



**Vermont Bar Association
Seminar Materials**

62nd Mid-Year Meeting

Criminal Law 101

**March 22, 2019
Lake Morey Resort
Fairlee, VT**

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Criminal Law 101 – Basic Skills Track
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I. Introduction – Welcome!

II. Beginning of a Case:

a. Arraignment

- i. V.R.Cr.P. 5 – Formalities and Reading of the Charge
- ii. 24-hour rule – Defendants can wait 24 hours to enter a plea
- iii. Conditions of Release – Rules for the Defendant to follow for the duration of the case. Violation of conditions of release is a misdemeanor charge.
- iv. Probable Cause Challenges at Arraignment – Good luck with that.
 - i. “The probable-cause standard is incapable of precise definition or quantification into percentages because it deals with probabilities and depends on the totality of the circumstances. We have stated, however, that [t]he substance of all the definitions of probable cause is a reasonable ground for belief of guilt.” *State v. Quigley*, 2005 VT 128, citing *Maryland v. Pringle*, 540 U.S. 366.
- v. Bail – 13 V.S.A. § 7553, § 7553a, § 7554 – which statute you use depends on the nature of the charge and whether the State is asking for bail.

III. Bail Litigation:

a. Types of Bail:

- i. Unsecured appearance bond (defendant only have to pay if you don't show up)
- ii. Secured appearance bond (defendant pays 10% of bail amount)
- iii. Surety bond (defendant pays whole amount)
- iv. Recognizance (defendant pays nothing – only talking about conditions of release)

b. 13 V.S.A. § 7553: Life offenses

- i. A person charged with a life offense when the evidence of guilt is great **may** be held without bail. If the evidence of guilt is not great, the person shall be bailable in accordance with section 7554.

c. 13 V.S.A. § 7553a: Violent felonies

- i. A person charged with a crime an element of which involves an act of violence against another person, may be held without bail when the **evidence of guilt is great and** the court finds, based upon **clear and convincing evidence**, that the person's release poses a substantial threat of physical violence to any person and that no condition or combination of conditions of release will reasonably prevent the physical violence.

d. Weight of the Evidence Hearings – Holding Defendant without Bail:

- i. Only have to do with offenses under 7553 and 7553a.

- ii. To hold a Defendant without bail, State has to show that the weight of the evidence against Defendant is great.
 - 1. V.R.Cr.P. 12(d) Standard for weight of the evidence – *State v. Duff*, 151 Vt. 433, 440, 563 A.2d 258, 263 (1989).
 - 2. State must to show “(1) that **substantial, admissible evidence** of guilt exists, and (2) the evidence can **fairly and reasonably** convince a fact-finder beyond a reasonable doubt that defendant is guilty.” *State v. Duff*, 151 Vt. 433, 440 (1989).
 - 3. **Weird Middle Ground:**
 - a. But the State is not required under this standard to actually present such evidence during the course of the § 7553 hearing. The § 7553 hearing is not a trial. The State’s burden is to demonstrate that it has evidence that will be admissible at trial, not to have it lawfully admitted at the hearing as if it were a trial. *State v. Bullock*, 2017 VT 7, ¶ 8.
 - 4. Recent litigation: see *State v. Hugerth*, 2018 VT 89; *State v. Crawford*, 2018 VT 119, *State v. Bullock*, 2017 VT 7, *State v. Bushey*, 2009 VT 12.
- e. **13 V.S.A. § 7554: All other charges – misdemeanors – revised statute as of July 2018**
 - i. The defendant shall be ordered released on personal recognizance or upon the execution of an unsecured appearance bond in an amount specified by the judicial officer unless the judicial officer determines that such a release will not reasonably mitigate the risk of flight from prosecution - in determining whether the defendant presents a risk of flight from prosecution, the judicial officer shall consider, in addition to any other factors, the seriousness of the offense charged and the number of offenses. 13 V.S.A. § 7554(a)(1)
 - 1. *Risk of flight from prosecution* - defined as “any action or behavior undertaken by a person charged with a criminal offense to avoid court proceedings,” 13 V.S.A. § 7576(9). Non-appearance does not always equal risk of flight from prosecution.
 - 2. The court must also consider, given the available information, the nature and circumstances of the offense charged, the weight of the evidence, the accused's family ties, employment, financial resources, character and mental condition, the length of residence in the community, record of convictions, and record of appearance or nonappearance at court proceedings or of flight to avoid prosecution. Id. § 7554(b). If the court finds that the defendant does pose a risk of flight, it must impose the least restrictive conditions that would “reasonably mitigate the risk of flight.” 13 V.S.A. § 7554(a)(1).

IV. Pre-Trial Issues and Motion Practice:

- a. **Motion to Dismiss for Lack of a Prima Facie Case: V.R.Cr.P. 12(d)**
 - i. Vermont is one of the only States in the country to have a 12(d) motion – functionally the equivalent of V.R.Cr.P. 12(b)(6) – meant to separate the wheat from the chaff
 - ii. In a motion to dismiss under Rule 12(d), the prosecution must “establish by affidavits, depositions, sworn oral testimony, or other admissible evidence that it has substantial, admissible evidence as to the elements of the offense.”
 - iii. Practically speaking: If the prosecution doesn’t have any sworn testimony, written or oral, then what the defense would like to have happen is to have the Judge dismiss the

case right away, but mostly what Judges do is set it for a hearing and see if the Prosecution can prove up their case.

b. Motion for More Definite Statement – V.R.Cr.P. 7(b)

- i. The indictment or the information shall be a plain, concise, and definite written statement of the essential facts constituting the offense charged
- ii. Force the State to elect which theory or element they will pursue at trial before you do depositions or engage in discovery

c. Motion to Suppress Evidence – V.R.Cr.P. 12 and Vermont / United States Constitutions

- i. Must be filed within 60 days or within timelines stipulated to in a felony stip
- ii. Most often filed in the context of a drug investigation or a DUI to throw out illegally gathered evidence – anywhere along the process of someone being arrested, initial encounter
- iii. Reasonable suspicion for a motor vehicle stop or Terry stops
- iv. Any reason to detain the person any further – expansion of the detention
- v. Arrest – probable cause to arrest someone
- vi. Search and seizures – sometimes based on seizure of a person or seizure of evidence
- vii. Warrants – was the warrant validly issued
- viii. Defendant's consent – consent isn't valid if it is given under duress
- ix. Exclusionary Rule – if evidence was unconstitutionally acquired, what is the remedy? You have a constitutional right to not have the evidence seized in the first place, so that's why we suppress unconstitutionally acquired evidence
 1. State v. Oakes, 157 Vt. 171 (1991) – Vermont does NOT have a good faith exception to the exclusionary rule
 2. State v. Badger, 141 Vt. 430 (1982)

d. Discovery Issues – V.R.Cr.P. 16 (State's Obligations) and 16.1 (Defense's Obligations) – Discovery Rules are generally Defense friendly in Vermont

- i. State: Discovery within the State's "possession, custody, or control" – important when it comes to what is in the State's file and what is not
 1. Vermont State Police materials are generally "within the file"
 2. Other State agencies (Department of Children and Families, Department of Corrections) – documents are typically not in the file unless the State has gone and retrieved them
 3. Federal Litigation: *Giglio v. United States*, 450 U.S. 150 (1972), *Brady v. Maryland*, 373 U.S. 83 (1963), *Smith v. Cain*, 565 U.S. 73 (2012)
- ii. Defense: Generally the Defendant has to submit to inspections of their person, give fingerprints and fingernail scrapings, etc. (V.R.Cr.P. 16.1(a))
 1. Defense only has to disclose lay witnesses if the State asks for them – V.R.Cr.P. 16.1(c)
 2. Medical / Scientific Reports – V.R.Cr.P. 16.1(b) - Subject to constitutional limitations, the court may require that the prosecuting attorney be informed of and permitted to inspect and copy or photograph any reports or results, or testimony relative thereto, of physical or mental examinations or of scientific tests, experiments or comparisons, or any other reports or statements of experts which the defense intends to use at a hearing or trial . . . **the court shall protect against**

disclosure of the mental impressions, conclusions, opinions, or legal theories of defendant's attorney or other representative of the defendant.

- e. Motions in Limine to Exclude or Limit Certain Evidence and Other Notices Before Trial:**
 - i. Usually due on or before jury draw – sometimes (usually) day of trial, motions are heard before the jury is sworn and jeopardy attaches
 - ii. Highlights of Motions in Limine / Other Notices before trial:
 - 1. Prior Bad Acts – V.R.E. 404 – State has to give notice 30 days before trial
 - 2. Discovery Issues / Sanctions – V.R.Cr.P. 16
 - 3. V.R.E. 609 – Impeachable convictions – 30 days before trial
 - a. Can be very important for cross examination
 - 4. V.R.E. 402 – Limiting evidence to relevant evidence
 - 5. V.R.E. 403 – Evidence that is more prejudicial than probative = not admissible / more probative than prejudicial = admissible

- f. Psychiatric Examinations: 13 V.S.A. § 4814**
 - i. Difference between competency and insanity
 - ii. Insanity: Defense at trial, defense has to declare defense before you get to trial
 - iii. Competency: Defendant cannot stand trial because they are incompetent
 - iv. Recent Litigation: *State v. Sharrow*, 2017 VT 25 – State was not entitled to their own expert to determine competency
 - 1. State cannot videotape competency evaluations – order from trial court in Rutland

- g. Change of Plea:**
 - i. Not Guilty to Guilty
 - ii. Nolo contendere – No contest plea – good to do for Defendants who were impaired during the course of the alleged events
 - iii. Colloquy with the Judge re: constitutional rights that Defendant is giving up
 - 1. Advice to give to your client before change of plea
 - a. Interact with the Judge respectfully
 - iv. Make sure you hammer out all details before going in to plea
 - 1. Term of probation
 - 2. Term to serve
 - 3. Pre-approved furlough
 - 4. Dual status – very, very confusing
 - 5. Restitution

V. Voir Dire / Trial: Best and Worst Time of Your Life as a Lawyer

- a. Voir Dire: In French “To see to tell” – you get to see and talk to your potential jury
 - i. Any issues specific to your case that you want the jury to know about ahead of time – are you going to be able to be fair and impartial with this particular type of case
 - ii. Best time to get a feel for folks on your panel – get out from behind the lectern and look them in the eye!
 - iii. What I generally cover in voir dire:

1. Burden is entirely on the State – defense could sit there and do nothing, no cross, no evidence
2. The charge itself is not a piece of evidence against Defendant, and the presumption of innocence is a piece of evidence in the Defendant's favor – if you had to vote right now, what would your verdict be? It would have to be not guilty because the only piece of evidence you have is the presumption of innocence
3. Beyond a reasonable doubt is the highest standard in American law – why is that?
4. Do police officers and other State employees (lab techs, etc.) always tell the truth? Just because they have a badge and a gun does that mean they are always going to be truthful or be truthful about their perceptions about a particular event?
5. What you will hear a lot about during trial – specific issues (domestic violence, guns, sex assault, fraud, lying, rock and roll, drugs, etc.)
- iv. Cannot talk about certain issues:
 1. Incarceration of Defendant
 2. Whether you are a public defender
 3. Habitual offender status
 4. Other pending charges or past charges depending on prior bad acts litigation before voir dire
 5. Potential punishment as a result of a guilty verdict
 6. Cannot ask the jury to put themselves in the Defendant's shoes

b. Trial:

- i. Opening – Tell a Story
- ii. State's Case – State goes first
- iii. Cross Examination
- iv. Basic objections
 1. Lack of personal knowledge
 2. Not relevant
 3. Hearsay
- v. Close of State's Case – V.R.Cr.P. 29 – Motion for Judgment of Acquittal
- vi. Defense's Case
- vii. Closings
- viii. Charge conference

VI. Post-Trial Motions and Issues

- a. Motion for a New Trial – V.R.Cr.P. 33
- b. Motion for Judgment of Acquittal – Again – V.R.Cr.P. 29
- c. Sentencing:
 - i. General (Public – other potential defendants) and Specific (this Defendant) Deterrence
 - ii. Punishment – The Public and the State getting their pound of flesh
 - iii. Different than the federal system with sentencing guidelines – Judges have a lot of discretion
 - iv. Rules of evidence do not apply in sentencing hearings, everything comes in