Vermont Department of State's Attorneys

Vermont Criminal Law Month

September - October 2021

Vermont Supreme Court Slip Opinions: Full Court Rulings

Includes three-justice bail appeals

DEFENDANT NOT ENTITLED TO ENTRAPMENT INSTRUCTION

In re Hernandez, 2021 VT 65. POST-CONVICTION RELIEF: PREJUDICE. ENTRAPMENT: FACTS ENTITLING DEFENDANT TO INSTRUCTION.

Full court published opinion. Denial of post-conviction relief affirmed. The underlying offense was two counts of selling or distributing heroin. At trial the court declined to give an entrapment instruction because it had not been requested timely. Since the undisputed facts demonstrate that there was insufficient evidence presented at trial to warrant an entrapment instruction, the petitioner cannot show that her attorney's alleged error affected the outcome. An entrapment instruction is warranted where the defendant has established a prima facie case on each element of the defense. The elements are that a person involved with law enforcement induced or encouraged the defendant to engage in the offense by employing methods of persuasion or inducement that create a substantial risk that such an offense will be committed by persons other than those who are ready to commit it. The particular defendant's predisposition is not relevant; the focus is on police conduct and its probable effect on a reasonable person. Here, viewing the evidence in a light most favorable to the petitioner, the evidence does not show that law enforcement used methods of persuasion or inducement so extreme that these actions created a substantial risk that an otherwise honest, law-abiding citizen would be ensnared in wrongdoing. The informant here was friends with the petitioner, several times asked her for drugs, and the petitioner knew the informant sought the drugs to relieve her pain. These are not unusual or extreme circumstances which provide enough evidence to meet the elements of a prima facie case of entrapment. The evidence showed that in the two days leading up to the first drug sale, the informant called the defendant six to eight times each day and left messages, stating that she needed something for the pain and asking the defendant for help. She might have left a message saying, "you gotta help me out. You gotta get me something." Law enforcement was not aware of what the informant told the defendant during the telephone calls or messages. The informant denied that her repeated telephone calls and messages were begging, luring, or pressuring the petitioner because of their relationship. She testified that she and the petitioner were

close friends, and they had a habit of calling each other dozens of times a day to chat and would leave messages if the other person did not answer. The number of calls and the content of the conversations in the days before the drug sales were not unusual for her and the petitioner. Thus, the evidence shows that the informant and the petitioner were friends, the informant attempted to contact the petitioner several times, which was customary in their relationship, and the informant appealed to the petitioner's sympathy. These circumstances do not create a "substantial risk" that the petitioner would commit an offense she was not otherwise inclined to commit. Robinson, with Reiber, dissenting: There was sufficient evidence of entrapment to submit the question to the jury. A jury could have concluded, based upon the confidential informant's close friendship with the petitioner, her appeals to sympathy, and her persistence in calling, that the government's methods created a substantial risk that an offense would be committed by someone who was not otherwise ready to commit it. Doc. 2020-176, September 3, 2021. https://www.vermontjudiciary.org/sites/default/files/documents/op20-176.pdf

RESULTS OF BORDER PATROL WARRANTLESS AUTO SEARCHES AWAY FROM BORDER INADMISSIBLE

State v. Walker-Brazie and Butterfield, 2021 VT 75. US BORDER GUARD SEARCHES OF AUTOS WITHOUT WARRANT DURING ROVING PATROLS: INADMISSIBLE PER ARTICLE 11.

Full court published opinion. Denial of motion to suppress reversed. The defendants were stopped by a roving patrol of the United States Border Patrol about a mile from the Canadian border based upon a reasonable suspicion that the occupants of the vehicle were engaged in illegal activity relating to the border. After stopping the vehicle, the Border Patrol agent smelled a strong odor of marijuana and determined that he had probable cause to search the vehicle. The search uncovered marijuana and hallucinogenic mushrooms. The Border Patrol notified Vermont law enforcement and provided them with the seized evidence, and the occupants were subsequently charged with unlawful possession of these materials. The defense sought to suppress the results of the search on the grounds that the Vermont Constitution requires a search warrant in order to search a vehicle, even when the officers have probable cause. The Border Patrol was not bound by the Vermont Constitution and the warrantless search was legal under federal law assuming the officers had probable cause (which was not an issue on this appeal). Although evidence found during warrantless searches conducted at the border or its functional equivalent are admissible in Vermont courts, searches conducted by federal border officials on roving patrol on interior Vermont roads are subject to Article 11's protections, and the results of an automobile search conducted without a warrant are inadmissible. Carrol, with Eaton, dissenting: This case is squarely governed by precedents holding that when searches are lawfully conducted under federal law by federal border agents exercising their exclusive authority to safeguard the U.S. border, evidence derived from those searches and turned over to Vermont law enforcement officials is admissible in Vermont criminal proceedings and cannot be challenged under Article 11 unless Vermont law enforcement was involved in the search. Doc. 2019-388, September 24, 2021.

PLAIN VIEW EXCEPTION NOT AVAILABLE FOR INVESTIGATIVE ACTIVITIES

State v. Calabrese, 2021 VT 76. ARTICLE 11: STANDING – PARTICIPATORY INTEREST IN EVIDENCE RESULITNG FROM ALLEGED CRIME; PLAIN VIEW DURING WELFARE CHECK – SCOPE OF WELFARE CHECK; UNDUE PREJUDICE: DEFENDANT'S USE OF RACIALLY INFLAMMATORY LANGUAGE.

Full court published opinion. Aggravated assault with a deadly weapon, unlawful possession of a firearm, and violation of conditions of release, reversed and remanded for further proceedings. The trial court erred in concluding that a trooper's search did not violate Article 11. The defendant was charged with having threatened several people with a firearm, cocking it and thus ejecting a cartridge, while he was standing in front of his girlfriend's house. Looking around the property, the officers did not see the cartridge. Several days later the trooper was dispatched to the house for a welfare check. He and the girlfriend's father did not receive an answer to their knock, so they entered the house and looked around, but didn't see anyone. As they were leaving, walking down the driveway, the trooper realized that they were at the location on the driveway where the incident was said to have happened. He looked down, possibly using a flashlight, and saw the cartridge on the edge of the driveway. The defendant's motion to suppress the cartridge as the product of an illegal search was denied. 1) The defendant had standing to argue that this search violated Article 11 given his participatory interest in the cartridge because the defendant's involvement in the underlying criminal conduct of threatening the witnesses with a handgun is what gave rise to the ejected cartridge. The Court also notes, as bearing on standing, that only two days had passed after the alleged crime, and that the officer was still actively investigating the crime. Furthermore, the Court noted that the law enforcement officer was aware of the defendant's alleged criminal conduct at the time of this search, although it is not clear if this is a factor in the standing analysis. 2) With respect to the merits of the challenge to the search, law enforcement officers may pass to and from the front door of a private residence without a warrant in the context of community caretaking activities, absent an indication that members of the public are not invited to approach. Officers need not wear blinders on the way to and from the front porch, and the use of evidence encountered in the course of ingress or egress may be constitutionally permissible under the plain view doctrine. But if the officer exceeds the scope of this limited license by undertaking a search within a constitutionally protected area without a warrant, evidence observed in the context of the officer's exceeding the license does not fall under the plain view exception. Because the trial court here relied on the erroneous notion that observations made from the so-called "semiprivate" areas within the curtilage that serve as a normal access route for visitors are not covered by Article 11, the court did not make findings regarding the trooper's conduct and whether and how it fit within the scope of his limited license to enter the property. The Court could therefore affirm only if the record, viewed in the light most favorable to the defendant, compels the conclusion that the trooper did not engage in investigative activities that exceeded the scope of his limited license to be on the property. These facts could support a conclusion that the officer took actions to affirmatively search for the cartridge that had nothing to do with the purpose of his visit, which was to conduct a welfare check at the home. Affirmatively looking for the incriminating evidence from a spot where

the officer is entitled to be is constitutionally different from stumbling upon it because the scope of the officer's limited license does not encompass searching for the incriminating evidence. Since the court did not make the necessary factual findings to inform the proper legal analysis because it applied the wrong constitutional standard, the matter is remanded for the trial court to make findings of fact concerning the trooper's conduct surrounding the location of the incriminating evidence. 3) The defendant also challenged on appeal the admission of the fact that he used the n-word the next day in describing the victims of the offense. In this case, the evidence had some probative value in that a jury could conclude that it made the State's version of events – a version in which the defendant used racialized language in addressing the alleged victims – more likely. Although the evidence did carry some prejudicial effect, the Court does not conclude that the trial court abused its discretion in concluding that the probative value was not substantially outweighed by the risk of unfair prejudice. Eaton, with Carroll, dissenting: Assuming that the defendant has standing, would not find that the seizure of the cartridge violated Article 11 because it was seen in plain view by the officer when he was in a location where he was legally permitted. Doc. 2020-079, October 1, 2021. [This summary reflects the amended version of the opinion issued on October 29, 2021, after the filing of the State's motion for reargument]. https://www.vermontjudiciary.org/sites/default/files/documents/op20-079_0.pdf

SUSPECT OUTSIDE CONVENIENCE STORE WAS IN CUSTODY

State v. Barry, 2021 VT 83. Full court published decision. INTERVIEW WITHOUT MIRANDA WARNINGS: CUSTODY.

Interlocutory appeal from order granting defendant's motion to suppress her statements. The defendant spoke to the police while standing by the side of a convenience store. At the conclusion of the conversation, she was formally arrested. The Court concludes that she was in custody during the conversation based upon the following factors: 1) She was not told that she was free to leave. This is the most important factor in the determination of custody. 2) She was not told that she could decline to answer their questions. 3) She did not arrive at the interview voluntarily, and she had previously attempted to avoid speaking with the officers. In addition, one of the officers told her that he "needed to talk" to her. 4) There was a restraint on freedom of movement of the degree associated with a formal arrest. The defendant was positioned between a wall to her back and a police car to her front, preventing her from leaving in either of those directions. Because the officers were situated on either side of her, the defendant could not leave without walking by at least one of the officers. The fact that her purse was on the police car also impacted her freedom of movement since if she chose to leave she would either have to approach the officers and the car, or leave without her purse. 5) One of the officers acknowledged that the officers' approach during the interview was to convey belief in her guilt and to confront her with evidence of her guilt. When an officer communicates to a suspect a belief in the suspect's guilt, this contributes to a feeling that the suspect is not free to leave. The fact that the conversation took place outdoors, in a public setting, the police did not use deceptive techniques, the short duration of the interview, and the presence of only two officers, does not outweigh the other factors. Doc. 2021-013, October 29, 2021. https://www.vermontjudiciary.org/sites/default/files/documents/op21-013.pdf

NOTICE NOT REQUIRED FOR DIMINISHED CAPACITY DEFENSE WITHOUT EXPERT WITNESSES

State v. MacFarland, 2021 VT 87. DIMINISHED CAPACITY DEFENSE: NOTICE REQUIREMENT. TRESPASS: REQUISITE MENTAL STATUTE FOR TRESPASS CONTRARY TO ACTUAL COMMUNICATION.

Full court published opinion. Convictions for resisting arrest and unlawful trespass following a bench trial reversed and remanded for further findings and conclusions based on all the evidence and otherwise in accordance with this opinion. The defendant was convicted of these offenses after she refused to leave a bar after being asked to do so, and resisted the police efforts to remove her and arrest her. The trial court erred when it refused to allow the defense to pursue a diminished capacity defense based upon intoxication on the grounds that the defense had not provided notice of its intent to pursue that defense. V.R.Cr.P. 12.1 requires notice of a diminished capacity defense only when the defense intends to call an expert witness on the defense, which was not the case here. Nor did the failure to give such notice violate the trial court's scheduling order, which required notice of diminished capacity defenses "in the form required by V.R.Cr.P. 12.1(b)". But that rule does not require any form of notice of a diminished capacity defense to be established without expert testimony. It cannot be said that this error was harmless beyond a reasonable doubt. The evidence presented at trial confirms that the defendant's alcohol consumption may have been a significant factor in her conduct on the evening in question and that a court might conclude this evidence supported a diminished capacity defense. The trial court did not discuss the defendant's intoxication with respect to either the unlawful trespass charge or the resisting arrest charge. It is undisputed that the resisting arrest charge contains a specific mental element, that the defendant have intentionally attempted to prevent a lawful arrest on herself. Although this Court previously held that trespass does not involve a knowing element, that was with respect to trespass where notice is conveyed by signs or placards so designed and situated to give reasonable notice and with respect to the defendant's legal authority to enter or remain on the premises. But the trespass charge here involved trespass where notice is given by actual communication. The Court holds that notice by "actual communication" denotes a subjective standard. Therefore the defendant was entitled to raise the diminished capacity defense to this charge as well. The matter is therefore remanded to the trial court to make further findings and conclusions, consistent with this opinion, based on all the evidence presented at trial. Doc. 2020-297, November 5, 2021. https://www.vermontjudiciary.org/sites/default/files/documents/op20-297.pdf

Vermont Supreme Court Slip Opinions: Three-Justice Entry Orders

MOTION TO WITHDRAW GUILTY PLEA WAS NOT SUPPORTED BY ADEQUATE GROUNDS

State v. Williams, three justice entry order. MOTION TO WITHDRAW GUILTY PLEA: NO ABUSE OF DISCRETION.

Denial of motion to withdraw guilty pleas affirmed. Defendant fails to show an abuse of discretion. The court considered the points he raised on appeal and found them unpersuasive. It recognized that defendant did not delay in filing his request, that he had rejected prior settlement offers, and that the State would not be prejudiced if the motion was granted. At the same time, it found that defendant's pleas were knowingly and voluntarily entered. It explained that defendant had sufficient time to consider the State's offer and that his counsel was competent and prepared. Defendant's counsel explained the terms of the plea agreement and she also discussed the concepts of probation and violating probation, including by failing to complete sex-offender programming. She told defendant that something could occur that might extend his eight-year minimum. The court explained that it had no concerns during the plea colloquy as to defendant's understanding of the case and noted that defendant's correspondence with the court evidenced his understanding of the case as well. The factual basis for the charges was reflected in the complainant's deposition and defendant agreed with the specific factual basis for each charge. Beyond arguing that this Court should weigh the evidence differently, defendant made no specific challenge to the court's findings. This Court does not reweigh the evidence on appeal. The trial court did not err in concluding that defendant had simply changed his mind and that this was an insufficient basis on which to allow him to withdraw his pleas. Doc. 2020-272, September 23, 2021. https://www.vermontjudiciary.org/sites/default/files/documents/eo20-272.pdf

EXPERT'S CHARACTERIZATION OF CHILD'S REPORT OF SEXUAL ABUSE WAS NOT PLAIN ERROR

State v. Lee, three-justice entry order. VOUCHING FOR WITNESS: NO PLAIN ERROR.

Four counts of aggravated sexual assault of victims less than thirteen years of age. During the course of the trial a pediatrician who had evaluated one of the victims testified concerning his interview and examination of her. He testified that the child's story had specifics that "made it quite compelling, quite clear." He noted that she volunteered without questioning or comment on his part that the defendant put his penis in her mouth so far that it was choking her and she pushed him off and was coughing, and he said, 'when you are older you will love this," and that she replied 'well, I am younger and I don't like this." The pediatrician testified that it was unusual that a child will tell a story so clearly; it usually requires questioning of the child, and it was of significance that the child became comfortable and out the story came. On

appeal the defendant argued that the pediatrician impermissibly vouched for the victim's credibility. Because the defense did not object to the testimony, the issue is only reviewed for plain error. No plain error occurred here because even assuming that the testimony was impermissible, the nature and scope of his testimony was limited, and his description of the abuse was merely cumulative of the victim's testimony. The pediatrician was not the primary witness and the State did not focus on his statements in closing argument. The admission of the testimony therefore did not deprive the defendant of a fair trial. Doc. 2020-305, October 15, 2021. https://www.vermontjudiciary.org/sites/default/files/documents/eo20-305.pdf

COP COURT WAS NOT REQUIRED TO RECITE MENTAL ELEMENTS OF SECOND-DEGREE MURDER

In re Gould, three-justice entry order. RULE 11: FACTUAL BASIS FOR PLEA.

Grant of summary judgment in post-conviction relief matter affirmed. The petitioner pleaded guilty to second-degree murder pursuant to a plea agreement. He subsequently filed this petition alleging that the plea colloquy did not comply with V.R.Cr.P. 11 because the trial court did not recite the mens rea element of the charge and because the petitioner did not acknowledge that there was a factual basis for the plea. Although the trial court did not specifically discuss the mental state for second-degree murder during the plea colloquy, the record demonstrates that defendant possessed an understanding of the law in relation to the facts and there was no fundamental error. It is evident from the entire plea colloquy that petitioner pled guilty based on an understanding that his actions caused the victim's death, and that his acts were done with, at a minimum, a wanton disregard of the likelihood that his behavior may cause death or great bodily injury. Petitioner's counsel explained that if the case went to trial, then the sole question at trial would be whether petitioner's actions amounted to first- or second-degree murder, implying that petitioner agreed he had a mental state sufficient for second-degree murder. When the trial court questioned petitioner directly, petitioner responded that he had stabbed the victim and had stabbed the victim to death. Neither petitioner nor petitioner's counsel raised any affirmative defense or any facts surrounding the crime that would have raised questions about petitioner's mental state or that would indicate petitioner did not act with volition. Unlike in In re Pinheiro, 2018 VT 50, in this case, there was nothing in the colloquy or the recitation of facts to indicate that the petitioner acted with anything less than an intent necessary for second-degree murder. Doc. 2021-015, October 15, 2021. https://www.vermontjudiciary.org/sites/default/files/documents/eo21-015.pdf

FAILURE TO FILE FUTILE MOTIONS IS NOT INEFFECTIVE ASSISTANCE

In re Sheldon, three-justice entry order. INEFFECTIVE ASSISTANCE OF COUNSEL: FAILURE TO FILE FUTILE MOTION TO SUPPRESS.

Denial of post-conviction relief affirmed. The defendant was convicted of first-degree aggravated assault following a jury trial. He claimed ineffective assistance of counsel in his post-conviction relief petition, in that his attorney failed to file a motion to suppress

his post-arrest statements. The PCR court's determination that counsel's performance did not fall below the objective standard of reasonableness is supported by the evidence. Counsel's decision not to file a motion to suppress was reasonable given the state of the record and existing case law. The U.S. Supreme Court has held for purposes of the Fourth Amendment that "where the police have probable cause to arrest a suspect, the exclusionary rule does not bar the State's use of a statement made by the defendant outside of his home, even though the statement is taken after an arrest made in the home in violation of Payton [v. New York, 445 U.S. 573 (1980)]." New York v. Harris, 495 U.S. 14, 21 (1990). Thus, even assuming that petitioner was arrested in his home without a warrant, the statements would not be subject to exclusion under the Fourth Amendment. The petitioner's claim that his warrantless arrest violated Article 11 would have been unlikely to succeed given the record in this case, and this Court's analysis in State v. Libbey, a case involving facts very similar to this one (the defendant there was standing behind a screen door on his porch and was asked to step outside, after which he was arrested. The Court declined to suppress his subsequent statements, finding no Article 11 violation). Petitioner's counsel had reviewed an affidavit in which the arresting officer testified that he saw petitioner through the screen door and asked if he would step outside the residence, and petitioner agreed. Counsel could reasonably assess that the court was likely to credit this testimony. On this view of the facts, the case would be difficult to meaningfully distinguish from Libbey. Trial counsel was not ineffective for not pursuing a motion that would likely have been futile. Doc. 2020-186, October 15, 2021. https://www.vermontjudiciary.org/sites/default/files/documents/eo20-186.pdf

Vermont Supreme Court Slip Opinions: Single Justice Bail Appeals

TRIAL COURT ABUSED DISCRETION IN REFUSING RELEASE TO RESPONSIBLE ADULT

State v. Cassinell, single justice bail appeal. RELEASE TO RESPONSIBLE ADULT: ABUSE OF DISCRETION.

Denial of motion to review bail and release on conditions is reversed. The trial court abused its discretion when it declined to release the defendant to his proposed responsible adult with GPS and SCRAM monitoring. The responsible adult testified that she is retired and normally at home so she can monitor the defendant; she has no criminal history and does not take any medication and does not keep alcohol or firearms in her home; her property encompasses about three-quarters of an acre and has a security system that sends an alert to her phone if someone is in the front yard; the rest of the perimeter is fenced in by a six to seven-foot high fence; she has observed a police presence in town; she understood that the defendant was not to leave her property and was not to possess firearms, alcohol or drugs; and she realized that it was a big responsibility and she would immediately pick up the phone and call 911 if the defendant violated a condition of release. The evidence showed that she had the willingness and the ability to supervise and monitor the defendant and that DOC has the technological capacity to act as a second

layer of protection. The trial court's finding that she did not know the very significant allegations in this case is not supported by the record. She was aware of evidence that the defendant threatened the complainant with a firearm and prevented the complainant from calling emergency services. She was aware of some details but not others. Ignorance of some details in the allegations does not prevent an otherwise qualified responsible adult from understanding the severity of the charges or fulfilling her obligations to the court. The matter is remanded so the court may re-examine its analysis and impose the set of conditions reasonably necessary to protect the public. Doc. 21-AP-187, September 3, 2021, Cohen, J. https://www.vermontjudiciary.org/sites/default/files/documents/eo21-187.pdf

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