Vermont Department of State's Attorneys

Vermont Criminal Law Month

March - April 2018

Vermont Supreme Court Slip Opinions: Full Court Rulings

Includes three-justice bail appeals

UNANIMITY INSTRUCTION NOT REQUIRED WHERE ALL ALLEGED ACTS WERE PART OF ONE CONTINUOUS ASSAULT

State v. Peatman, 2018 VT 28.
UNANIMITY: MENTAL STATE; INTERTWINED ACTS.
PRESERVATION: OBJECTION TO ANSWER TO JURY QUESTIONS.

First-degree aggravated domestic assault, aggravated assault of a law enforcement officer, and resisting arrest, affirmed. 1) The jury was not instructed that they had to be unanimous on whether the defendant had acted willfully or recklessly, because willfulness necessarily involves a degree of intent that is greater than recklesslness. The defendant here argued that this theory did not apply because the jury was also given the added consideration of a diminished capacity instruction, which applied to the willfulness aspect. He argued that if the jury first considered willfulness, and had a reasonable doubt because of diminished capacity, then the jury should return a verdict of not guilty without considering the recklessness aspect. But the fact that a defense is applicable to only one of the possible intent levels does not change the availability of the other as an alternate theory of guilt. 2) With respect to the aggravated assault of a law enforcement officer and resisting arrest charges, the jurors were told that they were not required to agree on which act, or acts, they found established the requisite element. Although this instruction was not objected to at the charge conference, the claim of error was preserved when the defense objected to the trial court's answer to a question from the jury during deliberations, asking if they had to be unanimous on the specific acts that constituted the charge. 3) While it is true that when there is evidence of many acts, any one of which would constitute the offense charged, the state must make an election in order to ensure a unanimous verdict, there is an exception to the election rule, when the specific acts are so related as to constitute but one entire transaction or one offense. Here, all of the alleged acts took place over a span of six minutes as part of one continuous assault. The acts were inextricably intertwined as one continuous offense, and so the instruction was correct. Doc. 2016-284, March 16, 2018.
https://www.vermontjudiciary.org/sites/default/files/documents/op16-284.pdf

CIRCULAR JURY INSTRUCTION DID NOT PREJUDICE DEFENDANT

State v. Davis, 2018 VT 33. FINANCIAL EXPLOITATION OF VULNERABLE ADULT: SUFFICIENCY OF THE EVIDENCE: VALIDITY OF POWER OF ATTORNEY; MENTAL ELEMENT – PRESERVATION; MEANING OF LEGAL AUTHORITY – LACK OF PLAIN ERROR. SENTENCING: MEANING OF COMPETENT FOR PURPOSES OF APPOINTING GUARDIAN FOR VICTIM.

Financial exploitation of a vulnerable adult affirmed. The defendant had taken control of his mother's finances, and then failed to pay her rent. He was charged with withholding funds from a vulnerable adult. 1) The defendant argued that his motion for judgment of acquittal should have been granted because the State failed to prove that the power of attorney signed by the victim was invalid as to the defendant. He argued that the power of attorney did not create any obligation for him to act, such as by paying his mother's rent. Even assuming that a valid power of attorney would have had any relevance to the charge of withholding his mother's rent while he controlled her finances, the evidence was sufficient for the jury to find that the power of attorney was not valid. The evidence established that the power of attorney took effect only upon completion of certain conditions, and there was evidence that these conditions had not taken place. 2) The defendant argues that the State was required to prove that he acted willfully both in withholding funds, and in acting without legal authority. The defendant did not raise this issue in his motion for judgment of acquittal. He replies that the argument was not waived because in its ruling on that motion, the trial court considered the issue sua sponte. But it is unclear that the trial court was evaluating the evidence presented by considering the mental element relative to each of the necessary elements of the charge, or merely against the element of withholding funds. This was insufficient to preserve the issue. 3) There was no plain error in the trial court's instruction that legal authority was defined as being authorized by law, although the court should have instructed the jurors regarding how a power of attorney is validly executed, both under the common law, and under the current statutory framework. The instruction here was circular, and did not attempt to define legal authority, but when considered in light of the record evidence as a whole, the erroneous instruction does not require reversal. The central issue concerned whether the power of attorney granted the defendant authority to act as his mother's attorney-in-fact. This issue was clearly framed for the jury. Therefore, there was no prejudice to the defendant in the trial court's insufficient instruction. 4) The trial court found that because the defendant's mother had been found to be a vulnerable adult for purposes of the conviction, she was also incompetent to testify during sentencing, and her guardian would be permitted to make a statement on her behalf. The trial court erred when it equated the finding that the defendant's mother was a vulnerable adult with incompetence for purposes of sentencing. But this error does not constitute an abuse of discretion in sentencing because the trial court did not rely on the guardian's statement in its final sentencing determination. A witness is incompetent for purposes of sentencing if they either cannot express themselves regarding the issue to which they are testifying, or cannot understand a witness's obligation of truthfulness. The guardian's statement was just one of the factors considered by the court, and the court never referred to it in its final sentencing determination. It is likely, therefore, that the statement carried little or no weight in the final sentencing determination. https://www.vermontjudiciary.org/sites/default/files/documents/op16-280_0.pdf

AFTER HOURS BAIL DOES NOT PRECLUDE DENIAL OF BAIL AT INITIAL APPEARANCE

State v. Morton, 2018 VT 22. HOLD WITHOUT BAIL ORDER: ISSUANCE AFTER RELEASE ON CONDITIONS ON AFTER-HOURS ORDER.

Three-justice published bail appeal. Hold without bail order affirmed. The defendant was arrested on two counts of attempted murder, and an after-hours order was issued imposing a surety bond or cash in the amount of $150,000 and other conditions of release. Later that day the defendant's initial appearance occurred, during which he was ordered held without bail pending a weight-of-the-evidence hearing. At that hearing, the defendant argued that because the court had set after-hours bail when he was arrested, any subsequent decision to hold him without bail must be based on findings sufficient to support bail revocation pursuant to 13 V.S.A. § 7575. The Court disagreed. The Vermont Rules of Criminal Procedure explicitly characterize the after-hours bail order as temporary, which makes sense given that it is often based on an incomplete, ex parte recitation of the relevant facts, for which no record exists. Doc. 2018-044, February Term, 2018. https://www.vermontjudiciary.org/sites/default/files/documents/eo18-044.pdf

DEFENDANT WAS ON NOTICE DESPITE EQUIVOCAL ANSWER BY PROBATION OFFICER

State v. Stern, 2018 VT 36. Full court published opinion. VIOLATION OF PROBATION: RELIANCE UPON ADVICE OF PROBATION OFFICER; WILLFULLNESS.

Violation of terms of probation affirmed. The defendant had a condition of probation that he "not engage in criminal behavior." 1) The Court found that this put the defendant on fair notice that his possession of a firearm was a violation of probation, because the pertinent statute states that someone convicted of domestic assault may not possess a gun. However, the defendant had asked his probation officer whether he was permitted to possess a gun, and the probation officer gave an equivocal answer – "I don't see why you can't… I told him that in my opinion you could; but I'm not an attorney." The probation officer's equivocation should have put the defendant on notice that he must make further inquiries to ensure he understood the terms of his probation. 2) The defendant argues that his conduct was not willful because of the advice he received. But the willfulness elements refers to the action that violates probation, not to an intention to violate probation. Robinson, dissenting: Would defer to the trial court's finding that the probation officer informed him that he could possess a firearm (without equivocation). Although the transcript indicates the probation officer said, "I'm not an attorney," this can be read to be a statement the probation officer is making in court, not what he said to the defendant, and this reading would be consistent with the trial court's finding, which this Court should defer to. Under these circumstances, where the defendant reasonably relied upon assurance from his probation officer, and there was nothing inherently wrong or offensive about the conduct at issue, there should not have been a finding of violation of probation. Doc. 2018-36, April 6, 2018. https://www.vermontjudiciary.org/sites/default/files/documents/op17-150.pdf

NO-PORNOGRAPHY PROBATION CONDITION NOT REASONABLY RELATED TO SEXUAL ASSAULT OF AN ADULT

State v. Lumumba, 2018 VT 40. CONDITIONS OF PROBATION: STANDARD CONDITIONS; IMPOSITION AFTER SENTENCING HEARING; PRESERVATION; SPECIAL CONDITIONS: PORNOGRAPHY CONDITION NOT REASONABLY RELATED TO OFFENSE OR REHABILITATION.

Full court published opinion. Conditions of probation affirmed in part and reversed in part. 1) The defendant objects to the imposition of certain standard conditions of probation as having been imposed without being orally announced at the sentencing hearing, and as not supported by the facts of the case or related to his rehabilitation. This claim is raised for the first time on appeal, and therefore is reviewed for plain error. There are three ways a defendant can challenge a condition of probation: at sentencing before sentence is imposed; in a motion to reconsider; and pursuant to VRCrP 35(a) as illegal or illegally imposed. These means are the same regardless of whether the court reads the conditions orally or sets them out in a written order. All of the defendant's challenges could have been made by post-sentence motion or motion under Rule 35(a) to the trial court, so the objections are not preserved. 2) The defendant also argues that the imposition of the probation conditions out of the presence of the defendant violated his right to be present at all stages of trial, including sentencing. But even if this was error, it did not amount to plain error. The defendant had constructive notice that at least some are valid administrative conditions that could be imposed in every case, and the defendant had other avenues to challenge the written conditions after they were imposed. Nor did the alleged error result in the denial of any constitutional right. 3) The trial court's imposition of all of the standard conditions of release without particularized findings did not amount to plain error. 4) There was no plain error in the imposition of these conditions of probation based on the claim that they were unrelated to the offense or to the defendant's rehabilitation. Conditions A, F, G, H, and J relate to the supervision of a defendant and are within the trial court's discretion in any case in which probation is ordered. The State has agreed to strike conditions C, D, E, G, H, M, O, and P, and that conditions Q and R are inapplicable. Imposition of condition L, relating to regulated drugs, was not plain error as it precludes criminal conduct. Condition I, requiring written permission from the probation officer before leaving the State, was not plain error, given that the defendant was facing deportation, but is remanded for the trial court to add standards for the exercise of the probation officer's authority. Condition K is remanded, as it impermissibly delegates to the probation officer the authority to determine that the defendant must attend any counseling or training program. Condition N, prohibiting violent or threatening behavior, is not plain error, but in accordance with the State's concession, is remanded for clarification of the language. Condition S, requiring payment of any unpaid amount for legal services, is stricken, as the record does not indicate that a payment was imposed in this case. 5) The special sex-offender condition that the defendant not purchase, possess or use pornography or erotica, and not go to adult bookstores, sex shops, topless bars, etc., is not reasonably related to the defendant's rehabilitation or protecting the public. The record does not show that the crime here – sexual assault of an adult – was connected to pornography, erotica, adult bookstores, etc., nor did the State present evidence the defendant's individual behaviors supported the condition as part of his rehabilitation or for the protection of the public. The probation officer's testimony that pornography was

seen as a step towards reoffending was insufficient. Doc. 2015-389, April 6, 2018. https://www.vermontjudiciary.org/sites/default/files/documents/op15-389.pdf

EVIDENCE OF GUILT NOT GREAT FOR DENIAL OF BAIL PURPOSES WHERE EVIDENCE SHOWED ONLY PREPARATION, AND NOT AN ATTEMPT, TO COMMIT MURDER

State v. Sawyer, 2018 VT 43. DENIAL OF BAIL: EVIDENCE OF GUILT NOT GREAT. ATTEMPT CRIMES: PREPATORY ACTIONS NOT SUFFICIENT TO PROVE AN ATTEMPT.

Three-justice published bail appeal. Order holding defendant without bail reversed. The trial court erred in finding that the evidence of the charged crimes, all of which were attempts, was "great." The defendant here indicated an intent to shoot people at a high school, and he had purchased a shotgun with this intent in mind. He planned to conduct surveillance at the school to determine when the school resource officer would not be present; he kept lists of the items that he needed before actually committing a shooting, and researched the school calendar to select an optimal date for the shooting. The defendant took no action so proximate to the commission of the school shooting as to constitute an attempt. Each of his actions was a prepatory act, and not an act undertaken in the attempt to commit a crime. Therefore, as a matter of law, his acts did not fall within the definition of an attempt. He undertook no act that was the commencement of the consummation of the crimes he is charged with here, attempted aggravated assault, attempted first-degree murder, and attempted aggravated murder. The Court notes that although both attempt and conspiracy require an "overt act," the overt act required for the two crimes is not the same thing. In the context of a conspiracy, the slightest action on the part of a conspirator can constitute an overt act. It need not rise to the same level as that required for an attempt. The Court also notes that, unlike the case with the Model Penal Code definition of attempt, Vermont law does not provide a defense of withdrawal from an attempt. Once an attempt is committed, the crime is complete and the defendant cannot avoid liability by abandoning his plan. Doc. 2018-105, April 11, 2018. https://www.vermontjudiciary.org/sites/default/files/documents/eo18-105.bail_.pdf

DEFENDANT WHO ATTEMPTED TO LURE UNDERCOVER OFFICER MUST REGISTER AS SEX OFFENDER

State v. Charette, 2018 VT 48. SEX OFFENDER REGISTRY: CONVICTIONS INVOLVING UNDERCOVER OFFICERS AND NOT ACTUAL MINOR VICTIMS.

Order to register as sex offender affirmed. Although the defendant was convicted of attempting to lure a child based upon his attempt to meet with a person he believed to be a minor child for the purpose of having sex, but who was in fact a law enforcement investigator, he was still required to register as a sex offender, despite the statute's language that a sex offender is defined as a person who is convicted of any of the listed offenses "against a victim who is a minor." This conclusion is compelled by the language of the statute as a whole, its inclusion of convictions for attempts, the

statute's purpose, and the incongruous consequences of the defendant's interpretation. Doc. 2017-147, April 27, 2018. https://www.vermontjudiciary.org/sites/default/files/documents/op17-147.pdf

REVOCATION OF YOUTHFUL OFFENDER STATUS WAS AN ABUSE OF DISCRETION

State v. Suhr, 2018 VT 40. VIOLATION OF PROBATION: SUFFICIENCY OF THE EVIDENCE. YOUTHFUL OFFENDER PROGRAM REVOCATION: ABUSE OF DISCRETION.

Violations of probation affirmed; revocation of youthful-offender status reversed. 1) The evidence supported the trial court's finding that the defendant violated the terms of his probation by failing to attend school without excuse. The fact that the court did not name specific dates, but instead the number of absences during specific time periods, does not affect the validity of the finding of a violation. Nor did the court err in finding the violations willful. Although some absences were excused due to transportation issues, the court found the violation based on absences that resulted for reasons other than problems outside the defendant's control. 2) The trial court reasonably found that the defendant failed to comply with the GPS monitoring requirement, where the evidence showed that he understood how to maintain the GPS battery, and allowed it to remain uncharged on multiple occasions, causing it to shut off. The defendant claims on appeal that the evidence of this was hearsay, but he failed to object, and in any event testified himself to repeated shut-downs. The defendant did not meet his burden of showing that the shut-downs were not the result of willful conduct, since nothing in the evidence indicates that accident or mistake caused the shut-downs, rather than the defendant's intentional conduct. 3) The evidence shows that the defendant failed to participate in the Restorative Justice Panel, as required by the terms of probation. This failure was not the result of the Panel's refusal to work with him, but the result of the defendant's own actions, in refusing to take responsibility for his actions. Once he actively refused to participate, a violation finding was not premature even if time remained in which to complete the program. Refusing to participate in court-ordered programming is significantly different from simply failing to pay a fine. Whether a probationer engages in a program at the beginning or end of the probationary term could affect his or her overall treatment and success in the program, and refusing to participate can call into question the probationer's commitment to rehabilitation. 4) The trial court properly relied upon the same factors provided by the statute for determining whether to grant youthful-offender status in the first place, to the decision whether to revoke that status. 5) The revocation of youthful-offender status was an abuse of the trial court's discretion. The court failed to give significant weight to the one factor the Court considers most significant: the defendant's inadequate sex-offender therapy. The court found that the defendant's probation officer assigned him to a therapist who was not qualified to provide sex-offender therapy and who enabled the defendant's refusal to accept responsibility for his offense. In determining whether the defendant is amenable to rehabilitation on remand, the court should give proper consideration to the adequacy of the defendant's treatment. 6) The defendant is now older than twenty-two, and the statute permits participation in the youthful-offender program only until age twenty-two. Therefore a remand presents some procedural difficulties. An appropriate solution to the procedural dilemma will depend on an updated record, reflecting, for example, whether the defendant is currently on adult probation and what treatment he

has received. In addition, neither party briefed this issue. Robinson, dissenting in part: would not violate for failure to participate in the Restorative Justice Panel program, since time remained on the term of probation to complete it, the probation officer had not provided notice that the defendant must have complied with it by a certain time, and the defendant had not, by words or deeds, manifested an intention to refuse to complete it. Doc. 2016-310, April 27, 2018. https://www.vermontjudiciary.org/sites/default/files/documents/op16-310.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."

DEFENDANT DID NOT PRESERVE PROFFER OF CHARACTER EVIDENCE

State v. Dundas, three-justice entry order. CHARACTER EVIDENCE: FAILURE TO PRESERVE PROFFER.

Aggravated assault affirmed. The defendant argues on appeal that the trial court erroneously refused to allow him to present evidence of his character for peacefulness. When the defense made the proffer, it indicated that the witness did not know about the defendant's reputation in the community, which is the only form in which such evidence would be permitted (personal opinion is not permitted). The trial court noted that the evidence would be pretty truncated in that case, but indicated that the question of admissibility was still open. The defendant never raised the issue again, nor did he call the witness and attempt to present the character evidence. Therefore, he failed to preserve this issue for appeal. Doc. 2017-230, April 6, 2018. https://www.vermontjudiciary.org/sites/default/files/documents/eo17-230.pdf

RESTITUTION AWARD FOR DIMINISHED VALUE OF LOGGED PROPERTY WAS PROPER

State v. Morse, three-justice entry order. RESTITUTION AWARD: DIMINUTION IN VALUE.

Restitution order affirmed, matter remanded for findings on the defendant's ability to pay. The defendant clear cut approximately five acres of an eleven-acre property without permission. 1) The victim was awarded restitution in the amount of the diminution in property value, plus clean-up costs. The diminished value of the property was one reasonable means of assessing damages, even in this case, where the trees would eventually grow back. 2) The trial court failed to determine the defendant's ability to pay, so the matter is remanded for this purpose. Doc. 2017-335, April 16, 2018. https://www.vermontjudiciary.org/sites/default/files/documents/eo17-335.pdf

REPORT THAT DEFENDANT WAS CAUSING A SCENE SUPPORTED A REASONABLE SUSPICION OF CRIMINAL ACTIVITY

State v. Love, three-justice entry order. REASONABLE SUSPICION: REPORT THAT DEFENDANT WAS "CAUSING A SCENE."

Conditional nolo contendere plea to driving under the influence affirmed. The vehicle stop of the defendant was supported by a reasonable and articulable suspicion of criminal activity where a store clerk contacted police to report that three women were causing a scene inside the store, which the officer reasonably interpreted to mean, "causing a disturbance." The State did not have to prove that the defendant had in fact committed disorderly conduct, and the claim that the defendant's conduct constituted protected First Amendment speech need not be reached, as the only issue is whether the content of the tip gave rise to a reasonable suspicion of wrongdoing, which requires considerably less than proof by a preponderance of the evidence. The report that the defendant was "causing a scene" supported a reasonable suspicion that she was engaged in "tumultuous behavior" in a public place, in violation of the statute. The First Amendment issue need not be reached because reasonable suspicion need not rule out the possibility of innocent conduct. Doc. 2017-316, April Term, 2018. https://www.vermontjudiciary.org/sites/default/files/documents/eo17-316.pdf

GUILTY PLEA VALID DESPITE NO ADMISSION TO IMPLIED ELEMENT

In re Trowell, three-justice entry order. RULE 11: EXPLICIT ADMISSION TO IMPLIED ELEMENT NOT REQUIRED.

Summary judgment to State in petition for post-conviction relief affirmed. The Rule 11 proceeding in this case was sufficient to meet the requirements of the rule, despite the trial court's failure to elicit an explicit admission that the petitioner not only intended to take money or property from the victim, but intended to permanently deprive the victim of that money or property. The omission of an implied element during a Rule 11 proceeding is generally not plain error, since it would be hyper-technical to insist that courts explain an implicit mental element that is established by inferences drawn from the acts of the defendant, especially when the defendant's acts do not lead to equivocal inferences of his mental state. The petitioner admitted that he cut the victim's throat with a knife while attempting to take the victim's money and wallet. These acts do not suggest an equivocal inference of the petitioner's mental state at the time of the incident, and thus the petitioner's admissions were sufficient to support the change-of-plea court's determination that there was a factual basis for the plea and no further inquiry into intent was required. Doc. 2017-405, April Term, 2018. https://www.vermontjudiciary.org/sites/default/files/documents/eo17-405.pdf

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