

*Note: In the case title, an asterisk (\*) indicates an appellant and a double asterisk (\*\*) indicates a cross-appellant. Decisions of a three-justice panel are not to be considered as precedent before any tribunal.*

**ENTRY ORDER**

SUPREME COURT DOCKET NO. 2019-294

MARCH TERM, 2020

In re Walter Thompson Jr.\*

} APPEALED FROM:  
}  
} Superior Court, Orleans Unit,  
} Civil Division  
}  
} DOCKET NO. 10-1-19 Oscv

Trial Judge: Howard E. Van Benthuisen

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

Petitioner appeals the civil division’s grant of summary judgment in favor of the State with respect to his petition for post-conviction relief (PCR), in which he claimed violations in the taking of his guilty pleas to charges of domestic assault. We affirm.

At a change-of-plea hearing on October 31, 2017, petitioner pled guilty to two counts of first-degree aggravated domestic assault and one count of misdemeanor domestic assault. He received an aggregate sentence of four-to-seven years to serve, which was what the State recommended under the plea agreement. On January 7, 2019, petitioner filed a PCR petition, arguing that his change of plea was invalid because the colloquy between the court and him at the change-of-plea hearing did not ensure that his guilty plea to the misdemeanor count was voluntary and that his guilty plea to one of the felony counts was voluntary and based on his acknowledgement of the facts supporting the charge. In response to the parties’ cross-motions for summary judgment, the civil division denied defendant’s motion and granted the State’s motion. Defendant appeals, arguing that the plea colloquy failed to establish a sufficient factual basis for one of the felony counts and that the change-of-plea court erred by converting his guilty plea into a no-contest plea.

“To prevail on his PCR petition, petitioner needed to show by a preponderance of the evidence that one or more fundamental errors rendered his conviction defective.” *In re Bridger*, 2017 VT 79, ¶ 9, 205 Vt. 380 (quotation omitted). We review de novo the trial court’s summary judgment decision, applying the same standard as the trial court: summary judgment is the proper remedy when “there is no genuine issue of material fact and the movant is entitled to judgment as a matter of law.” *Id.* (quotation omitted).

Petitioner first argues that he never admitted a factual basis to one of the felony domestic assault charges, in which he was accused of putting his hand in the complainant’s mouth and permanently damaging a tooth. At the change-of-plea hearing, the following exchange took place

with respect to that count. The court stated that defendant was charged with causing bodily injury by damaging the complainant's teeth. When the prosecutor further explained that petitioner damaged the complainant's teeth by striking her in the mouth, petitioner interjected that she bit his thumb while it was in her mouth, causing him to yank out his thumb and break one of her teeth. He then added, "[s]he bit my thumb, and I yanked it, and it broke one of her partial plates." At that point, the court suggested that there was a question as to whether serious bodily injury occurred, depending on whether the teeth were injured or only the plate was damaged. Reading from the complainant's affidavit, the court noted that the complainant had alleged that defendant pulled out her partial plate and a front tooth. Defense counsel acknowledged that the complainant had alleged all along "that it was her tooth." The prosecutor noted seeing the complainant's tooth pointing in a different direction and permanently damaged. The court then asked petitioner if he agreed that his actions "also damaged part of [the complainant's] natural teeth," to which petitioner replied, "I would—if it did, it did. I didn't realize it was a natural tooth. I thought it was a partial—." At that point, the court found a factual basis to the charge, noting that defendant did not need to know all the consequences of his action and that "there's no contest." The court then asked defendant how he pled to the charge, to which defendant responded, "Guilty."

Vermont Rule of Criminal Procedure 11(f) provides that, prior to accepting a plea, the court must make an inquiry to "satisfy it that there is a factual basis for the plea." Pursuant to Rule 11(f), a plea colloquy must "include the defendant's personal admission of the facts underlying the offense." In re Barber, 2018 VT 78, ¶ 2, 208 Vt. 77. Petitioner argues that his responses in the colloquy described above "did not amount to an admission that serious bodily injury occurred, much less that [he] caused or attempted to cause such an injury willfully or recklessly." We disagree. Petitioner acknowledged the incident in which he placed his hand inside the complainant's mouth. He first described breaking one of her teeth, but then stated that he thought he had pulled out only a partial plate rather than a tooth. As noted, however, after hearing the complainant's written allegation, his attorney's comment that that had always been the complainant's allegation, and the prosecutor's observation of the damaged tooth, petitioner responded, "I would—if it did, it did. I didn't realize it was a natural tooth." This response demonstrated petitioner's acknowledgment and acceptance of the fact that he had damaged the complainant's natural tooth. That was sufficient to demonstrate petitioner's understanding of the elements of the offense and, specifically, his personal admission to facts supporting the element of causing serious bodily harm. Cf. Kyle v. United States, 759 A.2d 192, 200 (D.C. 2000) (rejecting Rule 11(f) claim because "even though appellant said he could not remember what occurred," he admitted to complainant's version of what occurred, which satisfied elements of charged crime).

Asserting that the change-of-plea court sought to cure the Rule 11(f) deficiency by reclassifying his guilty plea to the above count as a no-contest plea, petitioner also argues that because the Rule 11(f) requirement is a necessary component to a voluntary plea, as required by Rule 11(d), his guilty plea cannot be saved in that manner. This argument is unavailing, given our determination that the colloquy in this case satisfied Rule 11(f).<sup>\*</sup> In any event, the record

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<sup>\*</sup> In its decision, the PCR court stated that petitioner's response, "if it did, it did. I didn't realize it was a natural tooth," was, in effect, a "tacit admission," which the court "view[ed]" as a

demonstrates that petitioner's guilty plea on the count in question was voluntary, and petitioner does not argue otherwise.

Affirmed.

BY THE COURT:

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Paul L. Reiber, Chief Justice

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Harold E. Eaton, Jr., Associate Justice

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William D. Cohen, Associate Justice

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no contest plea. As indicated above, we conclude that petitioner's response and subsequent guilty plea satisfied Rule 11(f)'s requirement that he personally admit to the facts underlying his plea. Accordingly, to the extent the PCR's court's comments can be construed as converting petitioner's guilty plea into a no-contest plea, as petitioner claims, we conclude that there was no need to do so.