

SENTENCING

SENTENCING/CONTEMPT

[State v. North](#), 2009 VT 40. May 1, 2009

Judge Kupersmith found defendant committed three instances of contempt, imposing three consecutive sentences of five to six months for each time defendant made a serious of rapid expletive comments to the judge after the court imposed a sentence in another matter. Although proceedings for contempt involving disrespect to or criticism of a judge may require referral to another judge, the Court found that no referral was needed as the severity of the contempt at issue was not great and because there was no evidence that the judge lost his composure. The Court affirmed the three summary contempt findings, but held that the sentence must run concurrent rather than consecutive because the acts were part of the same contemptuous episode. Affirmed and reversed in part.

SENTENCING/DOUBLE JEOPARDY/GOOD TIME CREDIT

[State v. Martin](#) (Martin II), 2009 VT 15

Defendant appeals new sentenced imposed after his successful appeal of convictions on two counts of BWI with death resulting. Martin I, 2007 VT 96, had vacated one conviction because both deaths resulted from a single event, but remanded remaining conviction for resentencing. Original sentences had been 4-5 years on each count, with all but 3 years suspended on each, consecutive. Aggregate 6 years to serve, maximum of 10.

On remand, it was claimed: 1. Court lacked jurisdiction to order resentencing and trial court lacked jurisdiction to resentence; 2. new sentence violated double jeopardy, and 3. due process was violated in good time credit calculation.

The Court held that it has inherent power under statute and constitution to remand for resentencing, and that defendant, by appealing his convictions, had placed the entire judgment in issue. The fact that one conviction was vacated for purely formal reasons in no way affected his culpability or called into question the trial judges assessment of the scope of the necessary punishment.

On remand, he was sentenced on the one remaining count to 4 and ½ to 5 years, suspended after 4 years, with credit for time served according to law. As to the claim that this violated double jeopardy, the Court held that it was not an increase because his new sentence was not in excess of the original aggregate sentence. Interdependent sentences such as here are not considered independently in this double jeopardy analysis. A defendant may ultimately gain nothing from limited success on appeal, but he will ultimately lose nothing, either.

Regarding the claim that he was entitled to good time credits earned on his original sentence, to be applied to his new sentence, the Court agrees, but reminds that good time credits cannot by statute reduce the new maximum sentence to a number less than the new minimum sentence.

SENTENCE COMPUTATION

[Francis v. Hofmann](#), 2008 VT 137

Reversal of Judge Katz's decision that three concurrent sentences that included one partially suspended and two entirely suspended sentences should not be aggregated for computation purposes. Court holds that multiple sentences imposed concurrently run concurrently, including the suspended terms, unless the trial court expressly states otherwise, and when sentences are imposed concurrently that means probation cannot be indeterminate, but must be fixed.

LEGALITY OF FLAT SENTENCE/WAIVER OF RIGHT TO APPEAL

[State v. Kimmick](#), 2007 VT 45, (May 24, 2007)

Kimmick pleaded guilty to voluntary manslaughter of his ex-wife. Agreed to contested sentencing hearing and the plea agreement contained a provision that Kimmick was waiving his right to appeal any “lawfully-imposed sentence.” Sentencing court imposed a 14-15 year sentence. On appeal, Kimmick argued that the court erred in permitting victim impact testimony by unsworn witnesses and a non-victim to testify as a victim; and imposing a sentence in which the effective minimum and maximum terms, after taking into account the automatic good-time credit, are the same; and the waiver language did not preclude his claims because he was arguing that the imposed sentence was illegal and/or imposed in an illegal manner.

Court does not reach the issue of whether the appeal waiver precluded review of Kimmick’s claims because Court finds the claims unmeritorious. Both claims involving the victim impact statements were not raised below, so the Court reviewed the errors for plain error and court found no plain error. Court also finds that the sentence did not violate statute which says that min. and max. term of sentence cannot be the same. The court finds that terms of the 14-15 years sentence are close but not identical, and the effect of good time does not change the outcome (despite the fact that the State’s expert from P&P testified that a 13-15 or a 14-15 year sentence would **automatically** become a flat 14 year sentence when Kimmick walked through the jailhouse doors), because §7031 does not specify that the sentencing judge must take good time credit into account when imposing sentence, and even if the statute is ambiguous, DOC does not calculate sentence until after it is imposed, and to hold that courts must do good-time calculations before imposing sentence would require sentencing expert to testify at every sentencing. Furthermore, because of truth-in-sentencing, min. term can never be reduced and provision in 28 V.S.A. §811(g), which Court finds is the controlling statute, explicitly states that when applying good-time credit, max. can never be reduced such that it becomes less than min....it says nothing about the max. having to remain higher.

SENTENCE RECONSIDERATION/PLEA BARGAIN/TRIAL PUBLICITY

[State v. King](#), 2007 VT 124, 944 A.2d 224, – Vt. –

Appeal of sentence reconsideration where King was sentenced to 27-30 years, the max cap negotiated in a plea agreement, was denied by the Court. The sentence reconsideration was based on intense pressures generated by the media on the sentencing court to order the maximum sentence for voluntary manslaughter and aggravated domestic assault. The Court held that because the sentence was based on the original plea bargain, "sentence reconsideration has limited usefulness."

SENTENCING/PROVOST/RETROACTIVITY

[State v. White](#), 2007 VT 113

Motions to remand murder sentences for resentencing pursuant to Provost denied. The Provost ruling that Vermont’s murdering sentencing statute is unconstitutional was a new rule of law, and therefore would not be given retroactive effect, since it is not also an “extraordinary” case announcing a watershed procedural rule. Provost will therefore apply only to cases which were pending on direct review at the time the decision was released.