Vermont Department of State's Attorneys

Vermont Criminal Law Month

May - June 2022

Vermont Supreme Court Slip Opinions: Full Court Rulings

Includes three-justice bail appeals

MV STOP WAS SUPPORTED BY COLLECTION OF MINOR CLUES

State v. Sinquell-Gainey and Vaz, Doc. 2020-306. MOTOR VEHICLE STOP: REASONABLE SUSPICION OF INTOXICATION.

Grant of motion to suppress after motor vehicle stop reversed. The stop was justified based on reasonable suspicion of impairment, where the officer observed the vehicle pull into a gas station through a posted exit; maintain a reduced speed throughout; stopped for quite some time at an intersection where the traffic signals did not require him to do so; made a wide turn where the vehicle crossed over the fog line, traveling close to the guardrails; briefly flashed the car's high beams before signaling a right turn to get onto the interstate, at a time about forty minutes after the bars in the area had closed. This is more evidence than was found to justify stops in Pratt (drifting back and forth within the lane several times over about five miles; Haynes (failure to properly deal with a right-of-way, a wide left turn resulting in crossing the fog line, and unusual operation of headlights during a turn signal), and in Bruno (defendant swerved in the lane before briefly parking on a dead-end street and then operating without headlights). While each factor, standing alone, may not be sufficient, they are not irrelevant in the context of the other factors. Cohen, with Reiber, dissenting: The defendant's actions here were not dangerous or indicative of impaired decision-making; if anything, they speak to an abundance of caution while driving during the winter, at night, and out of state, and they do not amount to a reasonable suspicion of wrongdoing. Many of the facts the majority cites are equally consistent (or even more likely to be consistent) with careful driving, including driving under the speed limit and stopping at a flashing yellow light at an unfamiliar intersection. Other facts, such as defendant being on the road within an hour of the bars closing—with no accompanying evidence that defendant was coming from a bar—and flashing high beams before signaling a turn—either to intentionally brighten the road or because he made an innocent error when reaching for the turn signal level—are innocuous, commonplace acts that cannot support reasonable suspicion of DUI unless accompanied by other indicators of impairment. If factors like nervously driving

under the speed limit or accidentally turning on a high beam (or windshield wipers or any other action that is controlled by the same levers) can weigh into a totality-of-the-circumstances analysis, that will contribute to impermissibly intrusive searches and seizures by police and discriminatory policing. The Court's cited rationale about "rely[ing] on the expertise of the officer in recognizing signs of impaired operation" cannot and should not be present in a case where the officer's credibility is demonstrably lacking. To hold otherwise would leave the door open for law enforcement to follow any car they want to investigate in order to tally up the reasonable, non-dangerous driving errors that all drivers make. Doc. 2020-306, May 6, 2022. https://www.vermontjudiciary.org/sites/default/files/documents/op20-306.pdf

DEFENDANT'S PROFFER AGREEMENT WAS NOT CONFIDENTIAL

State v. George, 2022 VT 21. PROTECTIVE ORDER: DEFENDANT'S PROFFER.

Order denying request for protective order preventing disclosure of testimony provided by defendant to prosecuting authorities pursuant to a proffer agreement reversed and remanded. The defendant was charged with first degree murder, and his mother, the victim's wife, was charged with aiding in the commission of the murder and obstruction of justice. The defendant subsequently entered into a written proffer agreement with the state, in which the state promised "not to use any information [defendant] provides pursuant to this agreement directly against him in any criminal prosecution." In the next paragraph, it clarifies that "[a]ny leads or information derived from the information [defendant] provides, however, can be used against him in any future proceeding." The agreement also allows the government to use the information directly against defendant in a criminal prosecution in three situations: (1) to impeach defendant; (2) to rebut evidence defendant presents; and (3) in a prosecution for obstruction of justice, perjury, or false report to a police officer. Following completion of the proffer session, the State elected not to make a plea offer to defendant and indicated that it intended to provide the contents of the proffer to his mother. The defendant objected to this and filed a motion for a protective order. The trial court denied the motion. 1) The terms of the proffer agreement do not prohibit disclosure. Nowhere in the written proffer agreement is confidentiality or a limitation on disclosure expressly mentioned. Sharing information with potential codefendants alone is not direct use against defendant in a criminal prosecution. Extrinsic evidence will not sway the Court to the contrary. Defendant proposes that, to the extent the written proffer agreement is ambiguous, the discussions regarding keeping the proffer confidential "at this time" at the proffer session make it clear that the proffer agreement prohibits disclosure. Nothing in the written agreement can be reasonably read as requiring confidentiality, and in fact doing so would contravene the agreement's express grant to the State of the ability to investigate defendant's statements, which may include sharing the contents of the proffer with others to corroborate defendant's story. Defendant may not rely on extrinsic evidence to manufacture ambiguity where there is none. 2) It is self-evident that if defendant can establish that a credible safety risk to him or his wife exists, that would be a "clearly defined and serious injury." Further, the notes accompanying Rule 16.2(d) anticipate that a protective order may issue where disclosure would result in intimidation or harm. Unlike the proffer agreement argument resolved above, the criminal division's failure to

address defendant's danger argument raises factual questions that cannot be addressed on appeal in the first instance. When the criminal division concluded without further comment that none of defendant's arguments merited a protective order, it failed to exercise its discretion with respect to this issue. Without a record developing findings regarding the potential danger to defendant and his wife, the Court is unable to determine whether defendant is prejudiced by the criminal division's order. Accordingly, the matter is remanded for the trial court to consider this argument in the first instance. Doc. 2021-089, May 6, 2022. https://www.vermontjudiciary.org/sites/default/files/documents/op21-089.pdf

EVIDENCE OF MURDER WAS SUFFICIENT; EXCLUSION OF DEFENDANT'S EXICTED UTTERANCE WAS HARMLESS

State v. Caballero, 2022 VT 25. MURDER: SUFFICIENCY OF THE EVIDENCE. EXCITED UTTERANCES: TIMING OF STATEMENT. CRIME SCENE PHOTOS: PREJUDICE.

Second degree murder affirmed. 1) The court did not err in denying the motion for judgment of acquittal. There was sufficient evidence for the jury to conclude beyond a reasonable doubt that defendant acted, at the very least, in wanton disregard of a deadly risk to the victim. The defendant acknowledges that he repeatedly threatened to kill the victim, borrowed a gun, waited for the victim at his home, and fired a shot at the victim's windshield that ultimately killed the victim. He claims, however, that the evidence tends to show that he was merely firing a warning shot and did not aim directly at the victim, and therefore did not knowingly disregard a deadly risk. Whether he aimed directly at the victim or not, the defendant concedes that he deliberately fired the gun at the victim's front windshield. Firing a gun into the passenger compartment of an occupied vehicle is highly likely to pose a risk of death or serious bodily harm to a person inside the vehicle. The inherently dangerous act of intentionally shooting at the car while the victim was inside, coupled with defendant's prior statements that he was going to kill the victim, were sufficient to create a reasonable inference that he was subjectively aware of the deadly risk to the victim and consciously disregarded this risk. Some of the evidence presented at trial was arguably inconsistent with the State's theory about the relative positions of defendant and the victim. However, the State only had to prove each element of the crime beyond a reasonable doubt, not each fact or piece of its theory. 2) The trial court excluded the defendant's statement some four hours later that he felt horrible and did not know what really happened in the parking lot as not meeting the excited-utterance exception to the hearsay rule because it was made too long after the shooting. Such statements need not be contemporaneous with the startling event; the key inquiry is whether the declarant's excited condition was caused by the startling event. The trial court erred in focusing solely on the timing of the statement. But the error was harmless because, while the statement is somewhat supportive of the defense's claim that he did not specifically intend to kill the victim when he fired the gun, and therefore might have undercut the prosecution's theory of premeditated murder, the jury acquitted defendant of that charge. The statement was not probative of whether defendant knowingly disregarded a deadly risk to the victim, the minimum intent required for second-degree murder. Furthermore, defendant was able to elicit similar evidence during cross-examination of his former girlfriend. 3) The defendant claims that the

jury's verdict must be reversed because the State published three unadmitted photographs of the victim's body to the jury. He argues that the photographs were so inflammatory that they likely prejudiced the jury against him. The photographs were relevant to a disputed issue, namely, where the victim was located when defendant fired the shot and were not significantly more gruesome or offensive than other photographs that were admitted without objection. 4) Because none of the evidentiary issues raised on appeal prejudiced the defendant, there is no cumulative prejudicial effect. Doc. 2020-262, May 20, 2022. https://www.vermontjudiciary.org/sites/default/files/documents/op20-262.pdf

TRIAL COURT HAD NO JURISDICTION OVER MOTION FOR NEW TRIAL BASED ON MATTERS WITHIN THE SCOPE OF A THEN-PENDING APPEAL

State v. Kuhlmann, 2022 VT 28. Full court published opinion. NEW TRIAL MOTIONS PENDING APPEAL: JURISDICTION.

Denial of motion for new trial affirmed. The trial court had no jurisdiction to consider the defendant's pro se motion for a new trial which was filed while the matter was pending appeal in the Vermont Supreme Court. When a proper notice of appeal from a final judgment or order of the lower court is filed the cause is transferred to the Vermont Supreme Court, and the lower court is divested of jurisdiction as to all matters within the scope of the appeal. The new trial motion raised matters within the scope of the defendant's appeal, as it challenged the validity of the conviction based on evidence in the record. Since final judgment was on appeal in the Supreme Court, it had jurisdiction over the issues encompassed in the record leading up to final judgment. Also, were the trial court to grant the motion for a new trial, it would have mooted the appeal and impacted the Supreme Court's ability to review the questions presented there. Docs. 2020-041 and 2021-151. https://www.vermontjudiciary.org/sites/default/files/documents/op20-041.pdf

NUDE SELFIE WAS "PORNOGRAPHY" UNDER THE CIRCUMSTANCES

State v. Burnett, 2022 VT 30. VIOLATION OF PROBATION: INTERNET ACCESS CONDITIONS: PLAIN LANGUAGE, FIRST AMENDMENT, NUDE PHOTO AS PORNOGRAPHY, HARMLESS ERROR.

Revocation of probation affirmed in part and reversed in part. 1) The defendant, contrary to his claim on appeal, was subject to a probation condition prohibiting internet use. 2) The probation condition allowed his probation officer to approve internet access, and denial of permission had to be based upon reasonably objective criteria relating to his lack of progress in sex offender counseling and/or lack of progress in his overall rehabilitation such that access to the internet would risk violation of conditions of probation. The defendant argued that the probation officer had not made a finding of

inadequate progress in counseling or rehabilitation before prohibiting internet use. But the condition clearly contemplated that the defendant was to begin probation without any internet access, a restriction that could be loosened over time if he demonstrated progress in sex-offender counseling and rehabilitation. The condition did not require the probation officer to first make a finding that defendant was failing to progress in treatment before prohibiting him from using the internet. 3) For the same reason, the Court found that the condition put the defendant on notice that he was not permitted to use the internet. 4) The defendant's argument that the condition violated his First Amendment rights constituted a collateral challenge to a probation condition he was accused of violating. The conditions were carefully negotiated between defense counsel and the State and were agreed to by the defendant. The defendant had the opportunity to appeal the conditions or to move for sentence reconsideration, but he did not do so. Nor did he move to modify the condition at any point. Therefore he is barred from arguing now that the conditions are facially invalid. 5) The defendant's sending of a photograph of his genitals, under the facts of this case, could be found to constitute the possession or use of pornography. The defendant had pled guilty to sending a photograph of his erect penis to a seventeen-year-old girl on Facebook, and admitted that he knew the photo was sexual material. Five years later, and approximately one week after his release from prison, the defendant sent a naked picture of himself to his sister-in-law. Later that day the defendant left a voicemail for his probation officer saying that he wanted to turn himself into the jail because he knew his actions put him in violation of his probation. The defendant himself later characterized the photograph as inappropriate. The court could therefore conclude that the photograph was intended to cause sexual excitement, i.e. was pornographic. 6) The State conceded that the trial court erred in finding a violation with respect to the residential condition because he was never charged with violating this condition. The error cannot be said to have been harmless because the violation adjudication may have affected the court's decision regarding sentencing. The matter is therefore remanded for resentencing. Doc. 2021-031, July 1, 2022.
https://www.vermontjudiciary.org/sites/default/files/documents/op21-031.pdf

Vermont Supreme Court Slip Opinions: Three-Justice Entry Orders

OBJECTION TO ADMISSION OF VIDEO WAS NOT PRESERVED, AND WAS NOT PLAIN ERROR WHERE THE DEFENDANT HIMSELF VOLUNTEERED THE VIDEO TO THE POLICE

State v. Morrell, three-justice entry order. VIDEO: FOUNDATION, BEST EVIDENCE: PLAIN ERROR.

Domestic assault affirmed. A video recording of the incident was obtained by

the police at the request of the defendant, and it was shown to the jury during trial without objection. On appeal, the defendant argued that the police exceeded the scope of his consent by making a copy of the video and that the State failed to present the best evidence or properly authenticate the video. These claims were not preserved for appeal; the defendant's pretrial objections did not suffice, not did his pro se objection after the close of evidence. The defendant was obligated to object to the admission of the video at trial when the evidence was offered and he failed to do so. Nor was there plain error in the admission of the video. This case is unlike Hiltl: here, the defendant controlled the video recording, which captured images from his own home. He provided the camera system to police and there was no opportunity for police to modify it before viewing it. Defendant demanded that police review the video that he provided, and defendant and police watched the video together. There was evidence here from which the jury could reasonably conclude that the video was what it purported to be, and the court did not commit plain error in admitting it. Doc. 21-AP-218, May Term, 2022. https://www.vermontjudiciary.org/sites/default/files/documents/eo21-218.pdf

ABSENCE OF DEFENDANT DURING DISCUSSION OF PROCEDURAL MATTERS WAS NOT ERROR.

State v. Dragon, three-justice entry order. RIGHT TO PRESENCE AT TRIAL: PROCEDURAL DISCUSSIONS. DEADLOCKED JURY: COERCIVE INSTRUCTION.

Various convictions related to high speed chase affirmed. 1) The defendant argued that his right to be present during the entire trial was violated by his absence during a discussion of various procedural matters immediately before the start of the trial. Because the defendant did not object below, this claim is reviewed for plain error. No error occurred here. The discussion between the attorneys and the judge about the presentation of the video recording concerned trial procedure, and courts have generally held that defendants do not have the right to be present during sidebar or chambers conferences concerning trial procedure or the progress of the trial. In any event, the defendant was present when the video was played and could have voiced any concerns about it at that time. Nor did the discussion about which counts would be tried violate the defendant's right to be informed of the charges against him. The information filed by the State clearly set forth the charges against defendant. The record shows that defendant was provided with the information and affidavit and waived the reading of the charges at his arraignment. Defendant was present when the court read the charges that were to be tried to the jury. He could have raised an objection at that time if he had one; he did not. Defendant does not argue that the charges for which he was convicted were different than what was read by the court. Nor does he identify any prejudice that resulted due to his absence from the pretrial discussion of the charges. 2) The defendant next argues that the verdict must be reversed because the court gave a coercive instruction to the jury when it answered the jury's question about what would happen if they were deadlocked without advising the jurors that they should not surrender any strongly held beliefs. The court's response to the jury's question in this case was not coercive because it did not instruct or encourage the jury to continue deliberations. The court indicated that it was willing to accept a hung jury, and merely asked if additional time would help them to

determine if they could reach a unanimous verdict. The court did not impose an artificial time limit or otherwise exert pressure on the jury to reach a verdict. The defendant failed to ask for an instruction about not surrendering strongly held beliefs, and defense counsel instead requested the instruction that was given. Having advocated for a specific instruction below, the defendant cannot now claim error in that instruction on appeal. Doc. 2021-170, June 17, 2022.

Vermont Criminal Law Month is published bi-monthly by the Vermont Department of State's Attorneys.
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