Vermont Department of State's Attorneys

Vermont Criminal Law Month

September - October 2018

Vermont Supreme Court Slip Opinions: Full Court Rulings

Includes three-justice bail appeals

EVIDENCE OF DEFENDANT'S INCARCERATION ADMISSIBLE TO EXPLAIN TIMING OF COMPLAINANT'S REPORT OF ABUSE

State v. Amidon, 2018 VT 99. VOIR DIRE: TAINT OF JURY POOL. EVIDENCE OF DEFENDANT'S INCARCERATION RELEVANT TO TIMING OF COMPLAINANT'S REPORT OF ABUSE. CROSS-EXAM OF DEFENSE WITNESS CONCERNING HER PREVIOUS FAILURE TO NOTICE ABUSE.

Full court published opinion. Lewd and lascivious conduct with a child affirmed. 1) No mistrial was required after the prosecutor asked the jury pool whether anyone had had a bad experience previously serving on a jury, such as finding out afterwards information they weren't told about during the trial. This did not taint the jury pool by suggesting that there was negative information about the defendant that they would not be told about. The wording of the question was neutral, and the trial court's ruling that it was not prejudicial was not untenable. 2) Evidence that the defendant had been incarcerated was admissible to explain why the complainant had remained silent (she felt safe while he was in jail) and why she reported when she did (she learned that the defendant was being released and was going to be seeking custody of her). The trial court was not required to wait until the defense actually attacked the complainant's credibility on the basis of the delay in reporting before finding that this evidence was admissible and not unduly prejudicial. Furthermore, the trial court gave a limiting instruction with respect to this evidence. 3) A defense witness testified that she had been present in the home and had not seen anything untoward occur. The state impeached her by asking her whether her own daughter had been the victim of molestation, without her having known about it. A witness's personal bias and capacity to observe or remember are fair subjects for cross-examination. Allowing a single question on this point was within the trial court's discretion. Doc. 2016-354, September 7, 2018. https://www.vermontjudiciary.org/sites/default/files/documents/op17-065.pdf

CHALLENGE TO BREATH TEST AS INVOLUNTARY MUST BE MET WITH SHOWING BY STATE OF VOLUNTARINESS

State v. Edelman, 2018 VT 100. EVIDENTIARY BREATH TEST: VOLUNTARINESS CHALLENGE PERMITTED DESPITE IMPLIED CONSENT STATUTE.

Trial court order denying motion to suppress results of evidentiary breath test as not voluntary reversed. Vermont's implied consent law provides that anyone who operates a motor vehicle is deemed to have given consent to an evidentiary test, where the officer has reasonable grounds to believe that the person was operating a vehicle under the influence. An evidentiary breath test is a search for purposes of Article 11. An officer's warrantless request for an evidentiary breath sample meets the requirements of Article 11 because the term "reasonable grounds" is akin to probable cause, and a person is not required to take such a test. Although there are civil and criminal penalties for the refusal to take an evidentiary breath test under some circumstances, the choice whether to take the test remains with the defendant. An evidentiary test is a consent search, albeit a consent search in which the requirement that law enforcement have some suspicion of criminality tantamount to probable cause is paired to consequences for refusal to comply with a reasonable request. As such, as in other contexts, a defendant may argue that based upon particular circumstances, consent was not given voluntarily. The State is not required to prove voluntariness as a threshold matter every time it intends to admit breath test results. But when a specific challenge is made in a given case, the State must make the required showing that the defendant voluntarily submitted to the breath test. Voluntariness is to be determined from the totality of the circumstances, with the State carrying the burden of demonstrating that the consent was freely given and not coerced by threats or force or granted only in submission to a claim of lawful authority. Doc. 2017-065, September 7, 2018. https://www.vermontjudiciary.org/sites/default/files/documents/op17-065.pdf

CORRECTION OF SENTENCE TO REFLECT REQUIRED LIFE MAXIMUM DID NOT REQUIRE DEFENDANT'S PRESENCE

State v. Tobin, 2018 VT 108. SEXUAL ASSAULT OF MINOR: SUFFICIENCY OF EVIDENCE OF AGE; NOTICE OF CHARGES; ATTORNEY INEFFECTIVENESS; STATUTE OF LIMITATIONS; CORRECTION OF SENTENCE – PRESENCE OF DEFENDANT.

Full court published opinion. Aggravated sexual assault affirmed. 1) The evidence was sufficient that the victim was under thirteen years old at the time of the offense where he testified that he was six or seven years old, and the evidence indicated that the offense occurred between January 2007 and March 2007, and the complainant was 17 years old in December 2016. 2) The defendant contends that he was not properly informed of his charge, claiming that he was charged under 13 V.S.A. 3253a(a)(8) without being notified of that. The information correctly indicates that he was charged with violating 13 V.S.A. 3253(a)(8). 3) The defendant's claim that his attorney withheld recordings of police interviews with the victim and two other witnesses does not make out a Brady claim. This claim must be raised in a petition for post-conviction relief. 4) The defendant's claims of ineffective assistance of counsel

would not be considered on direct appeal. 5) The defendant's claim that the State violated a statute that prohibits "licensees" (but not attorneys) from willfully making or filing false reports or records would not be considered as it was inadequately briefed. 6) The defendant is incorrect in asserting that the statute of limitations for the offense was six years, and that it had expired before he was charged. The pertinent statute of limitations is "any time." 13 V.S.A. 4501(a). 7) The defendant argued that he was sentenced twice for the same crime, in violation of double jeopardy. This is incorrect. He was sentenced once, and then that sentence was corrected. The ninety day time limit does not apply to corrections of sentences, only to reconsiderations of sentences. 8) The court's issuance of an order correcting the sentence to comply with the statutory requirement that the maximum be life, outside of the presence of the defendant, did not violate his Sixth Amendment right to be present at every critical stage of the proceedings. In this case, the defendant's absence did not affect the fairness of the sentence correction. Doc. 2017 -267, October 12, 2018. https://www.vermontjudiciary.org/sites/default/files/documents/op17-267.pdf

TRESPASS REQUIRES ONLY REASONABLE NOTICE AGAINST TRESPASS, NOT ACTUAL KNOWLEDGE

State v. Pixley, 2018 VT 110. TRESPASS: OBJECTIVE TEST FOR NOTICE.

Full court published opinion. Unlawful trespass affirmed. Although the "without license" element of trespassing requires a "knowing" state of mind, the notice element requires only proof of reasonable notice through signage, and does not require a showing that the defendant subjectively saw and understood the signs. Doc. 2017-374, October 12, 2018. https://www.vermontjudiciary.org/sites/default/files/documents/op17-374.pdf

COURSE OF CONDUCT ELEMENT FOR STALKING REQUIRES ONLY ONE ACT WITHIN STATUTE OF LIMITATIONS

State v. Noll, 2018 VT 106. STALKING – CONSTITUTIONALITY; TRUE THREATS; STATUTE OF LIMITATIONS.

Full court published opinion. Stalking conviction reversed. 1) The stalking statute as it existed in 2015 was not facially invalid under the First Amendment, because any expression prohibited under the statute fell within the constitutionally unprotected category of true threats – statements where the speaker means to communicate a serious expression of an intent to commit an act of unlawful violence to a particular individual or group of individuals, regardless of whether he actually intends to carry out the threat. The statute only prohibited acts that are harassing, lying in wait, or following. The defendant did not argue that lying in wait or following, as defined, constitute constitutionally protected activity, and harassing was defined as applying only to expression that would cause a reasonable person to fear unlawful sexual conduct, unlawful restraint, bodily injury, or death, expression that is mostly if not completely constitutionally unprotected because it conveys a true threat. Furthermore, the statute expressly excludes constitutionally protected activity. 2) The chargeable course of conduct required by the statute can include acts outside the limitations period, as long as at least one act that meets the elements of the criminal stalking statute

occurred within three years prior to the date defendant was charged. The only act within the limitations period was the defendant's dissemination of his book on the campus where the complainant worked. A jury could have found that the book contained true threats, where it states, with respect to the complainant's artwork: "Shoot the terrorist? Or shoot the 'artist'?", as this would cause a reasonable person to fear unlawful violence, in the context of the defendant's actions overall. 3) The jury instruction permitted the jury to convict based solely on time-barred acts. It did not instruct that at least one of the acts must have occurred within the limitations period. Doc. 2017-146. October 12, 2018. https://www.vermontjudiciary.org/sites/default/files/documents/op17-146.pdf

AGGRAVATING CIRCUMSTANCES NOT REQUIRED TO IMPOSE SENTENCE IN EXCESS OF MANDATORY MINIMUM SENTENCE.

State v. Sullivan, 2018 VT 112. SENTENCING: EXERCISE OF DISCRETION, CREDIBILITY DETERMINATIONS, PERSONAL BIAS; EXCEEDING MANDATORY MINIMUMS.

Imposition of sentence after remand for resentencing affirmed. The matter was remanded for resentencing because the trial court abused its discretion in denying a continuance to allow the defendant to present expert testimony. After remand, and hearing testimony from the expert, the trial court re-imposed the same sentence. 1) The Court's review of a sentencing decision is limited and deferential, and the sentence will not be disturbed absent an abuse of discretion. 2) The defendant argues that the trial court erred when it imposed a sentence above the statutory minimum without a finding of aggravating factors. But the court is not required to find any aggravating factors in imposing a minimum sentence greater than the statutory minimum. The mandatory minimum is not a presumptive minimum, and does not limit the judge's discretion in imposing a minimum sentence greater than the mandatory minimum. 3) The trial court's finding that the defendant failed to take responsibility for his crimes and that he posed a risk to the public were supported by the evidence. There was evidence to the contrary, but it was not persuasive to the trial court. The trial court was entitled to find the defendant's expert not credible even absent any countervailing evidence from the state. The trial court did not summarily dismiss the defendant's evidence, but listened to it, considered it, and found it not credible. 4) The Court was not persuaded that the sentencing court acted out of personal animus. The comments cited by the defendant, in context, did not show personal bias. The record shows that the trial court based its decision on proper factors, accurate information, and the legitimate goals of criminal justice. Doc. 2017-299, October 19, 2018. https://www.vermontjudiciary.org/sites/default/files/documents/op17-299_0.pdf

AFFIDAVIT SUMMARIZING SWORN STATEMENT BY COMPLAINANT WAS INADMISSIBLE AT WEIGHT OF EVIDENCE HEARING

State v. Crawford, 2018 VT 119. BAIL APPEAL: USE OF HEARSAY TO ESTABLISH THAT EVIDENCE OF GUILT IS GREAT.

Three-judge published bail appeal. Finding that the weight of the evidence was great reversed. The court erred in considering the

complainant's out-of-court statements to the police officer as reflected in the trooper's sworn affidavit, and without those statements, there is insufficient evidence of the domestic assault. The statements were not demonstrated to have been excited utterances, and therefore admissible under an exception to the hearsay rule. Although the affidavit reflected that the complainant was crying and fearful, it did not establish that she was still under the stress of excitement of the event. And although the State can meet its burden by admitting a sworn statement, it did not do so here – it merely stated that such a statement exists (a recording of the officer's interview with the victim) but did not introduce it. Doc. 2018-334, October 24, 2018. https://www.vermontjudiciary.org/sites/default/files/documents/eo18-334.bail_.pdf

INFERENCE FROM BLOOD TEST REFUSAL IS STILL CONSTITUTIONAL

State v. Francis, 2018 VT 115. BLOOD TEST REFUSAL: USE TO DRAW INFERENCE OF INTOXICATION.

DUI affirmed. The defendant claimed that the use of his refusal to agree to a blood test for the presence of alcohol in his system as an inference of guilt violated his Fourth Amendment rights. This claim was recently denied in State v. Rajda, 2018 VT 72. The defendant's claim that the evidence was not relevant and was unduly prejudicial was not preserved for appeal and therefore would not be reached. Doc. 2017-306, October 19, 2018. https://www.vermontjudiciary.org/sites/default/files/documents/op17-306.pdf

SEARCH WARRANT AFFIDAVIT SATISFIED VERACITY PRONG WHERE CONFIDENTIAL INFORMANT WAS ACTING AGAINST HIS PENAL INTEREST

State v. Finkle, 2018 VT 111. PROBABLE CAUSE BASED ON CONFIDENTIAL INFORMANT: VERACITY ESTABLISHED BY STATEMENTS AGAINST PENAL INTEREST. EXCISION OF FALSE STATEMENTS FROM AFFIDAVIT.

Denial of motion to suppress affirmed. The police obtained a search warrant in reliance upon statements by a confidential informant, which were corroborated to some extent by the police officer. 1) The veracity prong of the Aguillar-Spinelli test was satisfied as to this confidential informant because the information he provided to the police was against his penal interest (he admitted having purchased heroin from the defendant). 2) Given that the statements satisfied the veracity prong of the test, it was unnecessary to determine that the police corroborated them. In any event, the officer was familiar with the defendant, and confirmed some details, including the condition and arrangement of the inside of the defendant's residence. Although corroboration of innocent details by itself generally cannot establish the reliability of a confidential informant, here the police corroboration merely bolstered the confidential informant's otherwise reliable statements. 3) The trial court was not required to hold a hearing on the defendant's claim that the officer provided false information and omitted relevant information in the affidavit, because the court assumed that the defendant had made out his case on this point, and evaluated the affidavit considering only the unchallenged information, and ruled that it established probable cause, a finding with which the Supreme Court agrees. The motion to suppress was therefore properly denied. Skoglund, with Robinson, dissenting: 1) The confidential informant's statements were not

sufficiently against penal interest to establish that he was trustworthy. 2) The only information supplied by the confidential informant that was corroborated consisted of innocent details. 3) The trial court failed to sufficiently evaluate the officer's veracity. There are obvious untruths in his sworn affidavit. Excising these, there is insufficient information in the affidavit to support a finding of probable cause. Doc. 2017-313, October 19, 2018. https://www.vermontjudiciary.org/sites/default/files/documents/op17-313.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'S ABSENCE FROM TRIAL UNDERMINES HIS CLAIM OF INEFFECTIVE ASSISTANCE

In re Fellows, three-justice entry order. POST-CONVICTION RELIEF: INEFFECTIVE ASSISTANCE OF COUNSEL.

Denial of petition for post-conviction relief affirmed. The petitioner's numerous claims of ineffective assistance, both those raised and litigated below, and those raised for the first time on appeal, are without merit. The petitioner told the police who questioned him about his daughter's allegations of sexual abuse that she would not lie, leaving defense counsel little to work with. The defense attempted a claim that the abuse occurred in the petitioner's sleep, but when the petitioner failed to appear for the last two days of the trial, defense counsel was severely hampered in making this argument. The petitioner insisted in presenting evidence of character for lack of sexual interest in under-age girls, knowing that this would open the door to evidence that the victim's mother was 14 years old at the time that the victim was conceived, the same age at which the alleged sexual abuse had occurred. It was not ineffective assistance to fail to challenge medical evidence of a vaginal bruise where the defense did not claim that the incident hadn't occurred. The petitioner's remaining claims are also without merit. Doc. 2018-130, September 28, 2018. https://www.vermontjudiciary.org/sites/default/files/documents/eo18-130.pdf

FAILURE TO ORDER TRANSCRIPT PRECLUDES CHALLENGE TO FINDINGS

In re Boule, three-justice entry order. DENIAL OF POST-CONVICTION RELIEF: CHALLENGE TO FINDINGS IN ABSENCE OF TRANSCRIPT; CLAIM OF INCONSISTENT FINDINGS.

Denial of petition for post-conviction relief (lewd and lascivious conduct with a child underlying) affirmed. The petitioner claimed he had been coerced into taking a plea offer by his defense attorney, but the trial court credited the testimony of the defense attorney and a private investigator who had

been present that this did not occur. The petitioner's challenges to the findings by the trial court are not reached on appeal because the petitioner failed to order a transcript of the proceedings below. The petitioner's claims that the trial court's findings are inconsistent are, in reality, simply disagreements with the trial court's factual findings. The petitioner's claim that his PCR attorney was ineffective is not properly before the court as having never been considered or ruled on below. Doc. 2018- 124, September 28, 2018. https://www.vermontjudiciary.org/sites/default/files/documents/eo18-124.pdf

PROSECUTOR'S DESCRIPTION OF DUI DEFENDANT'S OPERATION AS SCARY WAS FAIR

State v. Washek, three justice entry order. MOTOR VEHICLE STOP AND EXIT ORDER: SUFFICIENCY OF THE EVIDENCE. EXCLUSION OF CUMULATIVE EVIDENCE. CLOSING ARGUMENT: BASIS IN THE EVIDENCE.

Conviction of driving while under the influence affirmed. 1) The defendant waived his right to challenge the trial court's findings when he did not order a transcript of the suppression hearing. 2) The defendant argued that the trial court erred in finding that the police officer had reasonable and articulable suspicion of DUI based solely on intra-lane weaving, but the trial court also relied upon other factors relating to the operation of the vehicle, which supported the trial court's conclusion. 3) The trial court's finding that the exit order was justified by specific, articulable facts was also supported by the evidence and was not, as the defendant asserted on appeal, based solely on the faint odor of intoxicants. 4) The trial court did not err in failing to allow the jury to hear an inadvertently recorded sixty-second portion of the defendant's conversation with an attorney, which he argues was important to show his demeanor, articulation, and comprehension of events, as well as, for the first time on appeal, in order to comply with the rule of completeness. The court reasonably excluded this evidence as cumulative and incomplete. 5) There was no plain error in the closing argument. It was fair for the prosecutor to use the word "scary" to describe what it argued was erratic driving. This description was grounded in the evidence presented at trial, including the officer's testimony that he observed the defendant crossing the centerline, weaving, and coming to a stop at an intersection where there was no stop sign. The prosecutor's statement that the defendant threatened the officer was also grounded in the evidence, where the officer testified that the defendant threatened to report him to the police chief for allegedly conducting illegal procedures. Doc. 2018-009, October 3, 2018. https://www.vermontjudiciary.org/sites/default/files/documents/eo18-009_0.pdf

Vermont Supreme Court Slip Opinions: Single Justice Bail Rulings

EVIDENCE INSUFFICIENT TO FIND THREAT OF VIOLENCE CANOT REASONABLY BE PREVENTED

State v. Sweet, single justice de novo bail hearing. HOLD WITHOUT BAIL: INSUFFICIENT EVIDENCE THAT THREAT OF VIOLENCE CANNOT REASONABLY BE PREVENTED.

State's request to hold defendant without bail is denied. The State proved that the defendant poses a threat of violence to the complainant and any other woman that he enters into a romantic relationship with. But the State has not proven by clear and convincing evidence that any such threat of violence cannot reasonably be prevented by strict conditions of release, including the requirement that he reside with and be supervised by his sister and her family. When he has resided there before, he has followed his conditions of release and has not had additional involvement with law enforcement, and their supervision has proven effective. They reside in a separate county from the complainant, do not have alcohol in their home, and will report any violations promptly to law enforcement. Doc. 2018-295, September 27, 2018. https://www.vermontjudiciary.org/sites/default/files/documents/eo18-295.bail_.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.