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

ENTRY ORDER

SUPREME COURT DOCKET NO. 2001-371

FEBRUARY TERM, 2002

State of Vermont	}	APPEALED FROM:
	}	
v.	}	District Court of Vermont,
	}	Unit No 3, Essex Circuit
Michael B. Cahill	}	
	}	
	}	DOCKET NO. 89-8-99 Excr
	}	
	}	Trial Judge: Dennis R. Pearson
	}	

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

Defendant appeals the district court's denial of his motion to withdraw a no-contest plea to a charge of disorderly conduct. We affirm.

In September 1999, defendant was arraigned on a charge of disorderly conduct based on an August 20, 1999 incident in which he engaged in a fight with another man. See 13 V.S.A. § 1026(1) (person who engages in fighting or threatening behavior, thereby intending to cause or recklessly causing public inconvenience or annoyance, shall be imprisoned for not more than sixty days and/or fined not more than $500). On December 8, 1999, the day the jury was to be drawn, the state's attorney informed the court that he and defendant had reached an agreement whereby defendant would plead no-contest to the charged offense, and the State would recommend a $300 fine, which would be suspended if defendant donated $300 to a local library. Following a colloquy with defendant, the district court accepted the plea agreement. Defendant never donated the money to the library. In the spring of 2001, the court scheduled a hearing on the matter and issued an arrest warrant when defendant failed to appear for the hearing. In July 2001, defendant's counsel entered an appearance and filed a motion to withdraw defendant's plea. The district court denied the motion, ruling that the transcript of the plea hearing revealed that defendant had made a voluntary, knowing, and informed decision to plead no contest to the disorderly conduct charge. On appeal, defendant argues that the trial court's total failure to comply with V.R.Cr.P. 11(c), 11(d), and 11(f) at the plea hearing requires reversal.

Before addressing defendant's substantive arguments, we consider the standard of review. Under V.R.Cr.P. 32(d), if a motion to withdraw a plea "is made after sentence, the court may set aside the judgment of conviction and permit the withdrawal of the plea only to correct manifest injustice." We have interpreted the words "after sentence" to mean "after sentence is imposed or deferred." State v. Yates, 169 Vt. 20, 28 (1999). The record in this case indicates that the court imposed a deferred sentence. Accordingly, defendant cannot prevail unless he demonstrates manifest injustice. This rigorous standard is essentially the same as that applied to collateral attacks on plea agreements pursuant to petitions for post-conviction relief. See 3 C. Wright, Federal Practice and Procedure § 539, at 211 (2d ed. 1982). Under that standard, defendant "cannot prevail by merely claiming technical violations of Rule 11." In re Thompson, 166 Vt. 471, 475 (1997); see 3 C. Wright, supra, at 213. Rather, he must show that the court's failure to comply with Rule 11 prejudiced him. Thompson, 166 Vt. at 475. If the record of the plea hearing establishes that defendant made a knowing and voluntary plea, reversal is not required, even if the court failed to explain the nature of the charges or the maximum and minimum penalties applicable to the charged offense. Id. Relief is warranted, however, if "the record fails to remove

doubt as to whether [defendant] understood the charge[] at the time of the plea or whether a factual basis existed for the charge[]." Id. In short, substantial compliance, rather than strict adherence, to the rule is the standard, keeping in mind the particular facts and circumstances of each case.

Here, defendant appeared without counsel on the day of the jury draw. Before the jury was drawn, the state's attorney approached the bench and announced that he and defendant had reached a plea agreement. When the court asked defendant if that was correct, defendant indicated that he was annoyed at "copping a plea," but he was disillusioned and did not want to spend any more time dealing with the system. The court told defendant that if he was interested in telling his side of the story, then a jury could be chosen to decide the issue. Defendant declined the invitation, stating that he had decided not to go to trial. The court then noted that the State was alleging that defendant had engaged in fighting and threatening behavior. Defendant responded by stating that he was merely defending himself during the incident in question. The court interjected that defendant had to decide whether he wanted the plea agreement or a jury trial. Defendant indicated that he would shut up and pay his contribution to the library. At that point, the hearing adjourned.

First, we reject defendant's argument that the district court failed to comply with V.R.Cr.P. 11(d) and thus assure that his plea was voluntary. The colloquy at the plea hearing makes it clear that defendant's decision to plead no contest was one that he made voluntarily, and not as the result of coercion. Nor do we believe that reversal is required solely because of the court's failure to comply fully with V.R.Cr.P. 11(c). Without question, defendant knew what offense he was being charged with. He was not informed of the maximum and minimum penalties under the offense, but that was not a significant omission under the circumstances of this case. Cf. In re Bentley, 144 Vt. 404, 410-11 (1984) (court failed to explain nature of charges and to discuss minimum and maximum penalties of charged offense, but substantially complied with Rule 11); In re Hall, 143 Vt. 590, 595-96 (1983) (court failed to outline maximum and maximum penalties of charged offense, but substantially complied with Rule 11). The court explicitly and repeatedly informed defendant that he could elect to proceed to trial rather than accept the plea, which would require him to pay what amounted to a $300 fine, but defendant insisted that he had made his mind up not to go to trial.

The more difficult question is whether defendant's request to withdraw his plea must be granted because of the trial court's failure to comply with Rule 11(f), which requires the trial court to assure itself that there is a factual basis for the plea. We have stated "that 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, 776 A.2d 380, 387 (2002); see Yates, 169 Vt. at 24 (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 In re Kasper, 145 Vt. 117, 120 (1984) (Rule 11(f) ("The record must reveal that the elements of each offense were explained to the defendant and that a factual basis for each element was admitted."); In re Dunham, 144 Vt. 444, 450 (1984) (Rule 11(f) violated where factual basis for intent element of offense was not established). In this case, defendant contends that the court failed to examine the facts of the case in light of the elements of the charged offense, particularly the intent element included under 13 V.S.A. § 1026 ("A person who, with intent to cause public inconvenience, or annoyance or recklessly creating a risk thereof: (1) Engages in fighting or in violent, tumultuous or threatening behavior; . . . shall be imprisoned for not more than 60 days or fined not more than $500.00 or both.").

We find no manifest injustice. Rule 11 colloquies "may vary from case to case, depending on factors such as the competence of the defendant and the complexity of the legal issues." State v. Morrissette, 170 Vt. 569, 571 (1999) (mem.); see State v. Whitney, 156 Vt. 301, 302-03 (1991) (nature of inquiry required by Rule 11 necessarily varies from case to case; more searching inquiry under Rule 11(f) is required for more complex or doubtful situations). Here, the colloquy confirmed that there was a factual basis for the simple and straightforward charge of disorderly conduct. The court read the State's allegation that defendant had "engaged in fighting and violent, tumultuous, and threatening behavior." Defendant acknowledged engaging in a fight, but contended that he had acted in self-defense when the other man threw a rock at him. The court did not mention the mens rea element required by § 1026, but defendant has not suggested that the State would have been unable to prove that, at minimum, he recklessly created a risk of public inconvenience or annoyance. Cf. Dunham, 144 Vt. at 450 (refusing to infer requisite mental element for second degree murder where petitioner's mere presence as bystander at crime scene, by itself, did not establish intent to commit charge crime). Nor has defendant claimed that he was unaware of the mental element of the crime charged, or that he would not have agreed to plead no contest had he been aware of that element. Cf. State v. Gabert, 152 Vt. 83, 87-88 (1989) (where

lack of wrongful intent would not have been plausible defense, it was "simply not believable that defendant's plea was in any way affected by the judge's failure to mention an intent element"). Indeed, the transcript of the plea hearing demonstrates that defendant believed he was innocent of the charged offense because he had acted in self-defense, but that he wanted to plead no contest rather than go to trial.

Another factor weighing against defendant is the eighteen months that elapsed from sentencing until he filed his motion to withdraw the plea. A long delay in moving to withdraw a plea may, in and of itself, "be sufficient reason for denying it as not seasonably made." 3 C. Wright, supra, at 210; see United States v. Martell, 572 F. Supp. 110, 112 (D. Mont. 1983) (in view of problems that can result from withdrawal of guilty plea after considerable time has elapsed, court has obligation to be particularly vigilant in evaluating post-sentencing claims that pleas were involuntarily or unknowingly made). Given the simple and straightforward nature of the charged offense, the record of the plea hearing indicating that defendant entered the plea voluntarily and knowingly, and the length of time that passed before defendant filed his motion to withdraw, we find no manifest injustice in denying the motion.

Affirmed.

BY THE COURT:

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Jeffrey L. Amestoy, Chief Justice

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John A. Dooley, Associate Justice

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James L. Morse, Associate Justice