

COÖS, SS.

SUPERIOR COURT

State of New Hampshire

v.

Volodymyr Zhukovskyy

214-2019-CR-078

MOTION PURSUANT TO NHRE 609 – ANTHONY PLANT

NOW COMES the accused, by and through counsel, Jay Duguay and Steve Mirkin, Esq., and respectfully moves the Court pursuant to NHRE 609 (a) for leave to impeach the anticipated State witness, Anthony Plant, by reference to the following criminal convictions:

- a) Grafton Superior Court No. 215-2017-CR-065, three counts of selling a controlled drug (fentanyl), subsequent offense, in January and February 2017 (date of conviction May 25, 2017);
- b) Merrimack Superior Court No. 217-2016-CR-839, one count of possessing controlled drug in July 2016, date of conviction March 23, 2017; and
- c) Rockingham Superior Court No. 218-2015-CR-570, one count each of selling and possessing controlled drug in February 2015, date of conviction September 10, 2015.

In support hereof, the accused states as follows:

1. Anthony Plant appears on the State's witness list. Based on discovery provided, it is anticipated that he will testify as to his claimed observations of the accused's operation of his truck at Berlin City Motors, approximately one-half hour prior to the crash which is the subject of the indictments herein.

Granted

/s/ Peter H. Bornstein
Honorable Peter H. Bornstein
March 24, 2022

Clerk's Notice of Decision
Document Sent to Parties
on 03/24/2022

2. NHRE 609 (a)(1) provides in pertinent part as follows:
 - (a) *In General*. The following rules apply to attacking a witness's character for truthfulness by evidence of a criminal conviction:
 - (1) for a crime that, in the convicting jurisdiction, was punishable by death or by imprisonment for more than one year, the evidence:
 - (A) must be admitted, subject to Rule 403, in a civil case or in a criminal case in which the witness is not a defendant.
3. Each of the above-cited convictions on Mr. Plant's record are for felonies, punishable by imprisonment for more than one year.
4. Less than ten years have passed from the date of any of the above convictions, NHRE 609 (b).
5. Rule 403 analysis where the prior conviction is being sought for use under Rule 609 (a) against a witness, rather than against the defendant, is limited to whether "the probative value of admitting the evidence outweighs its prejudicial effect to the defendant." State v. McGill, 153 NH 813, 816 (2006) (emphasis in original); see Zola v. Kelley, 149 NH 648 (2003).
6. In this case, there is no prejudice at all, let alone substantial danger of unfair prejudice, to the defendant, arising from introduction of any of the above-referenced convictions to attack Anthony Plant's character for truthfulness. Nor do any of the other factors identified in Rule 403 – confusing the issues, misleading the jury, undue delay, wasting time, or needlessly presenting cumulative evidence – provide any reason for exclusion of this evidence herein. Where Rule 609 (a)(1) applies, a "trial court [is] required to admit evidence of the prior conviction if its probative value outweigh[s] its prejudicial effect to the defendant." *McGill, supra*, 153 NH at 816.

WHEREFORE, the accused respectfully prays the Court that this Motion be granted,
and for such further relief as may be just.

Respectfully submitted,



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CERTIFICATE OF SERVICE

I hereby certify that a copy of the foregoing has been forwarded this 9th day of March, 2022, to John G. McCormack, Esq., Coös County Attorney, and Scott Chase, Esq. and Josh Speicher, Esq., Assistant Attorneys General.



Steve Mirkin