
Vermont Criminal Law Month

April - May 2009



Vermont Supreme Court Slip Opinions: Full Court Rulings

Includes three justice bail appeals

FAILURE TO APPEAR VIOLATIONS APPLY ONLY TO COURT APPEARANCES

In re Miller, 2009 VT 36. Full court opinion. VOLUNTARINESS OF PLEA AGREEMENT: PLEA TO WRONG OFFENSE. FAILURE TO APPEAR: ELEMENTS.

Denial of petition for post-conviction relief reversed. Pursuant to a plea agreement, the petitioner pled guilty to, among other things, four counts of "failure to appear" under 13 VSA sec. 7559(d), arising out his failure to check in daily at the police station, as required by his conditions of release. Section 7559(d) penalizes a violation of a condition of release that requires the person to appear at a specified time and place in connection with a prosecution for an offense. However, the words "in connection with a prosecution for an offense" indicate that this section was intended to apply only to conditions of release specifying the time and place of appearances, such as court appearances, that directly advance a

prosecution. A failure to meet a reporting requirement should be prosecuted under Section 7559(e), which applies to violations of conditions of release generally, and which carries a lower penalty. Although the trial court found that no prejudice would accrue to the petitioner by pleading guilty to the wrong offense, no prejudice need be shown in order to collaterally attack a guilty plea on the grounds that the trial court failed to ascertain that there was a factual basis for the plea as required by Rule 11. Although a petitioner must show prejudice when claiming technical violations of Rule 11, this rule does not apply where the claim goes to the petitioner's understanding of the elements of the offense. Where the acts forming the basis of a defendant's guilty plea did not constitute the crime charged, the plea may not stand. Burgess dissents. Doc. 2007-254, April 3, 2009.

NO AUTOMATIC STAY FOR POST-CONVICTION RELIEF DECISIONS PENDING APPEAL

In re Jones, 2009 VT 39. POST-CONVICTION RELIEF: STAYS.

Full court entry order. Motion to lift stay of judgment pending the State's appeal of the trial court's grant of a petition for post-conviction relief granted. The petitioner was originally charged with two counts of kidnapping. Pursuant to a plea agreement, the petitioner was convicted of one count of burglary and two counts of unlawful restraint, and in the plea agreement the petitioner waived any statute of limitations claim that might apply to those charges. The petitioner subsequently filed a petition for post-conviction relief, claiming that the statute of limitations had expired on the two crimes for which he was convicted, and that the statute of limitations cannot be waived and that the court therefore lacked jurisdiction

over the offenses. The Superior Court granted the petition on this ground and, on the State's motion, stayed the decision pending the State's appeal. The automatic stay provisions of V.R.C.P. 62 do not apply to post-conviction relief proceedings, as those provisions apply to enforcement actions, whereas the post-conviction relief statute provides for a court to discharge a petitioner. The discretionary stay provisions of Rule 62 may or may not apply to a PCR decision, but that question need not be answered here because the Superior Court did not exercise any discretion in granting the stay. By withholding its discretion entirely, the Superior Court abused its discretion. Doc. 2008-504, April 8, 2009.

COURT FAILED TO CONSIDER PERSONAL CHARACTERISTICS OF DEFENDANT IN FINDING MIRANDA WAIVER WAS KNOWING AND INTELLIGENT

State v. Mumley, 2009 VT 48.
MIRANDA WAIVER: FAILURE TO CONSIDER DEFENDANT'S PERSONAL CHARACTERISTICS.

Full court opinion. Attempted kidnapping reversed. 1) The trial court's decision denying the defendant's motion to suppress his statements contains no consideration of factors indicating a knowing and intelligent waiver of

Miranda rights, as required by *Fare* and *Malinowski*, and no consideration of factors indicating his awareness of the Section 5234 rights and the consequences of waiving them as required by Section 5237. Instead, the court reached its conclusion that the defendant made a valid waiver of his rights by "assuming ... that defendant possessed the requisite experience, education, background, and intelligence

to understand the nature of his ... rights and the consequences of waiving them.”

2) This issue was preserved for appeal even though the primary argument below was that there was no waiver at all, where the defendant explicitly cited *Stanislaw* for the proposition that the State must prove a knowing and intelligent waiver, and that this scenario was an invalid waiver. 3) Admission of the statements was not harmless error, as they placed him at the scene and

corroborated that there had been an interaction with the intended victim. Most prejudicial was the defendant's statement that he had driven by the complainant several times, which substantially undermined the defense theory of the case. Furthermore, the State relied heavily upon them in closing argument. Doc. 2008-114, May 8, 2009.

CONSENSUAL ENCOUNTER CONVERTED TO BRIEF DETENTION BY POINTED QUESTIONS

State v. Pitts, full court opinion.
REASONABLE SUSPICION. TAINT
FROM PRIOR ILLEGALITY.
VOLUNTARY CONSENT TO SEARCH.

Conditional pleas to possession of illegal substances reversed in part and affirmed in part. 1) A reasonable person under the circumstances here would have concluded that he was not free to leave, where the defendant Yosef Pitts was aware that the police had followed him across town by two police officers who had just served a subpoena at a suspected drug house in Yosef's presence, and asked him questions indicating a particularized suspicion of criminal activity, such as whether he had any weapons and whether he had any drugs. The police therefore required a reasonable and objectively based suspicion that he was engaged in criminal activity. However, the officers here were operating solely on a hunch. The detention was therefore invalid, and the illegal detention irremediably tainted the consensual search of Yosef's person which immediately followed. Therefore,

all of the evidence seized from Yosef should have been suppressed. 2) Drugs found during a subsequent consent search of Yosef's sister's apartment were not tainted by the prior illegality, because the police had ample information independent of the money and drugs seized from Yosef to investigate the residence (the fact that, according to the taxi company, that address was a location where a taxi was regularly sent from a suspected drug-dealing operation in Burlington). 3) Even assuming that Sequoya Pitts, Yosef's sister, had standing to argue that his detention was illegal, she failed to establish a causal nexus between the items seized from Yosef and the police decision to search her apartment, as discussed above. 4) Sequoya's consent to the search of her apartment was voluntary. The court declines to adopt a standard for consent which would require the police to inform a resident of his or her right to refuse consent as a precondition to a residential search. Nor was her consent coerced by the police informing her that they would seize the residence and

apply for a search warrant if she refused, even though she then agreed so that her eight year old son would not be forced to go elsewhere. The officer's statement that he thought he had probable cause to seize the residence and apply for a warrant did not communicate that a warrant would automatically issue regardless of

Sequoia's decision or that her refusal would be a futile gesture. Johnson and Skoglund dissent: The search of Sequoia's apartment was tainted by the unlawful search of Yosef. Docs. 2007-077 and 2007-219, May 22, 2009.

DENIAL OF BAIL AFFIRMED

State v. Herrick, 2009 VT 62. DENIAL OF BAIL: DISCRETION.

Three-justice bail appeal. Order holding defendant without bail is affirmed. Assuming, arguendo, that the trial court's consideration of the current charge against the defendant was improper with respect to evaluating his character and mental condition, the defendant nevertheless failed to show that the court abused its considerable discretion in denying bail, especially as there exists a presumption of

incarceration. The trial court amply documented the variety of factors it considered in making its bail decision, including, in particular, the nature and circumstances of the offense. Even if the Court were to disagree with the weight assigned to any particular factor, or the relative weighing of all the factors considered by the trial court, it cannot conclude on this record that the court's decision was arbitrary. Doc. 2009-168, June 8, 2009.

FORM CONTROLLED OVER STATUTE ON TIME OF EFFECT OF CONDITIONS OF RELEASE

State v. Tavis, 2009 VT 63. CONDITIONS OF RELEASE: TIME OF EFFECT. Full court published entry order. Denial of motion to dismiss a charge of violating conditions of release reversed. The conditions of release form stated that the defendant would be released upon certain conditions, including no contact with the complainant. 13 V.S.A. sec. 7554(a)(3) states that no-contact orders shall take effect immediately, regardless of whether the defendant is incarcerated or released. The defendant contacted the

complainant while incarcerated. The standard condition of release form had not been updated to incorporate the statutory amendment, and unambiguously took effect only upon release. Furthermore, the defendant was not given fair warning of the conditions imposed upon him as required by 13 V.S.A. sec. 7554(c), since he was not informed that he was not to contact the complainant while he was incarcerated. Doc. 2008-152, June 12, 2009.

INVOLUNTARY MANSLAUGHTER DOES NOT REQUIRE INDEPENDENTLY ILLEGAL ACT

State v. Viens, 2009 VT 64.

INVOLUNTARY MANSLAUGHTER: NO NEED FOR INDEPENDENTLY ILLEGAL ACT; SUFFICIENCY OF THE EVIDENCE; INSTRUCTION – UNANIMITY AS TO CRIMINALLY NEGLIGENT ACT.

Full court opinion. Involuntary manslaughter affirmed. 1) The trial court did not err when it failed to instruct the jury that it must find an independently unlawful act resulted in the death of another. Any act undertaken by a defendant in a criminally negligent fashion that results in the death of another may subject the defendant to criminal liability for involuntary manslaughter. 2) The defendant did not preserve an objection to the instructions on the grounds that they did not require the jury to be unanimous as to the act which they found constituted the criminally

negligent act. There was no plain error.

The court instructed the jury that they must all agree upon the facts which would support a decision that the State has proven each element of the offense beyond a reasonable doubt. 3) The court did not err in denying the defendant's motion for judgment of acquittal. The defendant told the police that he shouldered his high-powered hunting rifle, disengaged its safety, and proceeded to view his surroundings through the rifle's scope with his finger on or near the trigger. Prior to the gun's discharge, the defendant also admitted to having seen the tractor through the scope (the victim was sitting in the tractor when he was killed). This was sufficient to support a jury's finding of criminally negligent behavior. Doc. 2007-444, June 19, 2009.



Vermont Supreme Court Slip Opinions: 3 Justice Panel Rulings

Note: 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."

EXPUNCTION NOT JUSTIFIED ABSENT UNUSUAL OR EXTREME CIRCUMSTANCES

State v. Forney, three-justice entry order. EXPUNCTION OF CRIMINAL CONVICTION.

Denial of motion to expunge plea agreement affirmed. The defendant was convicted pursuant to a plea agreement of, among other things,

sexual assault on a minor. After unsuccessfully moving to withdraw his plea agreement, he filed a motion to expunge the plea deal, arguing that new evidence showed that the charge resulted from a conspiracy between his child's mother and the victim. He also argued that he had ineffective assistance of counsel when he entered the plea agreement. The denial of the motion is affirmed because a motion to

expunge is not a method for attacking the validity of the underlying conviction. Even if this case were within the courts' inherent power to expunge conviction records, the district court was within its discretion to conclude that the defendant has not demonstrated circumstances that are so unusual or extreme as to warrant expunction. Doc. 2009-005, April 15, 2009.

EXPERT TESTIMONY NEEDED FOR INEFFECTIVENESS CLAIM ABSENT LACK OF CARE PER SE

In re Girouard, three-justice entry order. POST-CONVICTION RELIEF: NECESSITY OF EXPERT TESTIMONY; DENIAL OF ALLOCUTION. CHALLENGE TO PAROLE DENIAL.

Summary judgment for the State in post-conviction relief proceeding affirmed. 1) Expert testimony was necessary to demonstrate the alleged ineffectiveness in this case because the deficiencies claimed do not demonstrate a lack of care per se. 2) The petitioner failed to assert that his claimed denial of the right to allocution at the sentencing hearing resulted in prejudice where he failed to

assert that the court was misinformed as to any relevant circumstances, that he would have offered specific mitigating factors, or that he was affirmatively denied an opportunity to speak. 3) The petitioner's assertion that he received a minimum sentence of zero, thus demonstrating that the sentencing court intended to allow him to be released at some point between his zero minimum and maximum life sentence, appears to be a challenge to the parole board's most recent decision to deny him parole. This is not a claim for relief that may be reached in a PCR petition. Doc. 2008-408, April 15, 2009.

TRIAL WITHIN 30 DAYS OF JURY DRAW NOT APPLICABLE WHERE JURY IS STRICKEN AND NEW JURY IMPANELED

State v. Sanford, three-justice entry order. RULE 23: FAILURE TO TRY CASE WITHIN 30 DAYS OF JURY DRAW.

Conditional plea to domestic assault and reckless endangerment affirmed. The defendant was not entitled to have his

trial conducted within thirty days of the original jury selection, because after the jury was selected, the court granted the State's emergency motion to continue due to the unavailability of a key witness. Rule 23(d), requiring trial within thirty days of the selection of the jury, does not apply where the jury is

stricken and a new jury is impaneled. While the defendant's speedy trial claim is not reached, the court notes that the trial court acted well within its discretion

in granting the motion to continue, striking the first jury, and scheduling the case for a new jury draw. Doc. 2008-386, April 15, 2009.

COMMENT ON CREDIBILITY WAS NOT PLAIN ERROR

State v. Lake, three-justice entry order.
COMMENT ON CREDIBILITY.
HEARSAY INSTRUCTION: NO PLAIN ERROR.

Two counts of sexual assault on a minor affirmed. 1) The social worker's comments on the child's credibility did not require reversal, as on two occasions the court struck the answer and gave a cautionary instruction, and on the third, the judge reminded the jury that they were to decide on the issue of

credibility. In any event, the social worker's testimony was not the primary focus of the State's case. Rather, the case focused on the child's initial disclosures to family members. 2) There was no plain error when the court erroneously charged the jury that testimony regarding an inconsistency in what the victim and her sister had reported should not be considered for the truth of the matter asserted. Doc. 2008-136, April 15, 2009.

SUPERIOR COURT MAY CORRECT SENTENCE IN HABEAS PROCEEDING

Coyle v. Hofmann, 2009 VT 46.
RELIEF ON COLLATERAL CHALLENGE: COURT MAY CORRECT SENTENCE.

Full court published entry order. Superior court order correcting petitioner's sentence on a habeas corpus, rather than remanding to a contested resentencing, or new trial, or immediate release, affirmed. The trial court erroneously sentenced the petitioner to eight to fifteen months for attempting to elude, when the maximum

sentence for that offense is twelve months. 1) Although the petition should have been brought as a post-conviction relief petition, it would be treated as such where the substantive requirements of that statute have been met. 2) The PCR statute permits the court to grant several forms of relief, including correction of the sentence. Pursuant to case law in other jurisdiction, such relief is also available in a habeas corpus proceeding. Doc. 2008-101, April 29, 2009.

CONSECUTIVE SENTENCES FOR CONTINUOUS CONTEMPTUOUS EPISODE NOT JUSTIFIED

State v. North, 2009 VT 40. Full court opinion. CONTEMPT OF COURT:

SUMMARY DISPOSITION;
INVITATION TO CONTEMPTUOUS

BEHAVIOR; CONSECUTIVE SENTENCES OF A SINGLE EPISODE.

Order of contempt affirmed in part and reversed in part. 1) The court was not required to refer a contempt matter to another judge where it did not exceed that which we expect trial courts to meet with professionalism and self-restraint, and because there is no evidence that the court lost its composure. 2) The court's question, "Do you want to keep going, Mr. North?" after two instances of

contempt, did not "invite" the final statement, but served more as a warning than an invitation. 3) The trial court abused its discretion when it imposed consecutive sentences of five to six months for the defendant's multiple acts which were part of the same contemptuous episode, lasting about twenty seconds. Burger and Reiber would affirm consecutive sentences for two discrete outbursts, separated by the defendant being brought back into the courtroom. Doc. 2007-250, May 1, 2009.

DEFENDANT NOT ENTITLED TO RELEASE PENDING STATE'S APPEAL ON REMAND FROM US SUPREME COURT

State v. Brillon, three justice bail appeal.
RELEASE PENDING APPEAL.

Denial of motion for release pending appeal is affirmed. 1) The trial court erred when it stated that it did not have discretion to consider the defendant's motion for release, where the Supreme Court had authorized it to issue a mittimus for the defendant's arrest and confinement pending the outcome of the appeal on remand from the United States Supreme Court. That order did not alter the defendant's rights as any other convicted defendant with an

appeal pending, which includes the right to make a motion to be released pending appeal under Rule 46(c). 2) The trial court alternatively ruled that it would not grant release even if it had the discretion to do so, and that ruling is affirmed. Although the defendant voluntarily returned to the State to surrender, he also stood as a convicted felon with a substantial sentence left to serve and is not entitled to bail as a matter of right. Under these circumstances, the district court did not abuse its discretion. Doc. 2009-114, May 7, 2009.

CLAIMED HEARSAY WAS HARMLESS ERROR

State v. Verno, three-justice entry order.
HEARSAY: HARMLESS ERROR.
PROSECUTORIAL MISCONDUCT:
HARMLESS ERROR.

Sexual assault (four counts), attempted sexual assault, and lewd and lascivious conduct affirmed. 1) Admission of the

victim's prior consistent statement was unobjected to, and was harmless error, and therefore it is unnecessary to decide if it was properly admitted either as an exception to the hearsay rule or to rehabilitate the witness. It was harmless because there was a witness to the attempted assault and therefore the

case did not rest solely on the victim's credibility; another witness testified that the victim had told her that the defendant had raped her and attempted to sexually assault her; the prior statement was introduced during the victim's own testimony and did not introduce any new allegations, but was cumulative of her testimony and the defense had ample opportunity to cross-

examine her concerning her statements.

2) There was no plain error where the prosecutor stated that the defense counsel did a "hatchet job" of the complainant, where the complained of remark was not blatant or persistent, was made only once, and was not an inflammatory remark on the defendant's character. Doc. 2008-198, May 29, 2009.

TRESPASS CAN BE LESSER INCLUDED OFFENSE OF BURGLARY

State v. Prior, three-justice entry order.
LESSER INCLUDED OFFENSES:
BURGLARY AND TRESPASS;
INCONSISTENT VERDICTS.

Unlawful trespass of a building affirmed.

1) The defendant's claim that the court erroneously charged the jury on unlawful trespass of a dwelling as a lesser-included offense of burglary was not preserved for appeal. In any event, in this case, trespass was a lesser-included offense of burglary (which requires any building or structure), as

the defendant was charged with burglary of an occupied dwelling. 2) The verdict was not necessarily inconsistent even though the defense was based upon a claim that the defendant lacked the capacity to know that he was not licensed or privileged to enter the structure, an element of both offenses. The jury could have found that the defendant merely lacked the intent to commit assault, which was an element of the burglary charge but not of the trespass charge. Doc. 2008-253, May 29, 2009.

COURT NEED NOT MAKE RELIABILITY FINDINGS AT PROBATION HEARING FOR OUT OF COURT STATEMENTS BY DEFENDANT

State v. Silva, three-justice entry order.
PROBATION: SUFFICIENCY OF THE EVIDENCE; HEARSAY – HARMLESS ERROR.

Revocation of probation affirmed. 1) The court's finding that the defendant violated a condition of probation prohibiting possession and use of drugs without a prescription was supported by the evidence, where the defendant admitted to the offense to her probation officer. This statement was nonhearsay

as the admission of a party opponent, and therefore the court was not required to make a specific finding as to the reliability of the statement. The fact that a drug test on the same day came up clean is modifying evidence but does not show that the court's finding is clearly erroneous. 2) Any error in the admission of the defendant's hearsay statements concerning the use of drugs was harmless, as it was cumulative, and admitted solely in response to the defendant's corpus delicti argument

(which has been abandoned on appeal).

3) The defendant's challenge to a finding of violation of another condition, by taking cocaine into a correctional facility, need not be considered, as the revocation of probation is supported by the first violation and other,

unchallenged, violations. 4) The evidence also supported the finding that the defendant's probation officer had required her to attend and complete Job Corps training, and that she failed to do so. Doc. 2008-266, May 29, 2009.

TOUCHING NINE YEAR OLD'S VAGINA SUFFICIENT EVIDENCE OF SEXUAL INTENT

State v. Russin, three-justice entry order. LEWD AND LASCIVIOUS CONDUCT: SUFFICIENCY OF EVIDENCE OF SEXUAL INTENT. INEFFECTIVE ASSISTANCE: NOT REACHED ON DIRECT APPEAL.

Lewd and lascivious conduct with a child affirmed. 1) The evidence was sufficient to support a finding that the defendant acted with an intent of appealing to his sexual desires where

he unbuttoned and unzipped a nine-year old's clothing, reached his hand into her pants, and touched her vagina. 2) The claim of ineffective assistance of counsel would not be reached on direct appeal, and should be raised in a post-conviction relief proceeding, where the evidence can be developed, despite the fact that counsel here raised the issue himself in a post-trial motion, and submitted his own affidavit in support. Doc. 2008-313, May 29, 2009.

ADMISSION OF PRIOR CONVICTION WAS ERROR

State v. Casey, three-justice entry order. PRIOR CONVICTION.

Disturbing the peace by telephone reversed. The trial court erred in admitting the defendant's six year old prior conviction for the same offense where the court failed to make any findings supporting a conclusion that the prior conviction was relevant to the

requisite intent in this case. Where the case was essentially a credibility contest between the complainant and the defendant, who denied making the statements at issue, it cannot be concluded with confidence that the admission of the prior confession was harmless beyond a reasonable doubt. Doc. 2008-369, May 29, 2009.

DRIVING IN PARKING LANE SUPPORTED ROADSIDE STOP

State v. Pinney, three-justice entry order. ROADSIDE STOP: EVIDENCE SUPPORTING. SOBRIETY TESTING: VOLUNTARINESS.

Civil suspension and DUI affirmed. 1) The trial court did not err in admitting, and relying upon, the officer's testimony

that the defendant's driving in a non-traveled portion of the roadway was longer than he would have expected for a driver who was driving with due diligence. It was not necessary to present additional evidence as to how long a diligent driver would have done so. 2) The court's finding that the defendant drove in such a manner for a "considerable" time was supported by the officer's testimony that the defendant drove in that manner for a "considerable" time. 3) Whether or not the evidence supported a finding that the defendant drove "quickly" into a school parking lot, the remaining evidence justified the stop. 4) The trial

court was justified in relying upon the fact that the defendant drove over grass while turning into the parking lot despite some equivocation in the evidence as to whether the officer had turned on his blue lights by that point. Once the officer refreshed his memory, he testified that he had turned on his blue lights after the defendant drove on the grass. 5) The officer was not required to have informed the defendant that he had a right not to perform the roadside sobriety tests. The constitutional validity of the officer's request did not rely upon the defendant's voluntary consent. Docs. 2008-371 and 2008-496, May 29, 2009.

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