

**ENTRY ORDER**

SUPREME COURT DOCKET NO. 2021-066

MARCH TERM, 2021

State of Vermont v. Nicholas Sweet*	}	APPEALED FROM:
	}	
	}	Superior Court, Rutland Unit
	}	Criminal Division
	}	
	}	DOCKET NO. 98-1-18 Rdc

In the above-entitled cause, the Clerk will enter:

Defendant seeks permission to appeal the trial court’s order denying his motion to continue his violation-of-probation (VOP) merits hearing until after trial in the associated criminal dockets. The motion is denied for the reasons set forth below.

In April 2019, defendant was sentenced to twelve-to-thirty-six months, all suspended with a two-year term of probation, for convictions of unlawful trespass, unlawful mischief, simple assault, and interference with access to emergency services. One of defendant’s probation conditions prohibited contact with his brother, who was a victim of those crimes. In June 2020, defendant was arrested for multiple violations of an abuse prevention order as well as domestic assault of his girlfriend. In July 2020, defendant was arrested again for domestic assault and simple assault against his brother, his brother’s girlfriend, and his mother. These incidents led to two VOP complaints against defendant. He was released with additional conditions. The State indicated that it planned to seek revocation of probation at the VOP merits hearing, which was initially set for February 18, 2021. Defendant filed a motion to continue the VOP merits hearing until after the criminal trial(s) on the 2020 charges took place, citing the preference expressed for such a procedure in State v. Begins, 147 Vt. 295 (1986).

The trial court denied defendant’s motion, concluding that delaying the VOP hearing would be detrimental to public safety because defendant had assaulted two people while on probation, including his brother, whom he was prohibited from contacting. The court also concluded that a continuance would result in undue delay because the hearing had already been delayed for eight months and there was little likelihood that the criminal trial(s) would occur soon. It rescheduled the VOP merits hearing for April 13, 2021. The trial court subsequently denied defendant’s request for permission to appeal under V.R.A.P. 5.1., concluding that the order met the criteria for a collateral final order appeal but that this was not the rare case where an appeal was necessary to prevent injustice.

Defendant argues that this Court should accept the appeal and review the trial court’s decision to deny the continuance. He contends that if the trial court conducts the VOP merits hearing now and probation is revoked, he will be incarcerated for longer than his minimum sentence on his original convictions, and will not be eligible for programming, due to his pending

criminal charges. He argues that because the pandemic has delayed criminal trials indefinitely, he will be incarcerated for longer than he otherwise would have been. He argues that Begins, which gives the trial court discretion to hold a VOP merits hearing before an associated criminal trial to protect the probationer or public safety but prevents the State from using the probationer's testimony at a subsequent trial, is insufficient to protect his due process rights under current circumstances.

We agree that the order defendant seeks to appeal conclusively determined a disputed question that was completely separate from the merits—i.e., whether the revocation hearing would be held before trial—and the order would be effectively unreviewable from a final judgment. See V.R.A.P. 5.1 (listing criteria for collateral final order). However, the trial court did not abuse its discretion in denying permission to appeal under V.R.A.P. 5.1. “The collateral order doctrine creates a limited, discretionary exception to the normal final judgment rule. It offers appellate redress in the small number of extraordinary cases where the normal appellate route will almost surely work injustice, irrespective of this Court’s final decision.” In re F.E.F., 156 Vt. 503, 507 (1991) (quotation omitted). As the trial court found, the State still has to prove the merits of the VOPs and it is not certain that probation will be revoked or that defendant will be incarcerated. It is therefore not clear that the normal appellate route “will almost surely work injustice.” Id. On the other hand, the court found that defendant posed a threat to public safety and that the case had already suffered from extensive delays. Under these circumstances, the court acted within its discretion in denying permission to appeal.

Defendant alternatively argues that the Court should accept his appeal as a petition for extraordinary relief. He argues that the Court should reconsider Begins, claiming that it is inadequate to protect his rights during the pandemic because it presumed a timely jury trial, which is unlikely to occur. Alternatively, he argues that the Court should find that the trial court abused its discretion in denying his motion to continue the VOP merits hearing until after the criminal trials.

Extraordinary relief is limited to situations where there is no adequate remedy by appeal or by filing for extraordinary relief in the superior court. V.R.A.P. 21(b); In re Search Warrant, 2012 VT 102, ¶ 9, 193 Vt. 51. Defendant has not petitioned the superior court for extraordinary relief or alleged that extraordinary relief is not available in the superior court. This fact alone would ordinarily be a sufficient basis to deny the petition. See Byrd v. Kehoe, 136 Vt. 204, 205 (1978) (dismissing petition for extraordinary relief where appellant failed to file complaint first in superior court or show that no adequate remedy is available in superior court).

To avoid further delay below, however, we consider the merits of the petition. The decision whether to grant a petition for extraordinary relief “is largely discretionary according to the merits of the case made by the petition and the record.” Pfeil v. Rutland Dist. Ct., 147 Vt. 305, 308 (1986). The relief sought here is in the nature of certiorari, because defendant seeks to review a discretionary decision rather than to enforce a simple ministerial duty. State v. Forte, 159 Vt. 550, 554 (1993) (explaining that “purpose of certiorari is to review judicial action of inferior courts and tribunals in regard to substantial questions of law affecting the merits of the case,” while “purpose of mandamus is to enforce a simple and definite duty, imposed by law, and arising under conditions admitted or proved to exist”); see State v. Roy, 2018 VT 67A, ¶ 18, 209 Vt. 133 (explaining that

V.R.A.P. 21 replaces common-law extraordinary writs of certiorari, mandamus, prohibition, and quo warranto). We have suggested that the Court will grant certiorari-type relief only when there is a lack of jurisdiction, an act outside of jurisdiction, or the proceedings are erroneous on the face of the record. See Roy, 2018 VT 67A, ¶ 26 (citing State v. Dawson, 38 S.W.3d 319, 325 (Ark. 2001)); Rhodes v. Town of Woodstock, 132 Vt. 323, 325, (1974) (stating certiorari “may not be used as a substitute for an appeal to correct mere errors in the exercise of a lawful jurisdiction”).

Here, the trial court plainly had jurisdiction over the proceeding below and had the power to deny the requested continuance. Its decision to deny the continuance is not facially erroneous under Begins and does not threaten important public interests or the integrity of the justice system. See Roy, 2018 VT 67A (declining to grant State’s request for extraordinary relief from trial court’s post-verdict judgment of acquittal because trial court’s legal conclusion, though erroneous, was within its jurisdiction, and case did not involve especially shocking conduct or risks to public safety); Burton v. Town of Springfield, 124 Vt. 502, 505 (1965) (stating writ of certiorari is discretionary and “will not lie where the action of the tribunal sought to be reviewed is correct”). Accordingly, this case does not fall within the narrow category of cases meriting extraordinary relief.

Defendant’s motion for permission to appeal under V.R.A.P. 5.1 or V.R.A.P. 21 is denied, and the appeal is dismissed.

BY THE COURT:

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Paul L. Reiber, Chief Justice

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Beth Robinson, Associate Justice

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Harold E. Eaton, Jr., Associate Justice

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Karen R. Carroll, Associate Justice

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William D. Cohen, Associate Justice