

STATE OF VERMONT
VERMONT SUPREME COURT
_____ TERM 2021

Order Adding Rule 11(a)(4) to the Vermont Rules of Criminal Procedure

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

1. That Rule 11(a) of the Vermont Rules of Criminal Procedure be amended as follows (new matter underlined):

RULE 11. PLEAS

(a) **Alternatives.**

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

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

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

(4) *Reservation of Post-Conviction Challenges—No Plea Agreement.* With the approval of the court, a defendant may preserve a post-conviction challenge to a predicate conviction when entering a plea of guilty or nolo contendere in cases where there is no plea agreement, by stating on the record at the change-of-plea hearing an intent to challenge one or more of the convictions through a post-conviction relief petition, specifically identifying the convictions to be challenged, and stating the basis for the challenges.

Reporter's Notes—2021 Amendment

Rule 11(a)(4) provides an additional procedure whereby a defendant may preserve a post-conviction challenge to a predicate conviction while pleading guilty or no contest to an enhanced offense, where the State has not consented to preservation of the challenge under the terms of Rule 11(a)(3). Rule 11(a)(3) was

promulgated to implement the Supreme Court’s direction in In re Benoit, 2020 VT 58, ___ Vt. ___, 237 A.3d 1243. In Benoit, the Court held that with the State’s agreement and the Court’s approval, defendants may preserve a post-conviction relief (PCR) challenge to a predicate conviction even while pleading guilty to an enhanced charge by stating on the record at the change-of-plea hearing an intent to challenge one or more of the convictions through a PCR petition, specifically identifying the convictions they intend to challenge, and stating the basis for the challenges. If a defendant pleads guilty or nolo contendere while preserving the PCR claim, with the consent of the State and the approval of the court, the plea is analogous to a conditional plea under V.R.Cr.P. 11(a)(2) (“With the approval of the court and the consent of the state, a defendant may enter a conditional plea of guilty or nolo contendere, reserving in writing the right, on appeal from the judgment, to review of the adverse determination of any specified pretrial motion. [A] defendant [who] prevails on appeal . . . shall be allowed to withdraw [the] plea.”).

This amendment seeks to address a specific issue not expressly reached in Benoit—cases in which a defendant is willing to plead guilty with or without benefit of a plea agreement as to recommended sentence, but the State is unwilling to consent to preservation of a PCR challenge as to a predicate conviction, even under a procedure that would be analogous to the conditional plea authorized by Rule 11(a)(2).

The amendment provides that, with the approval of the court, a defendant may preserve a PCR challenge to a predicate conviction when entering a plea of guilty or nolo contendere even in cases where there is no plea agreement, or consent to the preservation otherwise given by the State, by stating on the record at the change-of-plea hearing an intent to challenge one or more of the convictions through a PCR petition, specifically identifying the convictions to be challenged, and stating the basis for the challenges.

As is the case with a plea given under Rule 11(a)(3), the present amendment requires the court’s approval of a defendant’s attempt to preserve a post-conviction challenge to a predicate conviction while pleading guilty or no contest to the related enhanced charge. As with the Rule 11(a)(3) plea, the present amendment does not prescribe criteria governing the court’s approval, or rejection of a defendant’s effort to preserve a post-conviction challenge by stating the basis for challenge of an identified predicate conviction without State agreement. However, in contrast to Rule 11(a)(4), the procedure authorized under Rule 11(a)(3) is expressly recognized in Benoit as akin to a conditional plea under Rule 11(a)(2), with the

certainties of case outcome thus provided (i.e., either the defendant must be allowed to withdraw if the defendant prevails on the issue identified and appealed with approval of the court and consent of the State, or the conviction and sentence that were the subject of the plea stand).

The content of the colloquy with a defendant seeking to enter a plea per Rule 11(a)(4), and findings to be made by the court, are not prescribed in the rule, beyond those otherwise required in the entry of any plea of guilty or nolo contendere per V.R.Cr.P. 11(c)-(f). However, in the course of the colloquy as to a plea given under Rule 11(a)(4), if the court concludes that a defendant's plea is not knowingly and voluntarily given, or that the subject charge is without adequate factual basis, the court must not accept the plea.

Of course, in lieu of a plea under circumstances prescribed by either paragraph (a)(3) or (4), a defendant retains all rights of trial by jury on the enhanced charge, and appeal from any verdict of guilty therein, standing on the plea of not guilty.

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

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

Dated in Chambers at Montpelier, Vermont this ____ day of _____, 2021.

Paul L. Reiber, Chief Justice

Beth Robinson, Associate Justice

Harold E. Eaton, Jr., Associate Justice

Karen R. Carroll, Associate Justice

William D. Cohen, Associate Justice