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

SUPREME COURT DOCKET NO. 2018-325

MARCH TERM, 2019

In re Gary R. Perkins (State of Vermont*)	}	APPEALED FROM:
	}	
	}	Superior Court, Caledonia Unit,
	}	Civil Division
	}	
	}	DOCKET NO. 223-10-17 Cacv
		Trial Judge: Robert R. Bent

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

The State appeals the civil division of the superior court's grant of summary judgment to petitioner, who filed a post-conviction relief (PCR) petition contending that the plea colloquy at the hearing in which he pled guilty to several charges did not satisfy Vermont Rule of Criminal Procedure 11(f). Because we conclude that the colloquy satisfied the rule under our then-current law, we reverse the court's order and remand the matter for the court to grant summary judgment to the State.

In November 2016, while represented by counsel, petitioner pled guilty to charges of driving while intoxicated (DWI), fourth or subsequent offense, driving with a suspended license, and providing false information to a police officer. Following a lengthy colloquy at the change-of-plea hearing, the criminal division accepted petitioner's pleas.

In October 2017, petitioner filed his PCR petition with the civil division, arguing that the criminal division failed to satisfy Rule 11(f)'s factual-basis requirement during the colloquy at the change-of-plea hearing. See Vermont Rule of Criminal Procedure 11(f) (providing that court should not enter judgment upon guilty plea "without making such inquiry as shall satisfy it that there is a factual basis for the plea"). Based on the following portion of the underlying plea colloquy concerning Rule 11(f)'s factual-basis requirement, the civil division granted petitioner's motion for summary judgment:

> THE COURT: Do you understand that the DWI 4 or subsequent charge, alleges that on or about November 30 of 2014, you operated a motor vehicle on a public highway with an alcohol concentration of .08 or more, when you operated a Chevrolet Blazer on U.S. Route 5. At that time, you also had nine prior convictions for violating 23 VSA Section 1201. The maximum penalty is 5,000 dollars, or a term of—and/or a term of imprisonment of not more than ten years, or both. There has to be at least 192 consecutive hours of imprisonment. Do you understand that?

THE DEFENDANT: Yes.

THE COURT: Do you understand the State has also alleged that you are a habitual offender pursuant to Vermont law, and what that alleges is that you have three prior convictions of Vermont felonies, which were convictions in 2007 for DWI 3 or subsequent, in 1999 for DUI 4 or subsequent, in 1995 for DUI 4 or subsequent, and in 1982 for lewd and lascivious conduct. Do you understand that?

THE DEFENDANT: Yeah.

THE COURT: Do you understand that as a result of that enhancement, the sentence, instead of being a maximum of ten years in this particular case, is a maximum of up to life?

THE DEFENDANT: Yes.

THE COURT: Do you understand that the charge of driving with a suspended license in Count III alleges that on or about November 30 of 2014, that you were operating a motor vehicle on a public highway, while your license or privilege to operate was suspended or revoked for a DWI civil or criminal case, and that was while operating a Chevrolet Blazer, on U.S. Route 5?

The maximum punishment is two years, 5,000 dollars, or both, and there's a mandatory minimum of 300 dollars or forty hours community service that must be imposed. Do you understand that?

THE DEFENDANT: Yes.

. . . .

THE COURT: Okay. And Count V, Mr. Perkins, is false information to a police officer. It alleges that on November 30 of 2014, that you knowingly gave false information to a law-enforcement officer, with the purpose to deflect the investigation from yourself to another person, when you told Tpr. Herbs (ph.) that Crystal Knowles (ph.) drove you to the residence. The maximum punishment is six months, 500 dollars, or both. Do you understand that?

THE DEFENDANT: Yes.

. . . .

THE COURT: And to the charge of DWI 4 or subsequent, as alleged in Count I, what plea do you enter, guilty or not guilty?

THE DEFENDANT: Guilty.

THE COURT: To the charge of driving with a suspended license in Count III, what plea do you enter, guilty or not guilty?

THE DEFENDANT: Guilty.

THE COURT: And to the charge of false information in Count V, what plea do you enter, guilty or not guilty?

THE DEFENDANT: Guilty.

THE COURT: Have you previously reviewed the affidavit of Ofc. Herbs with your attorney?

THE DEFENDANT: Yes, Your Honor.

THE COURT: The affidavit that was filed in connection with this case?

THE DEFENDANT: Yes, I have.

THE COURT: And do you agree that that affidavit sets forth each . . . element—sets forth facts which establish each element—each of the charges to which you're entering your pleas here today?

THE DEFENDANT: Yes.

THE COURT: And are you pleading guilty to each of these charges because you are, in fact, guilty of them?

THE DEFENDANT: Yes.

THE COURT: The Court will find there's a factual basis, will find the plea to each charge had been made knowingly and voluntarily after a knowing, voluntary, and intelligent waiver, [and] will enter adjudications . . . of guilt. . . .

In granting petitioner summary judgment, the civil division stated that the criminal division did not specifically recite the facts underlying the charges and that petitioner did not admit to those facts or to the individual charges arising from those facts. Relying on State v. Bowen, 2018 VT 87, the court reasoned that, absent a specific recitation of the facts underlying the charges, petitioner's admission that he was "in fact" guilty amounted to only a generic admission to unspecified facts, in violation of Rule 11(f).

We disagree with the civil division's analysis. We initially note that this Court's decision in In re Bridger, 2017 VT 79, 205 Vt. 380—in which we revisited our law on Rule 11(f)—applied retroactively to Bowen, which was pending on direct appeal when Bridger issued. See Bowen, 2018 VT 87, ¶ 6. In contrast, the instant case is a collateral challenge to a Rule 11(f) colloquy, and thus any new law established in Bridger is not applicable. To be sure, "Bridger did not establish a new rule with respect to" the requirement in our precedents that there be "a recitation of the facts underlying the charges and some admission or acknowledgment by defendant of those facts." In re Barber, 2018 VT 78, ¶ 11. In Bowen, "there was no recitation of the facts underlying the charge or admission by defendant of those facts." 2018 VT 78, ¶ 11.

Here, in contrast, during the change-of-plea colloquy the civil division recited the specific alleged facts underlying each of the charges and confirmed that petitioner understood what the State was alleging. After petitioner indicated that he was pleading guilty to each of the charges,

he agreed that the affidavit accompanying the charges set forth facts establishing each element of each charge and that he was pleading guilty to each of the charges because he was "in fact, guilty of them." In other words, petitioner acknowledged that he was pleading guilty because he was guilty of having committed the acts as set forth in the affidavit. This is sufficient to satisfy the factual-basis requirement in Rule 11(f), certainly with respect to pre-Bridger law. "We do not require a particular formula for determining that there is a factual basis for the plea." In re Stocks, 2014 VT 27, ¶ 15, 196 Vt. 160. The fact that petitioner's acknowledgment of his having committed the acts as set forth in the affidavit came a few minutes after the court recited the alleged facts to him is of no consequence insofar as his acknowledgment was essentially a stipulation to a factual basis to the charges. See Barber, 2018 VT 78, ¶ 12 (stating that pre-Bridger caselaw permitted "a defendant's oral or written stipulation to the facts [to] support compliance with Rule 11(f)").

Reversed and remanded.

BY THE COURT:

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Marilyn S. Skoglund, Associate Justice

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Harold E. Eaton, Jr., Associate Justice

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Karen R. Carroll, Associate Justice