Vermont Department of State's Attorneys

Vermont Criminal Law Month

November - December 2019

Vermont Supreme Court Slip Opinions: Full Court Rulings

Includes three-justice bail appeals

EVIDENCE SEEN THROUGH GARAGE WINDOW WAS VALID PLAIN-VIEW OBSERVATION

State v. Bovat, 2019 VT 81.
CURTILAGE; PLAIN VIEW; DRIVEWAY; GARAGE.

Full court opinion. Shooting a deer out of season and failure to tag a deer affirmed. The police obtained information that the defendant had shot a deer out of season. They drove to his home and parked in front of his garage. They observed a pick-up truck through the window of the garage that appeared to have deer hair and blood on the tailgate. As a result they obtained a search warrant. The defendant sought unsuccessfully to suppress the results of the search warrant and argued on appeal that the officers violated his Fourth Amendment rights when they looked through the garage window. 1) The trial court did err in finding that the garage was not in the curtilage of the defendant's home, where the two were in close proximity with a walking path between them. 2) However, the officers made a plain-view observation through the window of the garage from a place that they had a right to be, and therefore the defendant's Fourth Amendment rights were not violated. The police are entitled to enter residential property, including portions that would be considered to be part of the curtilage, to carry out legitimate police business. Although the garage here is a private area that the police would not have been justified to enter without a warrant, the police restricted their movements to the defendant's driveway, a semiprivate area, from which they observed what they believed to be incriminating evidence on the defendant's truck. The defendant had no reasonable expectation of privacy from someone looking through the window of the garage, which was not covered in any way, and a person standing on the driveway could see through the window. Reiber, with Robinson, dissenting: The record is silent on how the officers came to be looking in the garage-door window or whether that spot was part of the

public's access route to the house. It does not suffice that the officer's point of observation was on the driveway. Furthermore, if the officers had parked in the driveway or anywhere in the parking area in front of the garage other than directly in front of the garage door window, they would have had to walk away from the normal access route to the house in order to get close to the garage-door window. Given the small size of the window, the officers would have had to walk directly to the garage-door window and stand right in front of it in order to look inside. Furthermore, the officers testified that they went to the property to look for the truck, not to contact the defendant. The officers did not have permission to wander freely around the driveway and investigate. The defendant could reasonably expect that the public would not wander around his driveway, in the opposite direction from his house, position themselves close to his garage-door window, and peer in. Doc. 2018-362, November 8, 2019. https://www.vermontjudiciary.org/sites/default/files/documents/op18-362.pdf

WHERE DEFENDANT DENIED COMMITTING ASSAULT AT ALL, THERE WAS NO EVIDENCE OF USE OF REASONABLE FORCE OR OF REASONABLE BELIEF OF IMMINENT BODILY HARM, SO SELF-DEFENSE INSTRUCTION WAS NOT JUSTIFIED.

State v. Fonseca-Cintron, 2019 VT 80. SELF-DEFENSE INSTRUCTION. DOUBLE-JEOPARDY: BLOCKBURGER ANALYSIS.

Full court opinion. Three convictions for domestic assault affirmed. 1) The defendant was not entitled to an instruction on self-defense. To receive such an instruction, there must be prima facie evidence that the defendant was not the aggressor, that he used reasonable force against the complainant, and that he did so based on his honest belief that doing so was necessary to protect himself from immediate bodily harm, and that his belief was reasonable. There was no evidence at trial that the defendant used reasonable force, since he claimed at trial that he did not use force at all, apart from pushing the complainant in response to her attack. Nor did the State's evidence suggest that the defendant used reasonable force. Nor was there any evidence to show that the defendant believed himself in immediate danger of unlawful bodily harm. There is no evidence at all, from either the defendant or the State, about the defendant's subjective belief. Such a belief must be reasonable, i.e. objective, but it must also be actual, i.e. subjective. No such evidence exists here. 2) The defendant argued that the State was not entitled to more than one conviction, because all of the defendant's actions constituted one continuous, uninterrupted assault. But this analysis only applies to multiple convictions of the same offense based on one act, and here the defendant was convicted of different offenses. Where there are different offenses, the issue is whether each offense required an element that the others did not. That was the case here, as one offense required an attempt to cause serious bodily injury to a family or household member; another required that the defendant have been armed with a deadly weapon and have threatened to use it on a family or household member; and the third required that the defendant have recklessly caused bodily injury to a family or household member. Robinson, with Skoglund, concurring and dissenting. Disagrees that the defendant can be

convicted of both attempting to cause serious bodily injury, and of causing actual bodily injury, based upon the same conduct. Doc. 2018-197, November 8, 2019. https://www.vermontjudiciary.org/sites/default/files/documents/op18-197.pdf

DENIAL OF YOUTHFUL OFFENDER STATUS WAS NOT ABUSE OF DISCRETION

In re B.B., 2019 VT 86. Full court published opinion. DENIAL OF YOUTHFUL OFFENDER STATUS.

Denial of motion for youthful-offender status in aggravated assault case affirmed. In denying the motion, the trial court referred to prima facie evidence that B.B. had engaged in a new violent act while under the influence of alcohol, despite being underage and under a condition of release that he not drink alcohol; noted that there was no punishment in the juvenile justice system, so there was no meaningful accountability mechanism; and found that B.B. had an unstable residential and employment situation. Given these facts, the trial court acted within its discretion in concluding that public safety would not be protected if B.B. were granted youthful-offender status. The court was not persuaded by the YASI test administered by DCF. This does not suggest that DCF failed to meet its own statutory duty to provide the court with an appropriately prepared report; it merely means that the court came to a different conclusion than DCF, and it was within its discretion to do so. In any event, it was B.B. that bore the burden of persuasion here, and he could have presented evidence that would have addressed the questions that the YASI tool left unanswered, and he did not. Nor did the court err in observing that punishment can provide accountability, and in considering whether B.B. could be held accountable as a youthful offender such that public safety would be protected. Doc. 2019-141, December 6, 2019. https://www.vermontjudiciary.org/sites/default/files/documents/op19-141.pdf

MOTION TO WITHDRAW PLEA SHOULD HAVE BEEN GRANTED

State v. Stewart, 2019 VT 89. MOTION TO WITHDRAW PLEA: LIBERALITY REQUIRED.

Denial of motion to withdraw plea reversed. The defendant pleaded guilty to assault and robbery with a deadly weapon. At the change of plea, the defendant asserted that he could not remember holding the gun to the victim's head, but he did not deny having done so. Two days later the defendant filed a motion to withdraw his plea, and for his attorney to withdraw. The motion to withdraw plea was denied. The denial of the motion was an abuse of discretion. Where, as here, the trial court acknowledged concerns about the factual basis for the plea, and the motion to withdraw was filed only two days later, the denial of the motion to withdraw was contrary to the court's long-standing practice to grant such withdrawals with great liberality. Doc. 2019-061, December 13, 2019.

COURT MUST FIND INDIVIDUALIZED GOOD CAUSE BEFORE ORDERING FINGERPRINTING OF PERSON CHARGED WITH A MISDEMEANOR

State v. Grant, 2019 VT 91. FINGERPRINTING OF PERSONS CHARGED WITH A MISDEMEANOR: SHOWING OF PATICULARIZED GOOD CAUSE IS REQUIRED.

Order issued at arraignment requiring defendant charged with a misdemeanor to submit to fingerprinting pursuant to 20 V.S.A. § 2061(d) reversed. Pursuant to Section 2061, police officers may fingerprint and photograph before arraignment only when they are permitted to make an arrest under V.R.Cr.P. 3. Otherwise, the court may order at arraignment that the defendant be fingerprinted and photographed upon request of the prosecutor and "for good cause shown." The trial court here found that the good cause showing had been met by the State's ratification of the National Crime Prevention and Privacy Compact, which concerns the exchange of criminal history records. This system includes the National Fingerprint File. By ratifying the Compact, the Legislature agreed to share information with the federal government and other participating states, including by submitting fingerprint-backed records to the FBI. Submission of fingerprints for every misdemeanor charge is not a requirement of participation in the system. The trial court erred in finding good cause based upon the State's participation in this system. The statute requires the court to find particularized good cause before ordering fingerprinting at an arraignment in a misdemeanor case. The trial court's reliance upon Vermont's participation in the system constitutes a blanket rule that all persons charged with a misdemeanor can be ordered to submit to fingerprinting, without any particularized finding of good cause. This is contrary to the statute. Doc. 2019-376, December 27, 2019. https://www.vermontjudiciary.org/sites/default/files/documents/op19-376.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."

FACTUAL FINDING THAT JUVENILE ENGAGED IN VIOLENT OR THREATENING BEHAVIOR, AND THEREFORE VIOLATED PROBATION, WAS NOT AN ABUSE OF DISCRETION

In re N.L., three-justice entry order. VIOLATION OF PROBATION: SUFFICIENCY OF THE EVIDENCE.

Finding of violation of condition of probation in youthful offender matter affirmed. The evidence was sufficient to justify the trial court's factual finding that the juvenile engaged in violent or threatening behavior by pushing and punching a police officer in the chest, knowing that he was a police officer. The juvenile argued that the circumstances supported a finding that she did not realize that it was a police officer, but the trial court was entitled to find, based upon the fact that the officer was in uniform and located five or six feet away when the juvenile first appeared, that she did know that it was a police officer. It was within the province of the trial court to assess witness credibility. December 2, 2019, Docket 2019-080. https://www.vermontjudiciary.org/sites/default/files/documents/eo19-080.pdf

COMMENTS DURING VOIR DIRE DID NOT VIOLATE RIGHT TO IMPARTIAL JURY

State v. Taylor, three-justice entry order. COMMENTS DURING JURY DRAW. ANIMAL CRUELTY: INSTRUCTIONS – DEFINING "DEPRIVE;" VOLUNTARY ACT; SUFFICIENCY OF THE EVIDENCE.

Three counts of animal cruelty affirmed. 1) The trial court's finding that no irregularity occurred during the jury draw, when a number of jurors expressed that they could not be fair in an animal cruelty case, was not an abuse of discretion. The prospective jurors' comments (the jurors in question were all stricken) did not introduce any extraneous information about the defendant or the facts or law of the case to the jury panel. The comments were about the prospective jurors' own feelings and experiences and were not relevant to an issue in the case. 2) The court did not abuse its discretion in declining to define the term "deprive" in the jury instructions. The word has a plain and common meaning, of which defense counsel reminded the jury during her closing statement. 3) The court did not err by denying a request that the jury be instructed that she must have acted voluntarily, willfully, or deliberately when she deprived her dogs of food or medical attention. The absence of any will to commit the act or omission that constitutes deprivation is a defense to the strict liability offense, not an element that the State has to prove. At least with respect to the charge that the defendant deprived each dog of adequate food, the court did not abuse its discretion by declining to instruct the jury on voluntariness because the defendant did not provide evidence to support this defense. She and her sister testified that the defendant always fed the dogs. There is no basis in the record to support a claim that the defendant's failure to adequately feed the dogs was involuntary, due to poverty or any other reason. Even if the defendant had presented sufficient evidence on the deprivation of medical care to warrant the instruction, the jury unanimously found that the defendant had deprived the dogs of adequate food as well as medical attention. 4) There was sufficient evidence to show that the defendant acted willfully to deprive the animals of adequate food. Doc. 2018-395, December 2, 2019. https://www.vermontjudiciary.org/sites/default/files/documents/eo18-395.pdf

RULE 11 PROCEEDING GAVE DEFENDANT ADEQUATE UNDERSTANDING OF THE ELEMENTS OF THE OFFENSE AND OF THE PENALTY

State v. Butler, three-justice entry order. RULE 11(c) CHALLENGE.

Appeal from guilty pleas to numerous offenses pursuant to VRCrP 11. 1) The defendant's challenge to the plea proceedings is not pursuant to VRCrP 11(f), establishing a factual basis, but pursuant to Rule 11(c), which requires the court to provide certain advice to a defendant prior to accepting a guilty plea, and to determine that the defendant understands that advice. The "substantial compliance" standard applies to review of Rule 11(c) claims, and because no challenge was raised below, the Court's review is for plain error. 2) The court adequately explained to the defendant that the maximum penalty that he faced on the first-degree aggravated domestic assault count, by virtue of the habitual criminal enhancement, was life imprisonment. The defendant repeatedly acknowledged that he understood and that he still wanted to go forward with the plea agreement. 3) It is equally apparent from the record that the defendant understood that the State needed to prove that he had three prior felonies in order to subject the defendant to an enhanced penalty, and that the defendant understood the legal significance of his

admission to his prior felony convictions. This is true even if the record did not technically conform to a particular script. 4) The fact that the court did not explicitly use the title of the offense, first-degree aggravated domestic assault, does not show that the defendant lacked an understand of the elements of that offense. The elements were expressly stated to him and he acknowledged that he understood them. There was no confusion with the charge of second-degree aggravated domestic assault, which the defendant also pleaded to, where one involved repeatedly stabbing the victim with a hunting knife, and the second involved an act months earlier, throwing a model airplane at the victim. 5) The court was not required to explicitly refer to the State's burden of proof, let alone to recite that the burden of proof applied to each element of each charge; the court's statement that the defendant would be considered innocent of the charges unless and until the State could prove beyond a reasonable doubt that he was guilty was adequate. 6) This charge was not so complex that the court was required to give a more detailed explanation, specifically, defining the term "household member." The court stated the elements of the crime and the defendant agreed that he had cohabitated with the victim for a period of months and that they had a sexual and romantic relationship during that time. The court's failure to further define the term "household member" did not create any confusion or render the plea unknowing or involuntary. 7) The court was entitled to use evidence regarding the defendant's sexual assault of the victim during sentencing, although he did not plead to it. The defendant stated during the plea colloquy that he would "stipulate" to the use of this evidence at sentencing. In any event, the court did not rely on the stipulation at sentencing, but instead upon the victim's hearing testimony and a transcript of her deposition testimony. The court found her testimony credible, and the court would not disturb that assessment on appeal. Doc. 2018-364, December 2, 2019. https://www.vermontjudiciary.org/sites/default/files/documents/eo18-364.pdf

EVIDENCE OF IDENTITY WAS SUFFICIENT

State v. Brown, three-justice entry order. SUFFICIENCY OF THE EVIDENCE: IDENTITY OF DEFENDANT AS THE PERPETRATOR. ORAL AMENDMENT OF PROBATION ORDER: PRESERVATION.

Felony unlawful trespass affirmed. 1) The evidence was sufficient to support a reasonable inference that the defendant was the same Brandon Brown who entered the complainant's apartment. The complainant testified that she personally knew Brandon Brown, that he entered her apartment, and that he was in the court wearing black jeans. She also affirmatively answered that "Brandon" was the defendant. The responding officer testified that the person who entered the complainant's apartment was present in the courtroom. The defendant was identified as "Brandon Brown" at the start of the trial, and at no point did any witness deny that the defendant was the Brandon Brown who perpetrated the alleged crime. Further, mistaken identity was not alleged in this case; the defendant's defense was that he did not know that at the time he was not allowed into the complainant's apartment. It was not required that the State request that the record reflect that a witness had identified the defendant as the person who entered the apartment. 2) The defendant's argument that the probation order does not reflect the oral pronouncement of sentence was not preserved for appeal. Doc. 2019-033, December 2, 2019. https://www.vermontjudiciary.org/sites/default/files/documents/eo19-033.pdf

EVIDENCE WAS SUFFICIENT TO FIND THAT DEFENDANT FAILED TO SIGNAL A TURN

State v. Lowe, three-justice entry order. MOTOR VEHICLE STOP: FAILURE TO SIGNAL TURN; SUFFICIENCY OF THE EVIDENCE.

DUI affirmed. The motor vehicle stop at issue here was valid. Although the officer did not explicitly testify in court that he observed the defendant's failure to use a turn signal before the turn, as the court found, the evidence as a whole supports the trial court's conclusion that the officer made sufficient observations to conclude that the vehicle did not signal before turning, where the officer, in his affidavit, stated that he observed the defendant's vehicle at the intersection, and then observed the vehicle turn right and not use a turn signal. This indicates that the officer first observed the defendant's vehicle and then observed it turn right without signaling. Doc. 2018-357, December 2, 2019. https://www.vermontjudiciary.org/sites/default/files/documents/eo18-357.pdf

LOUD MUFFLER JUSTIFIED MOTOR VEHICLE STOP DESPITE ABSENCE OF STATUTE REGULATING NOISE LEVEL OF VEHICLES

State v. Smith, three-justice entry order. MOTOR VEHICLE STOP: LOUD MUFFLER.

DUI affirmed. The motor vehicle stop here was justified by a reasonable and articulable suspicion that the defendant's muffler was not in good mechanical condition, where the police officer testified that the car was making very loud noises, and that in his experience this can indicate a defective muffler. The fact that the motor vehicle code does not regulate the noise level of vehicles does not require a different outcome. Nor does the fact that the statute requires that mufflers be in good mechanical condition render it void as unconstitutionally vague. Doc. 2018-316, December 2, 2019. https://www.vermontjudiciary.org/sites/default/files/documents/eo18-316.pdf

TRIAL COURT'S FINDING OF ABUSE OF THE WRIT AFFIRMED

State v. Bruyette, three-justice entry order. POST-CONVICTION RELIEF: ABUSE OF THE WRIT.

Dismissal of petition for post-conviction relief for abuse of writ affirmed. The State here met its burden of pleading abuse of the writ, where the present filing was the petitioner's fourth such petition. The petitioner then had the burden of disproving abuse, but he did not produce any evidence to demonstrate cause and actual prejudice, nor respond to the State's motion for summary judgment despite being granted numerous extensions of time. Doc. 2018-220, December 2, 2019. https://www.vermontjudiciary.org/sites/default/files/documents/eo18-220.pdf

PROPOSED RULE AMENDMENT

(NOTE: THE FOLLOWING AMENDMENT HAS BEEN PROPOSED AND HAS NOT BEEN APPROVED BY THE SUPREME COURT.)

Proposed Order Amending Rule 807 of the Vermont Rules of Evidence

This proposed amendment responds to the Vermont Supreme Court's decision in State v. Bergquist, 2019 VT 17, __ Vt. __, 211 A.3d 946, by correcting Rule 807's constitutional deficiencies described therein. The proposed amendments to subdivisions (c) and (f) ensure the Rule comports with the minimum constitutional standard set in Maryland v. Craig, 497 U.S. 836 (1990), as interpreted in Bergquist.

In criminal cases, the rule balances an important public policy interest—protecting certain witnesses in defined, vulnerable categories, from the trauma of testifying—against the defendant's constitutional right to confront accusers. To comport with the Sixth Amendment, as interpreted in Craig, the proposed amendment requires the court to make its findings at least by preponderance of the evidence, without precluding argument for the application of a stricter standard of evidence. To make the showing of necessity for these proceedings, the proposal requires the State to show that the witness would be traumatized not by the courtroom or other aspects of providing testimony, but by the presence of the defendant (or by defendant's image when subdivision (e) applies). The State must also show that the witness would suffer a level of emotional trauma that is more than mere nervousness, excitement, or some reluctance to testify.

The proposed amendment to subdivision (a) corrects an unintended effect of an amendment made in 2015. The purpose of that amendment was to make the rule consistent with the Legislature's efforts to eliminate offensive language from the Vermont Statutes, however, the term "psychiatric disability" provided by 1 V.S.A. § 147 encompasses a wider arc of impairments than the original term used by the Rule, which was "mental illness," as still defined in 18 V.S.A. § 7101(14). Thus, the language is amended to again refer to "mental illness."

Vermont Criminal Law Month is published bi-monthly by the Vermont Department of State's Attorneys.
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