Note: Decisions of a three-justice panel are not to be considered as precedent before any tribunal.

ENTRY ORDER

SUPREME COURT DOCKET NO. 2009-463

OCTOBER TERM, 2010

In re Yasin J. Mouliert	}	APPEALED FROM:
	}	
	}	Chittenden Superior Court
	}	
	}	DOCKET NO. S0261-08 CnC
		Trial Judge: Helen M. Toor

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

Defendant in this post-conviction-relief proceeding appeals from a summary judgment in favor of the State. Defendant contends the trial court erred in concluding that the charges to which he pled guilty did not present a double jeopardy violation requiring an express waiver. We affirm.

The material facts are undisputed. Defendant was originally charged with sexually assaulting the victim, a minor. The affidavit of probable cause recounted the victim's statement that defendant had pushed her onto a bed, sat on her stomach, "touched her breast and then put his hands down inside her pants and underwear and put one of his fingers inside her vagina." Defendant, who was represented by counsel, later entered into a plea agreement providing for amendment of the sexual assault charge to two counts of lewd and lascivious conduct, consecutive sentences of two to five and half years on each count, and a zero to one year sentence on a related charge of violating an abuse-prevention order, for a total sentence of two and a half to eleven years.

At the change of plea hearing, the trial court personally addressed defendant, explaining that the State had amended the sexual assault charge "into two separate lewd and lascivious conduct charges" and confirming that defendant understood and voluntarily pled guilty to both charges. The court then asked defendant to describe the offenses, and defendant responded that he had "sat on top of NC and inserted one finger inside of her and grabbed her breasts." The trial court accepted the negotiated plea and sentence.

One year later, defendant filed a pro se petition for post-conviction relief. Counsel was appointed, and an amended petition was later filed, asserting that defendant had committed only a single act of sexual misconduct, and that the plea was therefore invalid under the double jeopardy clause absent an express waiver. The parties filed cross-motions for summary judgment. In November 2009, the court issued a written decision, concluding that the two counts of lewd and lascivious conduct were not "facially multiplicitous" and that an express waiver was

therefore not required. Accordingly, the court entered judgment for the State. This appeal followed.

Just as a plea of guilty and ensuing conviction for a single offense represents a binding, final admission to having committed the substantive crime, so too a defendant who pleads guilty to two counts with allegations of distinct offenses "concede[s] that he has committed two separate crimes." United States v. Broce, 488 U.S. 563, 570 (1989). Thus, a voluntary and knowing plea generally constitutes an implicit waiver of any potential constitutional defenses, including a double jeopardy claim. Id. at 573-74; In re Parks, 2008 VT 65, ¶ 17, 184 Vt. 110. An exception to this rule has been recognized for double jeopardy claims where "judged on its face the charge is one which the State may not constitutionally prosecute." Menna v. New York, 423 U.S. 61, 63 n.2 (1975) (emphasis added); see also Parks, 2008 VT 65, ¶ 17 (holding that guilty plea implicitly waives double jeopardy defense if it was entered into knowingly and voluntarily and "the charges to which the defendant pleads do not on their face create a double jeopardy violation"). Only when a double jeopardy violation is apparent on the face of the charge or plea agreement, the defendant must "deliberately relinquish" his right to effectuate a waiver. Id. (quoting Taylor v. Whitney, 933 F.2d 325, 330 (5th Cir. 1991)).

Given the presumptive validity of a voluntary plea, this exception to the waiver rule has generally been narrowly limited to those circumstances where the factual record created at the plea or sentencing hearing conclusively demonstrates that "the court had no power to enter the conviction or impose the sentence." Broce, 488 U.S. at 569; see also Thomas v. Kerby, 44 F.3d 884, 889 (10th Cir. 1995) (rejecting post-conviction double-jeopardy claim where "the information and record do not conclusively demonstrate a single offense, but raise at most a question of fact that might have been resolved in petitioner's favor if he had disputed the matter at trial"); State v. Kelty, 2006 WI 101, ¶ 26, 716 N.W.2d 886 ("Under Broce, if a court cannot determine, based on the record, whether there is a double jeopardy violation, a guilty plea will relinquish a defendant's opportunity to have her double jeopardy claim resolved on the merits."). Thus, in Menna, the defendant was indicted and pled to the identical offense for which he had previously been convicted so that, as the Supreme Court later explained, "the admissions made by Menna's guilty plea could not conceivably be construed to extend beyond a redundant confession to an earlier offense." Broce, 488 U.S. at 576. Similarly, in Parks there was no real dispute that, when the original assault-and-robbery and habitual offender charges were later split into separate counts of assault-and-robbery and larceny from the person, the amended "charges alleged the same facts and amounted to the same offense," and we thus concluded that the defendant obviously "could not constitutionally be haled into court on the two essentially identical charges." 2008 VT 65, ¶ 19. Indeed, the double-jeopardy violation in Parks was so apparent that the trial court specifically questioned defense counsel as to whether "defendant was being charged with the same crime twice," yet failed to obtain an express waiver. Id. ¶¶ 4-5.

Here, defendant similarly contends that the two charges of lewd and lascivious conduct created a double jeopardy violation so obvious that an explicit relinquishment of the defense was required. Defendant relies on State v. Perrillo, 162 Vt. 566, 568 (1994), where we held that a defendant's rubbing of the victim's chest and vulva over the course of a few minutes constituted a single offense of lewd and lascivious conduct. Defendant also relies on State v. Fuller, 168 Vt.

396, 400 (1998), where we set forth several nonexclusive factors to consider in deciding whether a sexual assault consists of separate acts or one continuous assault, including the "elapsed time" between the acts, whether the acts occurred in more than one location, whether there was any "intervening event," and whether there was time for "reflection" between the acts sufficient to form a separate intent. Applying these factors, defendant argues that the touching of the victim's breasts and insertion of his finger into her vagina were close in time, and that there was no change of location, intervening event, or time for reflection sufficient to support two convictions.

Although the argument raises at least a colorable constitutional claim, we cannot conclusively determine—based on the limited record at the change-of-plea—that the two charges were so factually duplicative that the State could "not constitutionally prosecute" them. Menna, 423 U.S. at 63 n.2. Unlike Perrillo, where the defendant rubbed, but did not penetrate, different parts of the victim's body, the allegations here set forth two separate forms of misconduct—rubbing the victim's chest and digitally penetrating her vagina—that were significantly different in nature. In addition to the factors set forth in Fuller, courts have recognized that "differing and separate means or acts of abuse or gratification" may demonstrate that the defendant formed separate intents "to gratify himself or abuse his victim." Harrell v. State, 277 N.W.2d 462, 473 (Wis. Ct. App. 1979); see also State v. Koller, 2001 WI App 253, ¶¶ 59-60, 635 N.W.2d 838 (Wis. Ct. App.) (holding that defendant was properly convicted of separate sexual assault charges involving penis-to-vagina and mouth-to-vagina contact, as they were "plainly different in nature and involve[d] a new volitional departure, regardless of how much time separate[d] the two").

On the record presented to the district court it was only arguably, but not facially, impermissible for the state to charge two offenses. The underlying allegations described what could reasonably be read to be a lewd touching of the victim's breast as well as a sexual assault upon her vagina distinct from the other touching. Moreover, a determination of actual double jeopardy would have required further factual inquiry by the court, at least as to time elapsed and time for reflection under Fuller, when, as pointed out by the superior court, supplemental fact finding can be treated as waived by the defendant's voluntary guilty plea. See State v. Kelty, 2006 WI 101, ¶ 2, 716 N.W.2d 886, 888 (noting that where a determination of charge duplication depends on factual scrutiny beyond the given record, a voluntary plea of guilty is difficult to attack on duplication grounds since the right to additional fact finding is waived by virtue of the plea). In rejecting defendant's claim, the superior court here also analogized, appropriately in our view, to the "rebuttable presumption" recognized in Fuller that repeated sexual assaults constitute "separate and distinct" offenses, rather than a single continuous crime. 168 Vt. at 399. Thus, under the "narrow exception" to the waiver rule relied upon by defendant, United States v. Kurti, 427 F.3d 159, 162 (2d Cir. 2005), we cannot agree that the record "conclusively demonstrate[s] a single offense," Thomas, 44 F.3d at 889, and therefore find no grounds to invalidate the otherwise indisputably voluntary plea.[*]

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[*] Nevertheless, we take the opportunity to underscore that the better practice, and one to avoid disputes of this sort, when taking a "plea of convenience" on two charges at least arguably

Affirmed.

BY THE COURT:

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John A. Dooley, Associate Justice

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Denise R. Johnson, Associate Justice

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Brian L. Burgess, Associate Justice

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derived from one occurrence is to inform the defendant of his constitutional rights under the double jeopardy clause and obtain an express waiver.