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

ENTRY ORDER

SUPREME COURT DOCKET NO. 2005-064

FEBRUARY TERM, 2006

State of Vermont	}	APPEALED FROM:
	}	
v.	}	District Court of Vermont,
	}	Unit No. 2, Chittenden Circuit
James L. Bristol	}	
	}	DOCKET NOS. 4358-8-04 & 695-2-97 CnCr
		Trial Judges: Linda Levitt, Edward J. Cashman

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

Defendant appeals from his conviction of unlawful trespass, which was based on his nolo contendere plea. He argues that his plea was involuntary because the trial court failed to ensure that he understood the nature of the charge against him. Defendant also asserts that the trial court erred in revoking his probation and imposing his underlying sentence for a sexual assault conviction because the court=s decision may have been based on the unlawful trespass conviction. We affirm.

In January 1998, defendant pled guilty to sexual assault. He was sentenced to three to eight years, all suspended except twenty days, and he was placed on probation. Among other conditions of probation, defendant was prohibited from engaging in public behavior of a sexual nature, such as hiring strippers or purchasing pornography, Aor any other behaviors@ that placed him at risk of re-offending. Defendant violated probation in February 1999, and he was sentenced to three to eight years, all suspended except thirty days. A new condition of probation was added that prohibited defendant from purchasing, possessing, or consuming alcohol.

In August 2004, defendant was charged with felony burglary in violation of 13 V.S.A. ' 1201(c) and lewd and lascivious conduct in violation of 13 V.S.A. ' 2601. The supporting affidavit explained that police responded to a trespass report at a Burlington apartment where the victim, Gwendolyn Blaine, stated that she had been sleeping with the door open and a man, later identified as defendant, entered her apartment wearing only a pair of pants. Blaine did not know or recognize defendant, but indicated that he might have known her from her volunteer work. She did not invite defendant into her apartment. According to the affidavit, defendant kept trying to get Blaine to hug him, he grabbed her breasts from the outside of her clothing, and he took off his pants. Blaine went into her bedroom. Defendant then made two telephone calls and left the apartment.

In addition to the criminal charges, a probation violation complaint was also filed against defendant in August 2004. Defendant=s probation officer averred that on August 5, 2004, defendant had called an ex-girlfriend, Janet Thompson, approximately twenty times within two hours. Defendant had done the same thing in July and September 2002, and he had been warned that he would receive a citation if he continued engaging in such behavior. On August 5, 2004, defendant received a citation from police for disturbing the peace by telephone. The complaint also recounted the incident with Blaine, described above. Finally, the complaint stated that defendant had admitted consuming alcohol on numerous occasions, including the evening that he entered Blaine=s apartment.

In November 2004, Blaine completed an affidavit reiterating that defendant, whom she did not know, had entered her apartment. Although defendant insisted that she knew him, she still did not know who he was. Defendant told her that he wanted to lay down and cuddle up with her. He started to take his pants off. Blaine averred that defendant was not acting violent but rather Aout of it.@ She stated that he did not make sexual advances toward her.

Based on the victim=s affidavit, defendant moved to dismiss the criminal charges against him for lack of a prima facie case. At a status conference, however, the parties informed the court that they had entered into a plea agreement. Defendant agreed to plead nolo contendere to an amended charge of unlawful trespass in violation of 13 V.S.A. ' 3705(d), and he agreed to plead guilty to a violation of probation. The State agreed to dismiss the lewd and lascivious conduct charge.

After defendant admitted violating probation, the court read the unlawful trespass charge to him and explained the penalty that could be imposed for the crime. Defendant stated that he understood the charge, and he wanted to plead no contest. The court explained the rights that defendant would be giving up by pleading no contest. Although defendant initially indicated that he did not want to give up these rights, after counsel reminded him of their prior discussion, he said that he accepted the plea agreement. The State indicated that it would rely on the victim=s affidavit to explain the basis of the charge; defendant also admitted to the court that he entered the victim=s home. At the close of the hearing, the State indicated that it needed to talk to defendant=s therapist and assess the risk that defendant posed to the community before it could determine its sentencing recommendation. In response to the State=s comments, defendant=s attorney stated that there was some discrepancy as to whether defendant knew the victim or had been invited to her apartment. He acknowledged, however, that defendant had gone into the victim=s apartment late at night and clearly she was not expecting him.

A sentencing hearing was held several weeks later. As noted above, defendant admitted violating probation and the State explained that there were multiple bases for the violation including defendant=s consumption of alcohol and his repeated telephone calls to Ms. Thompson. The State asked that defendant be incarcerated, explaining that defendant was on probation for sexual assault and he had spent only a minimal amount of time in jail. Defendant=s counselor, Mr. Martin, whom defendant had been seeing since 1999, opined that defendant posed a public safety risk. The State also noted that defendant had entered Ms. Blaine=s home, and it was undisputed that she did not want him there. At the close of the hearing, the court stated that its main concern was that the outside service provider, Mr. Martin, was uncomfortable working with defendant. It was also concerned by defendant=s objectification of Ms. Thompson. The court revoked defendant=s probation on the sexual assault conviction and imposed the underlying sentence of three to eight years. On the unlawful trespass charge, the court imposed a suspended sentence of two to three years, to run consecutively, to be followed by probation. Defendant appealed.

Defendant first argues that his nolo contendere plea was involuntary because the trial court failed to ensure that he understood the elements of the charged crime. Specifically, he asserts that in light of the confusion over whether he had been invited to the victim=s apartment, and considering that he is mentally disabled, the court should have been more careful in explaining the elements of the charge and ensuring that he understood them.

A plea cannot support a judgment of guilt unless it is voluntary in the constitutional sense, and a plea cannot be voluntary unless a defendant receives Areal notice of the true nature of the charge against him, the first and most universally recognized requirement of due process.@ <u>Henderson v. Morgan</u>, 426 U.S. 637, 644-45 (1976) (quotation omitted). Rule 11 of the Vermont Rules of Criminal Procedure is designed to ensure that a defendant=s plea is knowing and intelligent, i.e., voluntary. <u>State v. Marku</u>, 2004 VT 31, & 21, 176 Vt. 607 (mem.); <u>Henderson</u>, 426 U.S. at 645 n.13 (AA plea may be involuntary either because the accused does not understand the nature of the constitutional protections that he is waiving . . . or because he has such an incomplete understanding of the charge that his plea cannot stand as an intelligent admission of guilt.@) (citation omitted). To this end, the trial court may not accept a plea of nolo contendere without first informing a defendant, and determining that he understands, among other things, Athe nature of the charge to which the plea is offered.@ V.R.Cr.P. 11(c)(1); see also <u>Henderson</u>, 426 U.S. at 645 n.13 (noting that A[w]ithout adequate notice of the nature of the charge against him, or proof that he in fact understood the charge,@ a plea cannot be voluntary in the sense that it is an intelligent admission of guilt). Because defendant failed to object during the Rule 11 plea colloquy, our review is for plain error only. <u>Marku</u>, 2004 VT 31, & 22.

We find no plain error here. Defendant=s assertion that he did not understand the true nature of the charge against him is belied by the record. The record shows that the trial court read the unlawful trespass charge to defendant, including the allegation that defendant had entered the victim=s apartment knowing that he was not licensed or privileged to do so. Defendant stated that he understood the charge. We recently examined an almost identical Rule 11 colloquy and found no error. See Marku, 2004 VT 31, & 23. As in this case, the trial court in Marku explained the nature of the charge to the defendant, and described the rights that he would be giving up by pleading guilty. Id. In response to the court=s query, defendant indicated that he understood what had been explained to him. Id. We concluded that the requirements of V.R.Cr.P. 11(c) were thereby satisfied. We discern no basis for reaching a contrary conclusion here.

We are not persuaded by defendant=s assertion that we should infer from his temporary confusion about waiving his trial rights that he similarly did not understand the nature of the charge against him. Additionally, defense counsel=s suggestion that defendant may have been invited to the apartment was offered in the context of determining an appropriate sentence. The suggestion was undermined by counsel=s later recognition that defendant had entered the apartment late at night and the victim was plainly not expecting him. Moreover, we note that defendant did not admit that he was guilty of the charge; instead, he pled no contest. See North Carolina v. Alford, 400 U.S. 25, 35 n.8 (1970) (explaining that Aplea of nolo contendere has been viewed not as an express admission of guilt but as a consent by the defendant that he may be punished as if he were guilty and a prayer for leniency@; and noting that F.R.Cr.P. 11 preserves the distinction between a guilty plea and a plea of nolo contendere by omitting requirement that trial court ensure that there is a factual basis for the plea).

Defendant maintains that like the defendant in Henderson, 426 U.S. 637, he is mentally handicapped and thus needed additional explanation of the nature of the charge. In Henderson, the United States Supreme Court considered Awhether a defendant may enter a voluntary plea of guilty to a charge of second-degree murder without being informed that intent to cause the death of his victim was an element of the offense.@ Id. at 638. Although the Court noted that the defendant had a low I.Q., its decision did not rest on this fact. Instead, the Court found that there had been no discussion during the plea colloquy of the elements of the offense, no indication that the nature of the offense had even been discussed with defendant, and no reference of any kind to the intent element of the crime. Id. at 642-43. The Court explained that, normally, a record contains either an explanation of the charge by the trial judge or a representation by defense counsel that the nature of the offense had been explained to the accused. Id. at 647 (explaining that, Aeven without such an express representation, it may be appropriate to presume that in most cases defense counsel routinely explain the nature of the offense in sufficient detail to give the accused notice of what he is being asked to admit@). Because the defendant had not received adequate notice of the offense to which he pled guilty, the Court concluded that his plea was involuntary and thus, the judgment of conviction had been entered without due process of law. Id.

We are not persuaded that this case supports defendant=s claim of error. Unlike Henderson, the trial court in this case did explain the elements of the offense to defendant, and defendant indicated that he understood the charge. Defendant=s reliance on Bradshaw v. Stumpf, 125 S.Ct. 2398 (2005) is equally misplaced. As defendant recognizes, in that case, the Supreme Court reiterated that a guilty plea is invalid if a defendant is unaware of the nature of the charges against him, including the elements of the charge to which he pled guilty. Id. at 2405. The Court explained that a trial judge need not explain the elements of the charge to a defendant on the record, but rather, the constitutional requirements of a valid plea may be satisfied where the record accurately reflects that the defendant=s competent counsel explained the nature of the charge and the elements of the crime. Id. Bradshaw does not establish, as defendant suggests, that a defendant must confirm on the record that he understood each element of a charged crime.

Finally, we are not persuaded that McCarthy v. United States, 394 U.S. 459 (1969) supports defendant=s claim of error. In McCarthy, the trial court failed to inquire personally whether the petitioner understood the nature of the charge against him as required by F.R.Cr.P. 11, and the Supreme Court held that compliance with the rule could not be inferred in the absence of such an inquiry. Id. at 464, 467. The Court also found that the elements of the charged offense had not been explained to the petitioner. Id. at 471. As previously discussed, that is not the case here. Defendant fails to establish that his plea was involuntary or that the trial court committed plain error in accepting it.

Defendant next challenges the trial court=s order revoking his probation and imposing the underlying sentence for sexual assault. He acknowledges that he violated probation by consuming alcohol but maintains that it is far from clear that this was the only factor that the court took into account during sentencing. Defendant argues that the record suggests that the court may have also factored in the unlawful trespass charge as well as harassing telephone calls that he was alleged to have made.

Defendant admitted violating probation, and thus his challenge is aimed more at the sentence imposed by the court than the court=s finding that a probation violation occurred. He did not raise any of these claims of error below. The sentencing court has wide discretion in determining the sentence to be imposed and it Amay consider factors such as the defendant=s disposition, family, and prior criminal record, in addition to the nature of the crime for which the defendant was convicted.@ State v. Neale, 145 Vt. 423, 435 (1985). The court expressly declared that the unlawful trespass incident was not a factor in sentencing, but as we have concluded that defendant=s unlawful trespass conviction was validly entered, we find no error in the court=s consideration of it, if indeed the court considered it at all. Defendant did not object to the court=s consideration of the harassing phone calls, and in fact, he essentially admitted making the calls. Defendant stated to the court that he needed to learn to relax on the phone, and A[i]f somebody doesn=t want to be bothered, don=t call them. If they say they don=t want to talk to you, don=t call them.@ In any event, the record indicates that the trial court based its sentencing decision on the fact that defendant=s outside service provider no longer felt comfortable working with defendant and not the telephone calls. Cf. State v. Bacon, 169 Vt. 268, 273 (1999) (harmless error doctrine applies to sentencing proceedings).

This case is not like State v. Higgins, 147 Vt. 506 (1986) (per curiam), cited by defendant, where we remanded for resentencing after concluding that two of the probation violations found by the trial court were not supported by the evidence. Id. at 508. We explained in Higgins that we could not know what sentence the trial court might have imposed if it had found one violation of probation rather than three. Id. As noted above, in this case, defendant admitted violating probation, and he fails to demonstrate that the court=s sentencing decision was based on consideration of any inappropriate factors. We thus find no basis to disturb the court=s order revoking defendant=s probation and imposing his underlying sentence for sexual assault.

Affirmed.

BY THE COURT:

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John A. Dooley, Associate Justice

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Marilyn S. Skoglund, Associate Justice

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Brian L. Burgess, Associate Justice