RECENT ROCKET DOCKETS

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." (Not all rocket dockets are included.)

In re P.S., Supreme Court Docket No. 2008-042 (August 21, 2008).

Court reverses the lower court's finding that PS committed acts constituting unlawful mischief under 13 V.S.A. 3701(c). The allegation was based on PS kicking a ball against a wall, knocking a picture frame off, and purportedly breaking the frame. The Court determined that the evidence at merits did not support meeting minimum elements of the charge—that there was any damage to property—as the state did not establish that the picture frame was actually damaged by PS's behavior. The Court noted that while established facts may include reasonable inferences, where the facts support equal inference of guilt or innocence, the state fails to meet its burden of proof. Here, where the state's witness testified that the picture frame was knocked off the wall by PS's kicking of the ball, it is equally plausible that the frame was either damaged or not damaged by the fall. Reversed.

PCR/INEFFECTIVENESS/COUNSEL
State v. Travis Lang, 2007-373

Superior court properly granted summary judgment for the state where petitioner failed to counter the state's statement of uncontested facts concerning whether the wired informant taped his statements in a car. The Court does not consider whether there was probable cause for the warrant the police did get. His claim that the monitoring violated his right to counsel was previously rejected in his direct appeal.

DUI/REFUSAL/REASONABLE AVAILABILITY OF BREATH-TESTER
State v. Driscoll, 2007-339

Refusing to give a blood sample while in the hospital, defendant was charged with DUI refusal. Trooper did not have a DataMaster breath tester in his cruiser and there was none at the hospital where defendant had to stay for a couple more hours. There was, however, a DataMaster at the police barracks only a mile away from the hospital. Trial court denied motion to suppress, which was based on reasonable availability of breath-testing equipment. Court affirmed, holding that trooper is not required to make every effort possible to take breath sample before blood. Although defendant was physically able to leave the hospital and was released soon after, trooper did not know in advance that release would be so quick.

DUI/RIGHT TO CONSULT AN ATTORNEY
State v. Howard, 2007-316, February 2008

Defendant claimed that breath test should be suppressed where police failed to honor his request to consult an attorney. Supreme Court upholds trial court's denial of the motion to suppress finding: "We agree with the trial court, however, that the evidence does not support the claim. As noted, although defendant's initial response to the question concerning counsel was a somewhat equivocal "probably . . . but let me think about it," any uncertainty was immediately resolved by defendant's clear statement that he did not wish to consult with an attorney at that time, a waiver which he then confirmed for the officer. Any doubt was further resolved when defendant signed the

form indicating a waiver of his statutory right to consult an attorney. Therefore, absent any claim or evidence of coercion or undue police pressure, we conclude—as the trial court here—that the State amply satisfied its burden of proving through substantial evidence a knowing and intelligent waiver of defendant's statutory right to consult with counsel."

PCR/PRO SE/PLEADINGS/ENTITLEMENT TO EXPERT SERVICES
In re Anthony LaFlamme, 2007-298, February 2008

Pro se petitioner files petition for post-conviction relief alleging several defects in trial process and ineffective assistance of counsel. Neither party attached a statement of undisputed facts or otherwise followed the requirements of V.R.C.P. 56; however petitioner did have several attachments to his pleadings. Superior Court grants state's motion to dismiss which claimed only that petitioner would be unable to show prejudice. Supreme Court affirms in part and reverses in part. Court holds that "petitioner's allegations and supporting documents were sufficient to require state to respond effectively to the alleged facts rather than rely on bare assertion of lack of prejudice in its motion to dismiss." Court also holds that Indigent pro se litigant is entitled to obtain the services of an expert witness if the petition draws connection between the request for an expert and the specific allegations contained in the petition.

EXPUNGEMENT/COURT GRANTED/PRO SE DEFENDANT APPEALS
State v. Huminski, 2007-223

Lower court granted defendant's motion to vacate case involving felony obstruction charges, striking defendant's adjudication of guilt, ordering destruction of documents referring to charges, that all index references to proceedings would be deleted, and that any inquiry about the matter to court, prosecutorial, or law enforcement personnel would result in a reply that no record existed. Defendant filed motion for reconsideration clarifying that he sought to vacate entire action rather than expunge his record. When motion denied, defendant appealed arguing court should have declared prosecution void ab initio instead of issuing expungement order. Court affirmed holding that defendant has been granted full relief and that there is no other legal relief available.

PRO SE V.R.C.P 75 COMPLAINT
Byron Martin v. Robert Hoffman, 2007-181, February 2008

Plaintiff alleged in his complaint, among other things, that while incarcerated in Kentucky and Virginia, he was charged for expenses related to litigating his cases despite the fact that he was indigent and "should not have [had] to pay a single dime." With no legal basis provided in support of plaintiff's claim, the trial court granted judgment for defendant and the Supreme Court affirmed.

DUI/CIVIL SUSPENSION/REAR LICENSE LIGHT
State v. Katz, 2007-173

A rocket docket reversal! No reasonable basis for the stop, where the cop testified that his sole reason for stopping defendant's car was his perceived violation of 23 VSA § 1248(b) (rear license plate illumination so that license plate is legible from 50 ft away)), but he failed to present any evidence that he was 50 feet away when he allegedly saw that it was not illuminated. Insufficient to establish that the officer observed a violation.

PCR/VIOLATION OF V.R.Cr.P. 32/NO PREJUDICE
In re James R. Ingerson, 2007-161, March 2008

Superior Court found that petitioner's trial counsel "violated V.R.Cr.P. 32 and prevailing norms of professional conduct" by discussing the PSI with him over the telephone rather than giving him the opportunity to independently review the PSI, however the court found that petitioner was not

prejudiced by counsel's conduct. Supreme Court affirms superior court's conclusion that counsel's error was of a technical nature, and that petitioner's proffer as to what objections he would have raised had he had an opportunity to read the report himself, failed to show, by a preponderance, that his sentence would have been different.

DUI/AFFIRMATIVE DEFENSE
State v. Lussier, 2007-158

Defendant failed to meet his burden of establishing the elements of the affirmative defense of no intent to operate. The defendant was asleep at the wheel of his truck which was running when the officer arrived. When awakened by the officer, the defendant put his hand on the key and said he was just going to go home and asked the officer to follow him. Although a passing motorist had called the police and thought she had seen a female driver in the truck, the claim that there was another driver is speculative. Defendant's BAC of .331% supports intoxication at time of operation.

DUI/PRODUCTION OF POLICE VIDEO/LOST EVIDENCE
State v. Poutre, 2007-149

Defendant moved to suppress a blood alcohol test where the state did not produce a videotape made by police of defendant's processing and testing at the station. The trial court denied the motion and the Court affirmed, holding that there was no "reasonable possibility" that the lost evidence would have been favorable to his case. Defendant claimed that videotape would have shown him to be "cogent and articulate" and that he gave "detailed and intelligent" responses during processing and testing. Court held that even reviewing with all reasonable inferences in favor of defendant, the affidavit does not support claim. The "reasonable possibility" standard must be based on concrete evidence and not mere speculation that the videotape would have shown defendant's claims. No due process violation where there was no evidence that the state's failure to produce videotape was due to bad faith or improper motivation.

CIVIL SUSPENSION/AMBIGUOUS TRAFFIC STATUTE
State v. Raser, 2007-138

Appeal of civil suspension of defendant's driver's license was affirmed. Initial stop based on failure to use turn signal when exiting public parking lot. Challenges to turn signal statute, 23 V.S.A. § 1011, as ambiguous and void for vagueness because reference to "public highway" was narrower than the definition of "highway" for purposes of the DUI statute was dismissed by the Court. Holding that "public highways" clearly include public parking lots, as defined in 23 VSA § 4(13), and that the definition of "highway" for DUI purposes is the same as "public highways," the Court found no error.

SEXUAL ASSAULT/MENTION OF JAIL/PLAIN ERROR
State v. Corsano, 2007-131

The Court re-characterizes the issue of whether the testimony that defendant had been in jail before was admissible to whether evidence of past criminal conduct is admissible. Not an abuse of discretion where the comment was connected to the complainant's alleged fear of defendant.

DUI/SUFFICIENCY OF THE EVIDENCE
State v. Blouin, 2007-130, March 2008

Defendant argues that relation back testimony was insufficient to support the conviction of driving while intoxicated because the state could not establish beyond a reasonable doubt when the defendant operated the vehicle, how much alcohol he had consumed, and when he drank his last drink. The Court found, after review of the record, that the evidence presented was more than

sufficient for a jury to find beyond a reasonable doubt that defendant operated a motor vehicle while intoxicated.

POST CONVICTION RELIEF/HABEAS CORPUS/SUCCESSIVE PETITIONS

Barney v. Hofmann, Cmmr of Corrections, 2007-081

Court affirmed dismissal of a second petition for a writ of habeas corpus as successive. Applying the standard developed in In re Laws, 2007 VT 54, the Supremes determined that although state did not use the magic words "abuse of writ," its response to petitioner's second petition was based on an abuse of writ and was made with clarity and particularity of petitioner's prior and new claims. The burden shifted to petitioner to demonstrate cause and prejudice, but petitioner failed to prove cause. Petitioner did not explain why he did not raise the new issue, relating to an uncertified hearing officer who conducted the furlough-revocation hearing, in the prior petition, which challenged general due process concerns with the furlough-revocation hearing. Defendant argued that between the filing of the two petitions, the Department of Corrections filed a letter that petitioner would be released back into the community due to an error in certifying the hearing officer, but that some concerns had to be addressed first. Petitioner argued that this letter reduced his incentive to challenge the revocation proceeding on that basis. The Court rejected this, determining that petitioner had been subsequently offered a new hearing before a certified officer, which he declined, and that the Department's letter did not guarantee petitioner's return to furlough status. Court held that petitioner failed, without good cause, to raise the issue before the court.

SEARCH & SEIZURE/CUSTODY

State v. Peck, 2007-080

Police stopped and arrested the driver of a pickup. Defendant was shopping and returned to the truck to find the driver under arrest. Police proceeded to question her about whether she had any marijuana and she said yes. The defendant admitted the marijuana found in the glove box was hers. Held: she wasn't in custody when questioned where she was merely confronted with incriminating evidence.

DISCOVERY VIOLATIONS/EVIDENCE OF OTHER BAD CONDUCT

State v. Davis, 2007-065, March 2008

Defendant charged with possession of cocaine and marijuana. State sought to introduce a "hearing notice" from Vermont district court, which did explain the nature of the crime, found in hotel room where traces of drugs were found. The hearing notice had defendant's name on it. Defendant objected to admission of document because state did not disclose the document until the day before trial and because the document was more prejudicial than probative. After trial, defendant moves for new trial on same grounds. Supreme Court affirms lower court's denial of motion for new trial finding that even if state's late disclosure was a violation of the discovery rules, the defendant failed to show how he was prejudiced by admission of the document. Furthermore, the court affirmed the lower court's determination that the document was more probative than prejudicial where the document was probative of whether the drugs found in the hotel room belonged to the defendant because the document had drug residue on it, because defendant's name was on the document and because the document was not the type that one would leave casually lying around.

POLICE OFFICER/COMMENT ON TRUTHFULNESS/JURY/ PROSECUTOR OPENING

State v. Eastman, 2007-034

The Court finds no plain error in seating jurors who expressed doubts about their ability to be impartial, but were able to say that they could be impartial. No plain error in prosecutor's referring

to the defendant as a sexual predator in opening statement. No plain error in letting the cop testify that it is important for him to observe the complainant's demeanor because "you can determine truthfulness, truthfulness of people…"

MISTRIAL BEFORE JURY SWORN/FAILURE TO INSTRUCT ON STATUTORY DEFENSE NOT PLAIN ERROR

State v. Baer, 2007-013, November 2007

Defendant convicted of second degree unlawful restraint following a jury trial on charges of first degree unlawful restraint and aggravated domestic assault. On morning of trial state informed court that complaining witness, although subpoenaed, had not appeared and could not be located. Defendant moved to dismiss, but court declared a mistrial, issued a warrant for the complaining witness' arrest and set the matter for the next jury draw. On appeal Supreme Court upholds district court's declaration of a mistrial holding that while it is well settled that jeopardy attaches when the jury is sworn, there is also authority for the proposition that trial commences with the jury selection process, and that the court may properly declare a mistrial, in the interest of justice, before the jury process has been completed and the jury sworn. Furthermore, where defendant failed to request the statutory defense to second degree unlawful restraint provided for in 13 V.S.A. § 2406(b), it was not plain error not to give the instruction because there was insufficient evidence presented to support the defense.

MOTION TO WITHDRAW PLEA

State v. Amidon, 2007-008, December 2007

Defendant moved to withdraw guilty plea prior to sentencing arguing that the due to the medication that he was taking at the time of the plea, he did not enter into his plea knowingly and voluntarily. Supreme Court affirms trial court's denial of motion where defendant failed to show that drugs affected his ability to understand the plea colloquy and enter into the agreement, where his own testimony indicated only that the medication affected his ability to remember later on what had transpired during the change of plea proceeding. The Court found that the defendant had failed to show any fair or just reason to grant his motion and delay the criminal prosecution further.