STATE OF VERMONT
VERMONT SUPREME COURT
NOVEMBER TERM 2021

Order Amending Rule 7 of 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 7 of the Vermont Rules of Criminal Procedure be amended as follows (new matter underlined; deleted matter struck through):

RULE 7. THE INDICTMENT AND THE INFORMATION

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(d) **Amendment of Information or Indictment Before Trial.** Prior to commencement of trial, the prosecuting officer may amend the information or indictment, and may add additional counts. Upon motion of the defendant, the court, in its discretion, may strike the amended information, indictment, or added counts, if the trial or the cause would be unduly delayed, or substantial rights of the defendant would be prejudiced. If the court allows the amendment or added counts, the defendant must be arraigned on the amendment or added counts without unreasonable delay, and must be given a reasonable period of time to prepare for trial on the amended information, indictment or added counts.

(~~d~~ e) **Amendment of ~~Indictment or~~ Information or Indictment During Trial**. If no additional or different offense is charged and if substantial rights of the defendant are not prejudiced, the court may permit an ~~indictment or~~ information or indictment to be amended at any time after trial has commenced and before verdict or finding for any purpose, including cure of the following defects of form: (1) any misspelling, grammatical, or typographical error; (2) misjoinder of offenses or defendants; (3) misstatement of the time or date of an offense if not an essential element of the offense; (4) inclusion of an unnecessary allegation; (5) failure to negate any excuse, exception, or proviso contained in the definition of the offense; (6) use of alternative or disjunctive allegations.

Reporter's Notes—2022 Amendment

Subdivision (d) is added to address amendment of an information or indictment prior to trial, including but not limited to late-stage amendments that may be authorized in the period when a case has been scheduled for final pre-trial conference, jury selection, and trial. In the latter circumstance, concerns may be invoked both as to prevention of prejudice to a defendant and effective administration of justice, in terms of the court's docket management and reasonable progression of long-pending cases to trial.

While added subdivision (d) does not prescribe specific criteria for the court's consideration in granting or denying pretrial amendment of an information, as is the case for amendments which occur during

trial, the defendant is nonetheless protected by constitutional safeguards. State v. Beattie, 157 Vt. 162, 170, 596 A.2d 919, 924 (1991) (citing Reporter's Notes, V.R.Cr.P. 7(d) as stating: "The right to amend prior to trial remains subject . . . to the constitutional requirement that the defendant receive fair notice of the charge."). The added subdivision adopts a requirement of arraignment on an amended or added charge "without unreasonable delay." "One of the most fundamental principles of our criminal justice system is that a person charged with a crime must be notified of the charges against him." State v. Cadorette, 2003 VT 13, ¶ 4, 175 Vt. 268, 826 A.2d 101. In this respect, "the central purpose of arraignment is to ensure that the defendant understands the nature of the charges so that he can prepare a defense." Id. ¶ 5 (citing State v. Bruyette, 158 Vt. 21, 35, 604 A.2d 1270, 1277 (1992)). But the failure to arraign will not result in reversal in the absence of prejudice to the defendant, that is, "that he did not have actual notice of the charges against him or an adequate opportunity to defend himself to justify reversal of the underlying conviction." State v. Ingerson, 2004 VT 36, ¶ 4, 176 Vt. 428, 852 A.2d 567 (citing Cadorette, 2003 VT 13, ¶ 5); see also State v. Woodmansee, 124 Vt. 387, 390, 205 A.2d 407, 409 (1964) ("Liberality of amendment, such as that mentioned in State v. Pelletier, 123 Vt. 271, 273, 185 A.2d 456 (1962), can be exercised only at times or under conditions giving full protection to this constitutional right."). Ultimately, "whether the amendment is sought by the prosecutor during the trial, or prior thereto, the test is the same. The allowance of the amendment must not prejudice the accused's ability to prepare an adequate defense." State v. Bleau, 132 Vt. 101, 104, 315 A.2d 448, 450 (1974) (citations omitted).

In assessing the prejudice to a defendant from a late-stage amendment of criminal charges, the standard of the existing Rule 7(d)—whether additional or different offenses are charged affecting substantial rights of the defendant—is informative. Whether the amendment occurs during or in the late stages prior to trial, prejudice may lie not only as a matter of basic inability to reasonably prepare for trial on the amended charges, but in resulting impact upon defense strategy, or in placing a defendant in a position of exercising inconsistent strategies as to charges joined for trial. Cf. Bruyette, 158 Vt. at 35, 604 A.2d at 1277; State v. Holden, 136 Vt. 158, 385 A.2d 1092 (1978).

The amendments do not establish a fixed time prior to trial beyond which the prosecution is categorically precluded from amending existing charges, in recognition that certain amendments may not be prejudicial, or may actually benefit a defendant, and that there may as well be reasonable grounds notwithstanding due diligence for the amendment sought by the prosecution, provided that the defendant's fair trial interests are protected.

Apart from prejudice to the defendant, the amendment also recognizes the court's discretion, consistent with the effective administration of justice and the obligation to manage and advance the docket, to deny amendment and strike the proposed amendment or added counts if amendment would result in unreasonable delay, when all competing interests in the specific circumstances are weighed.

Consistent with the terms of V.R.Cr.P. 48(b), denial of amendment, or striking or dismissal of an amendment seeking to add charges pursuant to new V.R.Cr.P. 7(d) or (e) is presumptively without prejudice, unless the court directs that dismissal is with prejudice.

The present rule amendments are addressed to the propriety of amending an information at various junctures in a criminal proceeding, and the court's authority and responsibility to grant or deny motions to amend. The rule amendments do not address, and are not intended to contravene, the independent, and constitutionally premised, criteria and calculus where speedy trial rights and double jeopardy protections are invoked.

As is the case with existing subdivision (d), the present amendment extends to amendment of an indictment prior to trial by the prosecuting attorney, even though the charge originates from grand jury determination. As the Reporter's Notes to the original promulgation of the rule indicate, V.R.Cr.P. 7 departs from the common-law view, reflected in the federal rule as well, that a superseding grand jury indictment is required to substantively amend an indictment, since under the Vermont rule, "the prosecutor has the option to bring an information in any case and the defendant has no right to indictment." Of course, the prejudice calculus reflected in the rule applies, whether the charge to be amended originates from either information or indictment.

References to "Indictment or information" in the caption and text of former subdivision (d) are reordered to "Information or indictment," reflecting the general Vermont practice of charging by information, and the relative rarity of charging by indictment. Former subdivision (d) is renumerated as subdivision (e).

2. That this amendment be prescribed and promulgated, effective on January 18, 2022. 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 15th day of November, 2021.

Signed by the Vermont Supreme Court

Paul L. Reiber, Chief Justice

Harold E. Eaton, Jr., Associate Justice

Karen R. Carroll, Associate Justice

William D. Cohen, Associate Justice