Vermont Department of State's Attorneys

Vermont Criminal Law Month

July - August 2019

Vermont Supreme Court Slip Opinions: Full Court Rulings

Includes three-justice bail appeals

ORDER QUASHING INQUEST SUBPOENA IS PUBLIC RECORD

In re VSP-TK/1-16-18 Shooting, 2019 VT 47. ACCESS TO COURT RECORDS: SEALING OF ORDER QUASHING INQUEST SUBPOENA REVERSED.

Full court opinion. Trial court order granting a motion to quash a subpoena issued in the context of an inquest is a public record presumptively subject to disclosure under the Rules for Public Access to Court Records. There is no basis for sealing the record in this case. The State served an inquest subpoena on WCAX-TV for all of its unedited video recordings of an incident in which the police shot and killed a bank robbery suspect. The television station moved to quash the subpoena, citing the journalist protection statute. The trial court granted the motion to quash the subpoena pursuant to that statute. However, the court kept that decision under seal. After the State completed its investigation and announced it would not bring any charges, the television station moved to unseal the court's order. The trial court denied the motion, holding that inquests are confidential and secret. Issues concerning public access to judicial case records should be decided pursuant to the Public Access to Court Records rules, rather than the Access to Public Records Act. Under the PACR rules, all case records are public records presumptively subject to public disclosure unless an exception applies, and no categorial exception from disclosure applies to this order. In addition, no basis exists in this case to seal or redact the order pursuant to the court's authority to seal or redact otherwise publicly accessible records. Doc. 2018-392, July 19, 2019. https://www.vermontjudiciary.org/sites/default/files/documents/op18-392.pdf

NO PLAIN ERROR WHERE SENTENCING COURT DEEMED MURDER VICTIM TO BE "PARTICULARLY VULNERABLE"

State v. Ray, 2019 VT 51. SENTENCING: PLAIN ERROR: ERRONEOUS CONSIDERATION OF AGGRAVATING FACTOR.

Full court opinion. Sentence of twenty years to life for second-degree murder,

imposed after contested sentencing hearing following a plea agreement, affirmed. There was no plain error in the trial court's finding that the victim here was "particularly vulnerable." Assuming without deciding that the victim was not particularly vulnerable, any such error did not affect the defendant's substantial rights or result in prejudice to him, and thus was not plain error. Where a trial court's erroneous consideration of an aggravating factor had no effect on the defendant's sentence, the error has not affected the substantial rights of the defendant and was therefore not prejudicial. The court listed three other aggravating factors to justify its sentence and further mentioned a variety of other considerations it made in fashioning the sentence, such as punishment, rehabilitation, general and specific deterrence, and incapacitation. The only reference to vulnerability was in a single, brief reference in a lengthy discussion by the court, in which it notes that the factor does not fit perfectly, and it is not mentioned at the end of the sentencing hearing, where the court again summarized the aggravating and mitigating factors it considered. The passing reference to and minimal consideration of the victim's "particular vulnerability" as an aggravating factor neither affected the defendant's substantial rights nor resulted in prejudice to him. August 2, 2019, Doc. 2018-103. https://www.vermontjudiciary.org/sites/default/files/documents/op18-103_0.pdf

DEFENDANT'S CONCURRENCE AT TRIAL WITH TRIAL COURT'S PROPOSED INSTRUCTION WAIVED ANY CLAIM OF ERROR ON APPEAL UNDER INVITED ERROR DOCTRINE

State v. Morse, 2019 VT 58. JURY INSTRUCTIONS: INVITED ERROR. DISORDERLY CONDUCT: PROBABLE CAUSE.

Full court published opinion. Simple assault on a law enforcement officer, disorderly conduct, and resisting arrest, affirmed. 1) The defendant argued on appeal that the trial court erred when it instructed the jury that the defendant was charged with disorderly conduct by tumultuous behavior "by her statements and words." The defendant argued that such a conviction cannot be based upon speech alone. But at trial the defendant endorsed the proposed instruction and disavowed any concern that more than words were required for an action to be tumultuous. This constituted invited error, which is a doctrine pursuant to which a party cannot induce an erroneous ruling and later seek to profit from the legal consequences of having the ruling set aside. There is no standard of review in such cases; the party who invites the error waives or intentionally relinquishes their right to challenge it on appeal. 2) The defendant argued that the officer lacked probable cause to arrest her for disorderly conduct, since statements and words alone are insufficient. But the defendant's loud and boisterous swearing outside of a motel, combined with her raising her arm and blocking an officer as he tried to move past her, provided the officers with probable cause to arrest her for disorderly conduct. Although she was ultimately charged with disorderly conduct based only on her statements and words, the court is not limited to considering only her statements and words in determining whether the officer had probable cause to arrest her on that charge. The issue is whether a reasonable officer would believe there to be probable cause based on the circumstances present at the time of arrest. Whether the jury charge was correct or whether the defendant was ultimately acquitted of the charge is irrelevant to establishing whether there was probable cause for the underlying arrest. Doc. 2018-263, August 30, 2019. https://www.vermontjudiciary.org/sites/default/files/documents/op18-263.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."

JOINING DEFENDANTS FOR TRIAL CONCERNING COMMON SCHEME WAS NOT PLAIN ERROR

State v. Tower, three-justice entry order. SEVERANCE. SUFFICIENCY OF THE EVIDENCE.

Obstruction of justice, disorderly conduct, assault and robbery, and unlawful mischief convictions affirmed. 1) The defendant waived any argument on appeal that the trial court improperly joined her case with that of another defendant by failing to file a separate motion to sever, or to join her co-defendant's motion to sever. In any event, there was no plain error in the joinder of the cases where they concerned a common scheme and were closely connected in time and place. Statements that were offered against her co-defendant would have been admissible against the defendant even without joinder because they were not hearsay but admitted to show her co-defendant's knowledge and state of mind. 2) The evidence was sufficient to show that the defendant intended to intimidate a person whom the defendant had assaulted the day before, as a result of which the defendant faced potential prosecution. 3) The defendant failed to move for judgment of acquittal on the assault-and-robbery and unlawful mischief convictions, and she cannot show that the evidence on these charges was so tenuous that a conviction would be unconscionable. The claim she raises is simply one of witness credibility, which is a matter for the jury. Doc. 2018-238, July 12, 2019. https://www.vermontjudiciary.org/sites/default/files/documents/eo18-238.pdf

TRAFFIC STOP WAS NOT UNLAWFULLY EXTENDED

State v. L'Esperance, three-justice entry order. STANDARD OF REVIEW OF MOTIONS TO SUPPRESS; RELEVANCE OF OFFICER'S SUBJECTIVE MOTIVATION. REASONABLE SUSPICION: EXTENDING TRAFFIC STOP.

Conditional guilty plea to DUI affirmed. 1) The court's review of the trial court's denial of a motion to suppress is not de novo. Such a motion raises a mixed question of law and fact. The legal conclusions are reviewed de novo, but the Court gives substantial deference to the trial court's findings of fact. 2) The Court has not held that an officer's subjective motivation is relevant in evaluating the totality-of-the -circumstances in determining if an officer had a reasonable and articulable suspicion of wrongdoing. 3) The defendant was stopped because of a missing front license plate. The officer wrote up a warning and returned to the vehicle to deliver the warning, and to ask about the missing front plate, because some people are not aware that it is required in Vermont. In the course of that exchange the officer acquired a reasonable suspicion of intoxication. At this point, the officer's tasks tied to the traffic infraction were not yet completed, and the

fact that the officer had a subjective motivation to attempt to determine if the defendant was intoxicated does not bear on whether the traffic stop was improperly extended. 4) At the time that the officer asked the defendant how much he had been drinking, the officer had a reasonable suspicion of criminal activity: there were empty alcohol containers in the truck bed; the defendant behaved oddly and appeared confused and had difficulty responding to the officer's requests for documents; his eyes were watery and his speech slurred; he was smoking, possibly to mask the odor of intoxicants; and, once the cigarette was gone, the odor of alcohol emanated from the truck, despite the small window opening. The same findings support the exit order and the defendant's arrest for suspicion of DUI. Docket 2018-187, July 12, 2019. https://www.vermontjudiciary.org/sites/default/files/documents/eo18-187.pdf

TRIAL COURT ERRED IN FINDING THAT STATUTORY PRESUMPTION OF INTOXICATION HAD BEEN DEFEATED

State v. Rowe, three-justice entry order. CIVIL SUSPENSION: SUFFICIENCY OF THE EVIDENCE.

Denial of civil license suspension reversed and remanded for entry of a civil-suspension order. The defendant had a BAC of .175 based upon a test taken within two hours of operation. The chemist testified that he would have had a BAC of .195 at the time of operation if he did not consume additional alcohol. The defendant testified that he drank three sample pours at noon and had a beer at the end of the day. His girlfriend testified that he had a beer at noon, another after that, and a third and fourth at a bar after skiing. Neither testified to the alcohol content of the beers. The trial court asked the chemist what BAC would result if a man the size of the defendant drank a strong twelve-ounce beer of 8 percent alcohol, and the answer was a maximum of .034. The trial court concluded that the statutory presumption of a BAC over .08 at the time of operation from a test result of .08 or higher within two hours of operation did not apply in this case because it was burst by the defendant's testimony regarding how much he had consumed, combined with the chemist's testimony of what the defendant's BAC would have been at the time of operation. The court also found that the defendant did not appear intoxicated, and that the test result of .175 was not accurate. The court credited the defendant's account of his drinking and concluded that the State had not met its burden of showing that the defendant had a BAC above .08 at the time of operation. This ruling is reversed. The defendant's evidence was insufficient to defeat the presumption that the BAC test results were accurate and accurately evaluated (as well as the presumption that the results reflected the defendant's BAC at the time of operation) because the defendant did not provide specific evidence that the methods were not reliable or valid, or to show that the presumed fact was not true in the particular case, given its actual underlying facts and circumstances. The court erred in relying upon the hypothetical BAC level, because it was not premised upon the actual underlying facts as testified to by both the defendant and his girlfriend. The record includes no evidence concerning the likely BAC level of a 225-pound male who consumes the amounts to which the defendant or his girlfriend testified. Given the absence of any evidence that the defendant's BAC was below .08 at the time of operation under the defendant's stated facts, the presumptions in the statute remained intact. Because the statutory presumptions were not defeated, the evidence as presented supported suspension of the defendant's license. Doc. 2018-360, July 12, 2019. https://www.vermontjudiciary.org/sites/default/files/documents/eo18-360.pdf

CIVIL SUSPENSION MATTER DISMISSED FOR FAILURE TO MEET DEADLINE

State v. Slen, three-justice entry order. CIVIL LICENSE SUSPENSION: FAILURE TO MEET DEADLINE.

Dismissal of civil suspension of defendant's driver's license affirmed. The preliminary civil suspension hearing was not held within twenty-one days as required by the statute. The State argued on appeal that the criminal arraignment, held within the twenty-one-day period, effectively accomplished all that is required in a preliminary civil suspension hearing, and thus satisfied the statutory requirement. But at the arraignment the trial court indicated that it could not hold a preliminary hearing on the civil suspension. Thus, the court neither ensured that the required disclosure had occurred, nor provided the defendant with an explanation of the procedures to be followed at the hearing on the merits, as required by the rule to occur during the preliminary hearing. Doc. 2018-382, July 12, 2019. https://www.vermontjudiciary.org/sites/default/files/documents/eo18-382.pdf

JURY COULD RELY UPON CIVIL COURT JUDGMENT IN FINDING DEFENDANT DID NOT HAVE LAWFUL POSSESSION OF PROPERTY ON WHICH HE WAS CHARGED WITH TRESPASSING

State v. Davis, three-justice entry order. TRESPASS: SUFFICIENCY OF THE EVIDENCE.

Conviction of unlawful trespass affirmed. The defendant argued that the State could not demonstrate that he lacked lawful possession of the property on which he allegedly trespassed because the boundary, established by a final judgment in civil litigation, was invalid. He argues that the civil court order did not establish a lawful boundary because, among other things, it was not submitted to the town, not part of a plat, and not made by a licensed surveyor. The Court holds that the State could rely on the civil court order to demonstrate that the defendant did not have lawful possession of the land that he entered. Lawful possession can be demonstrated from leases, court orders, or the circumstances of the land's use. Here, there was evidence to demonstrate that the defendant did not have lawful possession of the property – the defendant's neighbor testified that following a civil lawsuit, the court issued an order establishing the boundary line between the properties and enjoining the defendant from entering his neighbor's property. The State offered, and the court admitted, a redacted version of the trial court order. The defendant's neighbor further testified that the boundary was marked and she observed the defendant on her side of the boundary. This was sufficient for the jury to find that the defendant did not have lawful possession of the land. Doc. 2019-067, July 12, 2019. https://www.vermontjudiciary.org/sites/default/files/documents/eo19-067.pdf

EVIDENCE WAS SUFFICIENT TO SUPPORT FINDING THAT IT WAS THE DEFENDANT WHO, WHILE DRUNK, DROVE THE VEHICLE

State v. O'Keefe, three-justice entry order. DUI: SUFFICIENCY OF THE EVIDENCE OF IDENTITY.

DUI affirmed. The evidence was sufficient for the jury to find that it was the defendant who was the operator of the motor vehicle. A witness testified to seeing the car enter

the parking lot and the defendant get out of the driver's side of the vehicle and the witness did not see anyone else on the driver's side. The defendant was seen by another witness a few moments after the car pulled up, standing beside it on the driver's side with his arm on the roof of the car. The car was registered to the defendant and he had the car keys in his pocket when the trooper patted him down. Although circumstantial, this evidence was adequate, when viewed in the light most favorable to the State, to permit a reasonable inference that the defendant had been operating the vehicle when it entered the parking lot. Doc. 2018-302, August 7, 2019. https://www.vermontjudiciary.org/sites/default/files/documents/eo18-302.pdf

EVIDENCE OF DEFENDANT'S IDENTITY AS BURGLAR WAS SUFFICIENT

State v. Bosco, three-justice entry order. BURGLARY: SUFFICIENCY OF THE EVIDENCE.

Burglary conviction affirmed. 1) There was sufficient evidence to establish the defendant's identity as the burglar, where he nodded affirmatively when an officer asked if he had entered the apartment and taken a computer. 2) There was also sufficient evidence that the defendant intended permanently to deprive the victim of the computer where he entered the apartment, took the computer, and returned it only after his father was contacted, and it was damaged when returned. Doc. 2018-380, August 7, 2019. https://www.vermontjudiciary.org/sites/default/files/documents/eo18-380.pdf

OFFICER'S WAVE WAS REQUEST, NOT COMMAND, TO STOP.

State v. Labounty, three-justice entry order. DUI affirmed. MOTOR VEHICLE STOP VS. VOLUNTARY ENCOUNTER: WAVING TO MOVING VEHICLE.

The defendant was not subjected to a motor vehicle stop without reasonable suspicion where the police officer, in uniform, armed, and driving a marked cruiser, encountered the defendant as the officer was driving up a driveway to a residence to conduct a welfare check, and the defendant was driving down the driveway away from the residence, and the trooper, without making any verbal command, waved at the defendant, indicating that he wanted to speak to him. The officer did not activate his siren or blue lights and did not block the defendant's path down the driveway. The officer did not display his weapon and did not ask the defendant to exit his car until he observed signs of intoxication. The officer did not engage in any conduct asserting a show of authority or suggesting an investigation of wrongdoing but was merely attempting to gain the attention of the vehicle's occupants to initiate a consensual encounter. The fact that the defendant's car was moving at the time is merely a factor to consider and not determinative of whether there was a seizure. Doc. 2019-012, August 7, 2019. https://www.vermontjudiciary.org/sites/default/files/documents/eo19-012.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.