Vermont Department of State's Attorneys

Vermont Criminal Law Month

November - December 2021

Vermont Supreme Court Slip Opinions: Full Court Rulings

Includes three-justice bail appeals

EXPUNGEMENT STATUTE APPLIES TO ARRESTS WITHOUT CHARGE AS WELL AS TO CHARGES WTIHOUT CONVICTIONS

State v. A.P. and Z.P., 2021 VT 90. Full court published decision.
EXPUNGMENT AND SEALING: AVAILABILITY TO PERSONS CHARGED BUT NOT CONVICTED.

Denial of motions for expungement reversed. 13 V.S.A. 7603(g) provides that on request, the court shall seal or expunge a criminal history record related to the citation or arrest of a person if doing so serves the interests of justice, or if stipulated to by the parties. "Criminal history record" is defined as "all information documenting an individual's contact with the criminal justice system, including data regarding identification, arrest or citation, arraignment, judicial disposition, custody, and supervision." The plain language of this statute entitles any person who has been charged but not convicted of a crime to file a petition for expungement. The trial court erred in concluding that the statute only applies to persons who have been arrested or cited but not charged with criminal offenses by information or indictment. The statute does define the record eligible for expungement as the person's "criminal history record related to the citation or arrest," but this does not mean that a person can file for sealing or expungement under this subsection only if they have been arrested or cited for a crime but not charged. The language means that if the petition is granted, only the portions of the person's record related to that particular citation or arrest are sealed or expunged, and not "all information documenting an individual's contact with the criminal justice system," which could include numerous arrests, charges, or convictions. Furthermore, charges filed against a person in connection with an arrest or citation are related to that arrest or citation. Docs 2021-118 and 2021-119, November 12, 2021.

PCR RULING STRIKING PLEA AGREEMENT DOES NOT REINSTATES CHARGES THAT HAVE SINCE BEEN EXPUNGED PER A DEFERRED SENTENCE

In re Shannon, 2021 VT 91. JURISDICTION FOR POST-CONVICTION RELIEF: CHARGES EXPUNGED UNDER DEFERRED SENTENCE AGREEMENT.

Full court published opinion. State's appeal of PCR ruling denied. The petitioner entered into a plea agreement in 2014, pursuant to which he pleaded no contest to three felonies and received a sentence of one to five years; and no contest on ten additional charges, for which the petitioner received deferred sentences. A subsequent PCR petition based upon ineffective assistance of counsel (he was mistakenly led to believe that he faced a habitual offender sentence enhancement if he went to trial) was successful and the PCR court struck the convictions for which the petitioner had entered pleas. By this time the petitioner had successfully completed the terms of probation for the deferred sentence charges and they had been expunged. The trial court ordered that the three remaining charges be vacated and retried, but left the ten deferred sentence expungements intact. The State appealed this ruling, arguing that under contract law the petitioner materially breached the plea agreement when he sought post-conviction relief. As a result, the State argued, the petitioner should be placed in the same position he was in before the plea agreement, with all thirteen charges reinstated. But the trial court did not have statutory jurisdiction to review the ten charges for which the petitioner had completed the terms of his deferred sentence because he was not in custody under sentence for those charges. The petitioner was never "under sentence" for the deferred sentence charges. The State's contract theory does not permit another outcome. The PCR court cannot expand its statutorily based jurisdiction to include the charges for which the petitioner received and completed a deferred sentence. Doc. 2021-VT 91, November 19, 2012.

ORDER HOLDING DEFENDANT WITHOUT BAIL MUST ARTICULATE SOME LEGITIMATE GOVERNMENT INTEREST IN DETAINING DEFENDANT

State v. Rivera-Martinez, 2021 VT 96. HOLD WITHOUT BAIL: SUFFICIENCY OF EVIDENCE OF GUILT; STANDARD OF CONSENT FOR SEXUAL ASSAULT; EXERCISE OF DISCRETION.

Three-justice bail appeal. Order denying the defendant bail pursuant to 13 VSA 7553 affirmed. 1) The State met its burden to show that the evidence of guilt is great with respect to the charge of attempted sexual assault. The defendant argued that the State had not shown that the act of attempting to place his finger in the complainant's vagina while she slept was without consent because, he claims, the victim's "grinding" was tantamount to consent. But the evidence indicated that the complainant woke up to the defendant digitally penetrating her vulva and that before he was able to put his finger all the way in, she woke up and pulled his hand out of her pants and told him no. The defendant argued that the State could not show that he reasonably should have known that the complainant was asleep, and therefore did not act in violation of 13 VSA 3252(a)(4) (sexual act with another person, and defendant knows or reasonably should have known that the other person was asleep, unconscious, or otherwise unaware). But the defendant was not charged under this section; he was charged with violation of

3252(a)(1), sexual assault without the consent of another person, which requires an affirmative, unambiguous, and voluntary agreement to engage in a sexual act. The evidence here supports the court's finding that the evidence is great that the complainant never consented under this definition. 2) The court did not need to decide if the evidence was great as to the other charge, a completed sexual assault, because the evidence was great as to the attempted sexual assault charge, which alone allows for a hold without bail. 3) To hold without bail, the trial court must articulate some legitimate government interest in detaining the defendant so this Court can be assured that the defendant is not being arbitrarily detained. In exercising this discretion the trial court may look to the factors listed in Section 7554, but the court need not recite each of those factors. The court here did not abuse its discretion. It never explicitly announced that it was looking to the 7554 factors, but considered them in its analysis. The court looked at the evidence of the defendant's family ties, his history of violating abuse prevention orders and court-ordered conditions of release, the seriousness of the charges, and the fact that no conditions of release could mitigate the risk of danger to the complainant because of the defendant's unwillingness to abide by restrictive court orders. Doc. 21-AP-287, December 21, 2021.

DEFENDANT'S FAILURE TO TIMELY FILE OPPOSITION TO STATE'S MOTION FOR SUMMARY JUDGMENT IN PCR WAIVED ANY OBJECTIONS TO SUMMARY JUDGMENT FOR THE STATE

In re Piquette, 2021 VT 95. POST-CONVICTION RELIEF: WAIVER BY FAILURE TO FILE OPPOSITION TO MOTION FOR SUMMARY JUDGMENT.

Full court published decision. Summary judgment for the State in a petition for post-conviction relief affirmed. The defendant was convicted of aggravated sexual assault and domestic assault. In his petition, he claimed that his attorney had failed to communicate to him a plea offer from the State. The State filed a motion for summary judgment. The court granted the petitioner three extensions of time to respond to the State's motion, the last of which expired in January, 2020 with no opposition filed. On October 13, 2020, the court granted the State's motion. The next day the petitioner filed a motion to set aside the judgment, and filed an opposition memorandum to summary judgment on the day after that. On March 29, 2021, the court denied the motion to set aside the judgment, finding in part that no miscarriage of justice would result from its denial. On April 2, 2021, the petitioner appealed from the October 13, 2020 ruling, but did not challenge the March 29, 2021, order denying his motion to set aside the judgment. The petitioner waived the arguments made on appeal by failing to timely file a response to the State's summary judgment motion. Furthermore, the petitioner did not appeal the court's order denying his motion to set aside the judgment and reopen proceedings, and made no argument that the court abused its discretion in doing so. The petitioner's claims would not be reviewed on appeal because he waived them when he failed to respond to the summary judgment motion. Doc. 2021-072, December 17, 2021.

Vermont Supreme Court Slip Opinions: Three-Justice Entry Orders

FACTUAL BASIS DOES NOT REQUIRE SPECIFICITY CONCERNING HOW DEFENDANT'S ACTS WERE PART OF A COMMON SCHEME AND PLAN

State v. Pickard, three-justice entry order. PLEA PROCEEDING: FACTUAL BASIS, EXPLANATION OF ELEMENTS: FAILURE TO ENLARGE UPON "COMMON SCHEME AND PLAN" ELEMENT. MOTION TO WITHDRAW PLEA: NO ABUSE OF DISCRETION IN DENIAL.

Guilty plea affirmed in sexual assault of a minor. 1) The defendant's change of plea was not lacking an adequate factual basis where the State explained that he was charged with engaging in a sexual act with the victim and that that "happened more than once during that time frame and the multiple times were a part of his common scheme and plan." More specificity concerning how the acts constituted a common scheme and plan were not required. The defendant admitted that he had engaged in this behavior, which involved both a series of exertions of power and a similar method of assault on the same victim. 2) Nor did the change of plea fail adequately to explain the common-scheme-or-plan element. This is not a case where the court completely failed to discuss an essential element of the charge, or where the record does not support an inference that the defendant understood the charge. 3) The trial court did not abuse its discretion in denying the defendant's motion to withdraw his plea. The pleas were entered knowingly and voluntarily; the trial court did not find credible the defendant's claim that at the time of the change of plea he was suffering a panic attack and did not understand what he was doing; and the fact that the defendant later denied having planned or thought about the sexual abuse while being interviewed during his psychosexual abuse was not grounds for finding an abuse of discretion since the defendant did not refer to this report or the statements within it in his motion or at the hearing on the motion. Doc. 2021-009, November 19, 2021.

TRIAL COURT'S REMARKS ABOUT ARBITRARINESS OF SENTENCING NOT CONSIDERED IN REVIEW OF SENTENCING IN ANOTHER MATTER

State v. Hill, three-justice entry order. SENTENCING: ABUSE OF DISCRETION – STATEMENTS BY TRIAL COURT IN A DIFFERENT PROCEEDING. JUDICIAL NOTICE.

Imposition of sentence pursuant to plea agreement for second-degree arson, reckless endangerment, providing false information to a police officer, negligent operation, and driving with a suspended license, affirmed. The defendant argued that the trial court's agreement with the State's Attorney's assertions about the arbitrariness of sentencing in Vermont, made during a proceeding in a different matter, demonstrated that the trial court sentenced the defendant while under a misapprehension concerning the effect of the sentence, and thus abused its discretion. The Court refused to consider the transcript in an unrelated case as it did not contain any judicially noticeable or

adjudicative facts which this Court could take judicial notice of. In any event, the defendant's argument is belied by the record, which shows that the court inquired in great detail of DOC employees about the amount of time the defendant would actually serve given various programming options available to him, and also explained its own understanding of that information. Doc. 2021-069, November 19, 2021.

PCR COURT'S FINDING THAT PETITIONER WAS MENTALLY COMPETENT AT TIME OF CHANGE OF PLEA WAS NOT AN ABUSE OF DISCRETION

In re Bedell, three-justice entry order. POST-CONVICTION RELIEF: FACTUAL BASIS; COMPETENCY; ARGUMENTS BYPASSED ON DIRECT APPEAL.

Judgment for the State in post-conviction relief affirmed. In 1997 the petitioner pleaded guilty to one count of sexual assault on a child with an agreed sentence of six to thirty-five years. 1) Under the law applicable at the time of petitioner's change-of-plea colloquy, Rule 11(f) was satisfied if there was substantial compliance with its requirements, and the substantial-compliance standard was met if a defendant or a defendant's attorney stipulated to the factual basis. Although the criminal court in this case did not recite the factual basis or recite the statutory charge, the PCR court found that petitioner did not express any confusion regarding the charge. Moreover, both petitioner and his counsel affirmatively indicated that there was a factual basis for the charge. Therefore, there was a factual basis for the charge and there was no Rule 11(f) violation. 2) Petitioner appears to assert that he was not competent to plead guilty because he was having a mental-health crisis or was under the influence of drugs. The PCR court did not credit these claims, finding that although petitioner had consumed narcotics and sleep aids the day before and had a history of mental health issues, he was competent at the time of the plea change. In a PCR proceeding, "[w]e will not disturb the findings if they are supported by any credible evidence, and even when the evidence is conflicting, we defer to the trial court's judgment." Here, the court's findings regarding petitioner's competence are supported by the evidence submitted in the PCR proceeding, 3) Petitioner argues that the sexual-assault charge was invalid because the sexual contact was consensual either because he was married to his daughter or because he had a right to engage in sexual acts with his daughter. These arguments could have been brought on direct appeal, and petitioner has failed to demonstrate that he did not deliberately bypass them. Therefore, they are not properly raised in this PCR appeal. November 19, 2021, Doc. 2021-101.
https://www.vermontjudiciary.org/sites/default/files/documents/eo21-101.pdf

Vermont Supreme Court Slip Opinions: Single Justice Bail Appeals

CHALLENGE TO SIXTY-DAY HOLD WITHOUT BAIL MOOT AFTER EXPIRATION OF SIXTY DAYS

State v. Pat Wright, single justice bail appeal. BAIL APPEAL: MOOTNESS.

Appeal from order holding defendant without bail pursuant to 13 V.S.A. 7553a is moot. Because sixty days have passed since the hold without bail order, the defendant is entitled to a bail hearing. Defendant's only available relief in this appeal is a remand for the trial court to hold a hearing and set bail. Here, an intervening event, the expiration of the sixty-day period, has rendered the appeal moot because defendant is now entitled to that same relief under § 7553b. The Court therefore dismisses the appeal as moot. Doc. 21-AP-253, November 19, 2021. https://www.vermontjudiciary.org/sites/default/files/documents/eo21-253_0.pdf

Rule Changes

Vermont Rule of Criminal Procedure has been amended to add subsection (d):

> (d) Amendment of Indictment or Information or Indictment During Trial. If no additional or different offense is charged and if substantial rights of the defendant are not prejudiced, the court may permit an indictment or information or indictment to be amended at any time after trial has commenced and before verdict or finding for any purpose, including cure of the following defects of form: (1) any misspelling, grammatical, or typographical error; (2) misjoinder of offenses or defendants; (3) misstatement of the time or date of an offense if not an essential element of the offense; (4) inclusion of an unnecessary allegation; (5) failure to negate any excuse, exception, or proviso contained in the definition of the offense; (6) use of alternative or disjunctive allegations.

According to the Reporter's Notes, Subdivision (d) has been added "to address amendment of an information or indictment prior to trial, including but not limited to late-stage amendments that may be authorized in the period when a case has been scheduled for final pre-trial conference, jury selection, and trial. In the latter circumstance, concerns may be invoked both as to prevention of prejudice to a defendant and effective administration of justice, in terms of the court's docket management and reasonable progression of long-pending cases to trial. While added subdivision (d) does not prescribe specific criteria for the court's consideration in granting or denying pretrial amendment of an information, as is the case for amendments which occur during trial, the defendant is nonetheless protected by constitutional safeguards. State v. Beattie, 157 Vt. 162, 170, 596 A.2d 919, 924 (1991) (citing Reporter's Notes, V.R.Cr.P. 7(d) as stating: "The right to amend prior to trial remains subject . . . to the constitutional requirement that the defendant receive fair notice of the charge."). The added subdivision adopts a requirement of arraignment on an amended or added charge "without unreasonable delay." … Ultimately, "whether the amendment is sought by the prosecutor during the trial, or prior thereto, the test is the same.

The allowance of the amendment must not prejudice the accused's ability to prepare an adequate defense." State v. Bleau, 132 Vt. 101, 104, 315 A.2d 448, 450 (1974) (citations omitted). In assessing the prejudice to a defendant from a late-stage amendment of criminal charges, the standard of the existing Rule 7(d)—whether additional or different offenses are charged affecting substantial rights of the defendant—is informative. Whether the amendment occurs during or in the late stages prior to trial, prejudice may lie not only as a matter of basic inability to reasonably prepare for trial on the amended charges, but in resulting impact upon defense strategy, or in placing a defendant in a position of exercising inconsistent strategies as to charges joined for trial. Cf. Bruyette, 158 Vt. at 35, 604 A.2d at 1277; State v. Holden, 136 Vt. 158, 385 A.2d 1092 (1978).

"The amendments do not establish a fixed time prior to trial beyond which the prosecution is categorically precluded from amending existing charges, in recognition that certain amendments may not be prejudicial, or may actually benefit a defendant, and that there may as well be reasonable grounds notwithstanding due diligence for the amendment sought by the prosecution, provided that the defendant's fair trial interests are protected. Apart from prejudice to the defendant, the amendment also recognizes the court's discretion, consistent with the effective administration of justice and the obligation to manage and advance the docket, to deny amendment and strike the proposed amendment or added counts if amendment would result in unreasonable delay, when all competing interests in the specific circumstances are weighed. Consistent with the terms of V.R.Cr.P. 48(b), denial of amendment, or striking or dismissal of an amendment seeking to add charges pursuant to new V.R.Cr.P. 7(d) or (e) is presumptively without prejudice, unless the court directs that dismissal is with prejudice.

"The present rule amendments are addressed to the propriety of amending an information at various junctures in a criminal proceeding, and the court's authority and responsibility to grant or deny motions to amend. The rule amendments do not address, and are not intended to contravene, the independent, and constitutionally premised, criteria and calculus where speedy trial rights and double jeopardy protections are invoked. As is the case with existing subdivision (d), the present amendment extends to amendment of an indictment prior to trial by the prosecuting attorney, even though the charge originates from grand jury determination. As the Reporter's Notes to the original promulgation of the rule indicate, V.R.Cr.P. 7 departs from the common-law view, reflected in the federal rule as well, that a superseding grand jury indictment is required to substantively amend an indictment, since under the Vermont rule, 'the prosecutor has the option to bring an information in any case and the defendant has no right to indictment.' Of course, the prejudice calculus reflected in the rule applies, whether the charge to be amended originates from either information or indictment."

The amendment takes effect on January 18, 2022.

https://www.vermontjudiciary.org/sites/default/files/documents/PROMULGATEDVRCrP%207--STAMPED_0.pdf

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