

VT SUPERIOR COURT
WASHINGTON UNIT
STATE OF VERMONT

SUPERIOR COURT
Washington Unit

W
2019 AUG 28 P 2:23 CIVIL DIVISION
Docket No. 212-4-19 Wncv

JONATHAN WHALLEY
Petitioner

v.

STATE OF VERMONT
Defendant

DECISION
Mr. Whalley's Motion for Summary Judgment

Petitioner Jonathan Whalley seeks postconviction relief arguing that his guilty pleas in several criminal cases were accepted by the criminal court without compliance with the factual basis requirement of criminal Rule 11(f). V.R.Cr.P. 11(f). The guilty pleas at issue are those that were entered on August 1, 2008 in eight criminal cases docketed as numbers 971-8-06 Wncr; 1161-9-06 Wncr; 1163-9-06 Wncr; 66-1-07 Wncr; 128-1-07 Wncr; 142-1-07 Wncr; 544-4-07 Wncr; and 128-2-08 Wncr.¹ Mr. Whalley has filed a summary judgment motion supported by a complete transcript of the change of plea hearing at which his pleas were accepted and sentences were imposed. The factual record, essentially the transcript of the change of plea hearing, is undisputed. Otherwise, the State opposes summary judgment or any award of postconviction relief.

Rule 11(f) provides that "[n]otwithstanding the acceptance of a plea of guilty, the court should not enter a judgment upon such plea without making such inquiry as shall satisfy it that there is a factual basis for the plea." V.R.Cr.P. 11(f). "[A]n 'adequate factual basis' sufficient . . . [for Rule 11(f) purposes] must consist of some recitation on the record of the facts underlying the charge and some admission by the defendant to those facts." *In re Bridger*, 2017 VT 79, ¶ 21, 205 Vt. 380. The criminal cases at issue here were resolved long before *Bridger*, and thus pre-*Bridger* standards apply to whether the plea colloquy satisfied Rule 11(f). See *In re Barber*, 2018 VT 78, ¶¶ 10–16.

At the August 1, 2008 change of plea hearing, the prosecutor described the factual basis for the charge in the case docketed as No. 1161-9-06 Wncr. The court then asked Mr. Whalley, "[O]n this—on that particular charge, if the case went to trial, based on at least the facts presented by [the prosecutor], as well as I'm sure there's other facts, do you believe there's enough evidence by which a court or a jury could find you guilty of the elements of that offense beyond a reasonable doubt?" Mr. Whalley then responded, "Yeah. Pro— yes, probably."

The court itself then proceeded to review the numerous additional charges, briefly

¹ As part of the plea agreement, several charges were dismissed under these and other docket numbers. This resulted in the dismissal of some cases entirely.

describing a factual basis for each one. It then said, "So Mr. Whalley, if all of those cases went to trial, based on the information in the police officer's affidavits, do you admit that a court or a jury could find you guilty of the elements of the offense beyond a reasonable doubt?" Mr. Whalley then replied, "Yes, they could, your Honor."

The manifest problem with the questions put to Mr. Whalley is that they did not in any way ask him to admit to the facts asserted to form the bases for the charges. They instead asked him to speculate about whether a finder of fact could arrive at a guilty determination based on such facts. This is insufficient for Rule 11(f) purposes. The precise issue was addressed in *Barber's* analysis of the *In re Danielle M. Rousseau* case. See *Barber*, 2018 VT 78, ¶ 36 ("Here, petitioner Rousseau acknowledged that a court could find her guilty, but made no admission concerning the facts. Therefore, the requirements of Rule 11(f) were not met."). Mr. Whalley otherwise made no relevant factual admissions.

Following the colloquy, Mr. Whalley addressed the court and essentially apologized for his criminal behavior and attributed it largely to his previous substance abuse. The State argues that this somehow should change the Rule 11(f) analysis. However, in addressing the court, Mr. Whalley mentioned his criminal behavior generally. He did not specifically admit to the facts that formed the factual bases of the charges then at issue. Mr. Whalley's comments have no impact on the Rule 11(f) analysis.

The State also argues that if the court determines that any guilty pleas should be vacated for lack of compliance with Rule 11(f), then the court should sue sponte direct the substitution of nolo contendere pleas rather than remanding to the criminal division for further proceedings. The court is aware of no authority for such a procedure in these circumstances, and the State has supplied none. The court declines to impose nolo contendere pleas on Mr. Whalley in these circumstances.

Accordingly, Mr. Whalley is entitled to post-conviction relief. His guilty pleas in the eight criminal cases docketed as numbers 971-8-06 Wncr; 1161-9-06 Wncr; 1163-9-06 Wncr; 66-1-07 Wncr; 128-1-07 Wncr; 142-1-07 Wncr; 544-4-07 Wncr; and 128-2-08 Wncr are vacated. The State is free to determine how to proceed in those cases, as well as in any cases that were dismissed as part of the plea agreement, when proceedings resume in the criminal division. See *In re Morin*, 2011 VT 132, ¶¶ 9-10, 191 Vt. 580 (recognizing the State's authority to "reinitiate the dismissed charges—either by recharging or by making a motion to reinstate the charges with the court that dismissed them" in similar circumstances).

ORDER

For the foregoing reasons, Mr. Whalley's motion for summary judgment is *granted*.

Final judgment will be entered forthwith, and this matter will be remanded to the criminal division for further proceedings consistent with this decision.

Dated at Montpelier, Vermont this 28th day of August 2019.

Mary Myles Teachout
Mary Myles Teachout
Superior Judge