STATE OF VERMONT
VERMONT SUPREME COURT
NOVEMBER TERM, 2013

Order Promulgating Emergency Amendments to the Vermont Rules of Criminal Procedure

Pursuant to the Vermont Constitution, Chapter II, Section 37, and 12 V.S.A. § 1, it is hereby ordered:

1. That Rule 11.1 of the Vermont Rules of Criminal Procedure be added, to provide as follows:

RULE 11.1. PLEAS; ADDITIONAL COLLOQUY FOR CHARGES UNDER 18 V.S.A. § 4230

(a) In General. In addition to the procedures required pursuant to Rule 11, prior to accepting a plea of guilty or a plea of nolo contendere from a defendant charged with a violation of 18 V.S.A. § 4230, the court shall address the defendant personally in open court, informing the defendant and determining that the defendant understands that admitting to facts sufficient to warrant a finding of guilt or pleading guilty or nolo contendere to the charge may have collateral consequences. The court is not required to advise the defendant of all possible collateral consequences, but shall inform him or her that there are many such potential consequences (such as loss of education financial aid, suspension or revocation of professional licenses, and restricted access to public benefits such as housing).

(b) Failure to Provide Advisement; Procedure for Withdrawal of Plea. If the court fails to provide the defendant with any notice that there may be collateral consequences pursuant to subsection (a), and the defendant later at any time establishes that the plea and conviction may have, or has had a negative collateral consequence, the court, upon the defendant's motion, shall vacate the judgment and permit the defendant to withdraw the plea or admission and enter a plea of not guilty. The charges shall then be restored to the active docket for further pretrial proceedings and trial. Failure of the court to advise the defendant of a specific collateral consequence pursuant to subsection (a) shall not alone support a motion to vacate.

Reporter's Notes

Rule 11.1 is promulgated consistent with Act No. 76, § 1, effective July 1, 2013, which amends various provisions of 18 V.S.A. § 4230, and directs the court to engage in specific additional colloquy with a defendant entering a plea of guilty or no contest as to potential collateral consequences of a conviction for subject offenses, extending to such consequences as loss of education financial aid, suspension or revocation of professional licenses, and restricted access to public benefits such as housing. The statute upon which the rule is based requires that the advisement be provided to the defendant personally in open court, thus requiring presence of the defendant and a record

proceeding in each such case, in contrast to the provisions of Rule 11(c) and (d), amended effective May 13, 2013, which authorize pleas by waiver pursuant to Rule 43, without appearance in open court.

The statute and Rule 11.1(b) provide that if the court fails to provide record advisements as required by subsection (a), the defendant may at any later time establish that the plea and conviction may have, or have had, negative collateral consequence to the defendant, in which case the court shall vacate the judgment of conviction and permit the defendant to withdraw his or her plea. The rule contemplates that an opportunity for hearing be provided to the defendant on a motion to vacate the conviction and/or withdraw the plea, to meet the burden of establishing such negative collateral consequence.

In the event that the defendant meets the burden of establishing negative collateral consequence of the plea and conviction, the charges are restored to the active docket, with further pretrial and trial proceedings accordingly.

The statute provides that the failure of the court to advise the defendant of a particular collateral consequence shall not support a motion to vacate. As a general rule, in the absence of plain error (such as failure to ascertain factual basis for a plea, or failure of any meaningful personal colloquy at all), a standard of "substantial compliance" on the part of the court with the requirements of Rule 11 governs appellate review of alleged deficiencies in the court's plea colloquy with a defendant. See *State v. Marku,* 2004 VT 31, 176 Vt. 607, 805 A.2d 993 (mem.); *In re Calderon,* 2003 VT 94, 176 Vt. 532, 838 A.2d 109 (mem.); *State v. Riefensthahl,* 172 Vt. 597, 779 A.2d 675 (2001) (mem.); and *State v. Morrissette,* 170 Vt. 569, 743 A.2d 1091 (1999) (mem.).

In contrast to the provisions of Rule 11.1(b), and the statute upon which it is based, Rule 32(d), which is of general application to all cases, essentially establishes a balancing test: withdrawal of a plea of guilty or no contest is permitted after plea and prior to conviction for any fair and just reason, which substantially outweighs any prejudice to the state in consequence of withdrawal of the plea, and after conviction, only to correct manifest injustice.

2. That this rule, as amended, is prescribed and promulgated to become effective immediately. The Reporter's Notes are Advisory.

3. That the Court finds that this emergency amendment must be promulgated without resort to the notice and comment procedures set forth in Administrative Order No. 11, because the amendment seeks to implement to the procedures of Act. No. 76, § 1, which became effective July 1, 2013.

4. That the Chief Justice is authorized to report these amendments to the General Assembly in accordance with the provisions of 12 V.S.A. § 1, as amended.

Dated in Chambers at Montpelier, Vermont this **13th** day of **November**, 2013.

Paul L. Reiber, Chief Justice

Marilyn S. Skoglund, Associate Justice

Beth Robinson, Associate Justice

Dooley, J., concurring. As the Reporter's Notes reflect, the rule embodies the language of 18 V.S.A. § 4230(5) without change. Thus, I concur in the adoption to bring together in one place criminal procedure mandates whether adopted first by this Court or by the Legislature. While I concur, I do so with some hesitancy because, as the Reporter's Notes suggest, this rule is likely to import the jurisprudence of Criminal Rule 11 into this new rule. Because direct review of alleged Rule 11(c), (d) and (f) violations is possible only if defendant or defendant's counsel preserves an objection to Rule 11 noncompliance, an event that will never happen, see my dissent in State v. Clearly, 2003 VT 9, 175 Vt. 142, 824 A.2d 509, our regulation of compliance with these parts of Rule 11 is more theoretical than real. Further, I think it is difficult, if not impossible, to find consistency in our many decisions involving Rule 11under the limited and vague review standard we purport to apply. Ironically, it is the Legislature, and not this Court, that is trying to make Rule 11 complete by additions like the statute implemented here and 13 V.S.A. § 6565(c). I fear that the legislative intent in adopting these additions will not be effectuated because they are placed on a superstructure that is in great need of reform. Before the Legislature adds another new requirement, I hope we will take a serious look at Rule 11 implementation. If the requirements of sections c, d and f of Rule 11 are too onerous to be accomplished in the 95+% of cases resolved by guilty plea, we should change the requirements. Otherwise, we should enforce them.

John A. Dooley, Associate Justice