STATE OF VERMONT

| SUPERIOR COURT<br>Washington Unit | CIVIL DIVISION<br>Docket No. 299-6-19 Wncv |
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| Rickey L. LaPrade,<br>Plaintiff<br><br>v.<br><br>State of Vermont,<br>Defendant | |

Opinion and Order on Motion to Dismiss and Motion for Summary Judgment

Plaintiff brings this post-conviction review (PCR) proceeding seeking to vacate his plea of guilty to Driving Under the Influence (DUI) No. 4. Plaintiff pled guilty to that offense on October 23, 2003. He maintains, however, that the trial court failed to ensure that there was an adequate factual basis for the plea under Vt. R. Crim. P. 11(f). The State moves to dismiss on the ground that the Plaintiff is no longer "in custody under sentence" on the DUI charge and cannot challenge the plea on that basis. Plaintiff opposes dismissal and moves for summary judgment on the merits of its Rule 11(f) claim. The State opposes the motion. The Court makes the following determinations.

Analysis

I. The State's Motion to Dismiss

The State argues that the Plaintiff was sentenced to a nine-month to five-year sentence concerning the DUI No. 4. As a result of the passage of time, the

State maintains that the sentence has been served and Plaintiff is no longer "in custody under sentence" as is required by the PCR statute. 13 V.S.A. § 7131. The State also acknowledges, however, that Plaintiff was subsequently convicted of other offenses in 2004, 2006, and 2007 for which he received consecutive terms and that those terms do not expire until 2023.

The Plaintiff argues that, under 13 V.S.A. § 7032(c)(2), the Legislature has indicated that consecutive incarcerative terms are to be added together to obtain "*an* aggregate maximum." (Emphasis added.) As a result of that law, Plaintiff maintains, he remains in custody under all of his sentences until they are all complete. Plaintiff also asserts that analogous federal law supports that result. *See generally Garlotte v. Fordice*, 515 U.S. 39 (1995).

The Court believes that Plaintiff's approach is correct under Vermont law. The language of Section 7032 supports that view and, if Plaintiff succeeds in this action, that result may shorten his present term of imprisonment.

Similarly, the *Garlotte* Court's rationale in coming to a similar conclusion under federal law is persuasive. The Chittenden Superior Court's ruling in *In re: Matthew Rudavsky*, No 1111-10-13 Cncv (July 15 2014 Pearson, J.), pp. 6-9, explains in greater detail the force of *Garlotte's* analysis. The Court appends that ruling to this Opinion and Order and adopts its rationale on that point.

The Court concludes that Plaintiff is in custody and under sentence for the DUI No. 4 offense. The State's motion to dismiss is denied.

II. The Alleged Rule 11(f) Violation.

In the area of post-conviction relief, the "petitioner bears the burden of proof . . . and must show, 'by a preponderance of the evidence, that fundamental errors rendered his conviction defective.'" *In re Combs*, 2011 VT 75, ¶ 9, 190 Vt. 559, 561 (mem.) (quoting *In re Liberty*, 154 Vt. 643, 644 (1990) (mem.)). Here, Petitioner claims that the plea colloquy that preceded his guilty plea did not comport with Vt. R. Crim. P. 11(f) and that the deficiency warrants vacating his conviction. Specifically, he argues that, the Court failed to ascertain whether he was admitting to sufficient facts to support a conviction under Rule 11(f). The State counters that the colloquy "substantially complied" with Rule 11(f).

As interpreted by the Vermont Supreme Court, "Rule 11(f) requires not only that a court perform an inquiry to satisfy that there is a factual basis for a defendant's guilty plea, but also that the defendant understand that the conduct admitted violates the law as explained by the court." *State v. Blish*, 172 Vt. 265, 273 (2002); *see State v. Yates*, 169 Vt. 20, 24 (1999) (Rule 11(f) requires "that the defendant admit to and possess an understanding of the facts as they relate to the law for all elements of the charge or charges to which the defendant has pleaded"); *see also* Reporter's Notes — Vt. R Crim. P. 11 (rule is designed to "prevent the entry of false guilty pleas in situations where the defendant does not completely understand the elements of the charge or realize that [he or she] has a valid defense"). The rule accomplishes those goals by ensuring that the charge is

warranted by the underlying facts and that the defendant both agrees to those facts and understands that they establish criminal liability.

To pass muster under Rule 11(f), the court must directly inquire into the factual basis of the plea, and the defendant must "admit to and possess an understanding of the facts as they relate to the law for all elements of the charge or charges to which the defendant has pleaded." *Yates*, 169 Vt. at 24.

While the law now is different, *see In re Bridger*, 2017 VT 79, ¶ 20, 205 Vt. 380, 391, the law in effect at the time of Plaintiff's change of plea required only "substantial compliance" with Rule 11(f). *State v. Cleary*, 2003 VT 9, ¶ 15, 175 Vt. 142, 148; *see In re Barber*, 2018 VT 78, ¶¶ 11–13, 208 Vt. 77, 85–86 (holding that *Bridger's* rejection of the substantial compliance standard would not apply retroactively). Under that standard, there is "no particular formula" for determining whether there is a factual basis for the plea. *In re Stocks*, 2014 VT 27, ¶ 15, 196 Vt. 160, 167.

To determine whether a plea colloquy substantially complied with Rule 11(f), the Court should consider the complexity of the charged offense and the underlying factual circumstances. *State v. Whitney*, 156 Vt. 301, 302 (1991). Defendant's admission to the facts during the colloquy is usually sufficient, as is a recital of the facts by the prosecutor followed by a statement by the defendant confirming their accuracy. *In re Stocks,* 2014 VT 27, ¶ 15, 196 Vt. at 167.

A. The Merits of the Rule 11(f) Claim

Here, even under the more-forgiving standard applicable to pre-*Bridger* cases, the Court believes that the colloquy did not substantially comply with the requirements of Rule 11(f). Plaintiff pled guilty to DUI No. 4. The transcript shows that the Court did obtain an agreement from Plaintiff that he, in fact, had three prior convictions for driving under the influence. Tr. at 5. But, as to the remaining elements of the charge, the Court did not set them out with specificity, nor did it obtain an agreement from the Plaintiff that he had engaged in conduct that would satisfy those elements. The colloquy was as follows:

> The Court: And if this case did go to trial, based on the information in the police officer's affidavit, you admit that a court or a jury could find you guilty of the elements of the offense beyond a reasonable doubt?
>
> The Defendant: Yes.

Tr. at 6.

The Court agrees with Plaintiff that this colloquy is indistinguishable from the colloquy found wanting in *In re Barber*. In that decision, the Court reviewed a guilty plea that was based on the following exchange:

> THE COURT: If this case did go to trial, based on the information in the police officer's affidavit, do you admit that a court or a jury could find you guilty of the elements of the offense beyond a reasonable doubt?
>
> [Petitioner Rousseau]: Yup.

*In re Barber*, 2018 VT 78, ¶ 35, 208 Vt. at 94. Applying the substantial compliance standard, the Court vacated the guilty plea because the petitioner had only

"acknowledged that a court could find her guilty, but made no admission concerning the facts." *Id*. The same is true with regard to Plaintiff's plea. *Cf. In re Perkins*, No. 2018-325, 2019 WL 1110111, at *3 (Vt. Mar. 8, 2019) (3-Justice opinion) (different result where defendant acknowledged: reading the police affidavit, that it contained sufficient facts to support the elements of the charges, and that he was pleading guilty because he was "in fact" guilty of those charges).

B. The State's Entitlement to a Hearing

Against this result, the State argues that the Court should conduct a factual inquiry to determine whether Plaintiff's plea was voluntary. The Plaintiff counters that the Rule 11(f) inquiry is to be done on the record. The Court agrees with the Plaintiff.

As a textual matter, it is Vt. R. Crim. P. 11(d), not 11(f), that is directed at ensuring that a plea was entered into voluntarily. Nonetheless, our High Court has also indicated that the factual basis demanded by Rule 11(f) "goes directly to the voluntariness of [a defendant's] plea." *In re Dunham*, 144 Vt. 444, 451 (1984). The Court does not believe, however, that the law permits the parties to engage in an extra-record factual contest as to whether a defendant actually understood and agreed to a factual basis for the plea. Instead, a number of factors compel the conclusion that compliance with Rule 11(f) must be determined based on the record.

First, the text of the Rule supports that result. Rule 11(f) provides: "Notwithstanding 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.*" Vt. R. Crim. P. 11(f) (emphasis added). It is this "inquiry" and the response from the defense that determines whether the court properly determined that there was a factual basis for the plea. That inquiry can only be assessed by examining the actual record. In other words, it does not matter whether other witnesses could establish that there was a factual basis for the charges or even whether the defendant may have conceded the factual basis to a third party in another setting. The Rule requires *the trial judge* to make the inquiry, hold a colloquy, and confirm the factual basis for the plea. Whether she did so properly is assessed on the record.

Second, that result is supported by the case law. Numerous decisions have examined alleged Rule 11(f) violations and made plain that their analysis was based on "the record" from the plea colloquy. In *In re Kasper*, for example, the Court stated: "On the record before us, we cannot say that the defendant possess[ed] an understanding of the law in relation to the facts. . . . Absent such an affirmative showing *on the record*, we must conclude that defendant's pleas were not voluntary. 145 Vt. 117, 121 (1984) (emphasis added). Similarly, *Bridger* states:

> By ensuring, at the least, that the defendant personally admits to facts relating to the elements of the offense, the court exposes the defendant's understanding of the factual basis for each element on the record, which facilitates the court's understanding of the facts and provides subsequent courts with the opportunity *to review the record* to establish that the defendant's plea was truly voluntary.

*In re Bridger*, 2017 VT 79, ¶ 22, 205 Vt. at 392–93 (emphasis added). *Accord In re Miller,* 2009 VT 36, ¶ 11, 185 Vt. 550, 556 ("The requirement that *the record affirmatively show* facts to satisfy each element of the offense is, consequently,

absolute." (emphasis added)); *Durham*, 144 Vt. at 451 ("*record must affirmatively show* sufficient facts to satisfy each element of an offense") (emphasis added).

Third, Vt. R. Crim. P. 11(g) provides that:

> A verbatim record of the proceedings at which the defendant enters a plea shall be made and, if there is a plea of guilty or nolo contendere, the record shall include, without limitation, the court's advice to the defendant, the inquiry into the voluntariness of the plea including any plea agreement, and the inquiry into the accuracy of a guilty plea.

In turn, the Reporter's Notes to Rule 11 state that: "The purpose of the record is to provide evidence that the requirements of the rule were complied with if a conviction based on a plea of guilty or nolo contendere is challenged in post-conviction proceedings."

Fourth, while the original Reporter's Notes suggest that it was an open question as to whether a PCR court could make an extra-record inquiry regarding Rule 11(f), they also note that the United States Supreme Court had rejected such a practice in *McCarthy v. United States*, 394 US. 459 (1969).

In *McCarthy*, the United States Supreme Court held that the federal analog to Rule 11(f) was "designed to eliminate any need to resort to a later fact-finding proceeding in this highly subjective area. . . . There is no adequate substitute for demonstrating in the record at the time the plea is entered the defendant's understanding of the nature of the charge against him." *Id.* at 469–70 (internal quotation omitted). Though not expressly adopting that portion of *McCarthy*, a number of Vermont cases have

favorably cited *McCarthy* and its approach to assessing whether there is a factual basis for the plea. *See In re Bridger*, 2017 VT 79, ¶ 22, 205 Vt. at 392–93; *Kasper*, 145 Vt. at 121. The Court believes the Vermont Supreme Court will also follow *McCarthy* and conclude that Rule 11(f) reviews are on the record.

Lastly, the State's approach has many practical problems. It would mean that issues of fact would likely preclude resolution of most PCR cases that raise Rule 11(f) claims. In addition, as described by the Supreme Court in *McCarthy*, the evidentiary analysis of such claims would be fraught with difficulties, including the loss of evidence, the passage of time, and the subjective understanding of the defendant. *See McCarthy*, 394 U.S. at 469–70.

C. Transform the Plea Into a *Nolo Contendre* Plea

The final arrow in the State's quiver is its assertion that the Court should simply transform the existing guilty plea into a plea of *nolo contendre*. Since such pleas do not require that the Court make a determination under Rule 11(f), the State maintains the Court can reject Plaintiff's PCR claim on that basis.

The Court is unaware of any power or procedural vehicle through which to rewrite history to transform one type of plea into another. Even if it could somehow force Plaintiff to accept such a plea, a plea of *nolo contendre* also has to be acceptable to the court and to the State's Attorney. The Court

has no basis to know whether the original trial court and State's Attorney would have accepted such a result in connection with this DUI No. 4 plea. More importantly, where the Court concludes that there has been a Rule 11(f) violation, the plea itself is deemed to be involuntary. *In re Dunham*, 144 Vt. at 451. The remedy for such a violation is vacatur of the conviction. "To allow such a plea to stand would work a complete miscarriage of justice." *Id.* at 451; *accord McCarthy*, 394 U.S. at 472 ("a defendant whose plea has been accepted in violation of Rule 11 should be afforded the opportunity to plead anew").

III. Conclusion

In light of the foregoing, the State's motion to dismiss is denied and summary judgment is granted in favor of Plaintiff. Plaintiff's conviction is vacated, and the matter will be returned to the Criminal Division.

Dated at Montpelier, Vermont, this 24th day of December, 2019.

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Timothy B. Tomasi
Superior Court Judge