, at the time worth a couple hundred dollars, and with the brass knuckles in his front left pocket, which he later told a police officer was for protection. Cohen and Robinson, dissenting. Given the absence of any evidence that the defendant specifically intended to use the brass knuckles against another person other than in some hypothetical and conditional situation at some potential future time, the State did not meet its burden of proving an intent to use. Doc. 2020-028, March 26, 2021. https://www.vermontjudiciary.org/sites/default/files/documents/op20-028.pdf

TRIAL COURT DID NOT ABUSE DISCRETION IN DECLINING TO COINTINUE VOP HEARING UNTIL AFTER RELATED CRIMINAL TRIAL

State v. Sweet, full court unpublished entry order. PERMISSION TO APPEAL OR FOR EXTRAORDINARY RELIEF: DENIED.

1) Permission to appeal trial court's order denying his motion to continue his VOP merits hearing until after trial in the associated criminal dockets is denied. The order that the defendant seeks to appeal does conclusively determine a disputed question that was completely separate from the merits, and the order would be effectively unreviewable from a final judgment. But the trial court did not abuse its discretion in denying permission to appeal. The collateral final order rule creates a limited, discretionary exception to the normal final judgment rule in the small

number of extraordinary cases where the normal appellate route will almost surely work injustice, irrespective of the Court's final decision. But here, it is not certain if the State will be able to prove the merits of the VOP, and it is not certain that probation will be revoked, or that the defendant will be incarcerated. On the other hand, the court found that the defendant posed a threat to public safety and that the case had already suffered from extensive delays. Under these circumstances the court acted within its discretion in denying permission to appeal. 2) The Court also declined to accept the appeal as a petition for extraordinary relief. The defendant has not petitioned the superior court for extraordinary relief or alleged that extraordinary relief is not available in the superior court, and this fact alone would ordinarily be a sufficient basis to deny the petition. But to avoid further delays, the Court considers the petition on the merits. 3) Generally such relief will be granted only where there is a lack of jurisdiction, an act outside of jurisdiction, or the proceedings are erroneous on the face of the record. None of these are present here. Doc. 2021-066, March 30, 2021. https://www.vermontjudiciary.org/sites/default/files/documents/eo21-066.pdf

EVIDENCE OF INTENT TO KILL WAS SUFFICIENT IN HOLD WITHOUT BAIL HEARING

State v. Book, three-justice bail appeal. HOLD WITHOUT BAIL: SUFFICIENCY OF EVIDENCE OF GUILT.

Hold without bail order affirmed pursuant to 13 VSA 7553. 1) The defendant argued on appeal that the evidence of guilt was not great because the State had failed to show that he had acted with the specific intent to kill the police officer towards whom he drove a bus, coming within twelve feet. Although second-degree murder requires an intent to kill, or an intent to do serious bodily injury, or a wanton disregard of the likelihood that one's behavior may naturally cause death or great bodily harm, the defendant argues that an attempted second-degree murder requires proof of an intent to kill. The Court did not reach this issue because even assuming that the defendant is correct, the State produced sufficient evidence showing that he acted with an intent to kill the officer. The defendant drove a shuttle bus rapidly towards the officer, forcing the officer to run out of the way and causing another officer to discharge his weapon to stop the defendant. The defendant came within about twelve feet of the officer. In addition, shortly before this the defendant had told a 911 operator that people were going to be sorry, someone is going to get hurt, and after the shots, that the officers will get run over for less than that. This was substantial, admissible evidence that can fairly and reasonably show the defendant guilty of attempted second-degree murder beyond a reasonable doubt. 2) The information alleged that the defendant drove at the officer after the officer had fallen on the ground and after threatening the officer. The defendant argued on appeal that the State failed to introduce evidence of these facts. But he testified that part of his body slipped and fell, touching the ground. The dash-camera footage also shows him briefly slipping and making contact with the ground. The statement by the defendant, "If they keep fucking around, somebody gonna get hurt," was sufficient evidence that he acted after threatening the officer. 3) There was no abuse of discretion in the decision not to release the defendant on bail. Doc. 2021-073, April 30, 2021. https://www.vermontjudiciary.org/sites/default/files/documents/eo21-073.pdf

EXPUNGEMENT NOT AVAILABLE FOR CONVICTIONS FOR CONDUCT NO LONGER CRIMINAL, IF IT IS STILL PROHIBITED BY LAW

State v. Turner, 2021 VT 30. EXPUNGMENT: ESCAPE FROM FURLOUGH.

Full court published opinion. Denial of petition seeking expungement of two prior escape convictions affirmed. The defendant sought expungement on the grounds that the Legislature had recently decriminalized absconding from furlough (the legislature even more recently reversed that decision). The statute allows for expungement if "the person was convicted of an offense for which the underlying conduct is no longer prohibited by law or designated as a criminal offense." The Court agreed with the trial court that expungement was not available, even though it was no longer a criminal offense, because it was still prohibited by law. The defendant argued that the "or" meant that only one of these conditions needed to be satisfied. The use of a negative adverb phrase immediately before the clauses at issue suggests that the legislature intended "or" here to mean "and." Robinson dissents. Doc. 2020-143, April 30, 2021. https://www.vermontjudiciary.org/sites/default/files/documents/op20-143.pdf

SUSPECT IN CRUISER, TOLD THAT THE OFFICERS BELIEVED HIM TO BE GUILTY, NOT IN CUSTODY FOR MIRANDA PURPOSES. USE OF PSYCHOLOGICAL TECHNIQUES DID NOT RENDER STATEMENT INVOLUNTARY.

State v. Lambert, 2021 VT 23. Full court published opinion. MIRANDA: CUSTODY. VOLUNTARINESS: USE OF PSYCHOLOGICAL TACTICS, LYING. LIMITATION OF CROSS-EXAM; EXCLUSION OF STATEMENTS SHOWING WITNESS'S MOTIVE TO LIE: HARMLESS ERROR.

Two counts of sexual assault against a minor affirmed. 1) The defendant was not in custody for Miranda purposes where the officers came to his workplace and asked to speak to him, and he agreed to speak with them in their car. The officers explicitly told the defendant that he was free to leave; they only suggested the cruiser after asking the defendant if there was a place where they could speak and he replied, "wherever;" the cruiser was in a public space visible to others through the windows and open doors of the car; and the defendant's access to the car door was not obstructed, the doors were unlocked, and at one point the defendant was told he could open the door to get some fresh air. Although the detective made multiple statements indicating that he believed the defendant was guilty, these were not enough to indicate that the defendant was in custody. The statements were mere accusations, and the detectives presented no actual evidence of guilt; and the defendant maintained his innocence throughout the entire interview. Although the detectives falsely told the defendant that a man witnessed him and the victim walking into the woods, this was not the sort of deceptive technique that would lead a reasonable person to believe he was no longer free to leave. Finally, the interview lasted only twenty-one minutes and the defendant left freely afterwards. 2) Nor did the court err in finding that the statements were voluntary. The use of two psychological tactics, lying about a witness and lessening the severity of the offense,

did not overcome the other factors, including the defendant's prior experience with being questioned by the police about a sex crime; the absence of threats of adverse consequences or suggestions of leniency in the event of cooperation; and the fact that the defendant reacted to the lie about the witness by continuing to maintain his innocence. 3) There was no plain error when the trial court asked the defense to wrap up the cross-examination of a witness in fifteen minutes, where the cross-examination had been going on for quite some time and the defense did not point to any specific reason why he needed more than the additional fifteen minutes. 4) There was no plain error where the court excluded testimony concerning possible bias of one of the witnesses. The court excluded questions of the defendant's sister about whether there had been discussion of a deed to the defendant's house, proffered to show that the victim's mother harbored animosity towards the defendant because her attempts to be put on the deed were thwarted. The trial court found the statement relevant only for impeachment and therefore that it could have been asked of mother but was not. But this was an error. The statement was not hearsay and therefore admissible only to impeach. The statement was not being offered to prove the truth of the matter asserted, but for motive. But this was not plain error because the defendant cannot show that he was prejudiced. The initial allegation of sexual assault did not come from the mother, but from a mental health counselor after meeting with the victim. 5) The court also excluded evidence from this witness that the mother had allegedly heard mother say, if the defendant split up with her, she would make his life a living hell. Even assuming that this statement was not hearsay, its exclusion was not plain error for the same reason as the statement about the deed. Doc. 2020-091, April 30, 2021. https://www.vermontjudiciary.org/sites/default/files/documents/op20-091.pdf

DEFENDANT NEED NOT EXPLICITLY STATE "I AM GUILTY" IN RULE 11 PROCEEDING WHERE INTENT TO PLEAD GUILTY IS OBVIOUS FROM THE RECORD.

In re Lewis, 2021 VT 24. Full court published opinion. POST-CONVICTION RELIEF: RULE 11 CHALLENGES TO CONVICTIONS USED TO ENHANCE WAIVED BY PLEA TO ENHANCEMENT. ALTHOUGH PREFERRED, PETITIONER NEED TO EXPRESSLY SAY "GUILTY" IF IT IS OBVIOUS HE IS SO PLEADING. CLAIMS IN ORIGINAL PETITION NOT PRESERVED AFTER PETITION WAS AMENDED.

Summary judgment for the State in post-conviction relief petition affirmed. The petitioner pled guilty to charges of involuntary manslaughter and grossly negligent operation of a vehicle with serious bodily injury resulting. Pursuant to the plea agreement, the trial court sentenced the petitioner as a habitual offender based on four prior felonies dating from 2004 to 2008. 1) The petitioner's challenges to the Rule 11 proceedings in the earlier cases, used to enhance his current convictions, was waived when he pleaded guilty to the habitual-offender enhancement. 2) The petitioner also challenged his 2009 convictions on the grounds that he never verbally entered a plea of "guilty" to those charges in the context of his plea colloquy. While a verbal plea of "guilty" on the record is generally an important component of a knowing and voluntary guilty plea, it is not essential if the circumstances compel the conclusion that the defendant pled guilty to the charge and the court accepted it. The

court must satisfy itself that there is a factual basis for the plea, and that the defendant personally admits to those facts. But the Rule does not prescribe a specific form of colloquy, and it does not explicitly require that a defendant verbally state "I plead guilty" or a similar phrase. Court should, however, elicit an express verbal guilty plea to each count. This is the strongly preferred practice. Where a plea is otherwise knowing, intelligent, and voluntary, the court's failure to elicit an express verbal guilty plea from the defendant does not invalidate the ensuing conviction when there is no doubt that the defendant intended to plead guilty and understood that they were doing just that. That is the case here. During the lengthy plea colloquy with the petitioner, the court repeatedly referenced the fact that the petitioner had chosen to plead guilty. The petitioner confirmed that it was his choice to plead guilty, and expressly and verbally agreed that the prosecutor's description of the events was accurate. With respect to two counts, the court asked how the petitioner would like to plead, and he stated, "guilty." In other counts the court did not expressly ask how the petitioner wanted to plead, but in each case the court read the petitioner the charge, ensuring that he understood its elements, and confirmed the maximum penalty he faced; reviewed the count-specific facts, and had the petitioner orally confirm the accuracy of the essential factual allegations. This leaves no doubt as to the petitioner's intent to plead guilty to all counts in the plea agreement. 3) The trial court did not err in declining to address ineffective -assistance-of counsel claims because it correctly concluded that no such claims were raised by the pleadings before it. The petitioner's original pro se petition did raise this issue, but PCR counsel subsequently filed an amended petition. Although the motion to amend the petition stated that the challenges were based in part on ineffective assistance claims, the amended petition itself referenced only the Rule 11 challenges. Permission was granted for a second amendment, which also failed to mention ineffective assistance of counsel. The petitioner claimed that the amended petition was not intended to supersede the original petition, but the trial court disagreed. The trial court acted well within its discretion in declining to address any ineffective assistance of counsel claims. An amended pleading generally supersedes the pleading it modifies. Nothing in the petitioner's amended petition, nor his second amended petition, indicated an intent to incorporate or maintain the ineffective assistance of counsel claims pled in the first uncounseled petition. Doc. 2019-322, April 30, 2021, https://www.vermontjudiciary.org/sites/default/files/documents/op19-322.pdf

DEFENSE CHALLENGE TO COMPLAINANT'S IDENTIFICATION WAS MODIFYING EVIDENCE, DISREGARDED IN HOLD WITHOUT BAIL DECISION

State v. Lafayette, 2021 VT 38. HOLD WITHOUT BAIL: MODIFYING EVIDENCE.

Three justice bail appeal. Order that defendant be held without bail is affirmed. 1) The evidence submitted by the defendant which called into question the complainant's identification of him as the perpetrator was modifying evidence which the trial court correctly did not consider in making its weight of the evidence determination. 2) The court also did not err when it declined to consider this modifying evidence when considering the likelihood of flight, pursuant to the discretionary decision whether to release the defendant on bail. Doc. 2021-076, May 11, 2021. https://www.vermontjudiciary.org/sites/default/files/documents/eo21-076.pdf

TRESPASSING DOES NOT CONTAIN A "KNOWING" ELEMENT

State v. Richards, 2021 VT 40. Full court published opinion. TRESPASSING: NO KNOWLEDGE ELEMENT. CONDITIONS OF PROBATION: NOT ENGAGE IN CRIMINAL BEHAVIOR.

Conviction for misdemeanor unlawful trespass affirmed. 1) The trial court correctly declined to instruct the jury that the trespassing statue contains a knowledge element. The statute prohibits entering or remaining in a place as to which notice against trespass is given, either by actual communication by the person in lawful possession, or by signs or placards designed and situated as to give reasonable notice. The plain language of the statute does not require knowledge on the part of the defendant. The structure and surrounding provisions of the statute suggest that the Legislature made a deliberate choice to depart from the common law and exclude a knowledge element. Under the statute, if sufficient notice against trespass is given, defendants may not contend that they did not know they lacked authority or consent to be on the land. 2) A probation condition that the defendant not engage in criminal behavior is lawful and not unduly vague. The condition is reasonably necessary to ensure that the defendant will live a law-abiding life and is well within the court's discretion to impose. This is true even given the imposition of another condition that the defendant not be convicted of a crime. Doc. 2020-027, May 28, 2021. https://www.vermontjudiciary.org/sites/default/files/documents/op20-027.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."

DETAILED CORROBORATED TIP JUSTIFIED EXPANSION OF TRAFFIC STOP INTO DRUG INVESTIGATION STOP

State v. Rose, three-justice entry order. MOTOR VEHICLE STOP: NON-FUNCTIONING FOG LIGHT; EXPANSION OF STOP – RELIANCE OF INFORMATION FROM TIPSTER. VALUE OF HEROIN: RELEVANCE, PREJUDICE.

Heroin trafficking affirmed. 1) The motor vehicle stop here was done on the basis of a defective fog light. On appeal the defendant argued that a defective fog light is not a motor-vehicle violation per a 2018 amendment to the Vermont Periodic Inspection Manual and therefore the stop was illegal. But the stop here occurred in 2018 and there was no evidence in the record or on appeal as to when in 2018 the amendment occurred, and thus whether the

amendment occurred before or after the motor vehicle stop. Without this information, the defendant cannot show that the trial court committed plain error in upholding the stop on the basis of the defective fog light. 2) The motor vehicle stop was lawfully expanded into a drug investigation stop, permitting a 34 minute delay before a drug-sniffing dog appears, where the police had received a tip from an informant known to the police, offering a basis for his belief that the driver would be transporting drugs in his car at the predicted time and providing detailed predictive information about the driver's itinerary, location, name, passenger, and vehicle. The officer was able to corroborate the tip, including the description of the vehicle, the driver's name, where the driver was coming from, and the location of the vehicle. 3) The court acted within its discretion in admitting evidence concerning the value of the heroin located. The State was required to prove that the defendant possessed a certain amount of heroin with the intent to sell or dispense it. Although the statute contains a permissive inference that a person who possesses more than that amount of heroin intends to sell it, that does not preclude the State from introducing other evidence showing an intent to distribute. The value of heroin is relevant to whether the defendant intended to sell the drugs. Nor has the defendant shown on appeal that it was plain error for the court to admit the evidence on the grounds that it was unduly prejudicial. Doc. 2020-158, March 5, 2021. https://www.vermontjudiciary.org/sites/default/files/documents/eo20-158.pdf

ATTORNEY'S MOVE TO NEW FIRM DID NOT REQUIRE COURT TO GRANT TRIAL CONTINUANCE

State v. Lenher, three-justice entry order. MOTION TO CONTINUE: ABUSE OF DISCRETION. JURY INSTRUCTION: CIRCUMSTANTIAL EVIDENCE.

Sexual assault affirmed. 1) The trial court did not abuse its discretion in denying the defendant's motion to continue his trial because his attorney was moving to a new firm and his replacement would need time to prepare for trial. The trial court rejected the premise that the attorney's move to a new law firm would prevent him from continuing to represent the defendant. This did not deprive the defendant of counsel of his choice. For one thing, the motion was not a motion for leave to withdraw, or a motion by any other lawyer to enter an appearance. Furthermore, at no time did the defendant's attorneys indicate that the defendant no longer wanted to be represented by his original attorney or that he preferred someone from the original law firm to represent him. Inasmuch as the trial court made it clear that the original attorney would not be granted leave to withdraw, the assumption and rationale underlying the motion for a continuance did not apply. 2) The trial court did not abuse its discretion when it declined the defendant's request that the jury be instructed that circumstantial evidence alone may be sufficient proof of the noncommission of a crime. The charge accurately stated the law and there was no fair ground to say that the jury had been misled. The requested instruction was not required by law and might generate confusion. Doc. 2020-083, March 5, 2021. https://www.vermontjudiciary.org/sites/default/files/documents/eo20-083.pdf

EVIDENCE WAS SUFFICIENT TO SHOW DEFENDANT KNEW SHE WAS NOT LICENSED OR PRIVILEGED TO ENTER PREMISES; NECESSITY DEFENSE WAS NOT ESTABLISHED

State v. Caslani, three-justice entry order. TRESPASS: SUFFICIENCY OF THE EVIDENCE. NECESSITY DEFENSE.

Unlawful trespass affirmed. 1) There was no error, much less plain error, in the trial court's failure to grant sua sponte a judgment of acquittal on the grounds that the State failed to prove that the defendant knew that she was not licensed or privileged to enter the complainant's home, where the complainant testified that she had not given the defendant permission to enter her home, or having agreed that the defendant could take back some rabbits at any time if the defendant felt they were being neglected. The defendant's testimony to the contrary went to the weight of the evidence, not its sufficiency. 2) Nor was there error, or plain error, in the trial court's failure to enter judgment of acquittal on its own motion because the defendant had established the elements of a necessity defense. The basis of this claim is the defendant's testimony that she entered the house after hearing moaning coming from within, which she thought might be coming from the complainant. Whether this evidence was sufficient to establish the elements of a necessity defense turned in part on whether the jury found the defendant to be credible. And furthermore, this version of events was challenging by conflicting evidence. Because the viability of the necessity defense turned on the defendant's credibility, a matter within the province of the jury, the court did not err in failing to enter judgment of acquittal on this basis. Doc. 2020-104, April 9, 2021. https://www.vermontjudiciary.org/sites/default/files/documents/eo20-104.pdf

COURT COULD RELY ON ATTACHMENTS TO HOME DETENTION INVESTIGATION REPORT DESPITE NOT HAVING BEEN INTRODUCED INTO EVIDENCE.

State v. Lesage, 2021 VT 26. BAIL HEARING: RELIANCE ON HEARSAY.

Three justice bail appeal. Denial of motion for home detention affirmed. 1) The defendant argued that the trial court erred in relying upon the attachments to the home detention investigation report because they were not introduced into evidence during the hearing. This objection was not made below. Further, the defendant was on notice that the report would be used in the court's determination. Finally, such hearings need not conform to the rules of evidence. 2) The defendant does have a constitutional right to have the court establish good cause when it relies upon hearsay. Here, there was no good cause for one of the hearsay statements the trial court relied upon. But considering the totality of the court's findings that were predicated on properly considered evidence, the defendant was not prejudiced. It relied upon the serious, violent nature of the charged offense; the fact that afterwards the defendant fled to Indiana; that the supervisor proposed for the defendant planned to return to work part-time; that DOC had not done, and due to the pandemic did not plan to do, a site inspection or in-person visits, to search for prohibited items; and that the defendant posed a risk to third parties and public safety based on the random, violent nature of the crime alleged and the active relief-from-abuse order against her. Doc. 2021-064, April 7, 2021. https://www.vermontjudiciary.org/sites/default/files/documents/op21-064.pdf

EXPERT TESTIMONY WAS REQUIRED TO CLAIM INEFFECTIVE ASSISTANCE OF COUNSEL IN PLEA NEGOTIATION

In re Lampman, three-justice entry order. POST-CONVICTION RELIEF: NECESSITY OF EXPERT TESTIMONY.

Denial of petition for post-conviction relief affirmed. The petitioner was required to present expert testimony in order to support his claim that his attorney's advice and representation fell short in negotiating a plea agreement. Doc. 2020-170, April 9, 2021. https://www.vermontjudiciary.org/sites/default/files/documents/eo20-170_0.pdf

A CHANGE OF MIND DID NOT REQUIRE COURT TO ALLOW WITHDRAWAL OF GUILTY PLEA

State v. Foster, three-justice entry order. MOTION TO WITHDRAW PLEA: FAILURE TO SHOW FAIR AND JUST REASON.

Denial of pre-sentence motion to withdraw guilty plea affirmed. The trial court did not abuse its discretion in denying the motion to withdraw plea based on the fact that the defendant entered his plea within hours of first learning of the plea offer, and then changed his mind a few days later. This does not suffice as a basis to overturn the criminal division's discretionary decision to deny the motion. The plea was entered after the defendant acknowledged he was doing so freely and voluntarily with a full understanding of the ramifications of doing so, and there is no evidence in the record that the defendant was pressured into accepting the plea, that he did not understand the terms or consequences of the plea, or that any other aspect of his state of mind or the circumstances of the plea gave rise to a fair and just reason to withdraw. The defendant failed to present a fair and just reason for withdrawing his plea that could substantially outweigh even minimal prejudice to the State resulting from the canceling of the jury draw. Doc. 2020-190, May 7, 2021. https://www.vermontjudiciary.org/sites/default/files/documents/eo20-190.pdf

PETITIONER FAILED TO SHOW PREJUDICE FROM ALLEGED ERRORS OF APPELLATE COUNSEL

In re Johnson, three justice entry order. PCR: INEFFECTIVE ASSISTANCE OF APPELLATE COUNSEL: INABILITY TO SHOW PREJUDICE.

Denial of post-conviction relief affirmed. On direct appeal the defendant argued that the trial court erred in failing to sever the two counts of lewd and lascivious conduct for which he was convicted. This claim was denied. He then filed a post-conviction relief petition arguing that his appellate attorney had been ineffective in failing to cite to the fact that the prosecutor himself, in opening and closing statements, made statements reflecting a failure to distinguish the two incidents. Although the petitioner presented

expert testimony sufficient to survive summary judgment on the question of attorney error, he cannot show prejudice, that is, a reasonable probability that, but for appellate counsel's errors, this Court would have ruled otherwise. The opening statement issue was a momentary slip of the tongue when the prosecutor used one complaint's name when he meant the other, and he immediately corrected himself. It is hard to imagine how this could have affected the merits of the appeal. The statements in the prosecutor's closing argument are similarly unimpressive. All of these comments were in the transcript included in the record on appeal before the Court when it decided the appeal, and the Court cannot see how appellate defense counsel's highlighting those particular statements in his brief or oral argument would have altered this Court's analysis of the severance issue. Doc. 2020-298, April 9, 2021.
https://www.vermontjudiciary.org/sites/default/files/documents/eo20-298.pdf

COURT DID NOT ERR IN GIVING INSTRUCTION CLARIFYING WHAT THE STATE NEED NOT PROVE

State v. McGinness, three-justice entry order. JURY INSTRUCTIONS: TELLING JURY WHAT STATE NEED NOT PROVE.

Aggravated assault affirmed; conditions of probation stricken. 1) There was no plain error in the jury instruction on aggravated assault in advising the jury that the State need not prove that the complainant was actually placed in fear, or that the defendant actually intended to carry out her threat. The instructions were neither misleading nor confusing; rather, they helpfully clarified the State's burden of proof for the jury. 2) The State stipulated that the imposition of probation conditions relating to alcohol should be stricken. Doc. 2020-216, May 7, 2021.
https://www.vermontjudiciary.org/sites/default/files/documents/eo20-216.pdf

Rule Changes

VERMONT RULE OF CRIMINAL PROCEDURE 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.

Reporter's Notes—2021 Amendment Rule 11(a)(3) is added, consistent with the Court's direction in In re Benoit, 2020 VT 58, __ Vt. __, 237 A.3d 1243. 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 even while 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. 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) 2 ("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. [A] defendant [who] prevails on appeal . . . shall be allowed to withdraw [the] plea."). In reconciliation of two lines of case law addressing preservation of such challenges—established on the one hand in State v. Boskind, 174 Vt. 184, 807 A.2d 358 (2002), and on the other in In re Torres, 2004 VT 66, 177 Vt. 507, 861 A.2d 1055 (mem.), and leading to the decision in In re Gay, 2019 VT 67, __ Vt. __, 220 A.3d 769—the Court stated the following in Benoit, 2020 VT 58, ¶ 18: In contrast to the guilty pleas in Torres and Gay, such pleas will not foreclose a PCR petition challenging the specified predicate convictions. See Gay, 2019 VT 67, ¶ 10 n.5, 220 A.3d 769 (noting waiver rule does not apply to conditional guilty pleas); State v. Key, 312 P.3d 355, 361 (Kan. 2013) (holding that defendant who pleads guilty may preserve challenge to sentencing enhancement "by an objection on the record at sentencing"). A defendant convicted and sentenced pursuant to such a guilty plea may then challenge the validity of a prior offense in a PCR proceeding seeking to vacate the enhanced sentence. In Benoit, the Court requested that the Advisory Committee on the Vermont Rules of Criminal Procedure "propose a rule to standardize the process for documenting the type of PCRconditional plea" recognized in its decision. Benoit, 2020 VT 58, ¶ 20 n.6. The present amendment prescribes the procedure by which a defendant may preserve such challenges for postconviction review. Note that the amendment does not address all preservation scenarios which may be presented in the context of a defendant's plea resulting in conviction. These include a defendant's plea of guilty or nolo contendere without a plea agreement (and thus, the prescribed consent of the state), and those circumstances where a post-conviction challenge does not deal with the validity of a predicate conviction, but rather, issues such as ineffective assistance of counsel. Of course, in the absence of agreement by the state and consent of the court as prescribed by the rule, a defendant retains all rights of trial by jury on the enhanced charge, and appeal from any verdict of guilty therein, standing on the plea of not guilty. Nor does the amendment prescribe the level of specificity of the court's colloquy with a defendant as to the 3 consequences of a plea given under added new paragraph (a)(3), including waiver of the statutory right to a PCR challenge of any predicate offenses that are not specified in the parties' plea agreement. It should be noted that no such specific colloquy has been required under the existing paragraph (a)(2) governing conditional pleas, which has been in effect since 1989. Thus, the content of the court's colloquy with a defendant seeking to enter a plea of guilty or no contest in the manner prescribed by added paragraph (a)(3) is committed to the discretion of the court, consistent with all the other provisions and requirements of Rule 11. 2. That this rule, as amended, is prescribed and promulgated to become effective June 7, 2021. The Reporter's Notes are advisory. 3. That the Chief Justice is authorized t

PROPOSED RULE CHANGE: VERMONT RULE OF CRIMINAL PROCEDURE 7: THE INDICTMENT AND THE INFORMATION

(d) Amendment of Indictment or Information Before Trial. Prior to commencement of trial, the prosecuting officer may amend the indictment or information, and may add additional counts.

Upon motion of the defendant, the court, in its discretion, may strike the amended information or indictment or added counts, if the trial or the cause would be unduly delayed, or substantial rights of the defendant would be prejudiced. If the court allows the amendment or added counts, the defendant must be arraigned on the amendment or added counts without unreasonable delay, and must be given a reasonable period of time to prepare for trial on the amended information or added counts.

(e) Amendment of Indictment or Information During Trial. If no additional or different offense is charged and if substantial rights of the defendant are not prejudiced, the court may permit an indictment or information to be amended at any time after trial has commenced and before verdict or finding for any purpose, including cure of the following defects of form: (1) any misspelling, grammatical, or typographical error; (2) misjoinder of offenses or defendants; (3) misstatement of the time or date of an offense if not an essential element of the offense; (4) inclusion of an unnecessary allegation; (5) failure to negate any excuse, exception, or proviso contained in the definition of the offense; (6) use of alternative or disjunctive allegations.

Reporter's Notes—2021 Amendment Subdivision (d) is added to address amendment of an indictment or information prior to trial, including but not limited to late-stage amendments that may be authorized in the period when a case has been scheduled for final pre-trial conference, jury selection, and trial. In the latter circumstance, concerns may be invoked both as to prevention of prejudice to a defendant and effective administration of justice, in terms of the court's docket management and reasonable progression of long-pending cases to trial. While added subdivision (d) does not prescribe specific criteria for the court's consideration in granting or denying pretrial amendment of an indictment or information, as is the case for amendments which occur during trial, the defendant is nonetheless protected by constitutional safeguards. State v. Beattie, 157 Vt. 162, 170, 596 A.2d 919, 924 (1991) (citing Reporter's Notes, V.R.Cr.P. 7(d) as stating: "The right to amend prior to trial remains subject . . . to the constitutional requirement that the defendant receive fair notice of the charge."). The added subdivision adopts a requirement of arraignment on an amended or added charge "without unreasonable delay." "One of the most fundamental principles of our criminal justice system is that a person charged with a crime must be notified of the charges against him." State v. Cadorette, 2003 VT 13, ¶ 4, 175 Vt. 268, 826 A.2d 101. In this respect, "the central purpose of arraignment is to ensure that the defendant understands the nature of the charges so that he can prepare a defense." Id. ¶ 5 (citing State v. Bruyette, 158 Vt. 21, 35, 604 A.2d 1270, 1277 (1992)). But, the failure to arraign will not result in reversal in the absence of prejudice to the defendant, that is, "that he did not have actual notice of the charges against him or an adequate opportunity to defend himself to justify reversal of the underlying conviction." State v. Ingerson, 2004 VT 36, ¶ 4, 176 Vt. 428, 852 A.2d 567 (citing Cadorette, 2003 VT 13, ¶ 5); see also State v. Woodmansee, 124 Vt. 387, 390, 205 A.2d 407, 409 (1964) ("Liberality of amendment, such as that mentioned in State v. Pelletier, 123 Vt. 271, 273, 185 A.2d 456 (1962), can be exercised only at times or under conditions giving full protection to this constitutional right."). Ultimately, "whether the amendment is sought by the prosecutor during the trial, or prior thereto, the test is the same. The allowance of the amendment must not prejudice the accused's ability to prepare an adequate defense." State v. Bleau, 132 Vt. 101, 104, 315 A.2d 448, 450 (1974) (citations omitted). In assessing the prejudice to a defendant from a late-stage amendment of criminal charges, the standard of the existing Rule 7(d)—whether additional or different offenses are charged affecting substantial rights of the defendant—is informative. Whether the amendment occurs during, or in late stages prior to trial, prejudice may lie not only as a matter of basic inability to reasonably prepare for trial on the amended charges, but in resulting impact upon defense strategy, or in placing a defendant in a position of exercising inconsistent strategies as to charges joined for trial. Cf. State v. Bruyette, 158 Vt. at 35, 604 A.2d at 1277; State v. Holden, 136 Vt. 158, 385 A.2d 1092 (1978). The amendments do not establish a fixed time prior to trial beyond which the prosecution is categorically precluded from amending existing charges, in recognition that certain amendments may not be prejudicial, or may actually benefit a defendant, and that there may as well be reasonable grounds notwithstanding due diligence for the 3 Proposed Amendment to V.R.Cr.P. 7—FOR COMMENT amendment sought by the prosecution, provided that the defendant's fair trial interests are protected. Apart from prejudice to the defendant, the amendment also recognizes the court's discretion, consistent

with the effective administration of justice and the obligation to manage and advance the docket, to deny amendment and strike the proposed amendment or added counts if amendment would result in unreasonable delay, when all competing interests in the specific circumstances are weighed. The present rule amendments are addressed to the propriety of amending an information or indictment at various junctures in a criminal proceeding, and the court's authority and responsibility to grant or deny motions to amend. The rule amendments do not address, and are not intended to contravene, the independent, and constitutionally premised, criteria and calculus where speedy trial rights and double jeopardy protections are invoked. Former subdivision (d) (Amendment of Indictment or Information During Trial) is renumerated as subdivision (e).

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.