

RORY T. THIBAUT
STATE'S ATTORNEY

KRISTIN GOZZI
SR. DEPUTY STATE'S ATTORNEY

MALACHI BRENNAN
BRIDGET GRACE
ASHLEY HILL
ALFONSO VILLEGAS
DEPUTY STATE'S ATTORNEYS



STATE OF VERMONT
OFFICE OF THE
WASHINGTON COUNTY STATE'S ATTORNEY
255 NORTH MAIN STREET, SUITE 9
BARRE, VT 05641-4163
TELEPHONE: (802) 479-4220
FAX: (802) 479-4408

SUSAN SABENS
ELIZABETH HEBERT
ADMINISTRATION & SUPPORT

HOLLY LEACH
MELISSA BICKELMAN
VICTIM ADVOCATES

TODD PROTZMAN
INVESTIGATOR

POLICY MEMORANDUM

Interim Guidance on Fingerprinting & Photographing (Effective January 1, 2020)

Background

1. Recently, the Vermont Supreme Court held that 20 V.S.A. § 2061(d), concerning the taking of fingerprints in misdemeanor cases, “unambiguously requires an individualized showing of good cause for the court to order fingerprinting in the context of a misdemeanor arraignment, and does not authorize a blanket rule pursuant to which courts may order fingerprinting at arraignment in all misdemeanor cases.” The Court noted that the policies and procedures associated with Vermont’s participation in the Interstate Identification Index (“Triple-I”) System does not constitute good cause alone.¹
2. 20 V.S.A. § 2061(b) provides that: “[a] law enforcement officer may take, or cause to be taken, the fingerprints and photographs of a person who is arrested or given a summons or citation for a misdemeanor, only in the event that the officer would be permitted to make an arrest under Rule 3 of the Vermont Rules of Criminal Procedure.” Additionally, § 2061(d) provides that “[w]hen a defendant is arraigned for any misdemeanor and has not been previously fingerprinted and photographed in connection with the criminal proceedings leading to the arraignment, upon request of the attorney for the state and for good cause shown, the court shall order that the defendant submit to be fingerprinted and photographed at a time and place set by the court.”
3. V.R.Cr.P. 3(b) and 3(c) distinguish between witnessed and non-witnessed misdemeanors. V.R.Cr.P. 3(b) provides that “[a] law enforcement officer may arrest without a warrant a person whom the officer has probable cause to believe has committed or is committing a misdemeanor in the presence of the officer. Such an arrest shall be made while the crime is being committed or without unreasonable delay.”

¹ See *State v. Grant*, 2019-376, 2019 VT 91 (available at: <https://www.vermontjudiciary.org/sites/default/files/documents/op19-376.pdf>)

4. V.R.Cr.P. 3(c) provides guidance on the handling of non-witnessed misdemeanors: “[i]f an officer has probable cause to believe a person has committed or is committing a misdemeanor outside the presence of the officer, the officer may issue a citation to appear before a judicial officer in lieu of arrest. The officer may arrest the person without a warrant if the officer has probable cause to believe:

(1) The person has failed to provide satisfactory proof of identity.

(2) Arrest is necessary to obtain nontestimonial evidence upon the person or within the reach of the person, including an **evidentiary test for purposes of determining blood alcohol content**.

(3) Arrest is **necessary to prevent the continuation of the criminal conduct for which the person was detained, to prevent harm to the person detained or harm to another person**.

(4) The person has **no ties to the community reasonably sufficient to assure his or her appearance**, or there is a likelihood that he or she will refuse to respond to a citation.

(5) The person has **previously failed to appear in response to a citation, summons, warrant**, or other court order issued in connection with the same or another offense.

(6) The person has **violated an order issued by a court in this state pursuant to 12 V.S.A. chapter 178, 15 V.S.A. chapter 21, or 33 V.S.A. chapter 69 or subsection 5115(e)**.

(7) The person has violated a foreign **abuse prevention order** issued by a court in any other state, federally-recognized Indian tribe, territory or possession of the United States, the Commonwealth of Puerto Rico or the District of Columbia.

(8) The person has committed a misdemeanor which involves an **assault against a family member, or against a household member**, as defined in 15 V.S.A. § 1101(2), or a child of such a family or household member.

(9) The person has committed a misdemeanor offense prohibited by 13 V.S.A. §§ 1376-1379 against a **vulnerable adult** as defined in 13 V.S.A. § 1375(8).

(10) The person has violated 23 V.S.A. § 1201 (operating a vehicle under the influence), and has a **prior conviction under section 1201**.

(11) The person has violated a hate-motivated crime injunction issued pursuant to chapter 33 of Title 13.

(12) The person has **violated a condition of release** that relates to:

(A) **a restriction on travel, including curfew;**

(B) **the operation of a motor vehicle;** or

(C) **direct or indirect contact or harassment of a victim or potential witness.**

(13) The person has violated 13 V.S.A. § 1062 (**stalking**).

(14) The person has violated 13 V.S.A. § 1023 (**simple assault**).

(15) The person has violated 13 V.S.A. § 1025 (**recklessly endangering another person**).

(16) The person has violated 13 V.S.A. § 1304(a) (**cruelty to a child**).

(17) The person is a sex offender who has failed to comply with the provisions of subchapter 3 of chapter 167 of Title 13 (sex offender registration and notification).

Recommended Practices

1. Ultimately, discretion rests with the investigating officer whether to exercise the authority to arrest under V.R.Cr.P. 3(c). The allowance for arrest in cases of non-witnessed misdemeanors covers a broad range of offenses, many of which are not presumptively subject to court diversion or other pre-adjudication dispositions.

2. Decisions should continue to be based on public safety and the attendant circumstances of the interaction with the subject. Fingerprinting is most critical in cases that entail “listed crimes” as provided for under 13 V.S.A. § 5301(7), or the situations noted under V.R.Cr.P. 3(c) where risk of flight or public safety are a concern. Listed misdemeanor offenses include stalking (13 V.S.A. § 1062), domestic assault (13 V.S.A. § 1042), reckless endangerment (13 V.S.A. § 1025), violation of an abuse prevention order (13 V.S.A. § 1030), or abuse of a vulnerable adult (13 V.S.A. § 1376-1379). These offenses are all governed by 20 V.S.A. § 2061(b) and no change to existing practice is required.

3. At this time, for the remaining misdemeanor offenses (e.g. disorderly conduct, violation of conditions of release not subject to V.R.Cr.P. 3(c)(12), unlawful trespass,

etc.) this office asserts that “good cause” generally exists only when the individual is arrested or cited under the following circumstances:

a. Pursuant to V.R.Cr.P. 3(c)(1) when a person has failed to provide satisfactory proof of identity;

b. Pursuant to V.R.Cr.P. 3(c)(4) when a person has no ties to the community reasonably sufficient to assure his or her appearance, or there is a likelihood that he or she will refuse to respond to a citation;

c. Pursuant to V.R.Cr.P. 3(c)(5) when a person has previously failed to appear in response to a citation, summons, warrant, or other court order issued in connection with the same or another offense.

4. In cases where prints and photos are not obtained, I recommend that officers include notation of the following in their affidavits of probable cause:

Prints and photographs were not obtained at the time of citation/arrest, and I respectfully request that the Court order the subject to be printed and photographed if convicted.

The office will implement a form motion to accompany case filings when necessary, allowing for the court to order fingerprints and photographs upon conviction. In circumstances where prints and photos are believed to be necessary but could not be obtained, for example when a subject is combative or incapacitated, officers should specify such and request prints and photos as a condition of release, clearly citing a basis for “good cause.”

Conclusion

The Supreme Court’s ruling should have minimal impact, as a majority of the affected cases are presently referred to diversion or to a community justice program for adjudication and do not result in a criminal conviction. This policy will expire on or before December 31, 2020 pending any legislative changes or statewide policies adopted.

APPROVED December 30, 2019