Vermont Department of State's Attorneys

Vermont Criminal Law Month

January – February 2019

Vermont Supreme Court Slip Opinions: Full Court Rulings

Includes three-justice bail appeals

LICENSE PLACE WAS "ENTIRELY UNOBSCURED" DESPITE SNOW OBSCURING INSPECTION STICKER, SO MOTOR VEHICLE STOP WAS ILLEGAL

Zullo v. State, 2019 VT 1. REASONABLE SUSPICION FOR MOTOR VEHICLE STOP: SNOW OBSCURING INSPECTION STICKER. EXIT ORDER: ODOR OF MARIJUANA AND PRESENCE OF DRUG PARAPHRENALIA. PROBABLE CAUSE TO SEARCH VEHICLE: INSUFFICIENT EVIDENCE WHERE BASED SOLELY ON FAINT ODOR OF BURNT MARIJUANA.

Full court published opinion. An implied private right of action for damages is available directly under Article 11 of the Vermont Constitution. Damages may be obtained only upon a showing that a law enforcement officer acting within the scope of the officer's duties either acted with bad faith or knew or should have known that those actions violated clearly established law. Here, the motor vehicle stop and the warrantless seizure of the plaintiff's vehicle violated Article 11, and the matter is remanded for further proceedings. 1) The motor vehicle stop here was based upon a suspected violation of 23 VSA 511, which requires that number plates be kept entirely unobscured, and that the numerals and the letters thereon shall be plainly legible at all times. The officer did not have an objectively reasonable basis for believing that this statute had been violated based on snow partially obscuring the registration sticker affixed to the license plate. Under the statute, as it then existed, a license plate was not obscured unless the identifying numerals and letters were obscured. Although a registration sticker contains small numbers and letters and is affixed to a corner of the plate, those numbers and letters do not serve the purpose of identifying the vehicle. Hence, an obscured registration sticker did not violate the statute. 2) The exit order itself, aside from the illegal motor vehicle stop, was lawful as the faint odor of burnt marijuana, a bottle of Visine eyedrops, and an air freshener, supported a suspicion that the plaintiff was driving while impaired. 3) The officer's seizure of the vehicle on suspicion that marijuana was present in the car at the time of the stop was not justified by the faint odor of burnt marijuana. The odor of marijuana is a factor in determining whether probable cause exists to search for marijuana, but here the faint smell of burnt

marijuana, standing alone, was insufficient. Doc. 2017-284, January 4, 2019.

https://www.vermontjudiciary.org/sites/default/files/documents/op17-284_0.pdf

COURT NEED NOT RELY UPON UNIQUE FACTORS TO SENTENCE BEYOND THE STATUTORY MINIMUM

State v. Jones, 2019 VT 3. Full court published opinion. DISPENSING HEROIN: SUFFICIENCY OF THE EVIDENCE. SENTENCING: ABUSE OF DISCRETION.

Dispensing heroin less than 200 milligrams affirmed. 1)Taken in the light most favorable to the State, there is significant evidence that supports the inference that the defendant knowingly dispensed heroin to the informant. 2) The sentence imposed was not an abuse of discretion. A defendant does not establish reversible error simply because a trial court has imposed a longer sentence than in other cases involving the same or a similar charge. Even if the trial court had relied entirely on factors that would be present in every dispensing-under-200-milligrams-of-heroin case, imposition of a more lengthy sentence compared to other cases involving the same charge would not be reversible error, provided that the sentence under review is within statutory limits, is not based on improper or inaccurate information, and is not the product of personal animus or bias. Nor is imposing a harsher sentence than requested by the prosecution improper. Doc. 2017-294, January 11, 2019.

EVIDENCE THAT DEFENDANT WAS IN POSSESSION OF DRUGS IN VEHICLE OF CAR IN WHICH HE WAS A PASSENGER WAS INSUFFICIENT

State v. Scales, 2019 VT 7. POSSESSION OF DRUGS IN A VEHICLE: SUFFICIENCY OF THE EVIDENCE.

Denial of motion to dismiss and to dismiss charges is reversed. 1) The trial court should have granted the motion to dismiss because the evidence was insufficient to prove that the defendant was in possession of illegal drugs found in the trunk of the car in which he was riding. The permissive inference of possession found at 18 V.S.A. 4221(b) was insufficient to support a conclusion that the defendant was in possession of the drugs, even when combined with the additional facts relied upon by the trial court, that only the defendant knew the address of the destination, and that he did not know the driver. 2) In reviewing a motion to dismiss, the court should only consider evidence that was presented to the court at the hearing on the motion to dismiss. Thus, the Court would not consider other evidence in the file, contained in the affidavits of probable cause, in support of the sufficiency of the evidence, as these were not relied upon by the State in opposition to the motion to dismiss. Doc. 2018-125, February 1, 2019.

COURT DID NOT ABUSE ITS DISCRETION IN DENYING DEFENDANT BAIL

State v. Turner, three-justice bail appeal. HOLD WITHOUT BAIL ORDER AFFIRMED.

Order that defendant be held without bail affirmed. The defendant was charged with one count of aggravated domestic assault of the second degree based on a prior

conviction for domestic assault, and one count of simple assault. He faced a possible life sentence as a result of sentence enhancement for prior convictions. The defense conceded that the State had met its burden of showing that the evidence of guilt was great, and argued only that the court should exercise its discretion in releasing the defendant on bail. The court soundly exercised its discretion in holding the defendant without bail in light of the nature and circumstances of the offense charged, the weight of the evidence, the record of convictions, and the record of appearance and non-appearance. Furthermore, the defendant failed to introduce any evidence or argument as to why he was likely to abide by conditions if released on bail or why he was otherwise bailable. Doc. 2019-008, January Term, 2019.

VIOLATION OF ABUSE PREVENTION ORDER REVERSED WHERE ORDER WAS NOT SHOWN TO HAVE BEEN PROPERLY SERVED ON THE DEFENDANT

State v. O'Keefe, 2019 VT 14. Full court published opinion. VIOLATION OF ABUSE PREVENTION ORDER: SUFFICIENCY OF EVIDENCE OF PROPER SERVICE OF ORDER.

Violation of an abuse protection order reversed for failure to prove valid service of the order of protection. The defendant was charged with violating a protection order issued in New Hampshire, and therefore the State had to prove that the order was validly served on him "in compliance with the requirements of the issuing state." Under New Hampshire law, a temporary order must be served by a peace officer, and subsequent orders, as here, must be sent to the defendant's last address of record. The record does not show any evidence that a copy of the final order was served on the defendant by mailing it to his last known address. The record shows that the order was served on the defendant's attorney, but nothing in New Hampshire law provides that service on an attorney meets the service requirements. Whether service to an attorney, as the trial court held, was superior to service by mail, is not the issue. Although a New Hampshire civil rule requires only actual notice for injunctions or retraining orders, the more specific service provisions in the domestic violence chapter controls over this more general service requirement. Doc. 2018-093, March 1, 2019.
http://www.vermontjudiciary.org/sites/default/files/documents/op18-093.pdf

POLICE OFFICER HAD REASONABLE SUSPICION DEFENDANT HAD USED HEROIN, BUT NOT THAT SHE STILL HAD HEROIN IN HER CAR

State v. Dubaniewicz, 2019 VT 13. REASONABLE SUSPICION OF POSSESSION OF HEROIN.

Full court published opinion. Possession of heroin reversed. The defendant was ordered from the car after a traffic stop, and this order was supported by a reasonable suspicion. At the time of the exit order, the officer had noted that the defendant had constricted pupils and alleged track marks on the back of her hands; that her affect had shifted from an earlier motor vehicle stop, from dull, withdrawn, and showing symptoms of "dope sickness" to more comfortable and no longer withdrawn or sick. These factors, in combination with the implausibility of the defendant's motivation for traveling from New Hampshire to Greenfield Massachusetts – to get cake – gave rise to a legitimate reasonable suspicion that the defendant was potentially

under the influence of heroin, which impaired her ability to drive, and therefore the exit order was justified. However, the officer did not have reasonable suspicion to expand the scope of the stop into a drug investigation, after concluding that the defendant's driving was not impaired. There was no testimony concerning any objective factual basis to support the officer's suspicion that additional drugs would likely be found in the vehicle or in the defendant's possession. (The State argued that it was common sense that the defendant would not drive such a long distance only to buy one dose of heroin, and that she therefore likely had more heroin in the car. However, the officer did not testify to this practice.).

http://www.vermontjudiciary.org/sites/default/files/documents/eo19-032.bail_.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."

TWO TO SIX MONTHS FOR FAILING TO SHOW FOR FINGERPRINTING WAS NOT GROSSLY DISPROPORTIONAL SENTENCE

State v. West, three-justice entry order. SENTENCING: GROSS DISPROPORTIONALITY.

Sentence of two to six months to serve for conviction of a condition of release order to appear for photographing and fingerprinting affirmed. The sentence was not grossly disproportional to the offense in light of the defendant's criminal record, which includes repeated failures to comply with court orders. Nor does the record support the claim that the court imposed a sentence based on an assumption that the defendant did not have the ability to pay a fine. This factor was not relevant in the court's analysis. Doc. 2018-049, February 1, 2019. http://www.vermontjudiciary.org/sites/default/files/documents/eo18-049.pdf

COURT GRANTING PETITIONER SUMMARY JUDGMENT IN PCR CHALLENGING RULE 11 ERRONEOUSLY GAVE BRIDGER RETROACTIVE EFFECT

In re Shannon, three-justice entry order. RULE 11: ATTORNEY STIPULATION TO FACTUAL BASIS UNDER PRE-BRIDGER LAW.

Trial court's grant of partial summary judgment in post-conviction relief proceeding reversed. In granting the petitioner's claim that the underlying proceeding involved a failure to comply with V.R.Cr.P. 11, the trial court relied upon In re Bridger. However, Bridger was not given retroactive effect, and the controlling law at the time of the change of plea permitted an attorney's stipulation to satisfy the factual

basis requirement of Rule 11. In this case, the attorney did make such a stipulation, and therefore the colloquy satisfied Rule 11 under then-current law. Doc. 2018-144, February 1, 2019. http://www.vermontjudiciary.org/sites/default/files/documents/eo18-144.pdf

EVIDENCE SUPPORTED FINDING THAT DEFENDANT BAITED DEER

State v. Defoe, three-justice entry order. TAKING DEER BY BAIT: SUFFICIENCY OF THE EVIDENCE.

Conviction for baiting a deer affirmed. The evidence was sufficient to permit a finding that the defendant took deer by using bait where the defendant was found, dressed in camouflage gear, sitting in a tree stand with a bow and nocked arrow, ready to shoot, with his only clear line of sight to the bait site twenty-five to thirty yards away, which was an extremely easy shot. Doc. 2018-283, February 1, 2019. http://www.vermontjudiciary.org/sites/default/files/documents/eo18-283.pdf

IMPOSITION OF BAIL WAS SUPPORTED BY THE RECORD, INCLUDING DEFENDANT'S FINANACIAL MEANS, BASED UPON HIS PUBLIC DEFENDER APPLICATION FORM

State v. Hart, single justice bail review. BAIL REVIEW: FINDINGS OF RISK OF FLIGHT AND IMPOSITION OF BAIL WAS SUPPORTED BY THE EVIDENCE.

$10,000 bail on charges of first-degree aggravated and domestic assault, second degree unlawful restraint, interference with access to emergency services, reckless endangerment, and domestic assault. The court's finding that the defendant posed a risk of flight was supported by the evidence, including the seriousness and number of the charged offenses, the lack of evidence of any current ties to Vermont, and the other statutory factors. The imposition of bail was also within the court's discretion. The court considered the defendant's financial means, citing the public-defender application form showing that the defendant had made $3000 in the past year. There is no indication in the record that the court imposed the bail for any purpose other than to secure the defendant's appearance in court. Doc. 2019-027, January Term, 2019 (Robinson, J.).

INSTRUCTION ON INTENT IN LEWD AND LASCIVIOUS WITH CHILD CASE WAS CORRECT

State v. Thomas, three-justice entry order. LEWD AND LASCIVIOUS CONDUCT WITH CHILD: JURY INSTRUCTION RE INTENT; SUFFICIENCY OF EVIDENCE OF INTENT.

Lewd and lascivious conduct with a child affirmed. 1) There was no error, let alone plain error, in the trial court's failure to instruct the jury that the defendant intended the contact between his hand and the complainant's penis to appeal to either his or the complainant's sexual desires, lusts, or passions. The jury was instructed that

they must find that the defendant willfully engaged in lewd and lascivious conduct, in this case hand-to-penis contact – with the specific intent of appealing to either his or the complainant's sexual desires, lusts, or passion. No more was needed. 2) The evidence on this element was sufficient where the act might arguably have been intended to inflict pain. The grabbing of the complainant's penis occurred shortly before the defendant placed the complainant's penis in his mouth, and it was entirely reasonable, and not merely speculative, for the jury to conclude, given the circumstances, that the defendant grabbed and pulled on the complainant's penis to arouse his or his own sexual desires. Doc. 2018-221, February 1, 2019. http://www.vermontjudiciary.org/sites/default/files/documents/eo18-221.pdf

VICTIM'S TESTIMONY WAS SUFFICIENT TO PROVE SEXUAL ASSAULT

State v. Evans, three-justice entry order. SEXUAL ASSAULT: SUFFICIENCY OF THE EVIDENCE.

Sexual assault affirmed. The complainant testified to every element of the offense, and no corroborating physical evidence was required. The absence of such evidence despite a physical examination does not affect the rule that the complainant's credibility was for the jury to determine. The complainant's statement that "he had his penis inside me" and that she felt vaginal pain afterward, was sufficient to establish that a sexual act occurred. Doc. 2018-069, February 1, 2019. http://www.vermontjudiciary.org/sites/default/files/documents/eo18-069.pdf

Vermont Supreme Court Slip Opinions: Single Justice Bail Rulings

DEFENDANT'S VIOLENCE SUPPORTED NO BAIL ORDER

State v. Pierce, single justice bail appeal. NO BAIL ORDER: SUFFICIENCY OF EVIDENCE THAT NO CONDITIONS WILL PREVENT PHYSICAL VIOLENCE.

Order holding defendant without bail is affirmed. The underlying charges are first-degree aggravated domestic assault with a deadly weapon, criminal threatening, and violation of conditions of probation. The State met its burden of proving that release poses a substantial threat of physical violence to any person, and no condition or combination of conditions of release will reasonably prevent the physical violence, where the defendant's violent behavior was virtually unprovoked. He was on probation after a conviction for simple assault involving a threat of physical harm to another with a knife. The defendant has shown that he is unwilling, or unable to avoid violent behavior toward other persons following perceived slights, even though he is on probation and facing possible incarceration in the event he were to commit another crime. Doc. 2019-032, February 13, 2019 (Gerety, J., specially assigned). http://www.vermontjudiciary.org/sites/default/files/documents/eo19-032.bail_.pdf

Rule Changes

Vermont Rule of Evidence 902(13) was recently added to permit self-authentication for blockchain records:

(13) *Blockchain records*. Any digital record electronically registered in a blockchain if it is accompanied by a written declaration of a qualified person, made under oath, stating the qualification of the person to make the certification and:

(A) the date and time the record entered the blockchain;
(B) the date and time the record was received from the blockchain;
(C) that the record was maintained in the blockchain as a regular conducted activity; and
(D) that the record was made by the regularly conducted activity as a regular practice.

A party intending to offer a record into evidence under this paragraph must provide written notice of that intention to all adverse parties, and must make the record and declaration available for inspection sufficiently in advance of their offer into evidence to provide an adverse party with a fair opportunity to challenge them.

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