



Vermont Department of State's Attorneys

Vermont Criminal Law Month

January – February 2021



Vermont Supreme Court Slip Opinions: Full Court Rulings

Includes three-justice bail appeals

MOTIONS TO DISMISS FOR LACK OF SPEEDY TRIAL COUNT, IF WEAKLY, IN FAVOR OF DEFENDANT; COURT PUNTS ON HOW TO COUNT PERIODS OF PLEA NEGOTIATIONS

State v. Lafaso, 2021 VT 4. SPEEDY TRIAL: COMPUTATION AND ATTRIBUTION OF PERIODS OF DELAY; DELAYS ATTRIBUTABLE TO PLEA NEGOTIATIONS; MOTION FOR SPEEDY TRIAL NOT NECESSARY; PREJUDICE: PRIOR BAD ACTS; REFERENCE TO PRIOR IMPRISONMENT. PREJUDICE: COMPLAINANT'S USE OF PROFANITY.

Full court published opinion. Multiple convictions arising from defendant's entry into complainant's home and assaulting her affirmed. 1) Eighteen months delay in a not-complex case which took one day to try, without forensic evidence, co-defendants, or expert witnesses, was sufficient delay to require consideration of the remaining factors to be balanced in determining whether the defendant was denied a speedy trial. 2) Delays resulting from the defendant's attorneys withdrawing from the case and being unavailable for trial, and during a period for which his attorney had

agreed to a stipulated discovery schedule, are not counted against the State. 3) The Court declined to decide whether delays attributable to plea negotiations should count against the State or not because the record was too sparse to draw any conclusions on this issue, and therefore the delay was counted against the State, but not with great weight. 4) The fact that the defendant did not specifically move for a speedy trial, but merely for dismissal for lack of a speedy trial, does not mean that the defendant cannot satisfy the factor, "assertion of the right to a speedy trial." A motion for an immediate trial may be a strong showing that a defendant asserted his right to a speedy trial aggressively. But more feeble actions by a defendant, like a motion to dismiss on speedy trial grounds or objections to continuances, may also show that the defendant asserted the right. Here, the Court accords some weight to the defendant's motion to dismiss, his multiple complaints regarding the prolonged pretrial incarceration, and his expressed eagerness to expedite the proceedings. His failure to move for an immediate trial militates in the

opposite direction but it does not amount to an ipso facto failure to assert the right. On the whole, this factor does not weigh in favor of the defendant. 5) Although the defendant was prejudiced by being incarcerated for eighteen months, the restraint on his liberty, and the anxiety and concern with pending criminal charges, he does not maintain that his ability to defend himself at trial was impaired in a specific way, such as the loss of exculpatory evidence or witnesses or the erosion of a defense witness's memory. In sum, the only factor significantly favoring the defendant is the length of the delay, and therefore he was not deprived of his Sixth Amendment right to a speedy trial. 6) The trial court did not commit plain error when it failed to strike certain trial testimony which obliquely referred to the defendant's prior acts and imprisonment. The statements were brief and ambiguous; the evidence against the defendant was strong; and the trial court's

general jury instructions limited any potential prejudice that may have arisen. 6) There was no error in the trial court's failure to strike the complainant's use of profanity as irrelevant to the issues in the case. Jurors must be presumed to be able to avoid having profanity divert them from their duty, and here the use of profanity was innocuous and as likely to harm her own credibility as to prejudice the defendant. 7) The Court did not consider the State's contention that defense counsel invited error in eliciting the references to prior imprisonment, because invited error requires the Court to determine that counsel considered the issue and made a deliberate choice, and not just failed through neglect to make a proper objection. Doc. 2019-253, January 29, 2021. <https://www.vermontjudiciary.org/sites/default/files/documents/op19-253.pdf>

PRESENCE OR ABSENCE OF MIRANDA WARNINGS RELEVANT TO DEFENDANT'S KNOWLEDGE HE WAS BEING ARRESTED WHERE CHARGED WITH RESISTING ARREST

State v. Spencer, 2021 VT 5.
RESISTING ARREST: RELEVANCE OF MIRANDA WARNINGS OR ABSENCE THEREOF. INSTRUCTION CONCERNING ISSUE ON WHICH THERE WAS NO TESTIMONY: SPECULATION.

Full court published opinion. Resisting arrest affirmed. The evidence demonstrated that the police attempted to serve a relief-from-abuse order on the defendant, during which the defendant moved quickly and aggressively towards one of the troopers, who thought he was being attacked. The other officers interceded and the three tried to arrest the defendant for assaulting an officer. They commanded the defendant to get on the ground and put his hands behind his back. The defendant did not comply. After he was handcuffed, he continued to

pull away, kicked an officer in the shin, and was generally uncooperative as the troopers tried to place him inside a police cruiser. During deliberations the jury asked if the defendant had been given the Miranda warnings. The court decided to instruct the jury that the question is not relevant to the issues for it to decide in the case. The defendant had asked that the jury be instructed that whether the defendant was read the warnings was a question of fact for the jury to decide based on the evidence. Nothing was said by anyone during the testimony about Miranda warnings. On appeal the defendant argued that the trial court erred in answering the question because the Miranda issue was relevant to his intent, that is, whether he knew that he was being arrested. This claim was not preserved for appeal because at trial defense counsel only stated that the Miranda warnings "could be relevant" to one

of the issues in the case, but did not explain how or why. The Court agreed that a factfinder can consider the presence or absence of Miranda warnings as one of many factors bearing on the defendant's intent to resist arrest. But since no evidence was introduced on this point during the trial, and the evidence introduced could not support a reasonable, nonspeculative inference that the warnings were not provided, the court's instruction was not in error. There was neither direct testimony

that the defendant was not read Miranda rights, nor was there a comprehensive narrative of events from which the Miranda rights were omitted, and therefore it would have been mere speculation to have found that the defendant was not read Miranda warnings. For this reason, the court's instruction was correct. Doc. 2019-271, January 29, 2021.

https://www.vermontjudiciary.org/sites/default/files/documents/op19-271_0.pdf

LARGE CAPACITY MAGAZINE BAN DOES NOT VIOLATE VERMONT CONSTITUTION

State v. Misch, 2021 VT 10. RIGHT TO BEAR ARMS UNDER VERMONT CONSTITUTION: LARGE CAPACITY MAGAZINE BAN DOES NOT VIOLATE ARTICLE 16.

Denial of motion to dismiss charges of possession of a large capacity magazine affirmed. Article 16 of the Vermont Constitution protects a limited right to individual self-defense, not just to a general right of the people to maintain a militia. The proper standard for Article 16 challenges is a reasonable-regulation test, under which a statute implicating the right to bear arms will be upheld provided it is a reasonable

exercise of the State's power to protect the public safety and welfare. 13 V.S.A. 4021 satisfies this test because it has a valid purpose of reducing the lethality of mass shootings, the Legislature was within its authority in concluding that the regulation promotes this purpose, and the statute leaves ample means for Vermonters to exercise their right to bear arms in self-defense. Challenges to the statute under the Common Benefits Clause are not reached as not preserved. Doc. 2019-266, February 19, 2021.

https://www.vermontjudiciary.org/sites/default/files/documents/op19-266_0.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."

HABEAS PETITIONER MUST TRY PCR FIRST, EVEN IF CLEARLY FUTILE

Fellows v. Attorney General, three-justice entry order. HABEAS PETITIONS: PCR REQUIRED FIRST.

Dismissal of petition for writ of habeas corpus affirmed. The statute states that if a petitioner wants to collaterally attack the

proceedings below he must first apply for postconviction relief under Section 7131. The Court rejected the petitioner's argument that filing another PCR petition would be inadequate or ineffective to test the legality of his detention because the Essex court would dismiss any further PCR petition as an abuse of the writ. This argument is unavailing. The language of the habeas statute clearly shows that a petitioner must

first apply for postconviction relief. The petitioner cannot avoid his most recent petition being deemed successive by labeling it as a habeas corpus petition rather than a PCR. Doc. 2020-233, January 8, 2021.

<https://www.vermontjudiciary.org/sites/default/files/documents/eo20-233.pdf>

INADVERTANT ADMISSION OF WORD "CHOKED" DID NOT REQUIRE MISTRIAL

State v. Ferraro, three-justice entry order. MISTRIAL: INADVERTENT ADMISSION OF PRIOR BAD ACT.

Charges resulting from assault on girlfriend and neighbor affirmed. The State sought to play a portion of a video of an interview by the police of the defendant's girlfriend. The defendant objected to the mention in the video of a prior uncharged act of choking, for which notice had not been given per VRCrP 26(c), and the State agree to mute that portion of the interview. Inadvertently, the word "choked" was not muted. The defense asked for a mistrial and declined a curative instruction as it would draw further attention to the word. The court then instructed the jury to disregard the video entirely, and it was then replayed without the offending word. The trial court did not abuse its discretion in denying the motion for mistrial. The court acted within its discretion in determining that it was highly unlikely that the defendant suffered any prejudicial impact as a result of the jurors possibly hearing the isolated words "choked me" without surrounding context. The errantly played words followed a period of approximately fifteen seconds during which

the statements were muted, so the specific context of the words was unclear. The jury also knew that the defendant had been served with a one-year order of protection forbidding him from committing further acts of abuse against his girlfriend. Thus, any suggestion that the defendant had previously threatened or injured his girlfriend did not add significantly to the evidence. The court's curative instruction did not mention the challenged language but rather merely told the jury to disregard the recording in its entirety and listen to it played again. The defendant's suggestion that the jury's mixed verdict supports an inference that the mistakenly played words prejudiced him is highly speculative. There is nothing particular about the mention of an earlier incident of choking that would lead the jury to convict the defendant of two counts of domestic assault for threatening his girlfriend with a flare gun and causing her to be in fear of imminent serious bodily injury but acquit him of unlawfully restraining her or assaulting the neighbor. Doc. 2020-073, January 8, 2021.

<https://www.vermontjudiciary.org/sites/default/files/documents/eo20-073.pdf>



Vermont Supreme Court Slip Opinions: Single Justice Appeals

APPEAL FROM DENIAL OF BAIL RENDERED MOOT BY SUBSEQUENT DECISION DENYING MOTION TO REVIEW BAIL

State v. Collins, single justice bail appeal. APPEAL OF DENIAL OF BAIL: RENDERED MOOT BY SUBSEQUENT REVIEW OF BAIL DECISION.

Appeal of hold without bail pending violation of probation hearing dismissed as moot. The defendant was ordered held without bail on the VOP charge, following which the defendant filed a motion for review of that order with the trial court. The trial court held

a motion hearing on the motion for review, and filed a new order denying the motion to review bail. Given the trial court's later decision denying review, the appeal of the first order is now moot. The intervening event of the trial court's denial of the motion for bail review rendered moot any appeal of the earlier decision. Doc. 2021-018, January 28, 2021.

<https://www.vermontjudiciary.org/sites/default/files/documents/eo21-018.pdf>

DENIAL OF BAIL NOT ABUSE OF DISCRETION DESPITE POSSIBILITY OF DELAY IN HEARING DUE TO COVID

State v. Collins, single justice bail appeal. DENIAL OF BAIL PENDING VOP HEARING: DISCRETION, POSSIBILITY OF REMOTE VOP HEARINGS.

Denial of review of hold without bail order pending merits hearing on violation of probation complaint affirmed. The trial court did not abuse its discretion in denying bail, despite the defendant's argument that the court failed to consider whether an in-person hearing could be held on the probation violation charge within forty-five days, as the trial court had ordered, given the constraints imposed by Administrative

Order 49 as a result of the COVID-19 pandemic. The court's decision to hold the defendant without bail was not based upon whether he would be provided with an in-person hearing within 45 days, but rather upon the risk that the defendant posed to public safety. Given the trial court's reason for holding the defendant without bail, the question of whether the merits hearing will be in person is not ripe for consideration. The court does have the discretion to conduct non-evidentiary hearings remotely, upon agreement of all the parties. Doc. 2021-027, February 22, 2021.

<https://www.vermontjudiciary.org/sites/default/files/documents/eo21-027.pdf>

COURT ERRED IN DENYING BAIL IN VOP WHERE UNDERLYING OFFENSES WERE NONVIOLENT MISDEMEANORS

State v. Bessette, single justice bail appeal. NO BAIL ORDERS IN VOPs: DISCRETION IN CONSIDERING 7554 FACTORS: RELEASE REQUIRED IN NONVIOLENT MISDEMEANOR

CASES.

Order to hold without bail pending VOP hearing affirmed in some dockets and reversed in others. 1) In determining whether to release the defendant on bail

pending the VOP hearings in the matters in which the defendant is on probation for a listed offense, the trial court did not abuse its discretion when it considered the Section 7554 factors. Any factual errors in the court's recital, such as that the defendant has two escape convictions rather than just one, are harmless in the context of the broader context of the court's consideration of the 7554 factors. 2) With respect to the no bail order in the cases for which the defendant received probation for retail theft, violating conditions of release, and resisting

arrest, the court exceeded its discretion in holding the defendant without bail because the charges are for nonviolent misdemeanor offenses, and thus the defendant has the right to bail or release and the court must set conditions of release pursuant to the Section 7554 factors. The court does not have discretion to hold such persons without releasing them under conditions. Doc. 2020-320, January 12, 2021. https://www.vermontjudiciary.org/sites/default/files/documents/eo20-320_0.pdf

REQUIRING DEFENDANT ON CURFEW TO OPEN DOOR TO POLICE WAS NOT LEAST RESTRICTIVE MEANS OF ENFORCING CURFEW REQUIREMENT

State v. Deaette, single justice bail appeal. **CONDITIONS OF RELEASE: REQUIREMENT THAT DEFENDANT ON CURFEW OPEN DOOR TO POLICE.**

Condition of release that defendant open her door to law enforcement during reasonable times, to enforce curfew, remanded as the record does not support the condition. Given the absence of any findings demonstrating that the court undertook the analysis required under Section 7554, this Court cannot find that the order is supported by the proceedings below. The court failed to explain how the condition is reasonably necessary, as part of the least restrictive combination of conditions, to mitigate the defendant's risk

of flight or to protect the public; nor is there any indication in the record that the court examined the factors in Section 7554(b) before imposing the condition. On remand, the court should consider that the condition as imposed requires that the defendant open the door at all reasonable times, when the curfew is only from 7 pm to 7 am; nor is it clear that compelling her to open the door is the least restrictive means when there may be technological alternatives, including a phone call to the room. The defendant's constitutional challenge to the condition is not reached as it is not necessary to resolve the appeal, and the reimposed condition may or may not raise the same issue. Doc. 2021-016, February 4, 2021. <https://www.vermontjudiciary.org/sites/default/files/documents/eo21-016.pdf>

COMPLAINANT'S RETRACTION OF RECORDED STATEMENT DID NOT UNDERMINE FINDING THAT EVIDENCE OF GUILT WAS GREAT

State v. Sanborn, single justice bail appeal. **DENIAL OF BAIL: EVIDENCE OF GUILT IS GREAT DESPITE COMPLAINANT RETRACTING HER VIDEOTAPED STATEMENT. NO CONDITIONS WILL AMELIORATE RISK OF HARM.**

Hold without bail pending trial on first-

degree aggravated domestic assault charge affirmed. 1) In support of the State's claim that the evidence of guilt was great, the State placed into evidence a video recording of the victim giving a sworn statement describing the defendant's attack on her. The victim also testified at the hearing, recanting her statements on the videotape. The defendant argues that where

a witness provides live testimony at a weight-of-the-evidence hearing in contravention to a prior sworn statement, the live testimony controls and establishes what the State may be able to prove at trial, whereas the sworn statement becomes modifying evidence which must be excluded from consideration. But the State's burden at this point is to demonstrate that it has evidence that will be admissible at trial, not to have it lawfully admitted at the hearing as if it were a trial. Speculation at this point as to whether the victim's testimony at trial is likely to be consistent with her recorded statement rather than her statement at the bail hearing is precisely the type of pretrial credibility determination that the exclusion of modifying evidence is intended to prevent. Because the Court, in assessing the weight of the evidence, must take that evidence in the light most favorable to the State, disregarding modifying evidence in order to avoid pretrial determinations of credibility, the Court must assume at this point that the victim's sworn recorded statement, and not her testimony at the bail hearing, represents the evidence the State could produce at trial. To conclude

otherwise would amount to a pretrial determination that the victim's testimony adduced at the bail hearing was more credible than her sworn statement following the alleged assault. 2) The Court finds by a standard of clear and convincing evidence that the defendant poses a substantial threat of physical violence to the victim, even though she testified that she did not fear him. Her statement to this effect was predicated on the assumption that the defendant will be successful in treatment. Furthermore, no condition or combination of conditions of release could reasonably ameliorate the risk of harm where, at the time of the alleged offense, the defendant was subject to conditions of release prohibiting him to have contact with the victim and restricting him to a twenty-four-hour curfew in another town, where he was supervised by responsible adults. The defendant's own witnesses acknowledged that at the time of the alleged offense he was in violation of both of these conditions. Doc. 2020-316, January 4, 2021.

<https://www.vermontjudiciary.org/sites/default/files/documents/20-316.pdf>

BAN ON HUNTING WEAPONS AS CONDITION OF RELEASE ON HUNTING VIOLATION CHARGE WAS SUPPORTED BY THE RECORD

State v. Hagar, single justice bail appeal. **CONDITION OF RELEASE: RECORD SUPPORTED NO WEAPONS CONDITION IN HUNTING CASE.**

The trial court's condition of release that the defendant not have or use any firearms or dangerous weapons is supported by the record below. The defendant is charged with, among other crimes, attempting to shoot a deer from his truck. The trial court imposed this condition to protect the public against subsequent violations by the defendant. The court, in denying the defendant's motion to amend the conditions, was not required to explicitly reconsider

each factor listed in Section 7554(b), merely to set forth a reasonable basis for continuing the conditions imposed. The defendant argues that he can legally own certain weapons, such as a muzzleloader or a bow, but that does not mean that the condition was not the least restrictive condition, since the defendant was charged with hunting violations using a muzzleloader. Inclusion in the restriction of weapons that may be used for hunting was not an abuse of discretion. The court did not err by considering only the affidavits of probable cause, since the defendant did not proffer any additional evidence at the hearing. The defendant argues that his conduct never threatened the public or any

person. But even assuming that the public's interest in wildlife protection is not the sort of protection envisioned by the statute, the allegations against the defendant suggest a danger to the public in that he used firearms in an unsafe manner and possessed firearms illegally. This provided a reasonable basis for the condition. In any event, nothing in the text of Section 7554(b) limits the court to imposing conditions that protect the public from physical harm only. The protection of wildlife is in the interest of the public welfare. Finally, the defendant argued that there was no evidence of guilt.

Based on the State's affidavits, the trial court found probable cause for each of the charges brought. Although the defendant disputes the legitimacy of the State's evidence, the court did not err by relying on the affidavits pending a hearing on the defendant's motions. While the defendant may eventually succeed in challenging the charges, the record before the Court supports the trial court's determination. Doc. 2021-008, January 26, 2021. https://www.vermontjudiciary.org/sites/default/files/documents/eo21-008_0.pdf