

VERMONT SUPERIOR COURT
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CIVIL DIVISION
Case No. 252-7-18 Wmcv

In Re: Charles Sherman Sr.

Decision on Motions for Summary Judgment

The petitioner, Charles Sherman, filed his motion for summary judgment on January 13, 2021. The State filed its opposition and cross-motion for summary judgment on March 12, 2021. The petitioner filed his reply and opposition to the cross-motion on May 28, 2021.

Undisputed Material Facts

The undisputed material facts related to this matter are as follows, derived chiefly from copies of the documents charging him in Docket No. 920-6-02 Wmcv, and the transcript of the petitioner's guilty plea and sentencing on January 13, 2005, in that case.

On July 1, 2002, the petitioner was charged with a single offense: aiding in aggravated murder, in violation of 13 V.S.A. § 3, 13 V.S.A. § 2301, and 2311(a)(3) (a murder is an aggravated murder if at the time of the murder, the defendant also committed another murder). The punishment for aggravated murder is imprisonment for life, with no parole. 13 V.S.A. § 2311(c). At the time of his pleas of guilty the charge of aggravated murder was dismissed, and he was instead charged with two counts of aiding in second degree murder.

The petitioner signed a written plea agreement on January 13, 2005, before the colloquy on his pleas was held in open court. The plea agreement stated that the petitioner and the State were agreeing that he would plead guilty to the two counts of aiding in second degree murder, and that the charge of aiding in aggravated murder would be dismissed. The agreement also stated that the parties would jointly recommend that the petitioner be sentenced to two concurrent sentences of 20 years to life in prison for the two charges to which he would be pleading guilty.

The parties agreed to waive a pre-sentence investigation and stipulated that his pleas would result in his violating his probationary sentence in another unrelated matter, that sentence would be revoked, the underlying suspended sentence would be imposed to serve, and would run concurrently with his new sentences.

The agreement stated that the petitioner "also understands and waives the following rights:

- a. The right to appeal the convictions and sentences imposed;
- b. The right to petition for post-conviction relief, including relief set forth in Section 7131 of Title 13, except a good faith claim alleging ineffective assistance of counsel or prosecutorial misconduct."

The agreement outlined all of the rights that the petitioner was giving up by entering pleas of guilty. In the agreement, the petitioner also stated: “I understand that by my pleas of GUILTY I am admitting the essential elements of the offenses of Aiding in Second Degree Murder of Gregg Enos and Colleen Davis with which I have been charged. I am also admitting that the State has sufficient evidence to convict me of these two offenses as amended.”

He stated that he had read the agreement, that he had consulted with his attorney about it and that he fully understood the agreement. His attorney, Matthew Harnett, also signed the agreement. The petitioner signed the agreement twice, once at the end of the section describing the details of the agreement, along with State’s Attorney Davis and the petitioner’s attorney, and again after the detailed waiver of rights.

The hearing on the petitioner’s arraignment on and pleas of guilty to the amended charges took place on the afternoon of January 13, 2005. At the beginning of the hearing, Judge John P. Wesley stated that he had reviewed the plea agreement and outlined his expectations as to the procedure to be followed during the hearing. He asked Mr. Davis to explain the basis for the agreement. Mr. Davis explained that the decision to enter into this agreement was based in part on the outcome of the co-defendant’s jury trial, in which the co-defendant was convicted of aggravated murder, and in part on his office’s careful review of the evidence against the petitioner, and the petitioner’s admissions to the police at the time of his arrest. Mr. Davis also stated that the families of the two victims generally approved of the proposed plea agreement.

He explained that the “factual scenario,” or factual basis for the pleas was that the petitioner and his co-defendant, Mr. Perez, were together before the deaths of the victims, Mr. Enos and Ms. Davis, they were together afterwards, and they were at the location where the homicides were committed. Also,

It was Mr. Sherman’s knife that was used with regard to the stabbing of Mr. Enos. Mr. Sherman acknowledges to the police in his statement that he was the one that had taken the knife from the [Thurston] residence, not Mr. Perez, and that he had provided that knife to Mr. Perez while Mr. Perez was attacking Mr. Enos.

Plea Transcript at 5–6.

Also,

Mr. Sherman acknowledged to the police that Michael Perez was -- sexually assaulted Colleen Davis and Mr. Sherman indicated that although his version of this was that he was ordered to do that, he went up and feigned, like he was participating in that act as well.

Id. at 6.

Mr. Davis stated that he would play about one hour of an audio-recording of the petitioner’s statement to the police to further understand “the facts that will support the plea agreement.” *Id.*

The petitioner’s attorney, Mr. Harnett, then explained that from the petitioner’s perspective, “one of the key considerations” was that he “always has maintained and will continue to maintain that Michael Perez did the actual killings. He’s pleading on an aiding theory to second degree murder on the notion that his actions constituted wanton disregard of the likelihood that his behavior would naturally cause death or great bodily harm.” *Id.* at 6–7.

He stated that the factual basis would “come from a number of places.” *Id.* at 7. He specifically outlined the facts he expected to support the plea, as follows:

One, an indication of some participation in the sexual assault of Colleen Davis by Michael Perez to the extent that he says he was told by Michael to basically drop his pants for oral sex from Ms. Davis. It's clear that she had been struck by Mr. Perez at that point and injured to some degree, that he did that, and feigned oral sex with her. At some point, he also told the police that he was witnessing the altercation between Mr. Enos and Mr. Perez, where he actually provided the knife to Mr. Perez that was used by Mr. Perez to stab Mr. Enos.

He also admits to the police, as you'll see in the tape, that he did help move some of the -- move -- I guess we believe the dead body of Michael -- excuse me, Mr. Enos -- into the pickup truck and then assist with getting Ms. Davis into the pickup truck where she was later found dead, while presumably she was still alive, setting the stage for Michael Perez to finish killing her by hitting her with the stick.

Id.

Mr. Harnett also stated that the petitioner told the police that he "feigned hitting Ms. Davis in the head by hitting the truck bed instead with the big stick. . . . to [] placate Mr. Perez who was ordering him to hit Ms. Davis with a stick." *Id.* at 8. The petitioner also admitted that he assisted with attempts to destroy evidence at the scene and to dispose of other evidence in various locations. *Id.* at 8.

Mr. Harnett explained that the petitioner had made

"a practical assessment of his chances at trial after he saw what happened to Mr. Perez, did not wish to take the risk of a sentence of life without parole, and came to this agreement after a very reasoned and practical look at his age, his life, where he wants to be in the next twenty-some-odd years. I think that's really the basis for this plea."

Id.

Attorney Harnett also outlined some legal theories and approaches that he and the petitioner had discussed, and noted that the petitioner would be waiving his rights to pursue those defenses.

After these detailed explanations, Judge Wesley began a dialog with the petitioner, outlining the basic steps that he expected to take in considering the plea agreement, and stating explicitly that he would not decide whether to accept the agreement until he had viewed and listened to the recording of the petitioner's statement to the police, and also heard the statements from the victims. He told the petitioner that, if he decided to accept the plea agreement, he would give the petitioner

one more chance at that point to tell me you don't want to go through with it, but if you want to go through with it at that point and if I'm satisfied there's a factual basis for it, then I'll tell you that we'll accept the plea agreement.

At that time, it'll be -- that'll be final and then I'll ask you if there's anything else you wish to say before I impose sentence, and then assuming I've accepted it, I'm going to impose the sentence that's contemplated by the plea agreement.

Id. at 13. He asked the petitioner if he understood, and the petitioner said "Yes." *Id.*

Judge Wesley then carefully explained exactly how the agreed sentence would be imposed, and what the penalty would have been had the petitioner been convicted of aggravated murder after a jury trial, i.e., mandatory life imprisonment without parole. He asked the petitioner to confirm that he understood that

under the plea agreement, he would have a chance to be eligible for furlough, but this was not a guarantee. The petitioner stated that he understood that fact. Petitioner also confirmed that he understood that he would not be eligible for either furlough or parole until he had completed the minimum agreed sentence of twenty years. The petitioner also affirmed that he understood that under the agreed sentence it was possible he might end up being required to serve the entire maximum life sentence.

Judge Wesley then carefully reviewed all the constitutional and trial-based rights that the petitioner would be giving up if he pled guilty to the offenses as amended. The petitioner confirmed that he understood and agreed to give up all those rights. The judge reviewed the legal issues that Attorney Harnett had discussed in his initial presentation of the agreement, and asked the petitioner to confirm that he understood that he was waiving any right to raise those issues on appeal if he entered into this plea agreement. The petitioner did so. The judge raised the issue of a possible diminished capacity defense, based on the likelihood that the petitioner had been substantially impaired by alcohol or other substance use during the time that the homicides were committed, and the petitioner confirmed that he understood that if he pled guilty, he would be waiving the right to raise that as a possible defense.

Judge Wesley asked the petitioner if he understood he was giving up his rights to appeal and to sentence reconsideration, and the petitioner affirmed that he did. He also posed the following question to the petitioner, explicitly:

THE COURT: You're giving up your right to have – to seek any kind of post-conviction relief under Section 7131 of Title 13, unless you can raise a good faith claim that for some reason you were denied the effective assistance of counsel; do you understand that?

THE DEFENDANT: Yes.

Id. at 23.

The judge then explicitly asked the petitioner if he had heard his attorney's description of "what he believes the facts are that will form the basis for your guilty plea," and the petitioner agreed that he had heard it. The judge asked if the petitioner had "any disagreement with the facts that he described," and the petitioner said "no." *Id.* at 24. When asked if he was "prepared to agree that those facts... establish a factual basis for the plea," the petitioner said "yes." *Id.*

However, at that point, Attorney Harnett asked that the petitioner be permitted to make a statement to the court, and the court allowed it. In his statement, the petitioner asserted that he was "a victim" and "was forced" to engage in the acts with which he was charged. Much of his statement was inaudible to the transcriber; however, the audio-recording was provided to this court. From a review of that recording it is clear that the petitioner expressed significant remorse, repeatedly saying he was sorry. He also stated that he was entering into the plea agreement because he knew it would result in his having a chance to get out of jail. *Id.* at 25–27.

The judge then informed the petitioner that if he was unable to find a factual basis for the pleas, he would not be able to accept them. He pointed out that if he was in fact compelled to engage in the charged offenses, under threat of death or great bodily harm, that would be a defense to the charge against him, but that he would be waiving his right to assert this defense if he pled guilty. The petitioner stated that he understood that. *Id.* at 27–28.

The judge clarified that in order for the petitioner to be guilty of the amended offenses of aiding in second degree murder of Ms. Davis and Mr. Enos, the petitioner must:

admit to me that you did, at least, one act that aided Michael Perez in killing Colleen Davis and Gregg Enos. At least one act to help him do that. That that act was not forced, that you did it -- you did it with the mental intent and that mental intent is that you did it recklessly or wantonly in disregard of the likelihood that Colleen Davis and Gregg Enos would die, because of the aid that you were giving to Michael Perez.

Id. at 28. The petitioner stated that he understood that. During his dialog with the judge, he also stated explicitly both that he provided the knife that was used to stab and kill Mr. Enos, and that he helped to move Ms. Davis into the truck where she was killed. He denied, however, that he assisted in preventing her from escaping from the truck. The judge suggested that the petitioner and his client confer, to ensure that the petitioner could acknowledge facts sufficient to support a finding that he had engaged in an act that aided Mr. Perez in murdering Ms. Davis. Attorney Harnett asked that the tape of the petitioner's statement to the police be played before he and his client engaged in that private conference.

The tape was played. That recording demonstrated that in his statement to the police, the petitioner admitted that hours before the killings, he and Mr. Perez had gone to pick up a knife that he had sharpened, and that Mr. Perez was aware he had that knife in his possession. It was a 6- or 7-inch folding knife, with a wooden handle. Later, after Mr. Enos and Ms. Davis had picked the petitioner and Mr. Perez up, and given them a ride, Mr. Perez got into a fight with Mr. Enos, and told the petitioner to "give me the knife, give me the knife," and the petitioner did so. Later, the petitioner saw that Mr. Perez was sexually assaulting Ms. Davis. Mr. Perez told the petitioner to "have some too," i.e., to join in the sexual assault. The petitioner admitted that he dropped his pants, and feigned that Ms. Davis was giving him oral sex at that point. The petitioner also admitted that when Mr. Perez instructed him to "smack" Ms. Davis with a large wooden stick, the petitioner feigned doing so, and hit the truck to make it look like he was hitting her. While this was happening, Ms. Davis was still alive and begging for mercy. He also recalled "trying to stuff the body in the truck."

After the statement was played, the petitioner and Attorney Harnett conferred privately for about ten minutes. On their return to the courtroom, the court asked the petitioner whether he still wished to plead guilty under the terms of the parties' agreement, and he affirmed that he did. The court then read the amended informations to the petitioner, and he pled guilty to them both. When Judge Wesley asked him whether her had in fact "aided Michael Perez in the killing of Greg Enos," and he answered "yes." He asked him whether he had in fact "aided Michael Perez in the killing of Colleen Davis," and Petitioner again answered "yes." *Id.* at 34. As to both Mr. Enos and Ms. Davis's killing, the petitioner also said "yes" in answer to the judge's questions whether he had acted "with wanton disregard that your behavior in aiding Michael Perez would naturally cause death or great bodily harm to" each victim. *Id.*, at 34-35.

Legal Conclusions

Procedural Compliance with Rule 11(f)

The petitioner seeks summary judgment in his favor, arguing that under the standards set in *In re Bridger*, 2017 VT 79, 205 Vt. 380, the petitioner's pleas were not supported by an adequate factual basis. The State opposes this argument, asserting that, first, under *In re Barber*, 2018 VT 78, 208 Vt. 77, the specific standards set in *Bridger* do not apply to this case, which is based on pleas of guilty offered in 2005, 13 years before that decision was issued, second, that there was in fact a sufficient factual basis for the petitioner's pleas, under either the *Bridger*, or pre-*Bridger* standards. The court concludes that the State's argument is correct.

In *Bridger*, the Supreme Court held that “an ‘adequate factual basis’ sufficient to demonstrate voluntariness must consist of some recitation on the record of the facts underlying the charge and some admission by the defendant to those facts.” 2017 VT 79, ¶ 21. Whoever provides the recitation of the facts, and from whatever source the factual basis is provided, there must be “an inquiry that demonstrates the defendant’s admission to the facts as they relate to the law for all elements of the charges.” *Id.* (quotation omitted). The State correctly argues that in *Barber*, the Court held that *Bridger* does not apply retroactively to the extent that it amounted to a new criminal procedural rule in stating that “oral or written stipulations or waivers [cannot] satisfy the factual basis requirement of Rule 11(f),” and that the policy of approving pleas where there has been ‘substantial compliance’ does not apply to claims of violation of Rule 11(f). 2018 VT 78, ¶¶ 12, 13.

This court concludes that the plea colloquy conducted in this matter met the procedural requirements of Rule 11(f) under even the strictest interpretation of Rule 11(f). As stated above, the trial judge went through every detail of the plea agreement directly with the petitioner. The petitioner’s attorney and the State’s Attorney both outlined the facts that supported the petitioner’s pleas, on the record, in the petitioner’s presence. The petitioner’s own statement to the police shortly after the events that led to these charges was played in open court, in the petitioner’s presence, and both the defendant and the State agreed that this statement formed a part of the factual basis for the defendant’s pleas. The judge then engaged in a direct dialog with the petitioner, to ensure that he was willing to admit, and did actually admit, facts sufficient to support both of the charges to which he pled guilty. This court is satisfied that every term of the *Bridger* decision’s requirements was met in this case. The petitioner had a very clear understanding of the elements of the charges against him and the factual basis for those charges, and then voluntarily pled guilty to those charges. He acknowledged, openly, in his own words, the actions he took on the date of the alleged offenses that formed the factual basis for the judge’s acceptance of his guilty pleas. The petitioner’s pleas were clearly voluntary and knowing.

Sufficiency of Factual Basis

The petitioner also argues, however, that even if the procedural requirements of Rule 11(f) were met, the acts that he admitted at the time of his plea were insufficient to provide a factual basis for his guilty pleas to second degree murder. He admitted the following facts during the plea proceeding. He admitted that while Mr. Perez was actively engaged in a physical fight with Mr. Enos, he gave Mr. Perez a six-inch knife, with which Mr. Perez stabbed and killed Mr. Enos. He admitted that while Mr. Perez was sexually assaulting Ms. Davis, at Mr. Perez’s request, he dropped his pants and “pretended” to require her to engage in oral sex with him. He admitted that as Mr. Perez was beating Ms. Davis in the head with a large wooden stick, when requested to join in the beating, he took the stick and banged on the truck, as if he were hitting her. He admitted that he assisted Mr. Perez in putting Ms. Davis into the truck where her killing was completed.

A person is guilty of criminally aiding in an offense only if he “acted with the same intent as that required for the principal perpetrator of the crime.” *State v. Bacon*, 163 Vt. 279, 289 (1995) (citations omitted). “[T]he rule is intended to allow the conviction of defendants who intended to, and did in fact, aid in the commission of the charged offense, but who were not the primary perpetrators of the crime or did not participate in every aspect of the planned illegal act.” Thus, the petitioner’s guilty pleas must show that he acknowledged that he had the necessary mental state required to commit second degree murder.

There are “three possible mental states that can be used as a basis to support a conviction of ... second degree murder: intent to kill, intent to do great bodily harm, and wanton disregard of the likelihood of

death or great bodily harm.” *State v. Boglioli*, 2011 VT 60, ¶ 11, 190 Vt. 542. In this case, both parties made it clear that the petitioner was expected to plead guilty based on his wanton disregard of the likelihood that his actions would result in death or great bodily harm to both Mr. Enos and Ms. Davis. The petitioner’s attorney said explicitly, that “He’s pleading on an aiding theory to second degree murder on the notion that his actions constituted wanton disregard of the likelihood that his behavior would naturally cause death or great bodily harm.” Plea Transcript at 6–7. The petitioner told the trial judge that he had no disagreement with the facts that his attorney had stated.

The trial judge made it clear that he could not accept the petitioner’s pleas unless he admitted doing at least one act that aided Mr. Perez in both murders, and “that that act was not forced, that you did it -- you did it with the mental intent and that mental intent is that you did it recklessly or wantonly in disregard of the likelihood that Colleen Davis and Gregg Enos would die, because of the aid that you were giving to Michael Perez.” *Id.* at 28. The petitioner entered his pleas of guilty after the judge made this statement, and specifically said “yes” when asked if he had acted “with wanton disregard that your behavior in aiding Michael Perez would naturally cause death or great bodily harm to” each victim.

The acts the petitioner admitted that he engaged in, providing a sharpened six-inch long knife to Mr. Perez while Mr. Perez was engaged in an active physical fight with Mr. Enos, simulating sexual assault on Ms. Davis after Mr. Perez assaulted her, simulating hitting her with a large wooden stick after Mr. Perez hit her with the same stick, and assisting Mr. Perez in moving her into the truck where she was beaten to death, were indeed of assistance to Mr. Perez in committing the murders of both Mr. Enos and Ms. Davis. The petitioner admitted that he engaged in these acts, and explicitly waived on the record any claim that any of these acts were compelled by Mr. Perez. He also explicitly waived on the record any claim that he was unable to form the necessary mental state due to diminished capacity. He admitted that he acted with wanton disregard that his actions in assisting Mr. Perez would increase the likelihood that they would suffer death or great bodily harm.

There was a factual basis for the petitioner’s pleas of guilty.

Waiver of the Right to Bring This Action

As noted above, as part of the plea agreement that the petitioner signed, he stated that he understood and waived his “right to petition for post-conviction relief, including relief set forth in Section 7131 of Title 13, except a good faith claim alleging ineffective assistance of counsel or prosecutorial misconduct.” This is obviously such an action. The State argues that he should be held to this waiver, which the trial court confirmed on the record that the petitioner understood and waived, and that summary judgment should be granted in its favor on this ground alone.

The Vermont Supreme Court has not ruled on whether a defendant can waive the right to seek post-conviction relief as part of a plea agreement. The Court has held in general that “plea agreements are contractual in nature, and that the parties are entitled to rely upon the provisions of the plea bargain.” *State v. Parker*, 155 VT 650, 651 (1990). Such agreements are “an essential part of the administration of justice,” and “it is important to the integrity of the system that plea bargains be honored by both the defendant and the State.” *State v. Hance*, 157 Vt. 222, 225 (1991). Applying these principles, the Court has explicitly approved defendants’ waiver of the right to sentence reconsideration as part of a plea agreement. *Hance*, 157 Vt. at 227. The Court has stated broadly that “our decisions authorize a defendant to waive virtually any right, constitutional or statutory, as long as the waiver is knowing, intelligent, and voluntary.” *Id.* at 223.

In light of this guidance, this court concludes that the petitioner's explicit, on the record waiver of his rights to post-conviction relief, except in narrow circumstances not applicable here, was indeed valid, and binding on him. Accordingly, even if there were significant factual disputes about the factual basis for the petitioner's pleas, discussed above, the State would be entitled to summary judgment in its favor. During the plea proceeding, the petitioner repeatedly acknowledged that he had received a significant benefit as part of the plea agreement, because he was guaranteed a sentence substantially more favorable than he would have obtained if convicted of aggravated murder at trial. He repeatedly stated his desire to avoid the risk of a mandatory sentence of life without parole. The State gave up the right to seek his conviction for that offense and the imposition of such a sentence as part of the agreement. As in *Hance*, the court concludes that "the bilateral nature of the agreement supports allowing waiver of defendant's right to seek" post-conviction relief as part of the agreement. *Id.* at 225.

Order

Based on the legal conclusions stated above, the court orders that summary judgment in favor of the State is entered because the petitioner's pleas of guilty were made knowingly and voluntarily, there was a factual basis for his pleas, and/or in the alternative, because he waived the right to bring this action as part of a valid, knowing, and beneficial plea agreement, and he is bound by that agreement.

It is so ordered.

A handwritten signature in black ink, appearing to read 'K.A.H.', is written over a horizontal line. The signature is stylized and extends to the right of the line.

Katherine A. Hayes
Superior Judge
September 24, 2021