

STATE OF VERMONT
VERMONT SUPREME COURT
_____ TERM, 2012

Order Promulgating 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 16.2 of the Vermont Rules of Criminal Procedure be amended to read as follows (new matter underlined; deleted matters struck through):

(a) **Investigations Not To Be Impeded.** Except as is otherwise provided as to matters not subject to disclosure and protective orders, neither the attorneys for the parties nor other prosecution or defense personnel shall advise persons having relevant material or information (except the defendant) to refrain from discussing the case with opposing counsel or showing opposing counsel any relevant material, nor shall they otherwise impede opposing counsel's investigation of the case.

(b) **Continuing Duty To Disclose.** If, subsequent to compliance with these rules or orders pursuant thereto, a party discovers additional material or information which is subject to disclosure, the party shall promptly notify the other party or his-that party's attorney of the existence of such additional material, and if the additional material or information is discovered during the trial, the court shall also be notified.

(c) **Custody of Materials.** Any materials furnished to an attorney pursuant to these rules shall ~~remain in his exclusive custody and~~ be used only for the purposes relating to the preparation and trial of conducting his side of the case, and shall be subject to such other terms and conditions as the court may provide.

(d) **Protective Orders.** Upon a showing of cause, the court may at any time order that specified disclosures be denied, restricted, or deferred, or make such other order as is appropriate, provided that all material and information to which a party is entitled must be disclosed in time to permit the party's attorney to make beneficial use thereof.

(e) **Excision.** When some parts of certain material are discoverable under these rules, and other parts are not discoverable, the nondiscoverable parts may be excised by order under subdivision (d) of this rule. Material excised pursuant to judicial order shall be sealed and preserved in the records of the court, to be made available to the Supreme Court in the event of an appeal.

(f) **In Camera Proceedings.** Upon request of any person, the court may permit any showing of cause for denial or regulation of disclosures, or portion of such showing, to be made in camera. A record shall be made of such proceedings. If the court enters an order granting relief following a showing in camera, the entire record of such showing shall be sealed and preserved in the records of the court, to be made available to the Supreme Court in the event of an appeal.

(g) **Sanctions.**

(1) If at any time during the course of the proceedings it is brought to the attention of the court that a party has failed to comply with an applicable discovery rule or an order issued pursuant thereto, the court may order such party to permit the discovery of material and information not previously disclosed, grant a continuance, or enter such other order as it deems just under the circumstances.

(2) Willful violation by counsel of an applicable discovery rule or order issued pursuant thereto may subject counsel to appropriate sanctions by the court.

Reporter's Notes – 2012 Amendment

Subsection (c) is amended to remove the limitation that materials furnished pursuant to these rules remain in the attorney's exclusive custody and control. An attorney may disclose such materials to third parties as long as such disclosure is in furtherance of the preparation of the defense. Under subsection (d) of this rule, the prosecution may seek a protective order for good cause as to any materials whose disclosure to or possession by third parties would create a risk of harm to other persons, other prosecutions or the public. As provided for in Rule 54, a pro se defendant is treated as an attorney for purposes of receiving discovery and complying with discovery restrictions.

This amendment follows the revision to the ABA Standards for Criminal Justice Discovery, Third Edition. Former ABA Standard 4.3 has been replaced by Standard 11-6.4, which is consistent with this amendment. The court retains authority under subsection (d) to limit disclosure of material produced in discovery or to authorize broader disclosure as may be requested.

2. That Rule 18 of the Vermont Rules of Criminal Procedure be amended to read as follows (new matter underlined; deleted matter struck through):

RULE 18. PLACE OF PROSECUTION AND TRIAL

(a) **In General.** Except as otherwise permitted by statute or by these rules, with the exception of an initial appearance and arraignment under Rules 5 and 10 and a preliminary hearing under Rule 32.1(a)(1), which may be held in any unit, the prosecution shall be had in the ~~county or territorial~~ unit in which the offense was committed or in a contiguous unit. ~~The trial of~~

~~a proceeding in the district court shall be held either in the circuit in which the proceeding was filed or in any contiguous circuit within the territorial unit.~~

(b) Violations of Conditions of Pretrial Release. After arraignment, the prosecution and trial for the offense of violation of conditions of pretrial release shall be had (1) in the unit county or circuit of the court which issued the pretrial release order; or (2) if the defendant has also been charged with a new offense, other than violation of a condition of pretrial release, the prosecution may be had in the unit county or circuit where the offense occurred or a contiguous unit. ~~if the defendant has also been charged with a new offense other than violation of conditions of pretrial release.~~

Reporter's Notes – 2012 Amendment

This amendment revises the nomenclature used to refer to the place of prosecution and trial in order to conform to changes made by the Judicial Restructuring Act, Act 154 of 2009 (Adj. Sess.). This term “unit,” as used in this amendment, means and is coterminous with the territorial reach of each Vermont county. Additionally, this amendment provides for broadened venue for initial appearance and arraignment under Rules 5 and 10 and preliminary hearing under Rule 32.1(a)(1). The offense referred to in subdivision (b)(2) must be based on the same conduct as the offense that is the subject of the violation of conditions of release.

3. That Rule 26 of the Vermont Rules of Criminal Procedure be amended to read as follows (new matter underlined; deleted matter struck through):

RULE 26. EVIDENCE

(a) Form. In all trials the testimony of witnesses shall be taken orally in open court, unless otherwise provided by these rules, the Vermont Rules of Evidence, or other rules adopted by the Supreme Court.

(b) Examination of Witnesses. Except with leave of court, a witness shall not be examined by more than one attorney on a side, nor shall more than one attorney on a side be heard on questions of evidence. Attorneys shall stand when examining witnesses or addressing the court.

(c) Other Criminal Offenses. When the state in a criminal action intends to offer evidence or other criminal offenses under Rule 404(b) of the Vermont Rules of Evidence, or when any party in a criminal action intends to offer evidence of an offense for impeachment under Rule 609 of the Vermont Rules of Evidence, at least ~~seven~~thirty days before the trial, or such greater time as the court may order, that party shall furnish to the other parties in the proceeding a written statement of the acts or offenses it intends to offer except that the court may allow the notice to be given at a later date, including during the trial, if the court determines either that the evidence is newly discovered and could not have been obtained earlier through the

exercise of due diligence or that the issue to which such evidence relates has newly arisen in the case. No notice is required for evidence of offenses used in rebuttal. When evidence of other criminal offenses is admitted, the court shall, if requested, charge the jury on the limited purpose for which the evidence is received and is to be considered. After the close of the evidence, the jury shall be instructed on the limited purpose for which the evidence was received and that the defendant cannot be convicted for a charge not included in the indictment or information.

(d) Hearsay Statements of a Victim who is a Child Ten Years of Age or Under or a Mentally Retarded or Mentally Ill Person. When the state in a criminal action intends to offer hearsay statements of a victim who is a child ten years of age or under or a mentally retarded or mentally ill person, made admissible by Rule 804a of the Vermont Rules of Evidence, the state shall furnish to the defendant written statement of the evidence it intends to offer, including the name of each witness who will testify to the statement of the victim, at least 30 days before trial. The court may allow the notice to be given at a later date, including during the trial, if it determines either that the evidence is newly discovered and could not have been obtained earlier through the exercise of due diligence or that the issue to which the evidence results has newly arisen in the case.

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Reporter's Notes – 2012 Amendment

This amendment increases to thirty days before trial the notice required of an intent to introduce evidence of other acts or offenses. The former seven day notice requirement did not allow sufficient time for the opposing party to investigate the proposed evidence and gave rise to requests to continue the trial with the potential of requiring a new jury selection. The increased notice time should reduce or eliminate such problems. The amendment also makes express the court's authority to require earlier disclosure. The court retains its authority under the existing rule to authorize later disclosure for the reasons specified in the rule.

4. That Rule 30 of the Vermont Rules of Criminal Procedure be amended to read as follows (new matter underlined; deleted matter struck through):

RULE 30. INSTRUCTIONS

At the close of the evidence or at such earlier time during the trial as the court reasonably directs, any party may file written requests that the court instruct the jury on the law as set forth in the requests. At the same time copies of such requests shall be furnished to adverse parties. The court may give instructions to the jury at any time, but in all cases shall provide final instructions to the jury after argument. The court shall inform counsel of its proposed ~~action upon the requests~~ instructions ~~prior to their arguments to the jury, but the court shall instruct the jury after the arguments are completed~~ delivering them. All parties shall have

the opportunity to present objections to the instructions before their delivery. No party may assign as error any portion of the charge or omission therefrom unless ~~he~~ the party objects thereto before the jury retires to consider its verdict, stating distinctly the matter to which ~~he~~ objects ~~objection is made~~ and the ground of ~~his~~ the objection. Opportunity shall be given to make the objection out of the hearing of the jury. The court shall give a written copy of the instructions to the jury before it retires.

Reporter's Notes—2012 Amendment

This amendment contemplates that the court will have discretion to give preliminary instructions prior to the taking of evidence, as well as to give some instructions after the close of evidence but prior to argument. The amendment is not intended to change the court's existing practice of instructing the jury on the elements of the charged crime and on all other major and contested issues of the case after argument.

5. That Rule 41 of the Vermont Rules of Criminal Procedure be amended to read as follows (new matter underlined; deleted matter struck through):

RULE 41. SEARCH AND SEIZURE

(a) Authority to Issue a Warrant. A search warrant authorized by this rule may be issued only by a judicial officer upon request of a law enforcement officer, an attorney for the state, or any other person authorized by law.

(b) Grounds for Issuance. A warrant may be issued under this rule to

(1) search for and seize any

(A) evidence of the commission of a criminal offense, or

(B) contraband, the fruits of crime, or things otherwise criminally possessed, or

(C) weapons or other things by which a crime has been committed or is about to be committed, or

(D) person who has been kidnapped or unlawfully imprisoned or restrained in violation of the laws of this state, or who has been kidnapped in another jurisdiction and is now concealed within this state, or any human fetus or human corpse, or

(2) search for a person whose arrest is authorized by law; or

(3) monitor conversations for which one party has consented in order to obtain evidence of the commission of a crime, or

(4) enter any premises to install a tracking device or use a tracking device to track the movement of a person or property to obtain evidence of the commission of a crime.

(c) Issuance and Contents.

(1) *Probable Cause.* A judicial officer shall issue the warrant if the judicial officer is satisfied that there is probable cause to believe that grounds for the application exist based upon an affidavit or affidavits or sworn testimony or both. The finding of probable cause shall be based upon substantial evidence, which may be hearsay in whole or in part, provided there is a substantial basis for believing the source of the hearsay to be credible and for believing that there is a factual basis for the information furnished.

(2) *Particularity.* The warrant shall identify:

(A) the property or other object of the search and name or describe the person or place to be searched, or

(B) the conversations to be monitored, or

(C) (i) the premises to be entered to install a tracking device, and

(ii) the person or property the movements of whom or which will be monitored by the tracking device and the location of the property where the tracking device will be installed, or,

(iii) if no device is to be installed, the tracking method to be used and the person or property to be tracked.

(3) *Requesting a Warrant in the Presence of a Judicial Officer.*

(A) *Warrant on an Affidavit.* When a law enforcement officer, an attorney for the state, or other person authorized by law presents an affidavit in support of a warrant, the judicial officer may require the affiant to appear personally and may examine under oath the affiant and any witness the affiant produces.

(B) *Warrant on Sworn Testimony.* The judicial officer may wholly or partially dispense with a written affidavit and base a warrant on sworn testimony if doing so is reasonable under the circumstances.

(C) *Recording Testimony.* Testimony taken in support of a warrant shall be recorded by a court reporter or by a suitable recording device, and the transcript or recording shall be filed with the clerk, along with any affidavit.

(4) *Requesting a Warrant by Reliable Electronic Means.*

(A) In General. When a law enforcement officer, an attorney for the state, or other person authorized by law so requests, a judicial officer may issue a warrant based on information communicated by reliable electronic means.

(B) Transmitting and Affirming Affidavits. Upon learning that an applicant is requesting a warrant under Rule 41(c)(4), a judicial officer shall inform the applicant that a signed or unsigned affidavit shall be transmitted electronically to the judicial officer. The warrant affidavit shall be sworn to or affirmed by administration of the oath over the telephone by the judicial officer. The administration of the oath need not be made part of the affidavit or recorded, but the judicial officer shall note on the affidavit that the oath was administered. The determination of probable cause for issuance of the warrant shall be made solely on the contents of the affidavit or affidavits provided.

(C) Warrant by Reliable Electronic Means. If the judicial officer proceeds under this subsection, the following additional procedures apply:

(i) Transmission to a Judicial Officer. The applicant shall prepare an original warrant and shall transmit it to the judicial officer by reliable electronic means.

(ii) Modification. The judicial officer may modify the original warrant. The judge shall transmit a copy of the modified warrant to the applicant by reliable electronic means.

(iii) Signing the Warrant. Upon determining to issue the warrant, the judicial officer shall immediately sign the original warrant with any modifications, enter on its face the exact date and time it is issued, and transmit a copy by reliable electronic means to the applicant.

(iv) Filing of the Warrant. The judicial officer shall file with the clerk by an appropriate means the signed original or modified warrant and the affidavit. The clerk shall enter the signed original or modified warrant on the docket when filed. At the time of making the return, a copy of the warrant as served shall be filed with the clerk.

(5) *Contents of the Warrant.*

(A) In General. The warrant shall be directed to a law enforcement officer of the state of Vermont authorized to enforce or assist in enforcing any law thereof. The warrant shall command the officer to search the person or place named for the property or other object specified and seize the property or object and, if appropriate, the person specified. The warrant shall also command the officer to:

(i) serve the warrant within a specified period of time not to exceed 10 days from issuance;

(ii) serve the warrant between the hours of 6:00 A.M. and 10:00 P.M. unless the judicial officer for reasonable cause shown authorizes execution at other times; and

(iii) return the warrant to the court designated in the warrant.

(B) Warrant for Monitoring a Conversation. The warrant shall be directed to a law enforcement officer of the state of Vermont authorized to enforce or assist in enforcing any law thereof. The warrant shall command the officer to monitor conversations for which one party has consented. The warrant shall identify the nonconsenting parties to the conversation, if known. The warrant may indicate that multiple conversations may be monitored and that it may be executed on multiple occasions. The warrant shall command the officer to:

(i) execute the warrant within a specified period of time not to exceed 10 days from issuance;

(ii) execute the warrant between the hours of 6:00 A.M. and 10:00 P.M. unless the judicial officer for reasonable cause shown authorizes execution at other times; and

(iii) return the warrant to the court designated in the warrant.

(C) Warrant for a Tracking Device. The warrant shall be directed to a law enforcement officer of the state of Vermont authorized to enforce or assist in enforcing any law thereof. The warrant shall identify the premises to be entered to install the tracking device, if any; the person or property the movements of whom or which will be monitored by the tracking device and the location of the property where the tracking device will be installed, or if no device is installed, the tracking method to be used and the person or property to be tracked; and shall specify a reasonable length of time that the device may be used. The time shall not exceed 15 days from the date the warrant was issued. The court may, for good cause and based on probable cause, grant one or more extensions for a reasonable period not to exceed 30 days each. The warrant shall command the officer to:

(i) complete any installation authorized by the warrant within a specified time no longer than 10 calendar days; and

(ii) perform any installation authorized by the warrant between the hours of 6:00 A.M. and 10:00 P.M. unless the judicial officer for reasonable cause shown authorizes installation at other times; and

(iii) return the warrant to the court designated in the warrant.

(d) Execution and Return of the Warrant.

(1) *Execution.* The officer taking property under the warrant shall:

(A) give to the person from whom or from whose premises the property was taken a copy of the warrant and a receipt for the property taken; or

(B) shall leave the copy and receipt at the place from which the property was taken.

(2) *Inventory.* A written inventory of any property taken shall be made in the presence of the applicant for the warrant, or the officer serving the warrant, and the person from whose possession or premises the property was taken, if they are present, or in the presence of at least one credible person other than the applicant for the warrant, the officer serving the warrant or the person from whose possession or premises the property was taken, and shall be verified by the officer.

(3) *Return.* The return shall be made promptly and shall be accompanied by the inventory. The clerk of the court to which the warrant was returned shall upon request deliver a copy of the inventory to the person from whom or from whose premises the property was taken and to the applicant for the warrant.

(4) *Execution and Return of a Warrant for Monitoring A Conversation.*

(A) *Noting the Time.* A law enforcement officer executing a warrant for monitoring a conversation shall enter on the warrant the exact date and time that the warrant was executed and the period of time that any monitoring occurred.

(B) *Return.* If the warrant is executed a return shall be made within 90 days. Upon certification by a law enforcement officer, an attorney for the state, or any other person authorized by law that an investigation related to the warrant is ongoing, a judicial officer may authorize an extension of the time for making the return for such period as the judicial officer deems reasonable. The return shall identify:

(i) the identity of any nonconsenting parties to the conversation, if known;

(ii) the date and time of any monitored conversations; and

(iii) the approximate length of any monitored conversations.

(C) *Service.* At the time the return is made, the law enforcement officer executing a warrant for monitoring a conversation shall serve a copy of the warrant on any known nonconsenting parties to the conversation. Service may be accomplished by

delivering a copy to the known nonconsenting parties; or by leaving a copy at the person's residence or usual place of abode with an individual of suitable age and discretion who resides at that location; or by mailing a copy to the person's last known address. Upon certification by a law enforcement officer, an attorney for the state, or any other person authorized by law that an investigation related to the warrant is ongoing, a judicial officer may authorize an extension of the time for serving the return for such period as the judicial officer deems reasonable. Service need not be made upon any person against whom criminal charges have been filed related to the execution of the warrant.

(5) Execution and Return of a Warrant for a Tracking Device.

(A) Noting the Time. The law enforcement officer executing a tracking-device warrant shall enter on it the exact date and time a device was installed or tracking was undertaken without installation of a device and the period during which a tracking device was used.

(B) Return. Within 10 calendar days after the use of a tracking device has ended, the law enforcement officer executing the warrant shall return it to the court designated in the warrant. The return shall describe the person or property tracked, and indicate the exact date and time for which the person or property's movement was tracked.

(C) Service. At the time the return is made, the law enforcement officer executing a tracking-device warrant shall serve a copy of the warrant on the person who was tracked or whose property was tracked. Service may be accomplished by delivering a copy to the person who, or whose property, was tracked; or by leaving a copy at the person's residence or usual place of abode with an individual of suitable age and discretion who resides at that location; or by mailing a copy to the person's last known address. Upon certification by a law enforcement officer, an attorney for the state, or any other person authorized by law that an investigation related to the warrant is ongoing, a judicial officer may authorize an extension of the time for making the return for such period as the judicial officer deems reasonable. Service need not be made upon any person against whom criminal charges have been filed related to the execution of the warrant.

(e) Motion for Return of Property. A person aggrieved by an unlawful search and seizure may move the court to which the warrant was returned or the court in the county or territorial unit where property has been seized without warrant for the return of the property on the ground that the movant is entitled to lawful possession of the property which was illegally seized. The judicial officer shall receive evidence on any issue of fact necessary to the decision of the motion. If the motion is granted the property shall be restored and it shall not be

admissible in evidence at any hearing or trial. After an indictment or information is filed, a motion for return of property shall be made or heard only in the county or territorial unit of trial and shall be treated as a motion to suppress under Rule 12(b)(3).

(f) Motion To Suppress. A defendant aggrieved by an unlawful search and seizure may make a motion to suppress evidence in the county or territorial unit of trial as provided in Rule 12(b)(3). If the motion is granted, the evidence shall not be admissible at the trial or at any future hearing or trial.

(g) Definitions: The following words wherever used in this rule shall have the following meanings:

(1) The term "property" is used in this rule to include documents, books, papers, and any other tangible objects except those listed in Rule 41.1(m)(3); and

(2) The term "reliable electronic means" shall include facsimile transmission, electronic mail, or other method of transmitting a duplicate of an original document; and

(3) The term "tracking device" means any device which permits the tracking of the movement of a person or object.

Reporter's Notes—2012 Amendment

Rule 41 is amended to provide procedures for the issuance of search warrants for the use of tracking devices. The amended rule governs the process for obtaining a search warrant for all tracking devices and information when required by Vermont law.

Rule 41(b)(4) authorizes the issuance of a search warrant to install or use a tracking device to track a person or property for the purpose of obtaining evidence of the commission of a crime. "Premises" as used in this portion of the rule refers to any place in which an individual has an expectation of privacy.

Rule 41(c)(2)(C) requires that a warrant to authorize use of a tracking device must specify the premises to be entered for installation of a tracking device but recognizes that electronic tracking may occur without installation of a device. In such cases, the warrant, if required, must specify the tracking method to be used and the person or property to be tracked.

Rule 41(c)(5)(C) similarly recognizes the possibility that tracking may occur with or without installation of a device and limits the time that a device may be used to 15 days unless extended for one or more 30 day period for good cause and probable cause. The directions to the officer if a device is to be

installed are similar to those for monitoring a conversation under Rule 41(c)(5)(B).

Rule 41(d)(5) is similar to the provisions for execution and return of a warrant for monitoring a conversation under Rule 41(d)(4) in that it provides for service of the warrant at the time the return is made.

The definition of "tracking device" in Rule 41(g)(3) is broadly conceived to incorporate technological advances in the ability to track persons or property.

6. That these rules, as amended, are prescribed and promulgated to become effective on _____, 2012. The Reporter's Notes are advisory.

7. 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 _____, 2012.

Paul L. Reiber, Chief Justice

John A. Dooley, Associate Justice

Marilyn S. Skoglund, Associate Justice

Brian L. Burgess, Associate Justice

Beth Robinson, Associate Justice