Vermont Rules of Criminal Procedure, Rule 3

RULE 3. Arrest Without a Warrant; Citation to Appear

Effective: May 30, 2023
Currentness

(a) Arrest Without a Warrant for a Felony Offense. A law enforcement officer may arrest without warrant a person whom the officer has probable cause to believe has committed or is committing a felony.

(b) Arrest Without a Warrant for a Misdemeanor Offense Committed in the Presence of an Officer. A law enforcement officer may arrest without a warrant a person whom the officer has probable cause to believe has committed or is committing a misdemeanor in the presence of the officer. Such an arrest shall be made while the crime is being committed or without unreasonable delay.

(c) Nonwitnessed Misdemeanor Offenses. If an officer has probable cause to believe a person has committed or is committing a misdemeanor outside the presence of the officer, the officer may issue a citation to appear before a judicial officer in lieu of arrest. The officer may arrest the person without a warrant if the officer has probable cause to believe:

(1) The person has failed to provide satisfactory proof of identity.

(2) Arrest is necessary to obtain nontestimonial evidence upon the person or within the reach of the person, including an evidentiary test for purposes of determining blood alcohol content.

(3) Arrest is necessary to prevent the continuation of the criminal conduct for which the person was detained, to prevent harm to the person detained or harm to another person.

(4) The person has no ties to the community reasonably sufficient to assure his or her appearance, or there is a likelihood that he or she will refuse to respond to a citation.

(5) The person has previously failed to appear in response to a citation, summons, warrant, or other court order issued in connection with the same or another offence.

(6) The person has violated an order issued by a court in this state pursuant to 12 V.S.A. chapter 178, 15 V.S.A. chapter 21, or 33 V.S.A. chapter 69 or subsection 5115(e).

(7) The person has violated a foreign abuse prevention order issued by a court in any other state, federally-recognized Indian tribe, territory or possession of the United States, the Commonwealth or Puerto Rico or the District of Columbia.

(8) The person has committed a misdemeanor which involves an assault against a family member, or against a household member, as defined in 15 V.S.A. § 1101(2), or a child of such a family or household member.

(9) The person has committed a misdemeanor offense prohibited by 13 V.S.A. §§ 1376-1379 against a vulnerable adult as defined in 13 V.S.A. § 1375(8).

(10) The person has violated 23 V.S.A. § 1201 (operating a vehicle under the influence), and has a prior conviction under section 1201.

(11) The person has violated a hate-motivated crime injunction issued pursuant to chapter 33 of Title 13.

(12) The person has violated a condition of release that relates to:

(A) a restriction on travel, including curfew;

(B) the operation of a motor vehicle; or

(C) direct or indirect contact or harassment of a victim or potential witness.

(13) The person has violated 13 V.S.A. § 1062 (stalking).

(14) The person has violated 13 V.S.A. § 1023 (simple assault).

(15) The person has violated 13 V.S.A. § 1025 (recklessly endangering another person).

(16) The person has violated 13 V.S.A. § 1304(a) (cruelty to a child).

(17) The person is a sex offender who has failed to comply with the provisions of subchapter 3 of chapter 167 of Title 13 (sex offender registration and notification).

(18) The person has committed a misdemeanor that involves an assault against:

(A) a health care worker in a hospital as those terms are defined in 13 V.S.A. § 1028(d)(3) and 18 V.S.A. § 1902(1); or

(B) a person providing emergency medical treatment as defined in 24 V.S.A. § 2651(9).

(19) The person has violated 13 V.S.A. § 1702 (criminal threatening) against:

(A) a health care worker in a hospital as those terms are defined in 13 V.S.A. § 1028(d)(3) and 18 V.S.A. § 1902(1); or

(B) a person providing emergency medical treatment as defined in 24 V.S.A. § 2651(9).

(20) The person has committed a violation of 13 V.S.A. § 1026(a)(1) (disorderly conduct for engaging in fighting or in violent, tumultuous, or threatening behavior) that interfered with the provision of medically necessary health care services:

(A) in a hospital as defined in 18 V.S.A. § 1902(1); or

(B) by a person providing emergency medical treatment as defined in 24 V.S.A. § 2651(9).

(d) Persons Under the Supervision of the Commissioner of Corrections. A law enforcement officer may arrest without a warrant a person under the supervision of the commissioner of corrections:

(1) pursuant to 28 V.S.A. § 301, if the person is on probation and a correctional officer believes the person has violated a condition of his or her probation; or

(2) pursuant to 28 V.S.A. § 363, if the person is serving a supervised community sentence, and a correctional officer believes the person has violated a condition of his or her supervised community sentence; or

(3) pursuant to 28 V.S.A. § 551, if the person is on parole, and a correctional officer believes the person has violated a condition of his or her parole; or

(4) pursuant to 28 V.S.A. § 808, if the person is on the furlough, and the law enforcement officer or a correctional officer believes the person has violated a condition of his or her furlough.

(e) Continuation of Custody for Felony Offenses. A person who has been arrested without a warrant for a felony offense may be continued in custody unless the charge for which the arrest was made is reduced to a misdemeanor, and none of the exceptions in subsection (c) of this rule apply.

(f) Continuation of Custody for Misdemeanor Offenses. A person who has been arrested without a warrant for a misdemeanor offense shall be released on citation if:

(1) none of the exceptions in subsection (c) of this rule apply; or

(2) the arrest was made pursuant to an exception in subsection (c) of this rule, and the conditions or reason for which the exception applied no longer exist and no other exception applies.

(g) Appearance Before a Judicial Officer. A person arrested without a warrant and not released on a citation shall be brought before the nearest available judicial officer without unnecessary delay. The information and affidavit or sworn statement required by Rule 4(a) of these rules shall be filed with or made before the judicial officer when the arrested person is brought before the judicial officer.

(h) Discretionary Issuance by Prosecuting Officer. A prosecuting officer may issue a citation to appear to any person whom the officer has probably cause to believe has committed a crime. The citation shall be served as provided for service of summons Rule 4(f)(1) of these rules. Probable cause shall be based upon the same evidence required for issuance of a summons or warrant under Rule 4(b) of these rules.

(i) Form. The citation to appear shall be dated and signed by the issuing officer and shall state the name of the person to whom it is issued and the offense for which he or she would have been arrested or continued in custody. It shall direct the person to appear before a judicial officer at a stated time and place.

(j) Filing Citation and Information With Judicial Officer. A copy of the citation to appear, signed by the issuing officer, and the information and affidavit or sworn statement required by Rule 4(a) of these rules shall be filed with or made before the judicial officer at the time for appearance stated in the citation.

(k) Temporary Release. A law enforcement officer arresting a person shall contact a judicial officer for determination of temporary release pursuant to Rule 5(b) of these rules without unnecessary delay. The law enforcement officer shall provide the judicial officer with an affidavit or sworn statement as required by Rule 4(a) of these rules, and information upon which the determination as to temporary release may be made. The affidavit or sworn statement must indicate the crimes to be charged by the arresting officer.

Credits

[Amended by 1995, Adj. Sess., No. 170, § 29, eff. May 15, 1996; 1997, Adj. Sess., No. 117, § 30, eff. July 1, 1998; 1997, Adj. Sess., No. 152, § 7, eff. July 1, 1998; 1999, No. 56, § 5, eff. July 1, 1999. Amended Sept. 6, 2000, eff. Dec. 31, 2000. Amended by 2001, Adj. Sess., No. 121, § 2, eff. June 13, 2002. Amended eff. Dec. 9, 2003; July 6, 2006; Sept. 29, 2006, eff. Oct. 1, 2006; March 13, 2008, eff. May 12, 2008. Amended by 2007, Adj. Sess., No. 185, § 6, eff. Jan. 1, 2009. Amended eff. Oct. 1, 2008. Amended Sept. 22, 2010, eff. Nov. 22, 2010; Oct. 6, 2016, eff. Dec. 5, 2016. Amended by 2017, Adj. Sess., No. 164, § 2, eff. July 1, 2018. Amended eff. Sept. 5, 2018; Amended by 2019, No. 40, § 7, eff. July 1, 2019; 2023, No. 24, § 1, eff. May 30, 2023.]

Editors' Notes

REPORTER'S NOTES--2018 EMERGENCY AMENDMENT

Rule 3(k) was amended per 2017, No. 164, § 2, (Adj. Sess.) (effective July 1, 2018). The revision added provision for a prosecuting attorney, or a law enforcement officer, to contact a judicial officer for determination of temporary release following arrest; formerly, the rule had provided that a law enforcement officer was to make that contact. In addition, the enactment added that either the law enforcement officer or prosecuting attorney "shall provide the judicial officer with the information and affidavit or sworn statement required by Rule 4(a) of these rules."

The amended rule has spawned differences in interpretation over the meaning of "information" in the list of items required to be presented to the judicial officer for purposes of determining of temporary release.

The present emergency amendment provides clarification consistent with the purposes and intent of 2017, No. 164 (Adj. Sess.), which are to facilitate prompt judicial determination of bail, conditions of release, or release on citation following arrest, and to minimize unnecessary detention following arrest and preceding initial appearance before a judicial officer pursuant to Rule 5(b). The present amendment deletes the reference in the legislatively enacted amendment to "the information" (i.e., a charging document). The amendment maintains the mandate of the legislative enactment that an affidavit or sworn statement, consistent with Rule 4(a), be prepared and provided to the judicial officer, to enable an informed determination as to temporary release pending Rule 5 Initial Appearance.

In addition, the amendment requires that the affidavit or sworn statement must include reference to the prosecuting attorney's assessment of the offense(s) for which the defendant will be charged for purposes of determination of temporary release. This means the judicial officer will be relying on the prosecuting attorney's assessment of the offense(s) for which probable cause exists, rather than that of the law enforcement officer alone, a result that is plainly consistent with the purposes

of the legislative enactment. Because the means of preparing an information, or completing an investigation necessary to issuance of a formal charging document, may not be readily available to the prosecuting attorney at the time of contact with a judicial officer, the amendment seeks to avert unnecessary further delay in determination of temporary release associated with such.

REPORTER'S NOTE--2016 AMENDMENT

Rule 3(c) prescribes those nonwitnessed misdemeanor offenses for which a law enforcement officer, having probable cause, is authorized to arrest a person. This amendment is made to conform the nomenclature describing the offense of cruelty to a child to legislative enactment amending 13 V.S.A. § 1304. Per Act No. 60 of 2015, § 25, the Legislature amended the statute to create a felony offense of cruelty to a child, but retained codification of a misdemeanor offense in § 1304(a), which is the subject of V.R.Cr.P. 3(c)(16), recaptioning the section title as "Cruelty to a Child," and deleting former reference in the section title to the age of either the child or the defendant. The amendment makes a nonsubstantive change to the title of the offense specified.

REPORTER'S NOTES--2010 AMENDMENT

Rule 3(c)(9) is amended to conform to legislative changes that moved provisions establishing criminal offenses against vulnerable adults from Title 33, chapter 69, subchapter 1, to a new chapter 28 in Title 13. See Act No. 79 of 2005. Though the definitions deleted in this amendment remain in Title 33, those provisions now define conduct for purposes of mandatory reporting. The new language, as appropriate for rules relating to criminal proceedings, embraces the provisions of 13 V.S.A. §§ 1376-1378 that establish various specific offenses against vulnerable adults. The definition of that term is that found in 13 V.S.A. § 1375(8), a more recent version of the language of 33 V.S.A. § 6902(14) previously incorporated in the rule. The reference to "a minor child of a vulnerable adult" is deleted from the rule, because neither Title 33 nor Title 13 creates a separate offense of abuse of such a minor child. To the extent that abuse of a minor child causes "unnecessary harm, ... pain, or ... suffering to a vulnerable adult, the conduct is covered by 13 V.S.A. § 1376.

REPORTER'S NOTES--2008 EMERGENCY AMENDMENT

This emergency amendment is made to conform with an amendment to Vermont Rule of Criminal Procedure 3(c)(6) by the Legislature. See 2007, No. 185 (Adj. Sess.), § 6.

REPORTER'S NOTES--2008 AMENDMENT

The amendment of Rule 3(c)(6), promulgated as an emergency amendment by order of September 29, 2006, effective October 1, 2006, is now made permanent. See Reporter's Notes--2006 Emergency Amendment.

REPORTERS NOTES--2006 EMERGENCY AMENDMENT

Rule 3(c)(6) is amended to implement 12 V.S.A. § 5138(a), added by Act 193 of 2005 (Adj. Sess.), § 1, effective October 1, 2006, giving the Superior Court jurisdiction of proceedings on requests for orders against stalking and sexual assault sought by persons other than family or household members. Section 5138(a) provides that orders against stalking or sexual assault issued at the request of a person other than a family or household member may be enforced by "making an arrest in accordance with the provisions of Rule 3 of the Vermont Rules of Criminal Procedure." The amendment provides for arrest without warrant in such cases. The phrase "abuse prevention" order is deleted, because orders under §§ 5131-5138 are a different type of order. The statutory references to abuse prevention orders in Title 15 and Title 33 remain in the rule. Note that warrantless arrests for violation of foreign abuse prevention orders, also made enforceable under Rule 3 by § 5138(a), will be permissible by virtue of Rule 3(c)(7).

REPORTERS NOTES--2006 AMENDMENT

Rule 3(c)(17) was added by The Sexual Violence Prevention Act, Act No. 192, 2005 (Adj. Sess.), § 20, effective May 26, 2006. The amendment adds noncompliance with the sex offender registration and notification provisions of 13 V.S.A. §§ 5401-5414, as amended by Act No. 192, to the grounds permitting warrantless arrests for conduct outside the presence of an officer.

REPORTER'S NOTES--2003 AMENDMENT

This change is needed in order to conform with recent amendments to 33 V.S.A. § 6902.

REPORTER'S NOTES--2002 AMENDMENT

In subsection (b) of Rules 3 of the Vermont Rules of Criminal Procedure, regarding arrest without a warrant for a misdemeanor committed in an officer's presence, the phrase "while the crime is being committed or without unreasonable delay" has not yet been interpreted by Vermont courts. How long a delay is deemed to be reasonable where a person has committed or is committing a misdemeanor in the presence of an officer will necessarily depend on particular factual circumstances. As one author has noted, at common law, the failure to take prompt action was conclusive evidence that there was no necessity to take the offender into custody. FISHER LAW OF ARREST § 87, at 189; William A. Schroeder, Warrantless Misdemeanor Arrests and the Fourth Amendment, 58 Mo. L. Rev. 771, 851 (1993). On the other hand, where the delay is caused by "fresh pursuit" of the offender, that traditional doctrine clearly meets the test of "without unreasonable delay." See FISHER, supra, at 182. Schroeder would require "exigent circumstances" to justify warrantless arrests for misdemeanors committed outside the arresting officer's presence. Schroeder, supra, 851, 853. The passage of time compelled by "exigent

circumstances," as fresh pursuit, that are integrally related to the course of events beginning with the officer's observation of the misdemeanor and leading to the moment of apprehension, constitutes reasonable delay. No specific limits in seconds or minutes is intended by the phrase "without unreasonable delay," but it is equally clear arrest must follow promptly after it is feasible under the facts and circumstances of a particular case.

REPORTER'S NOTES--2000 AMENDMENT

Rule 3(a)(2) is amended to authorize arrests without warrant in cases involving violation of an abuse prevention order or commission of a misdemeanor involving assault or sexual activity against elderly and disabled persons and children of such persons. Chapter 69 of Title 33 provides criminal penalties for such abuse as well as a procedure for the issuance of protection from abuse orders by the Family Court on behalf of elderly or disabled adults. The amendment extends to these individuals the same protections previously provided for claims of abuse against family or household members. Elderly and disabled adults are particularly vulnerable to sexual and other assaults by caregivers and other predators. The delay entailed in securing a warrant could leave the victim at significant risk in such a case.

Rule 3(a)(2)(C) is amended to incorporate the statutory definition of "household members" as "persons who, for any period of time, are living or have lived together, are sharing or have shared occupancy of a dwelling, are engaged in or have engaged in a sexual relationship, or minors who are dating or who have dated." 15 V.S.A. § 1101(2). Although "family members" is no longer defined in that section, it remains in the rule, because the domestic assault statute, 13 V.S.A. §§ 1041-1044, includes the term, defining it as "persons who are eligible for relief from abuse under chapter 21 of Title 15." 13 V.S.A. § 1041. Pursuant to 15 V.S.A. § 1103(a), "any family ... member" may seek relief from "domestic abuse."

Rule 3(a)(2)(D) incorporates the definitions of "abuse" and "sexual activity" from Chapter 69 of Title 33. Clause (i) is drawn from the definition of "elderly adult" in 33 V.S.A. § 6902(6). "Disability" in clause (ii) is broader than the definition of "disabled adult" in 33 V.S.A. § 6902(5) as "a person eighteen years of age or older, who has a diagnosed physical or mental impairment." The purpose is to put on the officer a burden less than the statutory definition requires, so that the officer will not have to determine whether there is a diagnosis in the middle of a crisis situation. Children of elderly and disabled adults are included because the adult cannot provide even the normal measure of protection of such a child against an abuser.

Former Rule 3(a)(2)(D) is renumbered as subparagraph (E). The provision was added by the Hate Crimes Act, Act 56 of 1999, § 5, to provide for warrantless arrest when an officer has probable cause to believe that a person has violated an injunction against hate-motivated crimes issued pursuant to that Act as codified in 13 V.S.A. § 1461. A first violation of such an injunction is

subject to imprisonment for a term of not more than one year or a fine of not more than $2,000, or both. *Id*. § 1465(a).

REPORTER'S NOTES--1999 AMENDMENT

Rule 3(a)(5) was amended by Act 117 of 1997 (Adj. Sess.), § 30, to delete language limiting a warrantless arrest for DUI to a period of two hours after the time that the alleged offense was committed and limiting a warrantless arrest under 23 V.S.A. § 1201 to detention for purposes of taking a breath or blood sample. The purpose and effect of those provisions are described in the Reporter's Notes to the 1988 amendment of Rule 3. See *State v. Forcier*, 162 Vt. 71, 643 A.2d 1200 (1994).

New Rule 3(c)(2)(G) adds a further exception to the requirement of Rule 3(c)(1) for issuance of a citation in a warrantless arrest for a misdemeanor. Under the new subdivision, a citation need not be issued when the officer has probable cause to believe that a person previously convicted of an offense under 23 V.S.A. § 1201 has committed a second violation of that section.

REPORTER'S NOTES--1989 AMENDMENT

Rule 3 is amended to reflect passage of S.81, Act No. 102 of the Laws of 1987. New subdivision (a)(6) clarifies the new grounds for warrantless arrest contained in § 3 of the Act. These grounds are found at 13 V.S.A. § 7559(f), which was created by § 3 of the Act.

The two new statutory grounds are: (1) when a person “without just cause” has failed to appear “at a specified time and place in connection with a prosecution for an offense”; and (2) when a person has violated a condition of release relating to “a restriction on travel or ... that he or she not directly contact, harass or cause to be harassed a victim or potential witness.”

The language in the first ground does not explicitly refer only to failure to appear in court, nor is it expressly restricted to specifications of time and place that were imposed by a court. The clause refers to *any* failure to appear at a specified time and place “in connection with a prosecution for an offense.” If this language were interpreted expansively, it would authorize warrantless arrest whenever a person failed to appear at a police station or other such location “specified” by a law enforcement officer “in connection with” a prosecution. Such a broad reading would give law enforcement officers powers in conflict with the Fourth Amendment, Chapter 1, Article 11 of the Vermont Constitution, and the Vermont Rules of Criminal Procedure. See, e.g., *Coolidge* v. *New Hampshire,* 403 U.S. 443 [91 S.Ct. 2022] (1971) (warrants must be issued by neutral and detached magistrate; *Davis* v. *Mississippi,* 394 U.S. 721 [89 S.Ct. 1394] (1969) (Fourth Amendment prohibits law enforcement officers from ordering suspect to police station without probable cause to believe the suspect committed the offense); *State* v. *Badger,* 141 Vt. 430, 450 A.2d 336 (1982) (searches and seizures regulated by Chapter 1, Article 11; plain view seizure

approved because no impact on defendant's privacy and seizure was less restrictive than obtaining a warrant); V.R.Cr.P. 41.1 (nontestimonial identification orders must set forth “time and place” of appearance; person who fails to appear may be held in contempt of court).

Similar issues would arise even were the statute interpreted as authorizing arrest whenever a person had been ordered by a law enforcement officer to appear in court and had failed to appear. Without any finding of probable cause by a neutral and detached magistrate, it would be difficult to validate such an arrest. A procedure already exists for issuing arrest warrants when a person has failed to appear in court. V.R.Cr.P. 4(c). Rule 4 explicitly requires a finding of probable cause that an offense has been committed and that the defendant has committed it prior to issuance of a warrant for failure to appear. No intent to overrule Rule 4 can be found in the statute. That rule is not even mentioned. (In contrast, Rules 3 and 42 are both cited, and Rule 3 is expressly overruled--“Notwithstanding Rule 3 of the Vermont rules of criminal procedure....” See Chapter II, § 37 of the Vermont Constitution.)

Given the placement of this provision within a statute on bail and conditions of release, the failure of the statute to mention Criminal Rules 41.1 and 4, and the constitutional issues which would arise if the statute were interpreted as supplanting Rules 41.1 and 4, the only reasonable interpretation of the provision is that it authorizes warrantless arrest only when an arraigned defendant has failed without just cause to appear at a time and place ordered by a judicial officer.

Judges routinely issue such orders at arraignment. For example, a defendant may be ordered to appear at a psychiatric examination or an alcohol counseling session, or at a status conference or call of the calendar. Yet in many situations the judge may not feel it appropriate to subject the defendant to immediate warrantless arrest for failure to appear. Not infrequently the courts find that family illnesses, transportation problems, or other bona fide excuses prevent attendance. In these situations, arrest would not be justified, and may cause great hardship. A law enforcement officer may not be aware of the exigent circumstances. Therefore, the rule clarifies the statute by calling upon judges to specify, at the time an order is issued, whether or not violation may be remedied by warrantless arrest. Only where the judge authorizes warrantless arrest will this be permitted.

The second ground, violation of a condition of release relating to travel or to contact with a victim or witness, requires little discussion. These conditions of release are listed in § 2 of the Act, amending 13 V.S.A. § 7554. They are repeated verbatim in the rule.

While questions may arise as to the constitutionality of court rules for warrantless arrest in general (see Reporter's Notes, V.R.Cr.P. 3--1988 Amendment), Act No. 102, § 3, directly affects the workings of the criminal courts. The Act purports to establish procedure to follow after a person has been arraigned and after a judge has issued conditions of release. The statute adds a means of enforcing, or carrying out, the judge's order. The statute constitutes legislation in the area of

court procedure, and may be modified or superseded by duly issued court rules. See Chapter II, § 37 of the Vermont Constitution; Dooley, *The Regulation of the Practice of Law, Practice and Procedure, and Court Administration in Vermont--Judicial or Legislative Power?,* 8 Vt.L.Rev. 211 (1983) (explaining history and purpose of § 37); *State* v. *Corliss,* 145 Vt. 169, 484 A.2d 924 (1984) (V.R.A.P. 5(b)(1) supersedes 13 V.S.A. § 7403(c)); cf. *Granai* v. *Witters,* 123 Vt. 468, 194 A.2d 391 (1963) (statute mandating continuances when member of legislature is a party or attorney and legislature is in session intrudes into the judiciary's internal administration and unconstitutionally usurps judicial power).

REPORTER'S NOTES--1988 AMENDMENT

Since its adoption, this rule has been the subject of several amendments. All were designed to broaden the authority to arrest beyond the two categories allowed under the original rule--all felonies, and misdemeanors committed in a law enforcement officer's presence. Prior to the two amendments, Rule 3(a) required issuance of a citation for all misdemeanors committed outside an officer's presence.

Rule 3(c) contained a common-sense listing of public policies justifying actual imposition of arrest in particular cases (the suspect's failure to identify himself satisfactorily, the suspect's likelihood of injuring persons or property if not detained, etc.). But these policies were inapplicable where the misdemeanor had not been committed in the officer's presence, for under Rule 3(a) arrest was never authorized in those situations. For example, a police officer with probable cause to believe a person had committed misdemeanor assault outside his presence, or misdemeanor driving-while-under-the-influence outside his presence, could not arrest, even where suspects presented a grave danger to the public or absolutely refused to identify themselves (rendering a citation worthless).

In contrast, the decision whether or not to arrest when there was probable cause to believe a felony had been committed was left to the broad discretion of each officer. See Reporter's Note to the original Rule 3(c)(3).

In 1982 the legislature began to respond to this situation, by authorizing arrest for one class of misdemeanors committed outside the officer's presence, those involving violations of abuse prevention orders. See Reporter's Notes--1984 Amendment. In 1985 this authorization was extended by court rule to permit arrest for assaults against family members even in the absence of an abuse prevention order. See Reporter's Notes--1985 Amendment.

In late 1985, the Advisory Committee on Criminal Rules proposed further broadening of the authority to arrest for misdemeanors committed outside the officer's presence, this time for misdemeanors involving driving while under the influence of alcohol and leaving the scene of an accident. The Committee then reconsidered its position, and proposed a comprehensive overhaul

of Rule 3 to focus the rule more precisely on the problems of law enforcement and the liberty interests of suspects.

The Advisory Committee's draft eliminated the misdemeanor/felony distinction with regard to presence. Obviously this broadened police powers of arrest. To protect against misuse of this discretion, the draft required that citations be issued unless specific criteria, based on existing Rule 3(c), were met. The draft also required that these criteria control the decision whether or not to issue a citation to a person accused of a felony. And the proposal required an officer who chose to arrest, rather than to cite, without unnecessary delay to personally contact a judicial officer for determination of temporary release conditions. This proposal was placed in bill form and passed the House as H. 62, with few changes.

In the Senate H. 62 was rewritten to maintain the general rule that presence is required for misdemeanor arrests. Three additional exceptions were added to the general rule, appearing as new subdivisions (a)(3), (a)(4) and (a)(5). The House concurred in this approach, and the Senate version became Act No. 269 of the Laws of 1987 (Adj.Sess.). Act No. 269 also incorporated the requirement, from the Advisory Committee's draft, that the arresting officer "without unnecessary delay" contact a judicial officer for determination of temporary release.

The first new exception to the presence requirement, found in subdivision (a)(3), arises "when the person has refused to identify himself or herself when requested by the officer." The subdivision goes on to require that arrests under this provision "be made without unreasonable delay after the alleged offense was committed," and that detention cease once the person "is identified." The apparent purpose underlying this subdivision is avoidance of situations which arose under the prior wording, in which alleged misdemeanants who provided no name had to be released on a meaningless and unenforceable citation because the offense had not been committed in the officer's presence. Where the officer can adequately identify the suspect, regardless of his or her refusal to assist in the process, the rule appears to require issuance of a citation. The reference to unreasonable delay simply repeats the comment already found in the initial paragraph of subdivision (a).

The exception under subdivision (a)(4) arises when the officer has probable cause to believe not only that a misdemeanor has been committed by the suspect but that if not immediately arrested the suspect will cause personal injury or property damage. Again, the arrest must be made "without unreasonable delay," reiterating the second sentence of subdivision (a).

The exceptions found in subdivision (a)(5) are basically identical to the Advisory Committee's 1985 proposal, allowing arrest for driving while under the influence of alcohol and leaving the scene of an accident, 23 V.S.A. §§ 1201 and 1128. Act No. 269, however, places a time limit on such arrests. Instead of relying on the "unreasonable delay" language, the rule states that arrests under this subdivision "shall be made within two hours of the time the alleged offense was committed,

and not thereafter." The rule further limits the authority to arrest by stating that in arrests for alleged driving while under the influence, "the person may be detained only for the limited purpose of obtaining a sample of breath or blood." Thus an arrest for violation of 23 V.S.A. § 1201 must terminate once this testing has been completed, and the detention can be utilized for no other purposes. This is a substantial limitation. Testing results have only limited admissibility without information as to drinking history, usually obtained by questioning the suspect. *State* v. *Dumont,* 146 Vt. 252, 499 A.2d 787 (1985); *State* v. *Gray,* 150 Vt. 184, 552 A.2d 1190 (1988). If the suspect cannot be questioned during detention, admissibility of the test results may hinge on whether the suspect was willing to answer questions prior to being detained.

As noted above, subdivision (c)(7) is added to require that the arresting officer contact a judicial officer for imposition of release conditions. The criminal rules generally include only judges within the meaning of "judicial officer." See V.R.Cr.P. 54(c). However, both the rules and the bail statute contemplate that the initial setting of bail may be determined by a court clerk under procedures established by the presiding judge. V.R.Cr.P. 5(b), 13 V.S.A. § 7554(f). See also the Reporter's Notes to Rule 5(b) (explaining that temporary release procedures "might include delegation ... to the clerk."). H. 62, as passed by the House, stipulated that temporary release decisions under subdivision (c)(7) be made by a "judge." The Senate version struck this word, and inserted "judicial officer," which had been the wording of the Advisory Committee's draft. The bill as passed contains the Senate language. Because of this history, it is apparent that the bail call required by subdivision (c)(7) may be made to the same judicial officers already handling such matters under Rule 5(b) and 13 V.S.A. § 7554(f), not infrequently court clerks.

Requiring the arresting officer to place the bail call, and to do so without unnecessary delay, should minimize the frequency and duration of prolonged detentions. If the judicial officer decides that cash bail should be imposed, the arrested person may be able to make the necessary arrangements prior to being transported to the correctional center. The judicial officer may decide that cash bail should not be imposed. The judicial officer may have questions about the propriety of detention at all, under Rule 3, or questions about the propriety of continuing detention under Rule 3. If so the officer who performed the arrest--rather than a relatively uninformed guard at the correctional center--necessarily will be available to respond to these inquiries. Based on the information available, the judicial officer also may decide that neither cash bail nor nonmonetary conditions of release are appropriate, and may order release on the suspect's own recognizance. 13 V.S.A. § 7554.

These legislative amendments to Rule 3 derive their authority from sections 2 and 37 of Chapter II of the Vermont Constitution. The former is the Constitution's fundamental grant of legislative power to the General Assembly. The latter empowers the Supreme Court to promulgate "rules governing practice and procedure in civil and criminal cases in all courts," subject to revision by the General Assembly. The law of arrest governs conduct outside of a courtroom, generally prior to the initiation of court proceedings. No simple or conclusive answer may be found to the

question as to whether the law of arrest is appropriate for rule-making under § 37 or is reserved for legislative action. See Dooley, *Regulation of the Practice of Law, Practice and Procedure, and Court Administration in Vermont,* 8 Vt.L.Rev. 211 (1983), and *State* v. *Corliss,* 145 Vt. 169, 484 A.2d 924 (1984) (both discussing generally the allocation of power between the Supreme Court of Vermont and the legislature under § 37).

Until recently, the constitutionality of Rule 3, under separation of powers analysis, was a moot point: *both* branches of government had adopted the rule. The rule as originally promulgated by the Court was adopted by the General Assembly and signed by the Governor into law. Section 25 of Act No. 118 of the Laws of 1973 repealed the prior statutory law of arrest (13 V.S.A. § 5510) and section 26 of that Act adopted *in toto* the new criminal rules, including Rule 3.

As indicated above, the first change to the rule, in 1982, was by statute. The second, in 1985, was founded upon statutory policies, though not enacted by the legislature. Both involved domestic violence, an area in which the legislature had made patent its preference for prompt arrest regardless of the presence of the officer to witness the crime. But the 1985 amendment went beyond any specific legislative enactment in authorizing misdemeanor arrest where no abuse order has been issued and the assault did not occur in the officer's presence.

In 1987, in a case in which the authority of constables to make arrests was successfully challenged, the Court took note of the separation of powers issue, and construed Rules 3 and 54(c) narrowly to avoid the issue. *State* v. *Hart,* 149 Vt. 104, 539 A.2d 551 (1987). The opinion does not mention Act No. 118. See also *State* v. *LeBlanc,* 149 Vt. 141, 540 A.2d 1037 (1987) (also construing the criminal rules to avoid a constitutional issue, and finding that under then-existing law police officers lacked authority to make arrests outside their respective jurisdictions). Both Hart and LeBlanc cite Chapter I, Article 11 of the Vermont Constitution when discussing the law of warrantless arrest, and both describe the right to be free from unlawful arrests as "substantive" in explaining the inapplicability of the criminal rules. This suggests that only the legislature may promulgate standards for warrantless arrests, at least those occurring prior to the initiation of "criminal cases ... in courts." Chapter II, § 37, Vermont Constitution. The legislature now has done so three times, in 1973 (Act. No. 118), 1982 (Act No. 218 (Adj.Sess.) of the Laws of 1981, on domestic violence), and 1988 (Act No. 269 (Adj.Sess.) of the Laws of 1987). See also Act No. 102 of the Laws of 1987 (adding 13 V.S.A. § 7559(f), creating additional grounds for warrantless arrest, but after a criminal case has been initiated and a person has been released on conditions).

In sum, the 1973, 1982, and 1988 legislative changes to the law of arrest are well-rooted in constitutional authority. Indeed, after *Hart* and *LeBlanc,* it appears that only the legislature may have the authority to regulate warrantless arrest prior to the initiation of a criminal case in a courtroom.

REPORTER'S NOTES--1985 AMENDMENT

Rule 3 is amended to increase the instances when a law enforcement officer may arrest without a warrant and to clarify when an officer may issue a citation. The amendment to subdivision (a) adds a new situation where an officer may arrest for a misdemeanor without a warrant--where the officer has probable cause to believe that the person to be arrested has committed an assault against a family or household member, or a child of a family or household member. The term "family or household members" is defined in 15 V.S.A. § 1101(2) to include spouses, former spouses, persons of the opposite sex living as spouses now or in the past and persons age 60 or older living in the same household and related by blood or marriage. The assault is a misdemeanor under 13 V.S.A. § 1023. The amendment follows the trend in other states to liberalize the grounds for arrest in domestic violence situations because of the likelihood that the violence will continue. See United States Comm'n on Civil Rights, *Under the Rule of Thumb: Battered Women and the Administration of Justice* 9-10 (1982).

Finally, language added to subdivision (a) states explicitly that an officer can always issue a citation even if the officer cannot arrest under the rule. The wording of subdivision (c) has been silent on this point, suggesting that only a prosecutor could issue a citation for a misdemeanor. See subdivision (c)(4). The Reporter's Note implied, however, that the prosecutor's power to issue a citation for a misdemeanor was additional to an officer's power to issue such a citation. See Reporter's Notes to Rule 3 (discussion of Rule 3(c)(4)).

Subdivision (c) is clarified on when arrests may be made for a misdemeanor. The new language makes clear that such arrests are allowed only when authorized under subdivision (a) even though one of the grounds itemized in (c)(2)(A) through (F) is present. The amendment also adds a new ground as (c)(2)(F) to implement the new authorization in subdivision (a)(2).

REPORTER'S NOTES--1984 AMENDMENT

Rule 3(a) is amended to conform it to 15 V.S.A. § 1108(1), which authorizes law enforcement officers to arrest a person who the officer has probable cause to believe violated an order issued under the domestic abuse prevention chapter. Chapter 21 of Title 15. Violation of the abuse prevention order is not itself a crime. However, a statute enacted contemporaneously with the abuse prevention chapter makes entry of a residence in violation of a court order a misdemeanor. 13 V.S.A. § 3705(c). Thus, this amendment to Rule 3 would authorize arrest when the officer has probable cause to believe a person has violated 13 V.S.A. § 3705(c) if the order of the court was issued under Chapter 21 of Title 15. It would also authorize arrest when the officer has probable cause to believe a person has violated another misdemeanor statute when the violation would also involve a violation of an abuse prevention order.

Note that the violation of an abuse prevention order could also be a felony under Vermont's custodial interference statute, 13 V.S.A. § 2451. Since violation of that statute is a felony, Rule 3(a) already authorizes arrest without a warrant.

This rule change applies only to violations of orders under Chapter 21 of Title 15 V.S.A., the abuse prevention chapter. It is not intended to expand or reduce the ability of a law enforcement officer to arrest without a warrant a person who the officer has probable cause to believe has committed or is committing a crime which involves the violation of an order issued in another type of domestic relations proceeding.

REPORTER'S NOTES

This rule has no exact equivalent in the Federal Rules. It is based upon prior Vermont and federal law and the ABA Minimum Standards (Pretrial Release) §§ 2.1-2.5. Together with Rules 4, 5, and 46, this rule creates an integrated prearraignment procedure having as its purposes the simplification and standardization of the procedure generally and the elimination of unnecessary arrests and pretrial detention. Rule 3 applies to arrest or criminal process initiated by a law enforcement or prosecuting officer without the prior authorization of a judicial officer. Proceedings for issuance of summons or warrant by a judicial officer are dealt with in Rule 4. Note that under 13 V.S.A. § 4508 as amended by Act No. 118 of 1973, § 6, for purposes of the statute of limitations a criminal prosecution is deemed commenced by arrest without warrant or issuance of a citation under Rule 3, or application for a summons or warrant under Rule 4, whichever is the earliest to occur.

Rule 3(a) carries forward the provisions of former 13 V.S.A. § 5510(a)(3) and (b)(3), repealed by Act No. 118 of 1973, § 25, for arrest without warrant by a law enforcement officer (defined in Rule 54(c)(6)). In addition, the subdivision makes clear that the arresting officer may act only upon the same finding of probable cause which would be adequate for the issuance of a summons or warrant under Rule 4(b). This similarity is also a constitutional requirement. *See Wong Sun v. United States*, 371 U.S. 471, 479-80 [83 S.Ct. 407, 412-13] (1963); *Traub v. Connecticut*, 374 U.S. 493 [83 S.Ct. 1899] (1963); *State v. Adams*, 131 Vt. 413, 417, 306 A.2d, 92, 95 (1973).

Of course, an officer retains the power to stop and briefly detain a person for investigative purposes upon reasonable suspicion amounting to less than probable cause to arrest. *Terry v. Ohio*, 392 U.S. 1 [88 S.Ct. 1868] (1968); *Adams v. Williams*, 407 U.S. 143 [92 S.Ct. 1921] (1972). Note that the provisions of former 13 V.S.A. § 5510 permitting warrantless arrests where the officer knows that a warrant has been issued are not carried forward in this rule. Under Rule 4(f)(2)(C), however, an arrest may be made by an officer who does not have the warrant in his possession at the time of the arrest.

Rule 3(b) provides the procedure to be followed in a case of arrest without warrant. The individual arrested is either to be released upon citation to appear at a later date before a judicial officer as provided in Rule 3(c), or is to be brought before "the nearest available judicial officer without unnecessary delay" for the hearing provided under Rule 5. For purposes of this rule, "judicial officer" means a Superior or District Judge or acting District Judge. Rule 54(c)(4). The phrase "without unnecessary delay," taken from Federal Rule 5(a), has a long history in the federal courts, to which reference should be made for guidance in interpretation. See also ABA Minimum Standards (Pretrial Release) § 4.1. The new language is similar to that in former Vermont statutes which used the terms "forthwith" and "as soon as possible." See 13 V.S.A. §§ 5507, 5653 (repealed by Act No. 118 of 1973, § 25).

"Without unnecessary delay" embodies the so-called "McNabb-Mallory" rule imposed upon the federal courts pursuant to the supervisory power of the Supreme Court over the administration of justice, rather than as a constitutional requirement. McNabb v. United States, 318 U.S. 332 [63 S.Ct. 608] (1943); Mallory v. United States, 354 U.S. 449 [77 S.Ct. 1356] (1957). While the importance of the prompt appearance before a magistrate has been somewhat reduced by the requirement of warning prior to police interrogation, binding upon the states under Miranda v. Arizona, 384 U.S. 436 [86 S.Ct. 1602] (1966), the McNabb-Mallory rule still applies even when all Miranda requirements have been complied with. See Miranda v. Arizona, supra, at 463 n. 32 [86 S.Ct. at 1622]; United States v. Keeble, 459 F.2d 757 (8th Cir.1972); 1 Wright, Federal Practice and Procedure § 72 (1969). The McNabb-Mallory rule has two aspects--the procedural requirement of prompt appearance and the sanction of exclusion of confessions and other evidence obtained while a defendant is in custody in violation of the rule. The fruits thereof may also be excluded. Since the rule in the federal courts is supervisory only, neither aspect of it is constitutionally binding upon the Vermont courts. Presumably, however, in view of the fact that in Mallory v. United States, supra, evidence obtained in violation of Federal Rule 5(a) was excluded, and in light of the constitutional imposition of the exclusionary rule in the closely related Miranda situation, Vermont Rule 3(b) should be understood as carrying with it the exclusionary rule as a matter of supervisory control of the trial courts.

The federal courts have varied widely in what they have found to be "unnecessary delay." The phrase is best understood as meaning delay for the purposes of obtaining evidence, rather than for any fixed time period. 1 Wright, supra, §§ 73-74. In this connection, note that Rule 5(b) permits temporary release of the accused pending appearance if arrest is other than during normal business hours. The period of "delay" forbidden by Rule 3(b) should be deemed terminated upon the release of the accused under Rule 5(b) but continues if the defendant is not released thereunder. For full discussion, see Reporter's Notes to Rule 5(b).

Rule 3(b) also requires an information and supporting affidavit of probable cause adequate under Rule 4(a) to be filed with the judicial officer when the defendant is brought before him under Rule

5. This requirement, with the similar provisions of Rules 3(c)(6), 4(f)(1)(D), and 4(f)(2)(D), means that at the point of appearance under Rule 5, all cases will be in the same posture, regardless of the means by which the prosecution was commenced.

Rule 3(c) is based upon ABA Minimum Standards (Pretrial Release) §§ 2.1-2.5. It establishes a procedure under which an officer who has grounds to arrest a person without warrant is required in all but certain misdemeanor situations, and encouraged in those situations and all felony situations, to issue a citation directing the person to appear before a judicial officer for a hearing under Rule 5 at a later date in lieu of arrest. Like Rule 4(c) pertaining to issuance of summons instead of warrant, and the statutory pretrial release standards incorporated by Rule 46(a), this rules implements the basic policy of the rules to favor pretrial release. As the commentary to ABA Minimum Standards (Pretrial Release) § 1.1 puts it, in the interests both of the individual and the public, "Only if some legitimate purpose of the criminal process ... requires it, should the defendant be deprived of pretrial liberty." Accordingly, Standard 2.1 provides that arrest or detention should be allowed only when "required by the need to carry out legitimate investigative functions, to protect the accused or others where his continued liberty would constitute a risk of immediate harm or when there are reasonable grounds to believe that the accused will refuse to respond to a citation."

The procedure under Rule 3(c) is basically new to Vermont practice. The closest equivalent under prior practice is the statutory procedure for the use of the Uniform Traffic Complaint, 23 V.S.A. § 2201 et seq. Under Rule 54(a)(2), these rules supplement the procedure under the statute, providing a detailed procedure for the issuance of the traffic complaint.

Under Rule 3(c)(1), an officer who has grounds to arrest for a misdemeanor must issue a citation, unless one of the specific exceptions in Rule 3(c)(2) permits arrest. Even when there has been an arrest under one of those exceptions, a citation must be issued subsequently if the grounds for the exception cease to exist. The grounds of the exceptions are consistent with the previously noted investigative and protective purposes of the rule. Note that prior nonappearance should not be a ground for arrest when there is no evidence that defendant knew of the prior process and so acted willfully. See ABA Minimum Standards (Supp.) § 2.2(c)(v) and Commentary; cf. id., § 1.3.

Presumably, an arrest carried out in a situation where issuance of a citation under the rules is mandatory is an illegal arrest. Such an arrest is not grounds for any direct relief from prosecution, however. See Frisbie v. Collins, 342 U.S. 519 [72 S.Ct. 509] (1952); In re Greenough, 116 Vt. 277, 75 A.2d 569 (1950). An illegal arrest is grounds for suppression of evidence obtained incident to it. Ker v. California, 374 U.S. 23 [83 S.Ct. 1623] (1963). The specific exception in Rule 3(c)(2)(B), permitting arrest to conduct an evidentiary search, should largely eliminate the danger that an otherwise valid search will be invalidated for noncompliance with the rule.

The exception for searches should be read to apply only where the offense is one as to which tangible evidence or fruits might reasonably be expected to be found. The language of necessity in the rule negates a construction that would permit arrest solely for the purpose of conducting an exploratory search for evidence of other offenses. Moreover, such a construction might well be subject to constitutional objection. See Gustafson v. Florida, 42 U.S.L.W. 4068, 4070 [414 U.S. 260, 94 S.Ct. 488] (12/11/73) (concurring opinions of Justices Stewart and Powell). Where an arrest is independently justified under any provision of Rule 3(c)(2), however, a search incident to the arrest may extend to evidence or fruits of any criminal conduct found on the person or within reach of the arrested person. See United States v. Robinson, 42 U.S.L.W. 4055 [414 U.S. 218, 94 S.Ct. 467] (12/11/73); Chimel v. California, 395 U.S. 752 [89 S.Ct. 2034] (1969).

In this connection, note that Rule 3(c)(1) permits an officer having probable cause to arrest a person to detain that person briefly for the purpose of ascertaining whether any of the exceptions to the citation rule apply and of issuing a citation. The rule expressly provides that "if no arrest is made, such detention shall not be deemed an arrest for any purpose," which presumably includes conducting a search incident to an arrest. Certain forms of limited search carried out during a brief detention may be valid, however, provided that there is probable cause to arrest. Cupp v. Murphy, [412 U.S. 291] 93 S.Ct. 2000 (1973). Moreover, a limited search for weapons conducted pursuant to an investigative stop based on reasonable suspicion may be valid even in the absence of probable cause to arrest. Terry v. Ohio, supra; Adams v. Williams, supra.

Where the offense charged is a felony, Rule 3(c)(3) means that arrest will be the normal rule, but the officer is given broad discretion to issue a citation unless arrest is necessary for the public safety or to assure appearance. Presumably circumstances in which a felony arrest would be such an abuse of discretion as to be illegal and thus invalidate an incidental search will be extremely rare.

Rule 3(c)(4) is not based upon the ABA Standards directly, although it is consistent with them in effect. The rule formalizes a practice, common among prosecutors, of "inviting" a person to appear when the situation is such that the formality of arrest is not needed. If a "prosecuting officer" (defined in Rule 54(c)(5)) is confident that the accused will appear, he may issue a citation himself and avoid the time and expense of either the police officer's citation or a summons obtained from a judicial officer. Under Rule 4(f)(1), the prosecutor's citation is served in the same manner as a civil summons.

Rule 3(c)(5) does not carry forward the provision of ABA Standard 2.2(c) that the cited person be required to sign the citation in acknowledgement of its receipt. That requirement raises 4th and 5th amendment problems if made an absolute condition upon the issuance of the citation. The requirement of specificity in the direction of the citation and the requirements of paragraph (6) for submission of a copy of the citation and the officer's affidavit at the appearance before the judicial

officer should provide an ample basis for determining whether or not the accused was effectively given notice. For the form, see Official Form 8.

Rule 3(c)(6) provides for the same procedure to be followed subsequent to issuance of a citation that is to be followed after arrest with or without warrant and issuance of a summons under Rules 3(b) and 4(f).

The rule does not carry forward the provision of ABA Standard 2.2(d) that an officer who arrests should state his reasons therefor in writing. This requirement would be unnecessarily burdensome in light of the actualities of practice in Vermont. Moreover, the requirement of supporting affidavits in Rule 3(c)(6) and the presence of the prosecuting officer at the appearance under Rule 5 provide an adequate and prompt basis for review of the arrest decision at that hearing. This rule will not achieve its intended purposes of efficiency and fairness, however, if its implementation is to depend upon constant judicial scrutiny of the police. Effective implementation of the rule depends upon its informed use by the appropriate law enforcement agencies on their own initiative. As the Commentary to ABA Standard 2.1 says, "The point is that while there are doubtless a number of legitimate reasons for arresting an accused rather than issuing him a citation, the act of arrest ought not to be committed unless an acceptable justification can be articulated. Law enforcement agencies ought to train their officers to make a conscious choice between arrest and citation based on factors relevant to the necessity of arrest."

Rules Crim. Proc., Rule 3, VT R RCRP Rule 3
State court rules are current with amendments received through November 15, 2023. Some rules may be more current; see credits for details.