

STATE OF VERMONT
VERMONT SUPREME COURT
_____ TERM 2020

Order Adding Rule 11(a)(3) to the Vermont Rules of Criminal Procedure

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

1. That Rule 11(a) of the Vermont Rules of Criminal Procedure be amended to add the following subdivision (a)(3) (new matter underlined):

RULE 11. PLEAS

(a) **Alternatives.**

(1) *In General.* A defendant may plead not guilty, guilty or nolo contendere. If a defendant refuses to plead or a defendant corporation fails to appear, the court shall enter a plea of not guilty.

(2) *Conditional Pleas.* With the approval of the court and the consent of the state, a defendant may enter a conditional plea of guilty or nolo contendere, reserving in writing the right, on appeal from the judgment, to review of the adverse determination of any specified pretrial motion. If the defendant prevails on appeal, he shall be allowed to withdraw his plea.

(3) *Reservation of Post-Conviction Challenges—Pursuant to Plea Agreement.* With the approval of the court and the consent of the state, a defendant may preserve a post-conviction challenge to a predicate conviction when entering a plea of guilty or nolo contendere pursuant to a plea agreement with the state, by stating on the record at the change-of-plea hearing an intent to challenge one or more of the convictions through a post-conviction relief petition, specifically identifying the convictions the defendant intends to challenge, and stating the basis for the challenges.

Reporter's Notes—2021 Amendment

Rule 11(a)(3) is added, consistent with the Court's direction in In re Benoit, 2020 VT 58, __ Vt. __, __ A.3d __. In Benoit, the Court held that with the State's agreement and the Court's approval, defendants may preserve a post-conviction relief (PCR) challenge to a predicate conviction even while pleading guilty to an enhanced charge by stating on the record at the change-of-plea hearing an intent to challenge one or more of the convictions through a PCR petition, specifically identifying the convictions they intend to challenge, and stating the basis for the challenges. If a defendant

pleads guilty or nolo contendere while preserving the PCR claim, with the consent of the state and the approval of the court, the plea will be analogous to a conditional plea under V.R.Cr.P. 11(a)(2) (“With the approval of the court and the consent of the state, a defendant may enter a conditional plea of guilty or nolo contendere, reserving in writing the right, on appeal from the judgment, to review of the adverse determination of any specified pretrial motion. [A] defendant [who] prevails on appeal . . . shall be allowed to withdraw [the] plea.”).

In reconciliation of two lines of case law addressing preservation of such challenges—established on the one hand in State v. Boskind, 174 Vt. 184, 807 A.2d 358 (2002), and on the other in In re Torres, 2004 VT 66, 177 Vt. 507, 861 A.2d 1055 (mem.), and leading to the decision in In re Gay, 2019 VT 67, ___ Vt. ___, 220 A.3d 769—the Court stated the following in Benoit, 2020 VT 58, ¶ 18:

In contrast to the guilty pleas in Torres and Gay, such pleas will not foreclose a PCR petition challenging the specified predicate convictions. See Gay, 2019 VT 67, ¶ 10 n.5, 220 A.3d 769 (noting waiver rule does not apply to conditional guilty pleas); State v. Key, 312 P.3d 355, 361 (Kan. 2013) (holding that defendant who pleads guilty may preserve challenge to sentencing enhancement “by an objection on the record at sentencing”). A defendant convicted and sentenced pursuant to such a guilty plea may then challenge the validity of a prior offense in a PCR proceeding seeking to vacate the enhanced sentence.

In Benoit, the Court requested that the Advisory Committee on the Vermont Rules of Criminal Procedure “propose a rule to standardize the process for documenting the type of PCR-conditional plea” recognized in its decision. Benoit, 2020 VT 58, ¶ 20 n.6. The present amendment prescribes the procedure by which a defendant may preserve such challenges for post-conviction review. Note that the amendment does not address all preservation scenarios which may be presented in the context of a defendant’s plea resulting in conviction. These include a defendant’s plea of guilty or nolo contendere without a plea agreement (and thus, the prescribed consent of the state), and those circumstances where a post-conviction challenge does not deal with the validity of a predicate conviction, but rather, issues such as ineffective assistance of counsel. Nor does the amendment prescribe the level of specificity of the court’s colloquy with a

defendant as to the consequences of a plea given under added new paragraph (a)(3), including waiver of the statutory right to post-conviction challenge of any predicate offenses that are not specified in the parties' plea agreement. It should be noted that no such specific colloquy has been required under the existing paragraph (a)(2) governing conditional pleas, which has been in effect since 1989. Thus, the content of the court's colloquy with a defendant seeking to enter a plea of guilty or no contest in the manner prescribed by added paragraph (a)(3) is committed to the discretion of the court, consistent with all the other provisions and requirements of Rule 11.

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

3. 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 ____ day of _____, 2020.

Paul L. Reiber, Chief Justice

Beth Robinson, Associate Justice

Harold E. Eaton, Associate Justice

Karen R. Carroll, Associate Justice

William D. Cohen, Associate Justice