Vermont Department of State's Attorneys

Vermont Criminal Law Month

July - August 2018

Vermont Supreme Court Slip Opinions: Full Court Rulings

Includes three-justice bail appeals

WARRANTLESS BLOOD TEST REFUSAL ADMISSIBLE AS EVIDENCE OF GUILT DESPITE AMENDMENT OF STATUTE

State v. Rajda and State v. Lape, 2018 VT 72. REFUSAL TO SUBMIT TO WARRANTLESS BLOOD TEST: ADMISSION AS EVIDENCE OF GUILT IN SUBSEQUENT DUI TRIAL.

Full court published opinion. Trial court orders suppressing defendants' refusal to submit to blood tests to determine if they were DUI are reversed. 1) In June, 2016, the United States Supreme Court in Birchfield v. North Dakota held that, absent exigent circumstances, the Fourth Amendment permits warrantless breath tests incident to arrests for drunk driving, but does not permit the taking of warrantless blood tests either incident to an arrest for drunk driving or based on the driver's legally implied consent to submit to the test. In apparent response to this decision, the Vermont legislature amended Vermont's implied consent statute, which at the time stated that a motor vehicle operator is deemed to have given consent to an evidentiary test of that person's breath; or to that person's blood where breath testing equipment is not reasonably available, or the officer has reason to believe that the person is unable to give a sufficient sample of breath or testing, or the officer has reasonable grounds to believe that the person is under the influence of a drug other than alcohol. The law provided that if the person refused to submit to "an evidentiary test" it shall not be given, but the refusal may be introduced as evidence in a criminal proceeding. The amended statute now reads that a refusal to take a "breath test" may be introduced as evidence in a criminal proceeding. The defendants argue that this amendment means that the refusal to submit to a blood test may no longer be used as evidence in a criminal proceeding. In enacting this statute, the legislature's sole intent was to ensure that Vermont's implied consent law comported with the constitutional constraints imposed by the U.S. Supreme Court in Birchfield. Whether the Birchfield decision prohibited the evidentiary use of a blood test refusal, therefore, is decisive on the question of the legislature's intent. Insofar as the legislature has not explicitly prohibited the admission of refusal evidence with respect to blood tests, the evidence is admissible in these cases unless constitutionally prohibited. 2) In

Birchfield, although the Court concluded that motorists cannot be deemed to have consented to submit to a blood test on pain of committing a criminal offense, it did not disapprove of civil penalties and evidentiary consequences for persons who refuse to comply. Therefore, the Court holds that the Fourth Amendment does not bar admission in a criminal DUI proceeding of evidence of a refusal to submit to a warrantless blood draw. Robinson, with Davenport, specially assigned, dissenting: The only plausible understanding of the statutory amendment is that the legislature intended to eliminate the statutory authorization of the use in a criminal proceeding of refusal evidence with respect to blood tests. Docs. 2017-051 and 2017-126, July 20, 2018.

CUSTODIAL INTERFERENCE STATUTE CAN BE VIOLATED WHERE CUSTODY IS WITH DCF EVEN IN THE ABSENCE OF A COURT ORDERED SCHEDULE OF CONTACT

State v. Roy, 2018 VT 67. CUSTODIAL INTERFERENCE: NECESSITY OF COURT ORDERED SCHEDULE OF CONTACT WHEN CUSTODY IS WITH DCF. GRANTS OF JUDGMENTS OF ACQUITTAL: FINALITY ON APPEAL.

Conviction of custodial interference affirmed. The child's mother picked up the child at the child's grandfather's home, and took her to Massachusetts. At the time, custody of the child was with DCF, and physical placement was with the grandfather. The custody order did not specify the terms of the defendant's parent-child contact, and a DCF social worker would establish the schedule and framework for visits, which she coordinated with the defendant. The defendant sent the social worker a text message asking for permission for the visit at issue, but the social worker was on vacation and did not respond. After the jury returned a verdict of guilty, the trial court granted the defendant's motion for judgment of acquittal, holding that it had erred in not instructing the jury that, to prove custodial interference when DCF is the custodian, the State must produce evidence of a court order detailing the parent-child contact parameters. Such a court order is not required for liability under the custodial interference statute. Such a court order is not the only means of putting a defendant on notice of what might constitute a deprivation of DCF's custody, is inconsistent with past caselaw, and could undermine flexibility in visitation arrangements to the detriment of children in DCF custody and their parents. Furthermore, the evidence in this case was sufficient to demonstrate that the defendant was on notice as to the conditions under which she might have visitation. In determining when a parent's conduct is sufficiently egregious to support a custodial interference charge in instances where DCF is the temporary custodian, courts should consider the totality of the circumstances, including the duration of interference, the frequency, the reasons, the parent's intent, the impact on the safety and wellbeing of the child, the nature and reason for the restrictions on contact, and its significance in protecting the child's well-being. In this case, the parent's conduct meets the criteria for custodial interference under these factors. Doc. 2017-270, July 6, 2018. Note: after this decision was issued, the Court sua sponte requested briefing, including amicus briefs, on the issue whether it had the authority to reverse a grant of a motion for a judgment of acquittal. Doc. 2017-270, 07/06/2018.

DOC REGULATIONS AFFECTING ELIGIBILITY FOR PROGRAMMING AND PAROLE DID NOT VIOLATE EX POST FACTO CLAUSE

Wool v. Pallito and Carter v. Menard, 2018 VT 63. EX POST FACTO CLAUSE: DEPARTMENT OF CORRECTIONS DISCRETION IN PROGRAMMING.

Full court published decision.The plaintiffs, inmates in the custody of the Department of Corrections, argued that their sentences were retroactively increased in violation of the Ex Post Facto Clause of the US Constitution by operation of 13 V.S.A. 5301(7) and the DOC's directives. The directives at issue create a three-tiered prisoner classification system, A, B, and C. The plaintiffs have been designated as level C offenders, which requires that they be convicted of a listed offense, including those defined in Section 5301(7); that the crime be determined to be "egregious," based on certain specific criteria; and the offender has a score of 24 or above on the Level of Services Inventory and a score of 7 to 9 on the Violence Risk Assessment Guide. Level C offenders are only placed in programming, if then, after expiration of the minimum sentence, if the offender's behavior has been exemplary, and the Parole Board has indicated that parole will be considered after program completion. This case is controlled by Chandler v. Pallito, which held that the DOC's directives did not change the sentence range and were within the DOC's fundamental discretion over treatment programming. Although Chandler did not address an ex post facto claim, that provision is not implicated here because the statute at issue did not increase or even apply to the length of the plaintiffs' incarceration. Docs. 2017-131 and 2017-274, June 29, 2018.

DOC WORK CAMP PLACEMENT NOT REVIEWABLE BY COURT

Clark v. Menard, 2018 VT 68. DOC DENIAL OF WORK CAMP PLACEMENT DESPITE COURT RECOMMENDATION.

Full court published decision. Dismissal of Rule 75 complaint concerning eligibility for work camp affirmed. The trial court, pursuant to a plea agreement, included a recommendation to work camp. DOC denied that assignment because defendant had an earlier conviction that involved a violent assault against a police officer. The superior court correctly ruled that it did not have subject matter jurisdiction, because work-camp eligibility is a nonreviewable programming decision. Nor was the plea agreement violated, since it did not contain any promise that defendant would be deemed eligible for work camp. Doc. 2017-300, July 13, 2018.

DEFENDANT MAY BE RESPONSIBLE FOR RESTITUTION EVEN WHERE EXPENSES WERE PAID BY THIRD-PARTY

State v. Dwight, 2018 VT 73. RESTITUTION: LOSSES RECOVERABLE REGARDLESS OF WHO PAID THEM; COURT MAY ASSUME FULL TIME WORK WHEN DETERMINING PAYMENT AMOUNT.

Full court opinion. Restitution order affirmed. The defendant punched the victim in the mouth, as a result of which the victim lost four teeth. He subsequently incurred $21,441.15 in dental expenses that were not covered by insurance or the State of Vermont Restitution Unit. The victim's father paid for these expenses, after telling his son that his son had to choose between this expense and college tuition. The victim then took out a $28,000 loan for school expenses, an expense previously paid for by his parents. The court ordered the defendant to pay $21,441.15 in restitution. The defendant was working 35 hours a week. The trial court noted that there was no reason why he could not work 40 hours a week and calculated his ability to pay based upon a 40-hour week. 1) The fact that the victim's father paid the expenses does not render them ineligible for restitution. The loss incurred was complainant's loss, not his father's, and he incurred the dental expenses, and uninsured medical expenses constitution material losses without regard to who paid them or whether they have been paid at all. 2) In enacting the restitution statute, the legislature intended the court to consider not only a defendant's immediate ability to pay, but also his or her earning capacity. Thus, a restitution payment order does not necessarily have to be based only on the income a defendant actually is earning at the time of the sentencing hearing – it should be based on his "reasonably foreseeable ability to pay," and the amount the defendant "can or will be able to pay." A defendant's reasonably foreseeable earning capacity includes the income the defendant could earn at the same rate of pay the defendant currently receives if she or he were working full time in the occupation in which she or he is already employed. Whether that authority extends any further – such as to holding a defendant responsible for higher wages than she or he earns based on a credential for a higher-paying profession in which the defendant is not currently employed – is not decided. Based on this conclusion, the trial court did not abuse its discretion in determining the restitution amount based upon the defendant working a full forty-hour week, rather than the 35 hours he was currently working. Robinson, dissenting: Disagrees that the court can impute income based on potential earning capacity. Doc. 2017-075, July 27, 2018.

SENTENCING COURT DID NOT IMPROPERLY RELY UPON DEFENDANT'S DECISION TO GO TO TRIAL

State v. Hughes, 2018 VT 74. SENTENCING: VINDICTIVENESS; CONSIDERATION OF TESTIMONY RE APPROPRIATENESS OF COMMUNITY BASED TREATMENT; FAILURE TO ARTICULATE EVERY RELEVANT MITIGATING CIRCUMSTANCE.

Full court opinion. Sentence for sexual assault of a minor affirmed. 1) The Court declined to adopt a rule that would per se invalidate a sentence based on comments containing any words implicating the right to a trial. Instead, it will review the totality of the record when searching for the presence of vindictive sentencing. The trial court's comments were ambiguous in referring to the decision to "go[] forward with the case." The context indicates that the court was referring to the decision of the victim's family, not the defendant's exercise of his constitutional rights. Balancing the length of the sentence with the statutory maximum and the prosecutor's recommendation; asking whether the vast majority of the sentencing remarks focused on legitimate sentencing considerations; and considering the context of the challenged comments, the Court found no improper reliance on the defendant's assertion of his right to go to trial. 2) The court did not improperly disregard the opinion of the testifying

psychologist and findings of the PSI, both which stated that the defendant would be appropriate for community based treatment. The trial court might have agreed with the opinion, but found that treatment while incarcerated was even more important; or might have simply disagreed with the psychologist; or found that punitive and deterrent considerations mandated incarceration despite the viable community based option for rehabilitation. The mere fact that a viable community-based treatment option exists does not render an alternative sentence, based on legitimate sentencing goals, invalid. 3) The court did not fail to consider mitigating factors. The court is not required to discuss each potentially mitigating factor. In exceptional circumstances, this may be required, but the court here did not explicitly refuse to consider any relevant mitigating factors, nor are there exceptional circumstances. Thus, the trial court's failure to comment on mitigating factors such as the defendant's youth or past history as a victim of abuse does not imply a failure to consider them or an abuse of discretion. Doc. 2017-209, July 27, 2018.

STAY PENDING APPEAL DENIED FOR FAILURE TO SHOW STRONG LIKELIHOOD OF SUCCESS ON APPEAL

State v. Tower, full court entry order. STAY PENDING APPEAL.

Denial of stay pending appeal affirmed. To prevail on a motion for stay pending appeal, the defendant must show a strong likelihood of success on the merits; that irreparable injury if the stay is not granted; that the stay will not substantially harm other parties; and that the stay will serve the best interests of the public. All but the first factor favor the defendant. However, the defendant failed to demonstrate that she has a strong likelihood of success on the merits. Her entire argument on this point is that the court erroneously granted a motion to sever the trials. The Court cannot determine from this conclusory statement that the defendant's appeal has merit. Further, both the sentencing court and the judge who presided over the trial opined that an appeal was unlikely to be successful. Doc. 2018-238, August 1, 2018.

RULE 11 PROCEEDING INSUFFICIENT TO ESTABLISH DEFENDANT'S ADMISSION TO THE FACTUAL BASIS

State v. Bowen, 2018 VT 87. RULE 11(f) CLAIMS ON DIRECT APPEAL: STANDARD.

Full court published opinion. Conviction for sexual assault reversed based on failure to establish a factual basis for the charge during the change of plea proceeding. 1) The holding of Bridger, eliminating the substantial compliance standard for review of factual basis claims arising out of Rule 11 proceedings, applies to this case, in which a direct appeal was pending at the time that Bridger was issued. The plain error standard previously applied to such challenges on direct review will no longer be used. 2) This case involves a Rule 11(f) violation, because, although the court read the defendant the elements of the crime he was charged with, and the defendant agreed that the affidavits established a factual basis, there was no recitation of the facts underlying the charge or admission by the defendant of those facts. Doc. 2016-294, August 10, 2018.

TRIAL COURT DID NOT ACCEPT PLEA AGREEMENT BEFORE IT REJECTED IT

State v. Phillips, 2018 VT 85. full court opinion. Plea agreement: what constitutes acceptance; waiver of ex post facto challenge as condition of plea.

Trial court's refusal to accept plea agreement remanded for reconsideration whether to accept the plea agreement. 1) The trial court rejected the proposed plea agreement on the grounds that it provided that the defendant waived his general right to appeal as a condition of the plea agreement, and that this is not a legitimate plea agreement provision. A defendant may knowingly and voluntarily waive an ex post facto challenge to the statute to which he is pleading guilty. Therefore, the trial court's rationale for rejecting the plea agreement is legally invalid. 2) The defendant argues that the trial court had already accepted the plea agreement, and could not subsequently revoke its acceptance. He argues that the trial court accepted the plea agreement by accepting and entering the defendant's guilty pleas and dismissing the remaining charges, and by signing the notice of plea agreement and deferred sentencing order. The acceptance of a guilty plea is not the same as the acceptance of a plea agreement. Rather, when a defendant has entered a plea of guilty, and the trial court decides not to accept the plea agreement, the proper remedy is to allow the defendant to withdraw his plea of guilty. Rule 11 establishes when a plea agreement is accepted – when the trial court informs the defendant that the defendant will be sentenced in accordance with the agreement or with a lesser sentence. At no point in this case did the trial court make this statement, either explicitly or implicitly. The trial court's failure to expressly tell the defendant that it was deferring its decision on the plea agreement does not mean that the plea agreement was accepted. Nor does the trial court need to make a decision concerning the plea agreement before the entry of the plea. Nor does the fact that the trial court signed the deferred sentencing order in this case mean that the court accepted the deferred sentencing agreement. Doc.2018-014, August 10, 2018.

INTERVIEW OF CHILD, SWORN TO AFTER THE FACT, SUFFICIENT TO ESTABLISH THAT EVIDENCE OF GUILT IS GREAT

State v. Hugerth, 2018 VT 89. DENIAL OF BAIL: SUFFICIENCY OF THE EVIDENCE TO SHOW THAT GUILT IS GREAT; SWORN INTERVIEW OF CHILD.

Three justice published bail appeal. The defendant argued that the use of a child's sworn interview statement to establish that the guilt was great, for purposes of denying bail, was inappropriate because the officer did not take steps to ensure the child's truthfulness until the end of the interview, and failed to obtain sufficient guarantees that the child was telling the truth during the interview. The State was required to present substantial, admissible evidence that is legally sufficient to sustain a verdict of guilty on each element of the crime charged in order to establish that the evidence of guilt is great. The "admissible" requirement refers to admissibility at trial, and the State must show that the evidence will be admissible at trial. But the State need not have the evidence lawfully admitted at the hearing as if it were a trial. Thus, affidavits are admissible evidence at bail hearings and a sworn interview is the same as an affidavit. Thus, sworn oral statements are

admissible at weight of the evidence hearings. The fact that the child did not affirm that his statements were true until the end of the interview does not make any difference. Written affidavits are also attested to at the end of the statements. Further, the interview met the flexible standard required to obtain a sworn oral statement from a child witness – the interviewer determined that the child understood the difference between a truth and a lie and could distinguish between them, and appreciated his obligation to tell the truth during the interview. Doc. 2018-239, August 10, 2018.

EVIDENCE OF PROBATION VIOLATON WAS INSUFFICIENT

State v. Stuart, 2018 VT 81. PROBATION VIOLATION HEARING: USE OF HEARSAY; SUFFICIENCY OF THE EVIDENCE; FINDINGS REQUIRED FOR REVOCATION.

Full court opinion. Revocation of probation reversed. 1) The trial court did not apply the good cause balancing test when it admitted hearsay evidence during the probation revocation hearing and made no findings on the record at all to support its admission of this evidence. Nor did the evidence support admission of the testimony, since the State neither provided an explanation as to why a live witness was undesirable or impractical, nor suggested that the cost to produce the live witness was prohibitive. 2) The probation officer's testimony that the defendant did not complete the Tapestry program, without more, is insufficient to support a finding of a violation of a condition that the defendant failed to complete substance abuse counseling. There was no evidence as to the reason for the defendant's discharge from the Tapestry program. 3) By itself, the failure to complete a requirement when ample time remains in a probationer's term to do so is not a probation violation, unless the defendant has actively refused to participate or his conduct evinces an intent not to comply. But there is no evidence here of the defendant's refusal to comply with the requirement that she attend the CRASH program. 4) It is also noted that the trial court made no findings indicating that it conducted the required assessment before revoking probation as a result of the violations that it found. Doc. 2017-393, August 10, 2018.

BRIDGER RULE HELD NOT TO BE RETROACTIVE

State v. Barber, et al., 2018 VT 78. RETROACTIVITY OF BRIDGER DECISION CONCERNING REVIEW OF RULE 11(f) CLAIMS.

Full court published opinion. Rule 11(f) challenges reviewed. 1) The decision in In re Bridger, eliminating the substantial compliance standard for review of Rule 11(f) challenges to plea proceedings, announced a new criminal procedural rule, which does not apply to cases where direct review was concluded at the time that Bridger was decided. A new rule of criminal procedure is not applied to cases that are final before the new rule is announced, unless the decision is substantive, or it is a watershed rule of criminal procedure implicating the fundamental fairness and accuracy of the criminal proceeding. 2) Bridger did not establish a new rule with respect to its requirement of a recitation of the facts underlying the charges and some admission or acknowledgment by the defendant of those facts – existing precedent interpreting Rule 11(f) established this requirement. 3) The caselaw was not consistent on how the defendant's affirmance of those facts could be obtained. Existing caselaw supported the

trial court's decision that a defendant's oral or written stipulation to the facts could support compliance with Rule 11(f). Bridger established a new rule on this issue. 4) The Bridger holding that substantial compliance does not apply to evaluating claims under Rule 11(f) is also a new rule, as it was not dictated by existing precedent and required overruling prior case law. 5) None of the exceptions to non-retroactivity apply – the new rules do not decriminalize a class of conduct or prohibit imposition of a category of punishment on a certain class of defendants; nor is it a watershed rule of criminal procedure. The procedures are not constitutionally mandated, and are broader than the requirements of the equivalent federal rule. 6) Bridger does not apply to pleas governed by other rules, such as pleas by waiver pursuant to V.R.Cr.P. 43(c)(2). Nor does it apply to pleas of nolo contendere, which do not require a factual inquiry. The question of Alford pleas is left for another time. 7) The consolidated cases in this appeal are considered individually for compliance with pre-Bridger law. Skoglund concurrence: disagrees that the two holdings found to be new rules are in fact new, but in light of the contradictory or confusing statements in the cases, reluctantly agrees that the holdings are new for purposes of retroactivity. Docs. 2015-451, 2016-159, 2016-241, and 2016-277, August 10, 2018.

GAME WARDENS BARRED FROM POSTED LAND EVEN WHERE HUNTING IS PERMITTED

State v. Dupuis, 2018 VT 86. KIRCHOFF: APPLICATION TO LAND POSTED AGAINST TRESPASSING BUT NOT AGAINST HUNTING.

Full court published opinion. Trial court's grant of motion to suppress affirmed. 1) The defendant was charged with several fish and game violations after a game warden entered his property and found that the defendant was baiting deer. The defendant had posted his property against trespassing, but not in a manner that was effective, per statute, against hunters entering his property in order to hunt. The defendant argued that the game warden, under State v. Kirchoff, could not enter the property for law enforcement purposes; the State argued that if the public could enter in order to hunt, then the defendant did not have a reasonable expectation against game wardens entering in order to enforce the hunting laws. The Court held that the entry was illegal, that the game warden was bound by the same posting standard as any law enforcement officer, even assuming that hunters were permitted to enter. 2) The trial court correctly applied Kirchoff in finding that, by posting approximately thirty no trespassing signs roughly 100 feet apart around the perimeter of his property, and by placing a gate with no trespassing signs at the entrance to the main thoroughfare onto his property, the defendant objectively signaled to the outside world that strangers were not welcome. The trial court did not improperly rely on the topography of the land or the presence of vegetation in concluding that the defendant had established a reasonable expectation of privacy, but referred to the topography merely to explain why the game warden did not have the vantage point of a reasonable person when he entered the property up a steep grade through thick brush. Carroll and Eaton, dissenting: Would find that the landowner does not have a reasonable expectation of privacy concerning fishing and hunting law enforcement when he had none concerning entry by the public to engage in those activities on his land. Doc. 2017-344, August 17, 2018.

AOL NOT GOVERNMENT ACTOR FOR FOURTH AMENDMENT PURPOSES

State v. Lizotte, 2018 VT 92. HASH VALUE SEARCHES OF EMAIL ATTACHMENTS BY AOL: NO GOVERNMENT ACTION. NCMEC: STATUS AS GOVERNMENT ACTOR. REVIEW OF AOL REPORTS OF CHILD PORNOGRAPHY BY NCMEC AND LAW ENFORCEMENT: NO EXPANSION OF PRIVATE SEARCH. OPENING EMAIL CONTENTS: EXPANSION OF PRIVATE SEARCH. SUFFICIENCY OF SEARCH WARRANT ABSENT ILLEGALLY OBTAINED MATERIAL. RULE 11(f): SUFFICIENCY OF PLEA.

Full court opinion. Conditional guilty plea to two counts of aggravated sexual assault, one count of possessing child pornography, and two counts of promoting child pornography, affirmed. 1) Assuming that the defendant had a reasonable expectation of privacy in the content of his emails, his Fourth Amendment rights were not violated when AOL searched the defendant's transmissions over its network by using hashing technology (which analyzes images without anyone viewing them, to see if they are identical to images already viewed and analyzed and determined to contain likely child pornography). AOL was not acting as a government agent when it searched the transmissions. Although the law requires AOL to report suspected violations of federal laws concerning sexual exploitation of children, it does not require AOL to monitor transmissions over its network to detect illegal action. 2) NCMEC, on the other hand, was acting as an agent of law enforcement when it opened the defendant's email and the related attachment. ESPs and ISPs are required by statute to report suspected child pornography, and NCMEC's CyperTipline is the sole means to do so. NCMEC is required by statute to preserve the evidence and to forward CyberTipline reports to law enforcement. NCMEC is treated like an arm of the government in that it is authorized to receive and possess child pornography, which is otherwise contraband, and it is required to preserve the evidence and forward the information to law enforcement. 3) The searches performed by NCMEC and law enforcement did not expand on that performed by AOL. Under the private search doctrine, there is no violation of the Fourth Amendment if the police view evidence that is confined to the scope of the initial private search. As a result of the report from AOL, law enforcement knew that the attachment had a hash value that matched an image that had previously been opened and identified by an AOL representative as child pornography. Therefore, when NCMEC and then law enforcement opened the attachment, they were not expanding AOL's search because they already knew what was contained in the attachment and they could not learn more than was already known by AOL about the attachment. 4) Law enforcement and NCMEC did expand AOL's search by opening the email itself, which AOL did not open, and about which AOL had no information. However, there was probable cause for the search warrant even without the contents of the email. 5) Challenges on direct appeal to Rule 11 proceedings which allege a Rule 11(f) violation not objected to below are not reviewed for plain error, but under the same standard that applies in collateral challenges. 6) The Rule 11(f) colloquy here was sufficient to satisfy Rule 11(f). The court explained to the defendant that the State was going to recite the facts underlying the charge and then defendant would have an opportunity to indicate if he agreed with the facts. After the State's recitation of the facts supporting all elements of the charge, defendant indicated that he agreed with those facts. The court did not simply ask the defendant whether he agreed that the charging affidavits provided a factual basis for the charges. Doc. 2017-127, August 24, 2018.

COLLATERAL BAR RULE PRECLUDED PCR CHALLENGE TO IMPROPERLY IMPOSED RELIEF FROM ABUSE ORDER

In re Carpenter, 2018 VT 91. POST-CONVICTION RELIEF: ABUSE OF THE WRIT; COLLATERAL BAR RULE.

Full court published opinion. Dismissal of petition for post-conviction relief affirmed. The defendant pled guilty to a felony violation of an abuse-prevention order, based on a telephone call he made to his ex-girlfriend in violation of an emergency, ex parte RFA order. He received an enhanced sentence of five-to-fourteen years to serve. The petitioner argued that at the time, the statute did not permit no-contact orders in ex parte, emergency RFA orders. The petition was denied on the grounds that the petitioner could not collaterally challenge the validity of the underlying RFA order in his prosecution for felony violation of that order. 1) The trial court assigned to represent the petitioner was the same lawyer who had previously concluded that the claim had no merit. This was not the best practice, as it understandably undermined the petitioner's confidence that counsel would zealously pursue his claims, and because counsel was required to emphasize the neglect of prior counsel – in this case himself- in order to overcome the State's motion to dismiss for abuse of the writ. However, even if the assignment was error, the petitioner did not suffer prejudice, since the PCR court assumed, without deciding, that the petitioner should be allowed to pursue the claim because counsel's own neglect in reviewing the petitioner's claims was sufficient cause to satisfy the first prong of the abuse-of-the-writ analysis. 2) The PCR court properly dismissed the petition for abuse of the writ because, although he showed cause for failing to raise the claim previously, he could not show actual prejudice from the default, because the claim itself had no merit pursuant to the collateral bar rule. Under this rule, a person is generally barred from collaterally challenging the validity of a court order in defense to a contempt proceeding for violating the order. An exception to this rule applies where the party's ability to effectively challenge an order is constrained - where there was not an adequate and effective remedy to review the challenged ruling. Here the petitioner had avenues available to him to challenge the validity of the order short of violating it – the order was set to expire on its own terms four days after he was served, and the court had already scheduled a hearing on the RFA petition for that date. Moreover, the petitioner made no effort to challenge the no-contact provision in the temporary order in the meantime by filing an emergency motion asserting that the trial court had exceeded its statutory authority in issuing a no-contact order. Instead he violated the order within 48 hours of its service. Robinson, with Skoglund, dissenting: disagrees that the petitioner had an adequate and effective opportunity to challenge the court order. Doc. 2017-311, August 31, 2018.

CONSENSUAL ACTIVITY OFFERED UNDER RAPE SHIELD STATUTE TOO REMOTE TO BE ADMISSIBLE

State v. Patten, 2018 VT 98. PRIOR BAD ACTS: DEFENDANT'S CLAIM TO BE A SEX OFFENDER. RAPE SHIELD STATUTE: NON-CONTEMPORANEOUS CONDUCT.

Full court published opinion. Aggravated sexual assault affirmed. 1) The trial court did not abuse its discretion in admitting testimony by the complainant that the defendant told her, during the first attempt at sexual assault, that he was a sex offender. This was not evidence of a prior conviction, and therefore did not need to meet the requirements of VRE 609. The evidence was properly admitted to show the defendant's intent to intimidate the complainant and place her in fear. The trial court did not abuse its discretion in finding that the probative value outweighed the unfairly prejudicial effect. 2) The trial court did not err in excluding evidence of an incident some five months before the sexual assaults began, in which, the defendant claimed, he and the complainant engaged in simultaneous masturbation, and, according to the complainant, the defendant walked in on her while she was masturbating and she immediately covered up, but he began masturbating in front of her. This was not shown by the defendant to be part of a steadily building course of conduct between the two of them, because the other incidents he cites were not clearly shown to have occurred before the assaults began. Nor was the evidence admissible pursuant to the Rape Shield Statute as evidence of prior sexual contact between the defendant and the complainant, because the incident was not reasonably contemporaneous with the charged conduct. Doc. 2017-181, August 31, 2018.

VERMONT'S REVENGE PORN STATUTE CONSTITUTIONAL ON ITS FACE

State v. VanBuren, 2018 VT 95. REVENGE PORN STATUTE: FACIAL CONSTITUTIONALITY.

Trial court's determination that Vermont's revenge-porn statute is unconstitutional on its face is reversed. The defendant argued that the statute restricts speech on the basis of content, and is therefore presumptively invalid and fails strict scrutiny review. Pursuant to the First Amendment, if speech does not fall into one of the established categories that are subject to some content-based restrictions, the restriction must be narrowly tailored to serve a compelling government interest. 1) The speech restricted here does not fall into one of the categorical exclusions. It does not meet the constitutional definition of obscenity. There is, at least not yet, a categorical exclusion for extreme invasions of privacy. 2) Therefore, the statute can only be upheld if it is narrowly tailored to serve a compelling State interest. The State's interest is compelling – the speech involved has low constitutional significance because it relates to purely private matters, and can result in potentially severe harm to individuals. 3) The statute is narrowly tailored, in that it is limited to a confined class of content, and contains a rigorous intent element that encompasses the non-consent requirement and an objective requirement that the disclosure would cause a reasonable person harm, and excludes images warranting greater constitutional protection, and is limited to only those images the disclosure of which would violate a reasonable expectation of privacy. 4) The Court offers a narrowing construction, or clarification, of the statute, to ensure its constitutional application while promoting the Legislature's goals. The statute does not clearly exclude form coverage images recorded in a private setting, but distributed by the person depicted to public or commercial settings or in a manner that undermines any reasonable expectation of privacy. It seems clear that the Legislature sought its exclusion to apply to such images, as well as to those recorded in public. 5) The State was not confined to creating a civil remedy. 6) The matter is remanded to the trial court for resolution of the issue whether the complainant had a reasonable expectation of privacy after sending nude images of herself to someone through a private message on Facebook, and whether application of the statute to

these facts would violate the First Amendment. Skoglund, dissenting: The State does not have a compelling interest, as it does not relate to matters of public concern, and involves the State in protecting people from their own folly; it is not narrowly tailored as it concerns nude imagery or any sexual conduct and thus criminalizes an invasion of personal privacy; and there is a less restrictive means available in the form of private rights of action. Doc. 2016-253, August 31, 2018.

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."

PRIOR BAD ACTS ADMISSIBLE TO PROVIDE CONTEXT AND EXPLAIN COMPLAINANT'S ACTIONS

State v. Casey, three-justice entry order. PRIOR BAD ACTS: ADMISSIBLE TO PROVIDE CONTEXT AND EXPLAIN COMPLAINANT'S ACTIONS; NO PLAIN ERROR. HEARSAY STATEMENTS AT SENTENCING. PSI NOT REQUIRED FOR MISDEMEANOR. PROBATION CONDITIONS: VAGUENESS.

Unlawful mischief affirmed. 1) The trial court acted within its discretion in admitting the complainant's statement that she had many incidents with the defendant involving violence. This brief statement did not refer to any specific violent act and was made in response to a question about how the complainant felt when the defendant lunged at her. It was admissible to provide context and explain the complainant's actions during the incident. 2) The remaining comments by the complainants were not objected to at trial, and were not plain error. There was no prejudice to the defendant, given that the jury acquitted him of all charges except for unlawful mischief, based on kicking or stomping on the car. There was substantial evidence to support this charge, including the defendant's own admissions at trial. 3) There was no reversible error in the complainant's testimony at sentencing, which included hearsay statements for which no reliability finding was made. There is no indication that the court's decision was based on any of the challenged statements, and the court stated that it was taking into account the intentional nature of the defendant's conduct and his prior criminal history; the court did not mention any of the challenged assertions in the complainant's testimony. 4) The court properly exercised its discretion in dispensing with a pre-sentence investigation report because this was a misdemeanor. 5) The defendant did not object to a probation condition that he not engage in violent or threatening behavior in front of his children and that he attend anger management counseling, and did not argue on appeal that these conditions were plain error. In any event, his claim that these conditions are too vague to provide notice of what behavior is prohibited is without merit. Doc. 2017-237, 7/16/18.

PETITION FOR POST CONVICTION RELIEF PROPERLY DISMISSED AS SUCCESSIVE

In re Hall, three-justice entry order. PCR PETITION: SUCCESSIVE PETITIONS.

Dismissal of petition for post-conviction relief affirmed. The court is not required to entertain a second or successive motion for similar relief on behalf of the same prisoner. The ineffective assistance of counsel claim was raised and decided in the petitioner's first PCR action. The current petition is a thinly disguised rehash of the first, and the court was not required to consider it. Doc. 2017-260, 7/16/18.

CROSS-EXAMINATION OF COMPLAINANT WAS ADEQUATE DESPITE COURT-IMPOSED LIMIT

State v. Banis, three-justice entry order. CROSS-EXAMINATION: LIMITS WITHIN TRIAL COURT'S DISCRETION; FAILURE TO MAKE PROFFER.

Domestic assault affirmed. 1) On the night of the assault, the complainant drove away through the defendant's garage door, causing extensive damage. The defendant argued on appeal that he was not allowed to thoroughly cross-examine her on her fear of prosecution for causing this damage, to show that she fabricated her story to escape potential criminal charges. The defense was allowed to elicit that the complainant was aware that she could have criminal charges brought against her, and that her awareness of potential criminal liability resulting from being reminded at her deposition that she could exercise her right against self-incrimination. The court did not abuse its discretion by excluding the source of this understanding (allegedly the victim advocate), as this information was disputed, only marginally relevant to the case against the defendant, and may have been confusing to the jury. 2) The defendant also argues that the trial court erred in excluding testimony about the complainant's prior experience as a crime victim, which he says could show that she had experience with the system that led her to believe that she might avoid charges by accusing the defendant. But the defendant never made such a proffer to the trial court. Therefore the issue was not preserved for appeal. Doc. 2017-373, August 6, 2018.

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.