
Vermont Criminal Law Month

December 2006 – January 2007



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 Some full-court entry orders, and all three-justice panel entry orders, are unpublished decisions.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 In addition, summaries of full-court entry orders will now carry an indication whether they are to be published or unpublished.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 Unpublished decisions of the full court may not be given controlling effect.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. *.*

TRANSFER FROM JUVENILE TO DISTRICT COURT WAS UNAUTHORIZED

In re W.M., 2006 VT 129, 17 VLW 492, full court published entry order. TRANSFER TO DISTRICT COURT.

Transfer from juvenile court to district court reversed. A juvenile court may only transfer a case to district court under certain enumerated circumstances, one of which is after an adjudication of delinquency is made after a hearing on the merits. There was no such

adjudication here, and therefore the family court had no authority to transfer the case to district court. The fact that the district court originally transferred the case to juvenile court without a hearing does not change this result, because the district court was permitted to do so if no opposition is filed to a motion to transfer to juvenile court. Doc. 2005-462, December 4, 2006.

UNANIMOUS JURY VERDICT OBTAINED DESPITE ALTERNATIVE THEORIES OF GUILT WHERE EVIDENCE OF EACH WAS INTERTWINED

State v. Prior, 2007 VT 1, 18 VLW 12, full court published entry order. JURY INSTRUCTIONS: UNANIMITY. DOUBLE JEOPARDY.

Felony violation of relief from abuse order, attempted felony violation of relief from abuse order, and violation of conditions of release, two

counts, affirmed. 1) There was no plain error in the trial court's failure to instruct the jury that they must be unanimous as to whether the defendant had followed the victim, stalked the victim, or both. Where evidence relating to alternative theories under which a jury could convict is intertwined throughout the trial and defendant's defense did not distinguish between

the theories, no plain error will be found. 2) The defendant's convictions for violating the abuse prevention order by following or stalking the victim, and for contempt for violating his condition of release by coming within 100 feet of the victim or her vehicle, did not violate Double Jeopardy. The elements of the two offenses are different: one required that the defendant have been subject to an abuse prevention order that prohibited following or

stalking, and that he knew of that specific order, and that he engaged in conduct that rose to the level of following or stalking. The other required that the defendant have knowingly come within 100 feet of the victim's vehicle in violation of conditions of release known to him. In any event, the legislature clearly authorized multiple punishments in the VAPO statute. Doc. 2005-466, January 5, 2007.

ATTORNEY'S WAIVER OF COUNSEL WAS INTELLIGENT, VOLUNTARY, AND KNOWING

***State v. van Aelstyn, 2007 VT 6, 18 VLW 21, full court published opinion. WAIVER OF COUNSEL: VOLUNTARINESS; INTELLIGENT AND KNOWING WAIVER. STATUTORY AMENDMENTS: RETROACTIVITY.**

Two counts extortion and one count stalking affirmed. 1) The trial court did not force the defendant to go to trial pro se, where he had eighty-five days from the time of his second attorney's withdrawal to the jury draw to hire counsel or file a public defender application. The fact that the defendant filed a general pro se appearance during this time further supports a finding that his waiver of counsel was voluntary. 2) Under the totality of the circumstances, the defendant's waiver of counsel was made knowingly and intelligently. The defendant's

background (7 years of practice as an attorney) indicates a level of intelligence and legal sophistication from which the Court could reasonably infer his knowledge of the right and importance of having counsel. The fact that he made errors in representing himself does not undermine the finding that he deliberated chose to proceed pro se. 3) The amendment to the stalking statute after his trial which substituted an objective standard for "fear" rather than the subjective standard on which he was tried, did not require a new trial. 1 V.S.A. § 214(b) provides that the amendment of an act shall not affect any violation of the act prior to the effective date of the amendment. Nor can the amendment be considered to have been procedural and therefore applicable retroactively. Doc. 2005-220, January 12, 2007).

PRO SE PCR PETITIONER MADE INSUFFICIENT SHOWING OF NEED FOR ASSIGNMENT OF EXPERTS

In re Barrows, 2007 VT 9, 18 VLW 14, full court published opinion. POST CONVICTION RELIEF: APPOINTMENT OF EXPERTS NOT REQUIRED; RECUSAL OF JUDGE BRIEFLY INVOLVED IN UNDERLYING CRIMINAL CASE NOT REQUIRED; INSUFFICIENCY OF CLAIMS IN PETITION.

Summary judgment for State in PCR affirmed (underlying offense burglary and sexual assault).

1) The trial court properly denied the petitioner's request for provision of a legal expert under the Public Defender Act where the petitioner failed to make any particularized showing of a need for such an expert. The same is true of his requests for DNA, chemical, and investigative services. The DNA expert was sought to challenge the evidence of the identity

of the victim's assailant, but that issue is irrelevant to the petitioner's claims of consent as set forth in his petition; nor did he provide any basis for believing there was error in the State's tests. The chemical expert was sought to analyze for the presence of spermicidal cream in the victim. Whether this relates to consent is speculative; in any event petitioner and his counsel made a reasonable decision not to advance a consent defense at trial in light of countervailing evidence of force. Finally, the petitioner failed to show how an investigator's locating and questioning witnesses would advance a claim of fundamental flaw in the trial's outcome. 2) The Superior Court judge was not required to recuse himself from the PCR

matter where he had only early involvement in the underlying criminal trial, and did not preside over the trial; in any event, this issue was not raised until appeal. Nor was there any personal bias shown merely from the judge's prior knowledge of the petitioner. 3) The Superior Court was not required (although it is urged) to list the facts that it has determined to be undisputed. However, reviewing the filings, the Court concludes that the claims made in the petition were unsupported on their face; insufficient to change the outcome of the trial; or previously decided against the petitioner. The remaining of the total of 279 material facts were largely irrelevant or conclusory. Doc. 2004-082, January 26, 2007.

TAP ON WINDOW WAS NOT A SEIZURE

*State v. Bottigilonge, 2007 VT 12, published entry order. SEIZURES: TAP ON WINDOW.

Trial court's suppression order reversed. No

seizure occurred when the arresting officer pulled his cruiser beside defendant's vehicle and tapped on her window, pursuant to State v. Nault, 2006 VT 42. Docs. 2005-428 & 2005-429, January 29, 2007.

CONVICTIONS FOR AGGRAVATED SEXUAL ASSAULT AND LEWD AND LASCIVIOUS CONDUCT WITH CHILD MAY ARISE OUT OF SAME ACT

State v. Wiley, 2007 VT 13, full court opinion. DOUBLE JEOPARDY: AGGRAVATED SEXUAL ASSAULT AND LEWD AND LASCIVIOUS CONDUCT WITH A CHILD. SUFFICIENCY OF THE EVIDENCE: IDENTIFICATION OF DEFENDANT; COMMISSION OF OBSTRUCTION OF JUSTICE WITHOUT A THREAT.

Aggravated sexual assault, lewd and lascivious conduct with a child, and obstruction of justice affirmed. 1) The defendant argued that, where there was evidence of repeated sexual acts during a period of time, and where he was convicted of both aggravated sexual assault (aggravated by virtue of "repeated nonconsensual sexual acts") and lewd and lascivious conduct with a child, without either

offense having specific acts assigned to it, then the repeated nonconsensual sexual acts must have included all of the sexual acts described by the victim, leaving nothing to be assigned to the lewd and lascivious charge. Therefore, he argues, his conviction of both offenses violates double jeopardy. This argument need not be resolved because even assuming that both offenses were for the same conduct, each statute had an element which the other did not, thereby permitted conviction for both offenses. Sexual assault requires compulsion and engaging in a sexual act; and lewd and lascivious conduct includes the element of appealing to or gratifying one's sexual desires. 2) The evidence was sufficient to identify the defendant as the perpetrator even though the victim did not identify him in court as such, where she identified the assailant by name, and her mother identified him in court. DNA taken from the

victim's sheets also matched to the defendant.
3) The evidence of obstruction of justice was sufficient even though that victim testified that she did not feel threatened. Intimidation of the witness is not required where the charge is of endeavoring to obstruct justice, a different clause of the statute. 4) The evidence of a second obstruction of justice charge, based upon

the defendant urging the victim's mother to testify to a sexual encounter with him on the victim's bed, was also sufficient, even though the mother testified that the encounter had actually taken place. The finder of fact could justifiably find that the encounter had not taken place. Doc. 2005-435, February 2, 2007.



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."

Starting with the July, 1996, issue of Vermont Criminal Law Month, summaries of three-justice panel decisions are segregated from full-court rulings. Readers are cautioned that earlier editions did not make this distinction. Although three-justice panel decisions carry the notation "EO" (for Entry Order) in earlier editions, there are also full-court decisions carrying the same notation. When citing to any decision carrying the "EO" notation, readers are advised to investigate whether the decision was issued by the full-court or by a panel.

WITNESS CREDIBILITY WAS FOR THE FINDER OF FACT

State v. Henry, three-justice entry order.
CREDIBILITY OF WITNESSES,
DISCRETION OF COURT.

Erecting a permanent tree stand in a Wildlife Management Area affirmed. The court did not

abuse its discretion in finding the defendant guilty, despite his father's testimony to the contrary, where there was also evidence that the defendant had admitted to placing the tree stand to a warden. Doc. 2005-301, December 1, 2006.

OFFICER NOT REQUIRED TO TRANSPORT DEFENDANT FOR INDEPENDENT BLOOD TEST OVER HIS OBJECTION

State v. Whitcomb, three-justice entry order.
INDEPENDENT BLOOD TEST.
WAIVER OF COUNSEL.

DUI and DLS affirmed. 1) The defendant was not denied a right to an independent blood test where he refused the officer's offer of transportation to the hospital, stating that he could not afford the test. The officer was not

required to transport him to the hospital over his objections. There is simply no right to an independent blood test at the state's expense. 2) The defendant's claim that the court did not obtain a valid waiver of the right to counsel from defendant before allowing his public defender to withdraw is without merit, because the defendant never sought to waive his right to counsel. Nor was he forced to proceed without

representation during a time period when the only proceedings that took place were status conferences to determine whether he had been

able to secure representation. Doc. 2005-479, December 1, 2006.

EVIDENCE SUPPORTED FINDING OF OPERATION

State v. LaFlam, three-justice entry order. DLS: SUFFICIENCY OF THE EVIDENCE OF OPERATION.

DLS affirmed. A van was seen parked on the side of the road with the engine running. A man emerged and identified himself as defendant. he

said that he was alone and that he had driven the van to the site to take his dog for a walk. The jury could reasonably conclude from this evidence that the defendant had operated the vehicle on a public highway. Doc. 2006-188, December 1, 2006.

PRIOR BAD ACTS IN DOMESTIC ASSAULT ADMISSIBLE TO REBUT CLAIM OF ACCIDENT

State v. Seervald, three-justice entry order. PRIOR BAD ACTS IN DOMESTIC ASSAULT CASE; FAILURE TO GIVE PRIOR NOTICE; FAILURE TO INSTRUCT JURY. EXCITED UTTERANCE EXCEPTION – DECLARANT UNAVAILABILITY.

Domestic assault affirmed. 1) Admission of evidence that defendant had previously abused the victim was not plain error. This evidence was relevant to rebut the defendant's claim that the abuse was an accident, and helped to explain why the victim would recant her prior statement that the defendant had hit her intentionally. The fact that other evidence touched on these issues did not make this evidence either unnecessary or

inadmissible. Nor did the prejudicial effect significantly outweigh the probative value. 2) The defendant was not prejudiced by the State's failure to give notice of its intent to use the evidence at least seven days before trial, since he never objected to its admission. 3) There was no plain error in the court's failure to instruct the jury on the use of this evidence in the absence of a request. 4) The court was not required to find that a declarant was unavailable before admitted her out of court statements under the excited utterance exception. The exception applies whether she is available or not, and the confrontation clause requires unavailability only if the declarant does not actually testify at trial. Here, the declarant testified and was cross-examined. Doc. 2006-070, December 4, 2006.

EVIDENCE OF GUILT WAS SUFFICIENT TO SUPPORT DENIAL OF BAIL

State v. Bolesky, three-justice bail appeal, unpublished. SUFFICIENCY OF EVIDENCE TO DENY BAIL.

No bail order affirmed. Even excluding the evidence which was hearsay, the remaining evidence supported the trial court's finding that the evidence of guilt was great, where it

indicated that the defendant was shot in bed, through the back of head with a forty-five caliber bullet; the absence of tattooing indicated that the bullet had been fired from at least five feet away, thus eliminating suicide; a spent shell casing matching the recovered bullet was found in a forty-five caliber Ruger revolver; the defendant stated he owned such a gun which he

kept in a room separate from the bedroom; he also stated that all the doors and windows in the house were locked and that no one else had been

in the house that morning or at any time in the recent past. Doc. 2006-478, December 5, 2006.

EVIDENCE THAT DEFENDANT HIT VICTIM SUFFICIENT DESPITE WITNESSES' FAILURE TO SEE ACTUAL CONTACT

State v. Meacham, three-justice entry order. ASSAULT: SUFFICIENCY OF THE EVIDENCE. PRIOR BAD ACTS: REFERENCE IN CLOSING TO NON-EXISTENT TESTIMONY.

Second-degree aggravated domestic assault affirmed. 1) The evidence was sufficient to show that the defendant actually struck the victim, where it was seen by several witnesses, even though their view of his hand actually

making contact with the victim's face was obstructed. 2) Where there was no actual testimony that the defendant had told a police officer that he was "taking classes for this" (thus suggesting prior bad acts), and the court instructed the jury to disregard the prosecutor's reference to such a statement in closing argument; and the defendant neither objected to this curative instruction nor requested a mistrial, there was no prejudice to the defendant. Doc. 2006-009, January 25, 2007.

DEFENDANT OPENED THE DOOR TO PRIOR BAD ACTS BY IMPEACHING OFFICER

State v. Fraser, three-justice entry order. PRIOR BAD ACTS: WHEN DEFENDANT OPENS THE DOOR; FAILURE TO OBJECT; CURATIVE INSTRUCTION.

Possession of heroin affirmed. The trial court properly permitted a witness to testify to the defendant's prior intention to trade drugs for a firearm, that an investigation had shown a prior conviction for a firearms violation; and that a holster had been found in an address linked to the defendant, in order to rebut the claims made on cross-examination of a federal officer concerning his credibility and the propriety of his presence at the scene. The defendant opened

the door to these questions. Any prejudice to the defendant was outweighed by the need to rehabilitate the witness and to present a complete picture of the agent's involvement in the case in order not to mislead the jury. 2) Although other officers testified to the defendant's prior record and prior bad acts, the defendant did not seek a mistrial or even object on the grounds raised on appeal with respect to this testimony. In addition, the court gave a curative instruction to the jury as to the criminal record, and the witness did not finish his sentence concerning the prior bad act. Doc. 2006-213, January 25, 2007.

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



Vermont Supreme Court Slip Opinions: Single Justice Rulings

INTERLOCUTORY APPEAL ON FACTUAL ISSUE REFUSED

State v. Searles, single-justice decision.
INTERLOCUTORY APPEAL: FACTUAL DISPUTE.

Motion for permission to take interlocutory appeal denied. The defendant sought to appeal from the denial of his motion to dismiss for lack of a prima facie case, arguing that the victim’s

sworn statement provides numerous other possible explanations for her injuries. Where the evidence establishes two competing explanations for the same event, the issue must be tried. Therefore, an interlocutory appeal would resolve no controlling question of law and would not advance the termination of the litigation. Doc. 2006-529, December 21, 2006.



District Court Decisions

Judge Hayes held that a guilty plea hearing complied with Rule 11(f) (factual basis for plea) where the charges were not complex and the judge recited the nature of the charges, setting forth the elements of each one; the defendant’s pleas of guilty following immediately afterwards, so that there could be no real doubt that he understood the nature of the charges; and his counsel confirmed that he had thought about this plea arrangement for some time, had discussed it fully with her, and had reviewed depositions to ensure that the State’s evidence did in fact support his pleas. **Medina v. Vermont**, Doc. 280-6-04 Wmcv (May 11, 2006), 10 Vt.Tr.Ct.Rep. 287.

Judge Zimmerman held that the defendant had waived any claim that his sentence was imposed in violation of *State v. Provost*, 2005 VT 134, where the United States Supreme Court upon which *Provost* was premised had been decided while his case was pending on appeal, and therefore could have been raised at that time but was not. **State v. White**, Doc. 491-5-98 Rdcv (June 8, 2006), 10 Vt.Tr.Ct.Rep. 288.

Judge Toor denied a prisoner’s request that his extradition to Florida be stayed pending a medical examination, in view of his suffering from end stage liver disease secondary to Hepatitis C. The court ruled that an asylum state court has no discretion to do anything other than determine whether the four basic requirements for extradition are met, and if they are, the court must order extradition. **Muller v. Hofmann**, Doc. 342-6-06 Wncv (June 19, 2006), 10 Vt.Tr.Ct.Rep. 288.

Judge Cohen denied a writ of habeas corpus filed by a fugitive for whom a warrant of extradition had been issued. He had earlier been served with a warrant which was declared invalid. When he was served with the second warrant, he had already served 100 days in prison. He argued that pursuant to 13 V.S.A. §§ 4955 and 4957, he may not be held longer than 90 days, and therefore should be released. However, even if there were irregularities in the petitioner’s earlier arrest, the arrival of the second, valid, extradition warrant mooted any

earlier irregularities. **Mayotte v. Hofmann**, Doc. 37-1-06 Wrcv (August 11, 2006), 10 Vt.Tr.Ct.Rep. 289.

Judge Dimauro declined to suppress the results of a breath test analysis even though the state trooper erroneously told the defendant that he could be criminally charged if he did not submit to the test. The defendant was given the correct information to read, and had it read to him, and in addition consulted with an attorney, who had been advised that the defendant did not have a criminal record. In addition, the trooper told the defendant that he was not an attorney and advised him not to rely upon anything he said, nor based his decision whether or not to take a test on any advise he gave. The defendant bears the burden of demonstrating prejudice from a claim of erroneous advice, and under these facts had failed to do so. **State v. Anketell**, Docs. 131-1-06 Wrcr and 14-1-06 Wrcs (May 26, 2006).

Judge Hayes held that breath testing equipment was “reasonably available,” and therefore that the defendant was not entitled to a blood test, where the nearest working Datamaster machine was approximately twenty minutes’ drive away, and the defendant refused to be driven there because she did not want to be handcuffed again. This conclusion is particularly obvious since in order to obtain a blood test, the police would have had to drive her even farther away. **State v. Doyen**, Doc. 1418-9-05 Wmcr (June 2, 2006), 10 Vt.Tr.Ct.Rep. 291.

Judge Cashman held that a police officer had interfered with a DUI suspect’s right to make a voluntary decision whether to take the breath test when he refused to allow her to telephone her father for advice. **State v. McGrath**, Docs. 1095-3-06 Cncr, 88-3-06 Cncs (September 15, 2006), 10 Vt.Tr.Ct.Rep. 292.

Judge Teachout held that a police officer did not have reasonable suspicion to stop a motorist, even though the motorist failed to signal his turn “during not less than one hundred feet” before the turn, since the motorist did activate his brake lights to show that he was braking to a stop or near stop as he determined whether he had

arrived at the road where he needed to turn. Given his unfamiliarity with the road, the time of night, the condition of the street sign, and the effect of the trooper’s headlights, it is understandable that he had trouble locating the left hand turn. It would not make sense to require him to travel further on, turn around, and then return, in order to be able to signal for a full 100 feet before making the turn. It is unreasonable to expect technical compliance on every turn no matter the circumstances. Nor was the stop justified by the defendant’s failure to stay on the right side of the road, since the officer did not stop him for that purpose alone (since he followed him for some time after observing that behavior), and such driving is not unsafe on unpaved back roads in Vermont. This therefore appears to be an after-the-fact technical and secondary rationalization for the traffic stop, and not the trooper’s actual reason for the stop. **State v. Courtemanche**, Docs. 132-3-06 Oecr and 15-3-06 Oecs (August 29, 2006), 10 Vt.Tr.Ct.Rep. 301.

Judge Levitt declined to suppress evidence of a drug transaction which was electronically monitored by the police. The transaction occurred inside a foyer leading to two apartments, one on the first floor of the building and one on the second. The foyer was within the curtilage and the defendant therefore had a reasonable expectation of privacy there, and therefore the warrantless recording of the drug transaction must be suppressed. However, there is no basis for suppressing the undercover officer’s observations of the transactions, for which no search warrant was required, since he was invited into the home in order to purchase cocaine. A search warrant which was issued on the basis of the drug transaction was valid, as it did not reference the recording, and as it relied upon the officers’ collective knowledge of the transaction, and not upon the recording. The police engaged in an impermissible custodial interrogation when, after the defendant had asserted her Miranda rights, they brought the undercover officer by the holding cell and said, “you know who this is.” The defendant said nothing at that time, but later, believing that she was out of earshot of the police, made incriminating comments provoked by this

incident to her cellmate. There was no police coercion and no Miranda violation, and therefore those comments are admissible. **State v. Dean**, Doc. 2091-5-06 Cncr (August 30, 2006), 10 Vt.Tr.Ct.Rep. 302.

Judge Levitt declined to suppress the results of a search of a person and a search of an apartment.

In the initial encounter, the officer approached the defendant and asked who he was and where he was from. There was no seizure and therefore no reasonable and articulable suspicion was required for this request. The defendant then consented to a search of his person under circumstances indicating no physical or psychological coercion. Marijuana was retrieved during this search. The officer then knocked on the door of the house where the defendant said that he lived. When his sister opened the door, the officer asked if he could enter. She allowed him to enter, at which time he saw marijuana in plain view. He then asked for consent to search her house, which she gave voluntarily. There is therefore no reason to suppress the results of the search of the defendant's person or of the house. **State v. Pitts**, Doc. 506-2-06 CnCr (August 30, 2006), 10 Vt.Tr.Ct.Rep. 303.

Judge Teachout held that a police officer had a valid basis for a motor vehicle stop where the vehicle was seen following another vehicle too closely. The officer also had a valid basis for ordering the defendant to exit the vehicle, because the officer had detected signs of intoxication and impaired driving. Nor did the officer's actions of forcibly removing the defendant from the vehicle amount to a de facto arrest. However, the officer did use unreasonable force in removing the defendant from the vehicle in that he did so before ordering the defendant to leave the vehicle. This was true even though the defendant had left the engine running and had ignored orders to turn off the engine, instead repeatedly asking why he had been stopped. Therefore, evidence gathered as a result of the officer's conduct is suppressed. **State v. Stack**, docs. 64-2-06 Oecr and 6-2-06 Oecs (August 29, 2006), 10 Vt.Tr.Ct.Rep. 304.

Judge Fine held that the State was not estopped

from prosecuting a juvenile under 21 V.S.A. § 1216 (minor operating a motor vehicle with a BAC over 0.02) and also requiring completion of the teen alcohol safety program pursuant to 7 V.S.A. § 656(f)(1)(C), even though the officer initially told the juvenile that if he completed the diversion program successively, no ticket would be issued. There is no basis to conclude that the legislature intended that there not be "dual prosecutions" under both sections for one offense, as one is remedial in nature and the other is purely punitive. Nor was there any injustice under the circumstances here, since the defendant was required to complete the § 656 programming whether or not a ticket was issued under another statute, and any injustice does not outweigh the public interest in enforcing both statutes. **State v. Emerson**, Complaint 1865175 (March 8, 2006), 10 Vt.Tr.Ct.Rep. 310.

Judge Levitt held that a search warrant was not stale where it was issued on August 11, and executed on August 19, based upon a conversation on August 10. The charge of sale of DMT, a hallucinogen, must be dismissed as the State did not allege that the transaction occurred in Vermont, or that any money changed hands in Vermont, or that a communication relating to the transaction either originated or was received in Vermont. On the remaining count, the State's evidence indicated that the weight of the LSD was .45 grams, and that together with the blotter paper, the gross weight was 25.2 grams. This was sufficient to show that the defendant possessed LSD in an amount consisting of 100 milligrams or more of mixtures containing LSD. **State v. Rue, State v. Bradshaw**, Docs. 5283-10-05 Cncr and 5285-10-05 CnCr, 10 Vt.Tr.Ct.Rep. 324 (July 26, 2006).

Judge Kupersmith held that the defendant could be convicted of both kidnapping and unlawful restraint for the same underlying conduct, because each offense requires an element that the other does not. Kidnapping requires that the defendant have knowingly restrained the victim for the purpose of inflicting bodily injury, whereas unlawful restraint requires that the defendant knowingly restrain the person under circumstances exposing that person to a risk of

serious bodily injury. The evidence was sufficient to prove that the defendant knowingly restrained another person with the intent to place that person in fear that any person would be subjected to bodily injury, where the defendant's accomplice placed a belt around the restrained person's neck, tightened it to the point where it restricted his breathing, and demanded to know where the defendant's property was. **State v. Jackson**, Doc. 6038-12-05 CnCr (August 25, 2006), 10 Vt.Tr.Ct.Rep. 325.

Judge Kupersmith denied the defendant's motion for judgment of acquittal based upon the corpus delicti rule. Although the rule probably warrants dismissal in this case, that ruling would leave the State without a right to appeal. Therefore, the motion is denied so that the Vermont Supreme Court can decide whether to adopt the trustworthiness rule in place of the corpus delicti rule. The former rule emphasizes the reliability of the defendant's confession over the independent evidence of the corpus delicti. **State v. Poirier**, Doc. 1202-3-04 CnCr (August 25, 2006), 10 Vt.Tr.Ct.Rep. 326.

Judge Levitt held that the defendant's prior DUI convictions could be relied upon for purposes of enhancement even though no transcripts are available from the plea proceedings in those cases. The presumption of regularity applies even where a transcript is absent, and the defendant's counsel's representations about what the defendant remembers from hearings 21 to 24 years ago is not sufficient to overcome that presumption. **State v. Milliken**, Docs. 1005-3-82/3387-9-85 CnCr (July 25, 2006), 10 Vt.Tr.Ct.Rep. 327.

Judge Kupersmith declined to recuse a deputy state's attorney despite the defense claim that he had pressured the medical examiner to change

his opinion as to the cause of death. The deputy is not a necessary witness concerning the central dispute, the cause of manner of death. If there was evidence that the medical examiner was pressured to change his opinion, that evidence could be obtained from the medical examiner or from other witnesses. The court also found that the State's failure to disclose certain medical records was grossly negligent, and not an isolated event. The court stated that a period of ninety days should be sufficient to implement an orderly and systematic discovery process, for both new cases and for major pending cases. Future negligent discovery violations may be subject to sanctions. **State v. Walters**, Doc. 5042-9-04 CnCr (August 14, 2006), 10 Vt.Tr.Ct.Rep. 328.

Judge Kupersmith ruled that his prior ruling admitting a prior inconsistent statement of a witness was based upon a misreading of *State v. West*. *West* did not hold that a prior consistent statement was per se admissible, but that, once admitted, it was sufficient to support a conviction. In this case, the statement was admissible only as impeachment evidence, but the jury was never given a limiting instruction. However, the error was harmless. The outline of what she said in that statement had already been admitted without objection, and there was a plethora of other evidence to support the conviction. **State v. West**, Docs. 2820/2821/2823-5-05 CnCr (August 15, 2006), 10 Vt.Tr.Ct.Rep. 329.

Judge Wesley held that the Provost decision, overturning Vermont's murder sentencing statute, would not be applied retroactively to invalidate a sentence of life without parole. **In re Bacon**, Doc. 230-5-06 Wmcv (November 21, 2006), 10 Vt.Tr.Ct.Rep. 331.

Vermont Criminal Law Month is published bi-monthly by the Vermont Attorney General's Office, Criminal Justice Division. Computer-searchable databases are available for Vermont Supreme Court slip opinions back to 1985, and for other information contained in this newsletter. For submissions, information, or subscriptions, members of the law enforcement community may contact David Tartter at (802) 828-5515 or dtartter@atg.state.vt.us.