SEARCH AND SEIZURE

SEARCH AND SEIZURE/CONSENT/MIRANDA

State v. Pitts, 2009 VT 51. May 22, 2009

In this appeal of a denial of a suppression motion based on an illegal search of Yosef Pitts's person and Sequoya Pitts's home, the Court reviewed the point where mere questioning by police turns into a Terry stop requiring reasonable and articulable grounds to suspect a person is engaged in criminal behavior. The Court held that while mere innocuous questions may not be a seizure, "pointed questions about drug possession or other illegal activity in circumstances indicating that the individual is the subject of a particularized investigation" automatically converts it from a consensual encounter to a Terry stop.

After an initial encounter with Yosef when police were serving a subpoena at a suspected drug house and where Yosef appeared nervous, police followed him when he left in a taxi on a hunch that he was engaged in criminal activity. Upon arrival, the police approached Yosef and initially asked innocuous questions. Police then asked Yosef if he had any weapons although nothing suggested he was armed. Court held that at this moment the questions became more pointed as to whether Yosef was in possession of anything illegal and made it clear he was subject to a particularized investigation and was not free to leave. The detention was illegal and the consensual search that immediately followed was tainted.

Meanwhile, the Court held the search of Sequoia's home was reasonable and not tainted by the earlier illegal search of Yosef's person as the police had independent basis to investigate the residence. Additionally, Sequoia's consent to search the home was held to be voluntary. Where an officer indicates that a subsequent warrant would be issued regardless of her consent or otherwise suggests that her refusal would be futile, the Court noted consent may be involuntary. Justices Johnson and Skoglund dissenting.

SEARCH AND SEIZURE/CONSENT/MIRANDA

State v. Sole, 2009 VT 24.

Defendant was driver of car stopped for speeding. When officer approached window, he noted smell of "raw marijuana." Defendant was ordered to exit vehicle and enter the cruiser. In cruiser, defendant was told he would not be released until officer determined if there was anything illegal in car. Officer sought consent to search vehicle and told defendant if consent is withheld a warrant will be sought and the car impounded. The officer asked if defendant had marijuana on his person and defendant produced some from his pocket and also elicited admission that defendant smoked recently. Defendant consented to search, which revealed, in a passenger's backpack large quantities of cocaine and marijuana.

The Court finds that the attorney merely saying his client was joining partially in passenger's suppression motion was insufficient to raise the claim that consent could not be given by driver to search passenger's backpack. Court holds that "automatic standing" doctrine of State v. Wright (under which if possession is charged against multiple parties and the search is invalid as to one party, it is invalid as to all parties) was also not raised below.

Defendant argued that Miranda violation required exclusion of all evidence. The Court agreed that there was a Miranda violation. The defendant was in custody under circumstances approximating arrest because officer told him he was not free to go until the search issue was resolved. Therefore, the officer was required to administer Miranda warnings. Court ordered the suppression of statement about marijuana use and the small amount of marijuana produced from pocket.

Defendant also argued that his consent to search was subsequent to the Miranda violation and therefore the consent search producing physical evidence was tainted by the prior illegality and must be suppressed under State v. Peterson (fruit of the poisonous tree exclusionary rule applies to Miranda violations). The Court holds that Peterson does not apply to consent searches because Miranda warnings are not necessary before consent is sought. A request for consent to search calls for no incriminating response and thus is not an interrogation under Miranda.

Court held that the consent was voluntary under the totality of the circumstances. Affirmed.

SEARCH & SEIZURE/WARRANTS/CONFIDENTIAL INFORMANTS

State v. Na-Im Robinson, 2009 VT 1

Vermont state police received information from a C.I. that a man would be traveling into Vermont in a silver Ford Taurus with New Jersey plates, entering the state on Route 4 and then "probably" travel north on Route 30 towards Middlebury between 12:30 and 1:00 p.m. An officer traveled the suspected route in the opposite direction and then followed the suspected vehicle, pulling it over when he observed speeding and illegal passing violations. Defendant refused to grant consent to search and denied he was trafficking cocaine. The vehicle was impounded pending a warrant application.

The Court reversed the District Court's denial of the motion to suppress because the warrant affidavit established neither the informant's reliability nor the factual for his information. The Court employed a two-part test to examine probable cause resting on hearsay incorporated into the affidavit: Is there a substantial basis for believing 1.) the source of the hearsay to be credible; and 2.) for believing there is a factual basis for the information furnished. The Court went on to find that the informant was not credible because the affidavit did not establish either his "inherent credibility" or the reliability of the information he provided in the case in question.

Of note is the court's statement that a warrant affidavit must state information sufficient to allow a judge to "make an independent credibility determination" and that bare assertions of reliability must be accompanied by sufficient indicia of informant's reliability. A judge must be informed in detail of the "underlying circumstances" from which an officer makes such a credibility determination so that the judge can herself draw "the inferences from the facts which lead to the complaint." The information about a C.I.'s credibility must be specific enough to allow a judge to make their own credibility assessment.

The Court also found the affidavit insufficient to establish that the information provided about the likelihood that defendant was in the process of committing a crime. The affidavit merely stated that C.I. predicted that defendant would be driving a silver Ford Taurus along a predicted route at a more or less specified time. The Court found that this did nothing to corroborate the assertion of criminal activity.

SEARCH AND SEIZURE/CONSENT/MIRANDA/WARRANTLESS SEIZURES

State v. Guzman, 2008 VT 116.

Defendant was stopped for speeding and officer smelled distinct odor of marijuana and called for canine unit. Because defendant was moving hands around vehicle and nervous, officer gave exit order and a weapons pat down revealed that defendant had a many things in his pockets. Officer handcuffed him, and noticed marijuana smell was on defendant, who gave consent to search pockets, which contained cocaine and marijuana. Canine alerted on car, which was impounded over the weekend pending a warrant application filed on the first weekday afterwards.

Despite the fact that consent was obtained after defendant was placed in handcuffs and before Miranda, the Court finds that it need not address voluntariness of consent to search pockets because it was a valid search incident to arrest. The distinct odor of marijuana particularized to defendant's

car and then to his person is held to constitute probable cause to arrest, and the search of the pockets is then held lawful as incident to a valid arrest. Court found it of no significance that defendant was not then formally arrested, and held it enough that probable cause for arrest existed at time of search.

SEARCH AND SEIZURE/REASONABLE SUSPICION/PRELIM. BREATH TEST
State v. McGuigan, 2008 VT 111.

Defendant appeals denial of motion to suppress evidence that led to DUI arrest. Court finds that officers who had stopped to render roadside assistance to defendant and then smelled alcohol and noted slurred speech had reasonable suspicion to administer PBT, which resulted in probable cause to arrest. In so concluding, the Court held that a PBT qualifies as a "search" and therefore requires reasonable suspicion to justify its administration. An "officer's administration of these tests" must, therefore, meet "the constitutional requirements imposed by Article 11 and the Fourth Amendment." This case is citable for the proposition that "for an officer to administer a PBT" he or she must have reasonable suspicion of DUI and be able to "point to specific, articulable facts that an individual has been driving under the influence of alcohol" at the time of the PBT. Affirmed.

DNA/NON-VIOLENT FELONS/SPECIAL NEEDS
State v. Martin, et al., 2008 VT 53

The Court approves the warrantless, suspicionless taking of DNA from every felon for a database as a special needs search. Article 11 is not violated by these searches or by the analysis of the individuals' DNA because the procedure is narrowly focused, minimally intrusive, and subject to administrative guidelines. The majority rejects the argument that non-violent felons aren't involved in cases with DNA evidence.

J. Johnson and Judge Devine dissent arguing that there is no probable cause and special need that renders the warrant requirement impracticable.

SEARCH & SEIZURE/TERRY STOP/SCOPE & DURATION/DOG SNIFF
State v. Cunningham, 2008 VT 43

Two car stops and two dog sniffs lead the Court to splinter into three opinions. CJ Reiber and Burgess find that after legitimately stopping defendant for a DLS, the officer had no reasonable suspicion that a drug crime was afoot. A tip that defendant had prior drug involvement was insufficient, as was his alleged nervousness. The two find that the detention of the defendant while waiting for the canine unit to arrive was too long with too little justification. Justices Skoglund and Johnson decide that there was no reasonable suspicion to expand the scope of the detention to a drug search. J. Dooley dissents.

SEARCH AND SEIZURE/AERIAL SURVEILLANCE
State v. Bryant, 2008 VT 39

Bill Nelson and Rob Keiner's great case. J. Skoglund finds that the warrantless aerial search of the defendant's yard to detect criminal activity violates the Vermont constitution.

Defendant lives in Goshen next to the National Forest, and he has posted no trespassing signs around his property. He told a local official that he did not want the Forest Service or anyone trespassing on his land. This official suspected marijuana growing because he thought the defendant was paranoid. He told the state police to send a MERT flight over defendant's property and they did. They observed two plots of marijuana growing on defendant's property. The evidence of various townspeople was that the helicopter was flying very low- about 100 feet above the land. A National Guard member testified that the helicopter was flying about 120 feet and remained over the

defendant's property for about forty-five minutes. The trial court did not find the police testimony that they were flying at least 500 feet above ground to be credible. The Court finds that the surveillance violated defendant's legitimate expectation of privacy and considers the legality of the helicopter's position as one factor in the analysis as well as the intrusiveness of the search by law enforcement. J. Dooley concurs in the result and dissents from the reasoning.

INTERLOCUTORY APPEAL CHALLENGING SUPRESSION OF EVIDENCE
State v. Ford II, 2007 VT 107

State challenged district court's order granting defendant's motion to suppress evidence obtained during a Terry frisk. The trial court granted defendant's motion, concluding that the officer's decision to bring suspects outside of motel room on cold winter day for the purposes of interrogation was not constitutionally reasonable. Supreme Court disagreed opining, "Neither the weather, defendant's wish to be questioned indoors, nor the nature of the offense enter into a constitutional analysis of such a stop under either the United States or Vermont Constitutions, and the trial court erred in concluding otherwise." Furthermore, where the Court found that officer had reasonable suspicion that a crime had been committed, officer's exit request did not constitute and unreasonable seizure.

However the Court reversed and remanded the matter to district court to address an issue raised below but not addressed by the court: Whether the officer exceeded the scope of the "strictly circumscribed" search for weapons that Terry authorizes and in violation of Minnesota v. Dickerson where the officer had no acceptable basis for the search and seizure of the content of the defendant's pockets. The Court stated that it had not yet considered the scope or application of the so-called plain-feel doctrine announced in Dickerson (If an officer realizes that an object is not a weapon, he may continue his search for it only if he can immediately identify the object as contraband during the frisk), but was unable to address the issue here because the trial court made inadequate findings. On remand the trial court was instructed to make specific findings of fact regarding 1) whether the "incriminating character" of the marijuana was "immediately apparent" to the officer; and 2) the circumstances under which defendant agreed to a search of his pockets including whether any of the factors emphasized in United States v. Mendenhall (whether officers physically touched defendant or use language suggesting that a defendant was compelled to comply) were present.

REASONABLE SUSPICION
State v. Davis, 2007 VT 71

Trial court found no reasonable suspicion to stop the defendant's car. The videotape showed the defendant's car touching the centerline on I-89 several times and slight intra-lane weaving. No traffic violation and no reasonable suspicion. The Supremes agree.

REASONABLE SUSPICION
State v.Pratt, 2007 VT 68

Cop alleged that defendant's car touched the center line and the fog line 5-6 times. The trial court found that 5-6 times of weaving within one's own lane on I-89 could amount to reasonable suspicion. The Supremes agree. What's the difference? According to Dooley, it was the officer's testimony that made the difference-the officer testified that in his training and experience intra-lane weaving showed that there was reasonable suspicion of impaired operation. Justices Johnson and Skoglund dissent, saying that the majority overreaches and over-interprets the caselaw from other jurisdictions to establish a bright line rule that intra-lane weaving is always grounds for reasonable suspicion of DUI. Intra-lane weaving may be a factor in reasonable suspicion, they argue, but it is not by itself always sufficient to support a stop.

WARRANTLESS ELECTRONIC MONITOR/REFRESHING RECOLLECTION/PRIOR BAD ACTS

State v. Muhammad, 2007 VT 36, published Entry Order

The State agreed before trial that it could not use the recording it obtained through warrantless electronic monitoring in defendants home through wiretap worn by confidential informant (CI), or evidence derived thereof. Trial court did not err in rejecting defendant's argument that the electronic monitoring in violation of Article 11 compelled dismissal of the entire prosecution. Trial court also did not err in permitting the CI to refresh her recollection with the suppressed tape the day before trial. The Supreme Court found that she testified from her memory and not based upon the "refreshing" because she said so. Finally, even where the court failed to conduct a proper 403 balancing test, there was no error in admitting evidence of defendant's other drug related activity, because defendant opened the door to its use under 404(b) and because there was no 403 challenge below requiring plain error of which there was not.

MIRANDA VIOLATION/SUPPRESSION OF FRUITS/ARTICLE 11

State v. Peterson, 2007 VT 24. J. Dooley

The Court holds that under Article 10, physical evidence obtained in violation of Miranda must be suppressed, following its previous decision in State v. Badger, and not following the US Supreme Court decision in Patane. The trial court found that the defendant was in custody (in handcuffs) and without giving Miranda warnings, the police interrogated the defendant as to where his other marijuana plants were and asked him to show him the plants. He complied and 27 plants were seized, and the Court holds that they must be suppressed as fruit of the poisonous tree.

SEARCH & SEIZURE/STOP/USE OF HIGH BEAMS/COMMUNITY CARETAKING

State v. St. Martin, 2007 VT 20. Full court published entry order

The Court affirms a trial court's grant of a motion to suppress the fruits of motor vehicle stop. The driver of the car hit his high-beam headlights, momentarily blinding an approaching police officer- but that did not justify a motor vehicle stop under the community caretaking exception to the warrant requirement. The defendant's "misuse" of the high beams posed an ambiguous threat, if any, to the public. The doctrine does not extend to situations in which a defendant's actions might pose some danger to some member of the motoring public at some indefinite time in the future.

SEARCH INCIDENT TO ARREST/ REJECTION OF BELTON

State v. Bauder, 2007 VT 16. J. Johnson

Justice Johnson holds that Article 11 of the Vermont Constitution does not permit warrantless searches incident to an arrest unless the officer can show an immediate threat to his safety or the destruction of evidence, thus rejecting the US Supreme Court's extension of the search incident to arrest exception in Belton and Thornton. Dooley writes a 30 page dissent. A Henry Hinton win!

SEARCH AND SEIZURE/TAP ON WINDOW

State v. Bottiggilonge, 2007 VT 12, published entry order

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.