Vermont Department of State's Attorneys

# Vermont Criminal Law Month

November - December 2018

## Vermont Supreme Court Slip Opinions: Full Court Rulings

*Includes three-justice bail appeals*

### NO CREDIT FOR TIME SERVED WHILE OFFENSE UNDER INVESTIGATION BEFORE CHARGE

Bridger v. Systo, 2018 VT 121. Full court published opinion. CREDIT FOR TIME SERVED: TIME SPENT IN CUSTODY BEFORE ARRAIGNMENT, DURING INVESTIGATION; TIME SPENT BEING QUESTIONED BY POLICE.

Denial of habeas relief seeking credit for time served affirmed. The defendant was not in custody in connection with the pertinent charges where he was in custody in connection with another offense, simply because the police were investigating the pertinent offenses, and no charges had yet been filed. Nor was he in custody in connection with the pertinent charges during the one day that he spent being questioned in the police barracks concerning those charges. Being held for questioning, without more, does not mean that a person is in custody for purposes of credit. Doc. 2018-310, November 2, 2018. https://www.vermontjudiciary.org/sites/default/files/documents/op18-310.pdf

### DEFENDANT'S PRIOR BAD ACT IMPROPERLY ADMITTED

State v. McAllister, 2018 VT 129. Full court published opinion. PRIOR BAD ACTS: UNDUE PREJUDICE; COMMON PLAN OR SCHEME; MODUS OPERANDI. BELATED RULING ON WITHDRAWN OBJECTION TO TESTIMONY.

Procuring a person for prostitution reversed. 1) The defendant was convicted of arranging for the complainant to have sex with a third person, in return for which he paid her electric bill. The trial court admitted evidence that in a telephone call with the complainant's mother-in-law, he offered to allow the complainant's husband to live rent free in exchange for sex with the mother-in-law. This was not admissible as part of a common plan or scheme due to the distinction in circumstances between the two events – the defendant was not in a position of authority over the mother-in-law, whereas he was the complainant's

employer. Nor was it admissible as evidence of modus operandi, since identity was not an issue in this case. The defendant's general denial that it was he who initiated sexual contact with the complainant did not open the door to this evidence of prior bad acts. The fact that the defendant was acquitted of the charge on which this evidence was admitted (exchanging sex for rent with the defendant himself) does not mean that it was not significantly prejudicial as to the count for which he was convicted. 2) The trial court erred when, during deliberations and in response to a jury question, he instructed the jury to disregard testimony by the defendant that had been the subject of an objection by the State which the State subsequently withdrew. The State made a strategic decision to "just move on" without a ruling on its objection, and it was bound by that decision. The ruling by the trial court striking the testimony during the jury deliberations deprived the defendant of his right to argue against the objection or present further evidence to clarify and reinforce its case. Doc. 2017-376, November 16, 2018. https://www.vermontjudiciary.org/sites/default/files/documents/op17-376_1.pdf

## TURN SIGNAL REQUIRED AT T INTERSECTION

State v. Cook, 2018 VT 128. MOTOR VEHICLE STOP: FAILURE TO SIGNAL AT T INTERSECTION.

Conditional plea to driving under the influence affirmed. The defendant was stopped after he failed to signal a right-hand turn, while in the right-hand turn lane at a T intersection. He argued that he was not required to signal a turn when the turn was the only legal maneuver possible, i.e. that the right turn was the "natural course" of the lane in which he was driving. This interpretation is not supported by the plain, ordinary language of the statutes at issue, which are neither unclear nor ambiguous. The ninety-degree turn required at the intersection meant that there was no continuing trajectory, or natural arc, to be followed. Doc. 2017-368, November 30, 2018. https://www.vermontjudiciary.org/sites/default/files/documents/op17-368.pdf

## NO STATUTE ALLOWS STATE TO APPEAL FROM GRANT OF MOTION FOR JUDGMENT OF ACQUITTAL AFTER JURY VERDICT OF GUILT

State v. Roy, 2018 67A. STATE'S APPEAL FROM GRANT OF MOTION FOR JUDGMENT OF ACQUITTAL.

State's appeal from dismissal of custodial interference conviction dismissed. 1) The defendant was convicted of custodial interference, and following the jury trial the trial court granted a motion for judgment of acquittal on the grounds that the jury instruction concerning the elements of the offense had been in error – in order to prove custodial interference where the custodian is the Department of Children and Families, the State must produce evidence of a court order detailing the parent-child contact parameters, and could not rely upon an assigned social worker's advisement of visitation parameters. This Court reversed, holding that the trial court had erred in requiring that the State prove such an element. However, the Court then, on its own initiative, requested briefing on whether the State had a right to take an appeal from a judgment of acquittal. The Court now rules that it does not. The pertinent statute allows the State to appeal from the dismissal of an indictment or information, or from an order granting a motion to suppress evidence, or

to have a confession declared inadmissible, or granting or refusing to grant other relief where the effect is to impede seriously, although not to foreclose completely, continuation of the prosecution. The State argued that what happened here was the equivalent of the dismissal of an indictment or information, but dismissal occurs before the trial, and that provision does not apply here. The fact that permitting an appeal here would not violate the defendant's Double Jeopardy rights does not answer the question, since the issue is whether there is a statutory right to appeal. 2) The Court recognized that it could hear the appeal under V.R.A.P. 21, permitting the Court to grant extraordinary relief where there is no adequate remedy under the rules. The Court declines to do so in this case, because the trial court's ruling here does not meet the high standard – usurpation of power – required for such action. Instead, the issue here was a garden-variety error in interpreting the statute. There is no especially shocking conduct or exceptional risks to public safety, nor was the error so egregious that the Court would treat it as an act beyond the court's jurisdiction. The earlier ruling in this matter is therefore withdrawn, and the State's appeal is dismissed. Doc. 2017- 270, December 7, 2018.
https://www.vermontjudiciary.org/sites/default/files/documents/op17-270A.pdf

## DEFENDANT'S FALSE CONFESSION EXPERTS WEREN'T QUALIFIED

State v. Kolts, 2018 VT 131. CUSTODY. VOLUNTARINESS. EXPERT WITNESSES CONCERNING FALSE CONFESSIONS – QUALIFICATION. JURY INSTRUCTION CONCERNING VOLUNTARINESS.

Full court published opinion. Aggravated sexual assault of a child affirmed. 1) The defendant was not in custody when he confessed to the offense, and therefore the trial court did not err in declining to suppress his confession where the police did not obtain a Miranda waiver. He was plainly and repeatedly told that he could end the interview and was free to leave at any time. The detectives spoke in calm tones and were not aggressive in their demeanor. The defendant voluntarily went to the police station to be interviewed, after he called to request to speak to the police and was offered a meeting either at his home or the station. The interview was short, just 35 minutes until he was Mirandized. The defendant was told that he could have a witness present if he wished. Finally, the interview took place in a comfortable, unlocked room with a clearly marked and unobstructed exit. 2) The interview did not become custodial when the detectives falsely told the defendant that there was DNA evidence of his guilt, in light of the totality of the circumstances. 3) The trial court did not err in finding the confession voluntary. The false claim about the DNA was not enough to render the confession involuntary, without other coercive actions, such as a promise of leniency, and no such actions were present here. The police were not required to disclose the subject of the interview beforehand, and the statement that if he confessed the victim would not have to testify did not affect the voluntariness of the statement. This was not a promise by the detectives but a prediction of the State's strategy if the allegations progressed into a trial. Finally, the defendant's claim that his psychological state affected the voluntariness of the confession was not raised in a timely manner. 4) The trial court did not abuse its discretion by excluding the two defense experts proffered by the defense, who would have provided a psychological explanation of why the defendant would have made a false confession. Neither expert had sufficient training or experience in false confessions, and neither testified to

any methodology for concluding that someone confessed falsely. While the Court agreed that expert testimony on false confessions is potentially relevant and admissible in Vermont, the showing made here was insufficient. 5) The trial court's instruction that the question for the jury with respect to voluntariness was whether the interrogation was so coercive as to undermine the suspect's "ability to voluntarily waive his rights" was not error despite its reference to waiver of rights rather than voluntarily confess. Doc. 2018 VT 131, Dec. 14, 2018. https://www.vermontjudiciary.org/sites/default/files/documents/op17-291.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."*

### NO CREDIT FOR TIME SERVED AT HOME WHERE ALLOWED OUT TO WORK

State v. Justice, three-justice entry order. CREDIT FOR TIME SERVED FOR PRE-TRIAL HOME DETENTION.

Denial of motion for credit for time served affirmed. The defendant was released pre-trial on conditions that required him to observe a 24-hour curfew except for attorney and medical appointments, court hearings, emergency medical care, and when in the custody of his parents or at work. Although the decision in Byam, requiring participation in a home detention program to qualify for credit for time served, had not been issued at this time, the Court did not need to decide whether to give it retroactive effect, because even under the pre-Byam standard, under Kenvin, the conditions here do not require credit. The conditions of release here were not sufficiently onerous to qualify as being akin to incarceration in an institutional setting. Doc. 2018-034, November 2, 2018. https://www.vermontjudiciary.org/sites/default/files/documents/eo18-034.pdf

### DEFENDANT'S AGREEMENT THAT AFFIDAVIT SUPPORTED CHARGE DID NOT SAVE RULE 11 PROCEEDING

In re Morrill, three-justice entry order. RULE 11: INSUFFICIENCY OF PLEA COLLOQUY, PRE-BRIDGER.

The plea colloquy in this case was insufficient under V.R.Cr.P. 11, even applying the pre-Bridger substantial compliance standard: The petitioner acknowledged that the affidavit of probable cause supported the charge but made no admission that he agreed with the facts recited in the affidavit. Nor was the fact that the petitioner signed a written waiver sufficient to overcome this deficiency, as such forms are not relevant to determining if Rule 11(f) has been satisfied. Doc. 2017-356, November 2, 2018. https://www.vermontjudiciary.org/sites/default/files/documents/eo17-356.pdf

## DEFENDANT'S AGREEMENT THAT AFFIDAVIT SUPPORTED CHARGE DID NOT SAVE RULE 11 PROCEEDING

In re Webster, three-justice entry order. RULE 11: INSUFFICIENCY OF PLEA COLLOQUY, PRE-BRIDGER.

Grant of post-conviction relief for failure to comply with Rule 11(f) affirmed. Even under the pre-Bridger standard, the proceeding in this case was insufficient to comply with Rule 11(f), as the petitioner acknowledged that the affidavit supported the charge but made no admission that he agreed with the facts recited in the affidavit. The written waiver did not save the plea either. Doc. 2017-198, November 2, 2018. https://www.vermontjudiciary.org/sites/default/files/documents/eo17-198.pdf

## DEFENDANT'S AGREEMENT THAT THERE WAS A FACTUAL BASIS FOR THE CHARGES SAVED RULE 11 PROCEEDING

In re Haskins, three-justice entry order. RULE 11: SUFFICIENCY OF PLEA COLLOQUY, PRE-BRIDGER.

Denial of post-conviction relief for Rule 11(f) deficiency affirmed. Under pre-Bridger standards, there was substantial compliance with Rule 11(f) where the trial court recited each element of the charges and the underlying facts, not in detail, but enough to support each element of the charges. Although the defendant did not state during the colloquy that the facts recited were true, he later, when asked, personally stated that he agreed there was a factual basis for the charges. This is different from those cases where the court asks if the affidavit provides a factual basis, or if an affidavit could support a guilty verdict. The claim that some of the facts recited were untrue was not raised below, and would not be reached on appeal. Doc. 2017-354, November 2, 2018. https://www.vermontjudiciary.org/sites/default/files/documents/eo17-354.pdf

## POLICE ALLOWED TO ENTER THREE-SEAON PORCH TO KNOCK ON INTERIOR DOOR

State v. Kipp, three-justice entry order. ARTICLE 11: POLICE ENTRY ONTO THREE-SEASON PORCH; COERCION TO PERFORM DEXTERITY TESTS. CUSTODY WHILE AT HOME.

Denial of motion to suppress with respect to civil suspension of driver's license affirmed. 1) The police officer did not violate the defendant's constitutional rights when he knocked at the glass door of the three-season porch, and then proceeded into the porch to knock at the door connecting the porch to the main residence. It was objectively reasonable for the officer to conclude, after initially knocking at the glass porch door, that entry through the porch to the inner door to the main residence was a normal point of public access to the residence. 2) The video recording supports the finding that the defendant was not coerced into performing dexterity tests. 3) The officer was not required to obtain a Miranda waiver before questioning the defendant at what was essentially a routine traffic stop, albeit at the defendant's residence, since he had already returned home by the time the officer had responded to the report of erratic driving. Under the circumstances, the defendant was not in

custody. Nor were there any unduly coercive actions by the police. Docs. 2018-024 and 2018-070, November 2, 2018.

https://www.vermontjudiciary.org/sites/default/files/documents/eo18-024.pdf

## NO MOTOR VEHICLE STOP WHERE OFFICER APPROACHED ALREADY STOPPED CAR

State v. McGuire, three-justice entry order. SEIZURES: POLICE APPROACHING STOPPED VEHICLE.

Denial of motion to suppress evidence based on claim of illegal traffic stop affirmed. The officer observed the defendant's car approach him, then slow and come to a stop almost in front of him, with its headlights and engine on, and without hazard lights flashing. The vehicle stopped partly on the dirt and grass on the side of the road and partly on the paved road. After waiting for a few moments, the officer approached the vehicle, knocked on the driver's side window, and asked the defendant why he had parked, or if he was okay. The defendant said he was fine. Based on observations made at this point, the officer took the defendant into custody for a suspected DUI. There was no seizure here: the officer merely approached the vehicle and knocked on the window. He did not activate his cruiser's blue lights or park his cruiser in a manner that would prevent the defendant's car from exiting the area. There is no evidence that the officer displayed a weapon, or that he applied force to, threatened, or commanded, the defendant. Doc. 2018-098, November 5, 2018.
https://www.vermontjudiciary.org/sites/default/files/documents/eo18-098.pdf

## INSTRUCTION ON JURY NULLIFICATION WAS PROPER AFTER JUROR RAISED THE ISSUE

State v. Kebbie, three-justice entry order. INSTRUCTION CONCERNING JURY NULLIFICATION; MISTRIAL FOR JUROR MISCONDUCT; HEARSAY: EXCITED UTTERANCE. BEST EVIDENCE RULE. PROSECUTORIAL MISCONDUCT – CLOSING ARGUMENT.

Domestic assault, aggravated assault, and unlawful restraint affirmed. 1) The trial court did not err when it instructed the jury (in response to an incident involving a juror) that it did not have the power to decide questions of law. The court did not tell the jury that it was beyond its power to acquit against the evidence; rather, the court instructed the jury that it must follow the law as given by the court and to decide the case based on the evidence provided; this was an entirely accurate statement of the law. 2) There was no error in the court's failure to grant a mistrial instead of simply removing a juror, who had communicated to other jurors that they had the right to jury nullification. The court provided a curative instruction, and when questioned all remaining jurors stated that they could follow the law and disregard the juror's comments. Nor did the defendant demonstrate that the juror's comments affected the jury's ability to make a fair and impartial decision, in view of the fact that they acquitted the defendant on several counts. 3) The court did not abuse its discretion in admitting hearsay statements as excited utterances despite the absence of explicit evidence that the declarant was upset as a result of the event she was describing (the assault) when it

was clear from the circumstances that it was the assault that caused the declarant's stress. 4) The best evidence rule does not require the State to produce a gun rather than just a photograph of the gun; the rule pertains to proof of the contents of a writing, recording, or photograph. 5) The photograph of the gun was relevant even though the complainant did not actually see it on the occasion in question, merely heard it being cocked, where the complainant testified that she took the photograph, and it was of the gun she found in the area where she heard it being cocked. 6) The prosecutor's statement in closing argument that the complainant "came in and told you the truth" was not an expression of personal belief or opinion about the complainant's credibility, and so was not the egregious error found in State v. Ayers. Nor had the defendant shown the prejudice required to prevail on a plain error claim, given the corroborating evidence and the fact that there were some charges on which the jury acquitted the defendant. Doc. 2018-064, November 21, 2018. https://www.vermontjudiciary.org/sites/default/files/documents/eo18-064.pdf

## EXTRADITION MUST BE CHALLENGED THROUGH HABEAS PETITION

State v. Lewin, three-justice entry order. DETENTION AS FUGITIVE FROM JUSTICE: METHOD OF CHALLENGE.

Appeal from orders that defendant be held as a fugitive from justice dismissed. The defendant challenged the court's finding that he "fled from justice." However, this appeal was brought as an appeal from conditions of release. The appropriate vehicle for challenging a detention as a fugitive from justice is a petition for writ of habeas corpus. The court declined to consider the appeal despite its improper label, as the record had not been fully developed for its review. Doc. 2018-376, December 21, 2018. https://www.vermontjudiciary.org/sites/default/files/documents/eo18-376.pdf

## INTERLOCUTORY APPEAL FROM SUPPRESSION DECISION DISALLOWED

State v. Nagel, three-justice entry order. INTERLOCUTORY APPEAL: NOT ALLOWED.

Interlocutory appeal from denial of motion to suppress is not accepted. Generally such appeals will not be accepted unless a conditional plea is not available or practicable under the circumstances, and the criteria of Rule 5(b) have been met (requiring trial court to enter a written order indicating the bases for granting permission to take an interlocutory appeal). Neither requirement has been met here. Doc. 2018-354, December 11, 2018. https://www.vermontjudiciary.org/sites/default/files/documents/eo18-354.mtdismissinterlocappeal.pdf

## DEFENDANT NOT ENTITLED TO SELF-DEFENSE INSTRUCTION

State v. Delpha, three-justice entry order. SELF-DEFENSE INSTRUCTION: INSUFFICIENT EVIDENCE TO JUSTIFY INSTRUCTION.

Aggravated assault affirmed. The trial court did not err when it declined to instruct the jury on self-defense, as the defendant did not establish a prima facie case that he had an honest and reasonable belief that he

faced imminent peril of bodily harm. The defendant was seated in an operational truck at the time of the exchange, while the other person was outside the truck. There was no evidence that the others at the scene engaged physically or verbally with the defendant, and there was no evidence that the other person made any physical actions, gestures, or maneuvers towards the defendant before the defendant made his threat to blow his head off with his shotgun. Speaking to the police, the defendant never expressed fear, but that he had made the threat for the fun of it. Although he claimed the other person threatened to kick the shit out of him, he did not indicate when that was said. Doc. 2017-445, December 21, 2018. https://www.vermontjudiciary.org/sites/default/files/documents/eo17-445.pdf

### SEX OFFENDER PROBATION CONDITIONS UPHELD

State v. Moretti, three-justice entry order. PROBATION CONDITIONS: VALIDITY.

Probation conditions affirmed after conviction for lewd and lascivious conduct. 1) The court's imposition of a condition prohibiting violent or threatening behavior had a reasonable basis even though the defendant did not physically touch the victim, since the court reasoned that the defendant's act was at least threatening to the minor victim, and the condition was necessary to prevent the same or worse behavior in the future. 2) There was no plain error in the trial court's failure to clarify the condition to provide the defendant with adequate notice of what conduct is prohibited. The condition is not, on its face, invalid. 3) The condition prohibiting the possession of pornography was reasonably related to the offense, as the defendant's criminal act was connected to his possession and use of pornography. It was not based on a generalized assumption about a relationship between possession of sexually explicit media and sex offenses but flows from the defendant's individualized circumstances. 4) There was no plain error in the imposition of a condition that prohibited the defendant from frequenting adult bookstores, sex shops, topless bars, and other similar establishments. Given that no objection was made below, there was no evidence from which the court can conclude that the restriction was obvious error. Doc. 2018-099, December 21, 2018. https://www.vermontjudiciary.org/sites/default/files/documents/eo18-099.pdf

## Vermont Supreme Court Slip Opinions: Single Justice Bail Rulings

### DENIAL OF BAIL CONDITION CONCERNING FIREARM AFFIRMED

State v. Parker, single justice bail appeal. BAIL CONDITIONS: FIREARM POSSESSION.

The trial court did not abuse its discretion when it denied the defendant's motion to amend a condition of release that he not possess firearms, to permit the defendant to hunt in the upcoming deer season. The defendant was charged with first-degree aggravated domestic assault as a result of allegedly threatening the complaining witnesses and their children with a shotgun. Although a year has passed since the

condition was imposed, the defendant brought forth no evidence to show that the trial court should no longer have concerns over the defendant's alleged substance abuse or mental health. The trial court did not abuse its discretion in finding that the condition was warranted by the circumstances of the alleged crime and is the least restrictive condition of release necessary to ensure public safety. Doc. 2018-352, November 9, 2018. https://www.vermontjudiciary.org/sites/default/files/documents/eo18-352.bail_.pdf

## COURT DIDN'T CONSIDER RISK OF FLIGHT WHEN SETTING BAIL

State v. Bloom, single justice bail appeal. IMPOSITION OF BAIL: FAILURE TO CONSIDER STATUTORY FACTORS.

The trial court exceeded its discretion in imposing bail with insufficient evidence and findings concerning the defendant's resources as required under 13 VSA 7554. The hearing was primarily concerned with whether the requirements for a hold without bail order had been met. As a result, when the trial court found that those requirements had not been met, and imposed bail, there was little evidence in the record on the factors to be considering in setting bail, and the parties' arguments had been directed at the hold without bail factors. The matter is therefore remanded for the trial court to make the necessary findings on the risk of flight. Doc. 2018-359, November 21, 2018 (Robinson, J.). https://www.vermontjudiciary.org/sites/default/files/documents/eo18-359.bail__0.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.*