Vermont Department of State's Attorneys

Vermont Criminal Law Month

July - August 2022

Vermont Supreme Court Slip Opinions: Full Court Rulings

Includes three-justice bail appeals

CHALLENGE TO RESTITUTION ORDER WAS UNTIMELY MOTION TO RECONSIDER SENTENCE

State v. Therrien, 2022 VT 35. RESTITUTION: UNTIMELY MOTION TO RECONSIDER SENTENCE.

Full court published opinion. Restitution order affirmed. The defendant pleaded guilty to possession of stolen property in January 2008. The plea agreement provided that a restitution hearing would be held. The hearing took place over three days in 2008. The defendant was not present on the second day, but his attorney agreed that the hearing could proceed in his absence. On the third and final day of the hearing, neither the defendant nor his attorney were present. Court staff indicated that the defendant had not called into the clerk's office. The court ultimately issued a restitution order for $11,023. In November 2020 the defendant moved to vacate the restitution order and requested a new restitution hearing, arguing that he had been denied due process when the hearing continued without his attorney or himself present. 1) The motion was untimely pursuant to V.R.Cr.P. 35, which requires a motion to reduce the sentence to be filed within 90 days of the sentence or after affirmance on appeal. Although an illegal sentence may be corrected at any time, the claim here was not that the sentence was illegal, but that it was imposed in an illegal manner, and thus was governed by the 90 day limit. 2) The parties stipulated to the correction of a computational error in the restitution order. August 5, 2022, Doc. 2021-059. https://www.vermontjudiciary.org/sites/default/files/documents/op21-059.pdf

EVIDENCE OF IDENTITY WAS GREAT IN CHALLENGE TO HOLD WITHOUT BAIL ORDER

State v. Kirkland, 2022 VT 38. HOLD WITHOUT BAIL: SUFFICIENCY OF EVIDENCE OF IDENTIFICATION.

Three-justice bail appeal. Appeal from hold without bail order. The evidence of guilt was great, justifying the hold without bail order. The admissible evidence presented

below, excluding any modifying evidence, is sufficient to convince a factfinder beyond a reasonable doubt that defendant was the shooter. First, the State has an eyewitness identification of defendant as the shooter in complainant's sworn statement. Although defendant argues that complainant's identification lacks distinctive or specific reasons to support its veracity, and that the shooter was wearing a mask, these arguments go to complainant's credibility and are not properly considered at this type of proceeding. Additional circumstantial evidence supported the identification.

Defendant takes issue with two specific findings made by the trial court in its decision: that defendant represented himself to be his girlfriend in the Facebook messages and that the handgun found in the car matched the description of the one used in the shooting. The Court concluded these findings are based on inferences permissibly and reasonably drawn from the evidence presented. Doc. 22-AP-173, August 9, 2022. https://www.vermontjudiciary.org/sites/default/files/documents/eo22-173.bail_.pdf

DEFENDANT'S ATTEMPT TO EXPUNGE CONVICTIONS AND CHARGES DENIED

State v. E.C., 2022 VT 40. EXPUNGEMENT.

Full court opinion. Order denying expungement of criminal-history records affirmed in part and denied in part. 1) 13 V.S.A. § 7602(a)(1)(B) permits a person to file a petition requesting expungement of a conviction 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." This has previously been interpreted to mean that the statute only permits expungement when the underlying conduct is both no longer prohibited by law and no longer designated as a criminal offense. Although petitioner's conduct when he was a minor would now be considered a delinquent act and therefore no longer criminal, delinquent acts are still prohibited by law and are adjudicated by the family division. Therefore expungement is not available for these offenses. Nothing in § 7602(a)(1)(B) indicates that its terms apply differently in the context of a conviction for an offense committed when the person was a minor. 2) The defendant also sought expungement of charges that were dismissed. The defendant argues that this statute providing for automatic expungement should apply retroactively to his prior dismissed charges. But the statute requires that the expungement occur within 60 days after the dismissal, and thus the statute is inherently forward looking, and not retroactive. With respect to earlier charges, the statute requires a petition to the court and permits the State to object. 3) Finally, the defendant sought expungement of dismissed charges for which the statute of limitations had expired. But this statute only permits expungement of charges dismissed with prejudice. 4) The defendant was eligible to have his marijuana possession conviction expunged, since the statute permits expungements for such convictions occurring before January 1, 2021. Doc. 2021-179, August 26, 2022. https://www.vermontjudiciary.org/sites/default/files/documents/op21-179.pdf

Vermont Supreme Court Slip Opinions: Three-Justice Entry Orders

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EVIDENCE SUPPORTED EXIT ORDER IN MOTOR VEHICLE STOP

State v. Goodrich, three-justice entry order. EXIT ORDER: SUFFICIENCY OF EVIDENCE.

An anonymous tip combined with the odor of alcohol and the defendant's admission to having had a drink was sufficient to justify an exit order during a motor vehicle stop. The anonymous tip was sufficient where it matched the defendant's vehicle in terms of color, make, model, having temporary registration and an operator of matching gender, in the matching location. The context of the defendant's admission to having had "one seltzer drink," made it reasonable for the trooper to conclude that the answer referred to an alcoholic seltzer drink. The trooper's description of an odor of intoxicants was sufficient even without specifying the strength or direction of the odor, since the defendant was the only person in the vehicle. While any one of these factors may not have been enough to justify the exit order, taken in totality there was no error in concluding that there were grounds for the order. Docket 2021-175, July 14, 2022.
https://www.vermontjudiciary.org/sites/default/files/documents/eo21-175.pdf

COURT DENIED MOTION TO CONVERT DISMISSAL WITHOUT PREJUDICE TO DISMISSAL WITH PREJUDICE

State v. Warner, three justice entry order. MOTION TO DISMISS WITHOUT PREJUDICE: CONVERSION TO DISMISSAL WITH PREJUDICE.

Denial of motion to convert the State's dismissal of criminal case into a dismissal with prejudice affirmed. The defendant was charged with second-degree aggravated domestic assault. Shortly before the scheduled trial date the State filed a motion to continue on the grounds that it needed more time to prepare for trial and because it had failed to provide notice of its intent to introduce evidence regarding the context of the relationship between the defendant and the complainant. The court denied the continuance. The state orally raised the motion again at the jury draw and the court deferred ruling on the motion. The State subsequently withdrew the motion, and the day before trial was scheduled to begin and after a jury had been drawn, the State filed a notice of dismissal without prejudice. The trial court denied the motion to convert this into a dismissal with prejudice because it found that the record did not support the defendant's assertion that the State dismissed the case effectively to grant itself a continuance. The court found that the State appeared ready to go to trial and that the reason for its dismissal was not simply to obtain a continuance and therefore not a clear abuse of the State's dismissal power. The court acted within its discretion in denying the motion given these findings. Doc. 22-AP-016, July 14, 2022.
https://www.vermontjudiciary.org/sites/default/files/documents/eo22-016.pdf

Vermont Supreme Court Slip Opinions: Single Justice Entry Orders

EVIDENCE SUPPORTED HOLD WITHOUT BAIL ORDER

State v. Gibbons, single justice bail appeal. HOLD WITHOUT BAIL: EVIDENCE OF GUILT, THREAT TO THE PUBLIC; DISCRETION ON HOLD PENDING VOP HEARING.

Order holding defendant without bail pursuant to 13 VSA 7553a and also pending a violation of probation hearing affirmed. 1) A jury could reasonably find based on complainant's testimony that defendant was guilty of assault, and therefore that the evidence of guilt is great. Further, her testimony provides clear and convincing evidence that defendant poses a substantial threat of physical violence to her or potentially others and that no combination of conditions could reasonably prevent the violence, especially since the assault violated a condition of probation. The defendant's argument that there is a difference between violating conditions of probation and violating conditions of release is rejected. 2) The court acted arbitrarily in failing to consider or make specific findings under 13 V.S.A. § 7554(b). The trial court considered several of the § 7554(b) factors in the context of its decision under § 7553a. It examined the weight of the evidence and the nature and circumstances of the offense, and the court record from defendant's prior case, which indicated that he was convicted of domestic assault after pleading guilty. Although the court did not make findings regarding the remaining § 7554(b) factors, this does not amount to an abuse of discretion. 22-AP-214, August 22, 2022.
https://www.vermontjudiciary.org/sites/default/files/documents/eo22-214.pdf

Rule Amendments

a. ***Promulgation Order Amending V.R.C.P. 26(e)***

This Order was promulgated on July 11, 2022, effective September 12, 2022.

The amendment to Rule 26(e) conforms the Vermont rule to the federal rule in two respects. The first relates to supplementation of expert disclosures and expert depositions. The amended rule requires supplementation of disclosure of information provided about expert witnesses or by expert witnesses when deposed. The second change is a clarification. As originally drafted, the federal and state rules on supplementation referred to supplementing a response that was correct when initially made. The Vermont rule now follows the federal rule by deleting "thereafter acquired" from the first sentence of the rule. This change eliminates any interpretation of the rule that the duty to correct or supplement does not arise if information available to the disclosing party at the time of the initial disclosure rendered the initial disclosure incomplete or inaccurate.

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.