
Vermont Criminal Law Month

December 2005 - January 2006



Vermont Supreme Court Slip Opinions: Full Court Rulings

*Note to readers: Decisions of the Vermont Supreme Court may be full opinions, entry orders, or three-justice panel entry orders. Some full-court entry orders, and all three-justice panel entry orders, are unpublished decisions. Vermont Criminal Law Month attempts to summarize all decisions of the Vermont Supreme Court. Beginning with the July, 1996, issue, VCLM separately summarizes three-justice panel entry orders, which may be cited as persuasive authority, but shall not be considered as controlling precedent. V.R.A.P. 33.1(c). In addition, summaries of full-court entry orders will now carry an indication whether they are to be published or unpublished. (In some cases, the Court has checked neither option, and the summary will indicate this as well). Unpublished decisions of the full court may not be given controlling effect. See, In re Barlow, 160 Vt. 513, 518, n. *.*

ADMISSION TO SEXUAL MISCONDUCT WAS NOT AN IMPLIED CONDITION OF PROBATION

State v. Klunder, 2005 VT 130, 16 VLW 401. CONDITIONS OF PROBATION: FAIR NOTICE TO DEFENDANT. MODIFICATION OF CONDITIONS: FAILURE TO OBJECT.

Full court published entry order. Violation of probation affirmed in part and reversed in part. 1) Where the defendant agreed to a condition that he engage in individual mental health counseling with an emphasis on appropriate adult-child physical and sexual boundaries, an admission by the defendant in counseling that he had engaged in any particular sexual misconduct

was neither an express nor a reasonably implied condition of his counseling, and the court erred in finding a violation of the condition on these grounds. The conviction did not give the defendant fair notice that he would be required to admit to sexual misconduct as a condition of probation, because he was not convicted of an offense of a sexual nature. 2) The Court declined to find any error in the imposition of a condition of release in connection with a motion to modify conditions, where the defendant made no objection until five months later. Doc. 2004-356, December 13, 2005.

SEARCH WARRANT FOR APARTMENT DIDN'T INCLUDE LOCKED BEDROOM

State v. Quigley, 2005 VT 128, 16 VLW 394. SEARCH WARRANTS: JUDGE'S CONSIDERATION ON REVIEW OF INFORMATION NOT AVAILABLE TO OFFICERS; ABSENCE OF PROBABLE CAUSE TO SEARCH SEPARATE

LIVING QUARTERS BASED ON WARRANT FOR APARTMENT GENERALLY; COMMUNITY LIVING EXCEPTION.

Full court published entry order. Trial court's

order suppressing evidence affirmed. 1) Although the trial court erroneously considered information not available to the officers at the time of the search warrant application, the court's suppression order is nonetheless affirmed, based upon information that was properly considered by the trial court. 2) There was no probable cause to search the defendant's bedroom, which was locked, based upon the fact that another inhabitant of the same apartment had died of a drug overdose. There was no showing that the other tenants of the apartment had access to that room, and the affidavit, which sought a warrant to search the entire apartment, made no mention of the fact that this bedroom was locked when the officers arrived on the scene. When one tenant consistently denies all other tenants access to a part of the premises, probable cause based on a general description of the premises will not extend to the separately secured area. The community living exception, which permits officers to execute a warrant that merely describes the place to be searched by its outward appearance, without regard to the separate privacy interests officers may encounter therein, applies only when the officers could not have known or anticipated that they would

encounter separate privacy interests inside the premises prior to executing the warrant. The Court also noted that Vermont has not previously recognized the exception under Article Eleven, but reserves the question as not necessary to decide here, since the officers who executed the warrant were aware of the locked bedroom door. The existence of drugs in the remainder of the apartment did not give rise to probable cause of drugs in the locked bedroom, as there was no showing that the other tenants had access to that bedroom; the circumstances support an inference that the drugs found elsewhere belonged to the deceased; and the defendant's "obvious knowledge" of the drugs in the living room did not support the inference that drugs would be found in his room. In the context of a shared student apartment, it is not unusual for persons thrown together by a tight housing market to knowingly tolerate casual drug use on the apt of their roommates, even though they themselves may not use drugs. Dooley concurs: Notes the current state of the law on multiple spaces in a dwelling is uncertain, but supports the ruling based on the circumstances here. Doc. 2004-165, December 15, 2005.

VERMONT'S FIRST AND SECOND DEGREE MURDER SENTENCING STATUTES FOUND UNCONSTITUTIONAL

***State v. Provost, 2005 VT 134, 16 VLW 381. RIGHT TO COUNSEL AND WAIVER. DISCOVERY OBLIGATIONS. MURDER SENTENCING STATUTE CONSTITUTIONALITY.**

Full court opinion. Four first degree murder convictions affirmed; sentences are vacated and defendant is sentenced to four terms of thirty-five years to life, consecutive. 1) The defendant's waiver of his right to counsel when first interviewed by the police also served as a valid waiver of counsel under the Public Defender Act. The defendant's actions in falling silent and becoming verbally unresponsive at the end of that interview, even assuming that they served to revoke his waiver of the right to remain silent, did not revoke his waiver of the

right to counsel under either Miranda or the Public Defender Act. Therefore, the police were never required to contact a Public Defender on his behalf. 2) Nor were the defendant's rights under the Public Defender Act violated when he was not told of his right to representation when a district court judge denied bail by telephone. The Act requires this notification upon the commencement of a later judicial proceeding relating to the same matter, but the setting of bail by telephone is not the sort of later judicial proceeding contemplated by the Act. 3) The State did not violate its discovery obligations by failing to notify the defense of the medical examiner's opinion that one of the victims would have been unable to move immediately after being shot (which was contrary to the defendant's theory of the case). This testimony

was an obvious inference from the autopsy report, which included a lengthy description of the damage to the victim's spinal cord. Furthermore, the defendant chose to waive deposition of the expert during discovery, despite being aware that his testimony might go beyond the scope of the autopsy report. In any event, the defendant failed to show any prejudice from any failure to disclose. He has not shown how advance notice of the testimony would enabled him to have challenged it or lessened its impact on his case. 4) Vermont's murder sentencing statute violates the 6th Amendment by permitting the trial judge to increase the minimum sentence based upon findings of fact not submitted to the jury, nor

found beyond a reasonable doubt. This error was not harmless even though two of the factual findings did not need to be submitted to the jury (prior conviction), or were implicit in their verdict (multiple victims), because the jury was not given the opportunity to determine whether the State had proven the absence of mitigating factors beyond a reasonable doubt, nor to determine their relative weight. The only sentence consistent with both the federal Constitution and the statute is the presumptive term of life imprisonment with a minimum term of thirty-five years. These are imposed consecutively, as the trial judge did with the life without parole sentences. Doc. 2004-160, December 23, 2005.

FAILURE TO CONDUCT IN-PERSON COLLOQUY INVALIDATED FINDING THAT DEFENDANT WAIVED COUNSEL

**State v. Tribble*, 2005 VT 132. Full court opinion. COMPETENCY FINDING. WAIVER OF COUNSEL: NECESSITY OF COLLOQUY. INSANITY DEFENSE: DEFENDANT CAN MAKE CHOICE.

First degree murder reversed. 1) The trial court's conclusion that the defendant was competent to stand trial and/or waive any of his rights was supported by the findings, and the findings were supported by credible evidence and not clearly erroneous. Although one expert testified to the contrary, it was within the court's discretion to determine the credibility and the weight of the expert evidence before it. 2) The trial court should have conducted an explicit, on-the-record colloquy, and ascertained whether the defendant had validly waived counsel and explained to defendant the potential pitfalls of proceeding without representation. The court's

finding of a waiver based on the defendant's conduct was not appropriate where that conduct did not unequivocally indicate a desire to proceed without counsel. 3) The court also erred when it allowed trial counsel to withdraw on the grounds that the defendant refused to allow an insanity defense, which defense counsel believed to be the only effective defense. The defendant had the right to make the choice whether to present an insanity defense without having also to waive the right to counsel. The rules of ethics do not require a defense attorney to present the best defense of which he is aware, over his client's objection. An attorney's assessment of the relative merits of various defenses cannot be allowed to override a defendant's right to decide whether to mount an insanity defense. Doc. 2003-073, December 30, 2005.

CLAIM THAT DEFENDANT WAS ILLEGALLY DETAINED DID NOT MITIGATE HIS SUBSEQUENT CONDUCT OF DRIVING AWAY AND STRIKING OFFICER

State v. Daley, 2006 VT 5, 17 VLW 14. Full court published entry order. SENTENCING: REFUSAL TO FIND MITIGATING FACTORS; VICTIM

STATUS CONFERRED ON WITNESSES.

Aggregate sentence of twenty-six to thirty-three years following guilty plea to seven criminal

charges affirmed. 1) The trial court did not err in refusing to consider the defendant's allegedly unconstitutional detention a mitigating factor. Even assuming that the detention was unconstitutional, it did not in any way mitigate his subsequent actions of driving away at a high speed, and subsequently striking and killing a police officer. 2) For the same reasons, the trial court did not err in refusing to consider as a mitigating factor the claim that the officer's use of spike strips contravened police procedures and regulations. 3) There was no prejudice from the trial court's conferral of "victim" status upon the two police officers who witnessed the

incident, thus entitling them to appear at the sentencing and express their views, where the record indicates that the sentence was driven by factors other than the officers' statements. 4) The trial court did not err in failing to consider as a mitigating factor the defendant's claim that he was unaware of having hit the officer when he fled the scene. The defendant pled guilty to a charge that includes the element of actual or constructive knowledge of injury. And, the trial court found that the defendant's claim lacked credibility. Doc. 2004-458, January 6, 2006.

EVIDENCE OF GUILTY PLEA BY CO-DEFENDANT PROPERLY ADMITTED TO IMPEACH DEFENSE WITNESS

State v. Eddy, 2006 VT 7, 17 VLW 25. Full court opinion. USE OF GUILTY PLEA BY CO-DEFENDANT TO IMPEACH ALIBI WITNESS.

Burglary conviction affirmed. The trial court did not err in allowing the State to introduce evidence of a co-defendant's guilty plea to the same crime, in order to impeach a witness who had testified that both defendants were with her at the time of the offense and therefore could not have committed it. The alibi witness had denied on cross-examination any knowledge that the co-defendant had pled guilty to the crime. Rule 609, which allows the use of a prior conviction in order to impeach a witness, does not apply here because the person being impeached is not the one with the prior conviction. Therefore, Rule 609's limitations to crimes of falsification does not apply. The remaining ground for

exclusion, Rule 403, was not raised below, and is therefore reviewed for plain error only. It was not plain error here, because the guilty plea was compelling evidence that the alibi's testimony was either a mistake or a lie. The prejudicial effect of the plea was the subject of a jury instruction. While it is unfortunate from the defendant's perspective that the alibi witness vouched for the innocence of a person who had already pled guilty, it was not error for the court to allow the State to point out this discrepancy, particularly when defendant did not call the court's attention to any arguable legal basis for excluding such evidence. The instruction concerning this evidence, which told the jury they could use the plea only to help weigh the credibility of the alibi witness, and not as evidence of the defendant's guilt, was not erroneous. Doc. 2004-337, January 13, 2006.



Vermont Supreme Court Slip Opinions: Single Justice Rulings

COURT DIDN'T EXERCISE DISCRETION WHEN DENYING BAIL

State v. Bessette, single justice bail appeal.

BAIL PENDING VOP HEARING: COURT

MUST EXERCISE DISCRETION.

Although a defendant being held pending a hearing on violation of conditions of probation is not entitled to release on bail, the trial court nonetheless has discretion to release the defendant on bail. Even if the court concludes that no bail will be allowed, it must make

findings to indicate how it exercised its discretion. The trial court here failed to do so. The matter is therefore vacated and remanded for the trial court to consider whether to exercise its discretion to authorize conditions of release. Doc. 2005-505, November 29, 2005 (Dooley, J.).

* indicates cases handled by the Attorney General's Office.

District Court Decisions

Judge Wesley granted post-conviction relief to a defendant convicted of escape from a correctional facility. At the time of the escape, the defendant was on furlough, the conditions of which required him to be either at his place of employment or at his residence. "Correctional facility" is defined by statute to include any space "supported by the department (of corrections) and used for the confinement of persons committed to the custody of the commissioner." The court found that "support" implies something akin to the capital investment and staffing that might be necessary to create or lease temporary places of confinement under the statute; the mere designation of specified locations in a furlough order is not sufficient to convert any such designated restricted place into a "correctional facility," especially in view of the second clause of the statute, which creates a lesser felony for unauthorized visits while on furlough. **In re Bushee**, Doc. 313-10-03 Bncv (November 21, 2005), 10 Vt.Tr.Ct.Rep. 45.

Judge Cashman denied sentence reconsideration on his own motion to a defendant sentenced to sixty days to ten years to serve for aggravated sexual assault on a child, with additional sentences of three years to life, on probation, on a second count

of aggravated sexual assault on a child, and two years to five years on probation for lewd and lascivious conduct. The court justified the sentence on the grounds that, under Correctional

Department policy, the defendant would not be eligible for sex offender treatment while in prison, and the court did not want to delay that treatment at the risk of hardening the defendant in the meantime. The court noted that it would have imposed a minimum three year term if the department had made sex offender treatment possible during the minimum term. [The department subsequently did so, and the court imposed the three year minimum term on the State's motion to reconsider]. **State v. Hulett**, Docs. 2683-5-05, 2684-5-05, and 2655-5-05 Cncr (January 9, 2006), 10 Vt.Tr.Ct.Rep. 46.

Judge Van Benthuyzen suppressed the results of a breath test where the officer erroneously informed the defendant that his refusal to give a non-evidentiary alcosensor test would be a crime, that he would go to jail if he refused to take that test, that he could not have a blood test, and that his refusal to take the Datamaster evidentiary blood alcohol test was a criminal violation. Under these circumstances, he was misled into making uninformed choices, coerced into giving the alcosensor test, and caused to forego the independent test. The court declined to dismiss the charges outright, ruling that it did not find deliberate bad faith conduct. **State v. DeFazio**, Doc. 575-9-05 Oscr (October 26, 2005), 10 Vt.Tr.Ct.Rep. 49.

Judge Morris held that the defendant in a sexual assault case had made a sufficient showing to require an in camera review by the court of the complainant's medical records from the date that

she had consulted Planned Parenthood and given them a factual account of the events in question.

The defendant claims that the sexual contact was consensual; there is no physical evidence; and the issue of consent will depend upon assessment of the credibility of the complainant and the defendant, there being no other witnesses. The defendant also alleged that the complainant's accounts contained a number of inconsistencies. **State v. Garrow**, Doc. 158-2-05 Wncr (September 26, 2005), 10 Vt.Tr.Ct.Rep. 54.

Judge Cashman dismissed a DUI case in which a University of Vermont police officer stopped an operator on South Prospect Street in Burlington, off the campus of the University of Vermont. The court held that the existence of a police

department which was answerable only to the trustees of the University of Vermont violated Article 5 of the Vermont Constitution, which gives the people of the State the sole, exclusive, and inherent right of governing and regulating the internal police of the State. The court did assume that students, faculty, and staff of the University voluntarily accept jurisdiction of the University police department by their attendance upon campus. **State v. Curley-Egan**, Docs. 2640-5-05 Cncr and 187-5-05 Cncs (October 27, 2005), 10 Vt.Tr.Ct.Rep. 69.

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