VERMONT SUPREME COURT
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Case No. 2021-015

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

OCTOBER TERM, 2021

In re Joshua J. Gould*	}	APPEALED FROM:
	}	Superior Court, Bennington Unit,
	}	Civil Division
	}	CASE NO. 274-9-18 Bncv
		Trial Judge: Cortland Corsones

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

Petitioner appeals a civil division order granting summary judgment to the State in his petition for post-conviction relief (PCR). On appeal, petitioner argues that his plea colloquy did not comply with Vermont Rule of Criminal Procedure 11(c) because the trial court did not explain the mental element of the charge. We affirm.

The following facts are undisputed. In September 2007, petitioner was charged with first-degree murder, grand larceny, and second-degree unlawful restraint. In October 2008, petitioner entered a plea agreement with the State, in which petitioner agreed to plead guilty to second-degree murder and the State agreed to dismiss the other counts. The parties agreed on a sentence of twenty-eight years to life. At the change-of-plea hearing, petitioner's counsel stated that petitioner "understood what he had done and that he was fully prepared to accept responsibility for his actions." He explained that at trial the focus of the argument would have been whether it was first- or second-degree murder. The trial court explained the rights that petitioner was giving up. Petitioner indicated that he had discussed the plea agreement with his attorneys and understood their advice. The trial court reviewed the sentence that was being imposed. The trial court then had the following colloquy with petitioner:

> THE COURT: . . . to the charge that [defendant], in the County of Bennington, at Winhall, on or about May 10th, 2006, committed second-degree murder by stabbing, in violation of 13 V.S.A. § 2301, punishable by life, the presumptive minimum term of at least twenty years—to that charge, what do you plead, [defendant]?
>
> THE DEFENANT: Guilty.
>
> THE COURT: And [defendant], did you, in fact, stab [the victim] on that occasion?

THE DEFENDANT: Yes, sir.

THE COURT: And did you stab him to death?

THE DEFENANT: Yes, sir.

Based on the colloquy with petitioner, the trial court accepted petitioner's plea, finding it was entered voluntarily and that there was a factual basis for the plea based on petitioner's own admission and the affidavit of probable cause.

In 2018, petitioner filed a PCR petition alleging that during his plea the trial court did not comply with the requirements of Criminal Rule 11 because the trial court did not recite the mens rea element of the charge and petitioner did not acknowledge that there was a factual basis for the plea. The parties cross moved for summary judgment. The PCR court concluded that the plea colloquy had substantially complied with the requirements of Criminal Rule 11(c) and (f). See V.R.Cr.P. 11(c)(1) (requiring that court inform defendant of nature of charge to which plea is offered); V.R.Cr.P. 11(f) (requiring factual basis for plea). The PCR court explained that the facts of the colloquy demonstrated that petitioner pled guilty with an understanding of the nature of the charge. These facts included the following: petitioner affirmatively replied that he stabbed the victim to death, petitioner did not express any confusion about the charges, petitioner's attorney acknowledged that the sole issue in the case was whether petitioner committed first- or second-degree murder, petitioner stated that he understood the plea agreement; and petitioner's counsel reviewed the charging information with petitioner. The PCR court also concluded that the trial court substantially complied with the factual-basis requirement of Rule 11(f) in that the petitioner admitted he stabbed the victim to death on the day in question. The PCR court entered judgment for the State.

On appeal, petitioner argues that he was entitled to summary judgment because the undisputed facts demonstrate that the plea colloquy failed to substantially comply with Rule 11(c). Summary judgment may be granted when there is no genuine issue of material fact, and the moving party is entitled to judgment as a matter of law. V.R.C.P. 56(a). "We review the PCR court's summary judgment decision applying the same standard, without deference to the court's analysis." In re Pinheiro, 2018 VT 50, ¶ 8, 207 Vt. 466.

Petitioner contends that the trial court did not inform petitioner of the requisite elements of second-degree murder before accepting the plea and therefore his plea is invalid. A PCR proceeding provides a limited remedy and is "intended to correct fundamental errors in the judicial process." In re Hemingway, 2014 VT 42, ¶ 7, 196 Vt. 384 (quotation omitted). Rule 11(c) states that prior to accepting a guilty plea, the trial court must inform the defendant of "the nature of the charge to which the plea is offered." V.R.Cr.P. 11(c)(1). This rule embodies the constitutional requirement that a plea be entered knowingly and voluntarily. Pinheiro, 2018 VT 50, ¶ 9. When Rule 11(c) challenges are brought in a PCR proceeding, the question is whether there was substantial compliance with the rule such that there was actual prejudice to the petitioner. See id. ("The rule requires substantial compliance to promote its ends, rather than technical conformity to a particular script; but where the record does not reflect that the defendant pled guilty with an understanding of the nature of the charge, the conviction based upon the guilty plea cannot stand."); Hemingway, 2014 VT 42, ¶ 8 (explaining that post-conviction relief is not for technical violations and substantial compliance is sufficient to achieve fairness).

Petitioner's argument focuses on the trial court's failure to specifically inform defendant of the intent element of second-degree murder during the plea colloquy. Petitioner claims that this requires reversal.

We conclude that although the trial court did not specifically discuss the mental state for second-degree murder during the plea colloquy, the record demonstrates that defendant possessed an understanding of the law in relation to the facts and there was no fundamental error. "Second-degree murder may be predicated on an intent to kill, an intent to do great bodily harm, or a wanton disregard of the likelihood that one's behavior may cause death or great bodily harm." State v. Congress, 2014 VT 129, ¶ 20, 198 Vt. 241. It is evident from the entire plea colloquy that petitioner pled guilty based on an understanding that his actions caused the victim's death, and that his acts were done with, at a minimum, a wanton disregard of the likelihood that his behavior may cause death or great bodily injury. Petitioner's counsel explained that if the case went to trial, then the sole question at trial would be whether petitioner's actions amounted to first- or second-degree murder, implying that petitioner agreed he had a mental state sufficient for second-degree murder. When the trial court questioned petitioner directly, petitioner responded that he had stabbed the victim and had stabbed the victim to death. Neither petitioner nor petitioner's counsel raised any affirmative defense or any facts surrounding the crime that would have raised questions about petitioner's mental state or that would indicate petitioner did not act with volition.

For this reason, this case differs from Pinheiro, on which petitioner relies. In that case, the petitioner pled guilty to aggravated domestic assault after shooting her ex-boyfriend in the leg. In describing the elements of the offense at the change-of-plea hearing, the trial court did not advise the petitioner on the mental element of aggravated domestic assault. During the colloquy, the petitioner explained that at the time of the shooting it was the middle of the night, she was trying to protect herself, and she had taken pills. The trial court did not provide any further explanation of the required mental state to ensure that petitioner understood. On appeal, this Court concluded that the mental element was not implicit in the facts admitted by the petitioner and reversed. Id., ¶ 17.

In contrast, in this case, there was nothing in the colloquy or the recitation of facts to indicate that petitioner acted with anything less than an intent necessary for second-degree murder.

Affirmed.

BY THE COURT:

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Beth Robinson, Associate Justice

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Karen R. Carroll, Associate Justice

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William D. Cohen, Associate Justice