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

ENTRY ORDER

SUPREME COURT DOCKET NO. 2016-325

APRIL TERM, 2017

State of Vermont	}	APPEALED FROM:
	}	
	}	Superior Court, Chittenden Unit,
v.	}	Criminal Division
	}	
	}	
Paul J. Washburn	}	DOCKET NO. 5582-12-93 Cncr
		Trial Judge: James R. Crucitti

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

Defendant appeals the superior court's denial of his motion to vacate a 1994 criminal conviction for driving while intoxicated (DWI), first offense, and the accompanying civil suspension of his driver's license, based on his contention that the court at the 1994 arraignment accepted his no-contest plea to the DWI charge without assuring that he knowingly and intelligently waived his right to counsel and that the court failed to inform him of the potential collateral consequences associated with the conviction. We affirm.

The facts are not in dispute. On December 9, 1993, defendant, who was twenty-two years old at the time, was involved in a multi-vehicle automobile accident. According to the police affidavit, defendant informed police that he had drunk approximately twenty beers that day. During DWI processing at the police station, defendant submitted a breath sample that produced an evidentiary test result indicating a blood-alcohol content of .233 percent.

Defendant was arraigned on a charge of DWI on January 6, 1994. When the court inquired at the arraignment whether any pro se defendants were present, defendant identified himself and came forward. At that point, he had already negotiated a no-contest plea with the prosecutor. The plea agreement indicated that the State had agreed to recommend a sentence of zero-to-thirty days and that defendant's insurance company had "covered claims and any remaining restitution to be paid thru restitution." Defendant informed the court that the only thing left for him to do was to sign the agreement. The court then engaged defendant in a colloquy. The first part of the colloquy proceeded as follows:

> The Court: Okay. All right, Mr. Washburn, do you understand you have the right to be represented by an attorney—
>
> [Defendant]: Yes

The Court: —in these proceedings? Do you want to have the opportunity to hire an attorney—

[Defendant]: No.

The Court: —to represent you?

[Defendant]: No.

The Court: Or apply for public defender?

[Defendant]: Nope.

The Court: You want to represent yourself?

[Defendant]: Yes.

The Court: Are you giving up your right to be represented by an attorney?

[Defendant]: Yes.

The Court: Have you received a copy of the information which is the pink form?

[Defendant]: Yes.

The Court: And the affidavit of Officer Champlain?

[Defendant]: Champlain, yes.

The Court: Have you had an opportunity to review those documents?

[Defendant]: Yes, I have.

The Court: Do you have any questions or want anything read or explained to you?

[Defendant]: No.

The Court: Okay. You have a right to wait twenty-four hours before entering a plea and, if you want to exercise that right, we can have you return tomorrow?

[Defendant]: Nope

The Court: Do you want to enter a plea—

[Defendant]: All set.

The Court: today?

[Defendant]: Yup.

The court then proceeded to engage defendant in a colloquy concerning the elements of the charge and the consequences of entering into a plea on the charge. In relevant part, defendant indicated he understood that there would be a suspension of his license and that if, in the future, he was charged with another DWI, "the penalties [would] increase and a third offense [could] be charged as a felony."

Twenty-two years later, on February 29, 2016, defendant filed a motion to vacate the judgment pursuant to a writ of coram nobis.[1] In support of the motion, he stated that the court at the 1994 arraignment engaged him in a truncated colloquy that failed to assure he knowingly and intelligently waived his right to counsel and understood all of the consequences of pleading no contest to the DWI charge. Among other things, he noted that a third DWI could result in a lifetime suspension of his license and that a violation of his probation could result in him being incarcerated. He stated that even if the court had no duty to inform him of these particular consequences, "these questions could have been answered by consulting with an attorney." At the hearing on his motion to vacate the judgment, defense counsel noted that the record in the 1994 proceeding did not contain a written waiver of counsel, but he agreed that the colloquy was "pretty good," though not "perfect." Defendant also acknowledged that at the time of the 1994 colloquy the law did not require a warning of collateral consequences to persons entering pleas. See V.R.Cr.P. 11, Reporter's Notes—2016 Emergency Amendment (adding provision to Vermont Rule of Criminal Procedure 11(c) requiring court to advise defendants before accepting plea "that there may be collateral consequences to a conviction"); see also 13 V.S.A. § 8005 (2013 law requiring pretrial notice of specified collateral consequences to defendants who may plead guilty to or be convicted of charged offense and requiring court, before accepting no-contest pleas, to assure that defendants are aware of collateral consequences). Nonetheless, defendant argued that the court at the 1994 arraignment should have informed him"of the prospect of lifetime suspension" or increased insurance requirements if he arranges an ignition interlock device.

In a June 2016 decision, the superior court denied the motion to vacate. The court concluded that the 1994 colloquy provided sufficient information to defendant regarding the right to and availability of counsel. The superior court acknowledged that the 1994 court did not ensure that defendant understood all of the collateral consequences of his no-contest plea, but concluded that defendant failed to establish any legal support for his argument that this fact required vacation of the 1994 conviction.

On appeal, defendant argues that his 1994 conviction must be vacated because the record does not demonstrate a knowing and intelligent waiver of counsel or an adequate notice of potential

[1] Apparently, the impetus for defendant's motion was the fact that he had a second DWI conviction, with an accompanying civil suspension, in 2000, and a recent negligent operation conviction stemming from a DWI charge that led to a third civil suspension.

collateral consequences at the 1994 arraignment in which he pled no-contest to the charge of DWI, first offense. We discern no basis to vacate the 1994 conviction.[2] As defendant points out, a "waiver of counsel may not be found from a mere plea of guilty, or from the appearance of defendant without counsel, or from failure to request counsel, or from a record which is completely silent on this point." In re Huard, 125 Vt. 189, 194 (1965) (quotation omitted); see also State v. van Aelstyn, 2007 VT 6, ¶ 8, 181 Vt. 274 ("[T]he understanding and intent to waive counsel must be clear; the absence of a colloquy may not be justified solely by a defendant's silence or other equivocal conduct."). Here, waiver of counsel was not found on a silent record or on defendant's failure to request counsel. To the contrary, the record, as set forth above, reveals that the court at the 1994 arraignment engaged defendant in a colloquy in which he made it absolutely clear that he wanted to waive counsel and enter into the plea.

> [W]e require no sacrosanct litany for warning defendants against waiving the right to counsel[,] as the appropriate inquiry is what the defendant understood—not what the court said. We have found knowing and intelligent waivers when there was little or none of the suggested colloquy but circumstances nevertheless indicated that the waiver was knowing and intelligent.

Id. ¶ 13 (quotations omitted).[3] The colloquy in this case was sufficient to demonstrate a knowing and intelligent waiver of counsel.

Defendant's argument regarding notice of potential consequences of his plea appears to be dependent upon his argument that his waiver of counsel was not knowing and intelligent. In any event, the court at the 1994 arraignment confirmed defendant's understanding that, by entering

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[2] In addition to arguing that there was an adequate waiver of counsel and explanation of collateral consequences at the 1994 arraignment, the State argues that a writ of coram nobis is not available to defendant because he failed to exhaust his other remedies or justify his failure to do so in the past. See State v. Sinclair, 2012 VT 47, ¶¶ 7, 16, 191 Vt. 489 (noting that U.S. Supreme Court has held that writ of coram nobis is available only when no other remedy exists and there are sound reasons for not having sought relief earlier, and holding that writ is broad enough under modern-day formulation in federal court to encompass not only errors of fact but also legal errors of constitutional import and that "coram nobis is a viable means for challenging criminal convictions" but "may be used [only] when no other remedy is available"). The superior court rejected the State's argument finding that the State failed to provide support for this position. Given our determination that that there was a valid waiver of counsel and no-contest plea at the 1994 arraignment, we need not resolve the question of whether the writ is available to defendant under the circumstances of this case.

[3] The record indicates there was good reason for defendant to enter into a no-contest plea, given that he was charged with DWI in a multi-vehicle accident. See V.R.Cr.P. 11(e)(5)(B) (providing that no-contest plea is not admissible against defendants "in any civil . . . proceeding"). As noted, the plea agreement indicated that defendant's insurance company was covering claims concerning the accident, suggesting that defendant knew there was potential for civil liability.

into the plea, his license would be suspended and future DWI convictions would subject him to increased penalties, including being charged with a felony for a third offense. The court provided this warning to defendant even though, until the 2016 amendment to Vermont Rule of Criminal Procedure 11(c), the rule did not "require that a defendant be informed of the consequences of recidivism." State v. Pilette, 160 Vt. 509, 511 (1993).

Affirmed.

BY THE COURT:

_____
Beth Robinson, Associate Justice

_____
Harold E. Eaton, Jr., Associate Justice

_____
Karen R. Carroll, Superior Judge,
Specially Assigned