STATE OF VERMONT

SUPERIOR COURT
Rutland Unit

CIVIL DIVISION
Docket No. 560-10-17 Rdcv

Courtney E. Herrick,
Petitioner

v.

State of Vermont,
Defendant

DECISION ON MOTIONS TO DISMISS

On December 18, 2001, Petitioner Courtney Herrick pleaded *nolo contendere* to all counts of an eight-count information. Pursuant to his plea agreement, he was then sentenced to 25 years to life, consecutive to a sentence that he was then serving in New York. He now attacks that conviction, as violative of several provisions of Rule 11 of the Vermont Rules of Criminal Procedure. The State filed a Motion to Dismiss Mr. Herrick's initial Petition. When Mr. Herrick then amended the Petition, the State filed a Supplemental Motion to Dismiss. For the reasons set forth below, the court deems the State's first motion moot, and grants the second.

Before wading into the merits of the case, the court addresses the procedural posture of the motions. First, the court notes that the filing of the Amended Petition effectively mooted the original Motion to Dismiss. Nevertheless, the court considers the arguments made on both sides of that motion in its determination of the Supplemental Motion.

Second, while styled as a motion to dismiss, the State's Supplemental Motion relies upon facts that, strictly speaking, are outside the Amended Complaint. Specifically, the State asks the court to consider the transcript of the change of plea colloquy, which Mr. Herrick submitted as an exhibit to his Amended Petition. In both the Amended Complaint and his arguments against both the initial and supplemental motions, Mr. Herrick relied expressly and implicitly on the transcript. On a motion to dismiss, a court may properly rely on "facts, reasonable factual inferences, and legal bases for recovery alleged in the complaint, attachments thereto, or . . . matters the court may judicially notice." *Gilman v. Maine Mut. Fire Ins. Co.*, 2003 VT 55, ¶ 20, 175 Vt. 554 (mem.). These attachments may take the form of exhibits referenced in the complaint and attached to it. *McClellan v. Haddock*, 2017 VT 13, ¶ 15, 204 Vt. 252. Additionally, the Vermont Supreme Court has held that "[w]hen the complaint relies upon a document . . . such a document merges into the pleadings and the court may properly consider it

under a Rule 12(b)(6) motion to dismiss." *Kaplan v. Morgan Stanley & Co., Inc.*, 2009 VT 78, ¶ 10 n.4, 186 Vt. 605 (quoting *Alternative Energy, Inc. v. St. Paul Fire & Marine Ins. Co.*, 267 F.3d 30, 33 (1st Cir. 2001)). Thus, the transcript is properly before the court.

Turning to the merits of the case, Mr. Herrick asserts a catalogue of Rule 11 violations. Specifically, he alleges violations of subparts (b), (c), (d), (e), (f), and (g). None of these allegations survives scrutiny.

Rule 11(b)

Rule 11(b) provides, in pertinent part, "A defendant may plead nolo contendere only with the consent of the court. Such a plea shall be accepted by the court only after due consideration of the views of the parties and the effective administration of justice." The record establishes that the trial court complied fully with these requirements. On multiple occasions throughout the plea colloquy, Mr. Herrick, in response to questions from the court, entered pleas of *nolo contendere*; on many of those occasions, the court accepted the plea as it was made. After Mr. Herrick had entered pleas on all eight counts, the court stated, "I'll accept the pleas." Tr. of Change of Plea Hr'g, Dec. 18, 2001, 17:10. The court then inquired, "And do you agree that, in each of those cases, that the affidavit of Ronald Crossman sets forth the specific elements of each of those crimes?" *Id.* at 17:11–13. When Mr. Herrick responded, "Yes, I do, Your Honor," the court asked, "And do you wish to reaffirm your pleas in all eight of those crimes?" *Id.* at 17:14–16. When Mr. Herrick replied, "Yes, I do," the court stated, "Okay. I'll accept the pleas and I'll enter a judgment of guilty in each matter." *Id.* at 17:17–19. The court then invited the parties to offer their views on the agreement and proposed disposition; the ensuing conversation takes up five pages of transcript. At the end of this conversation, the court stated, "Okay. The court will accept the agreement." *Id.* at 22:15–16.

On this record, it is ludicrous to suggest that the court did not consent to Mr. Herrick's pleas. It is equally ludicrous to suggest that the court did not give "due consideration" to "the views of the parties and effective administration of justice." The entire plea colloquy reflects a studious attempt by the court to understand the parameters of the plea agreement, its factual underpinnings, Mr. Herrick's understanding of and voluntary waiver of constitutional rights, his understanding of and voluntary consent to the agreement, and the agreement's impact on Mr. Herrick, his victims, and the State. In short, the court's subsequent acceptance of the plea agreement clearly reflected "due consideration."

Rule 11(c)

As in effect at the time of Mr. Herrick's change of plea, Rule 11(c) provided, in pertinent part:

> Except as authorized by Rule 43, the court shall not accept a plea of guilty or nolo contendere without first, by addressing the defendant personally in open court, informing the defendant of and determining that the defendant understands the following:
>
> (1) the nature of the charge to which the plea is offered;
> (2) the mandatory minimum penalty, if any, and the maximum possible penalty provided by law for the offense to which the plea is offered . . . .

The record also establishes that the court fully complied with these requirements. In asking for his plea on each of the eight charges, the court recited the specific details of each charge. In each instance, these details covered all necessary elements of the charge. *See* Tr. Of Change of Plea 13:1–8, 13:12–18, 13:23–14:6, 14:25–15:9, 15:13–24, 16:2–12, 16:15–23, 16:25–17:8. With respect to the first three charges, the court set forth the minimum and maximum penalties separately from its discussion of the details of the charge, *id.* at 14:6–20;[1] with respect to the remaining charges, that explanation was included in the discussion of the charge itself, *id.* at 15:6–7, 15:22–23, 16:9–10, 16:20–21, 17:6–8. In short, the colloquy amply complied with the dictates of Rule 11(c).[2]

Rule 11(d)

As in effect at the time of Mr. Herrick's change of plea, Rule 11(d) provided:

> Except as authorized by Rule 43, the court shall not accept a plea of guilty or nolo contendere without first, by addressing the defendant personally in open court, determining that the plea is voluntary and not the result of force or threats or of promises apart from a plea agreement. The court shall also inquire as to whether the defendant's willingness to plead guilty or nolo contendere results from prior discussions between the prosecuting attorney and the defendant or his attorney.

The plea agreement itself was ample evidence of compliance with the second of these requirements. *See In re Hemingway*, 2014 VT 42, ¶ 13, 196 Vt. 384 ("That petitioner's guilty pleas resulted from discussions between his attorney and the prosecutor was evident from the written plea agreement presented to the court."). The court also clearly complied with the first requirement. It had a lengthy conversation with Mr. Herrick concerning his understanding of the plea agreement and its implications. *See* Tr. of Change of Plea 3:3–12:25. During the course of that conversation, it allowed Mr. Herrick time to consult with his attorney to assure understanding and voluntary consent to the part of the agreement that provided that the sentence imposed would be consecutive to Mr. Herrick's New York sentence. *Id.* at 7:3–10:19. After that recess, the court made certain that Mr. Herrick understood the degree of uncertainty associated

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[1] In 2005, the legislature amended 13 V.S.A. § 3253(b) to include a mandatory minimum sentence. At the time of Mr. Herrick's change of plea, however, there was no minimum—only a maximum.

[2] Mr. Herrick has not challenged compliance with any provisions of Rule 11(c) other than subparts (1) and (2). The court notes, however, that the court clearly complied with subparts (3) and (4), and that subparts (5) and (6) are inapplicable here.

with the interplay between the New York and proposed Vermont sentences. *Id.* at 10:20–11:13. It then offered Mr. Herrick the opportunity to continue the hearing to try to obtain greater certainty in that regard. *Id.* at 11:14–12:7. The court gave Mr. Herrick every opportunity to back out: "Are you sure about that? You're not going to wake up tomorrow morning and say this was a terrible thing you did and you want it back?" *Id.* at 11:23–25. Mr. Herrick replied: "There's several reasons why I'd rather make the plea today." *Id.* at 12:1–2. Finally, the court asked if Mr. Herrick had signed the plea agreement free and voluntarily, and Mr. Herrick replied, "Yes, I have, your honor." *Id.* at 12:15–20.

While the court never inquired directly concerning "force or threats or . . . promises apart from [the] plea agreement," it was not required to do so. Rather, the rule requires that the court determine voluntariness. The Supreme Court has made clear that an "affirmative inquiry" into voluntariness is sufficient, even if it does not expressly address threats, coercion, or promises. *In re Hemingway*, 2014 VT 42, ¶ 17, 196 Vt. 384. In assessing voluntariness, the court must consider the totality of circumstances surrounding the plea. *Id.* ¶ 15. Here, in addition to the lengthy colloquy leading up to the express question and answer concerning voluntariness, Mr. Herrick indicated, just before the court accepted the agreement and imposed sentence, "Your Honor, I'm satisfied with the agreement and everything that's been said." Tr. of Change of Plea, 22:13–14. The court therefore had more than enough reason to have determined, as it did implicitly, that Mr. Herrick's pleas were voluntary, not the result of force, threats, or promises apart from the plea agreement, and the product of negotiations between Mr. Herrick and his attorney and the State's Attorney.[3]

Rule 11(e)

Mr. Herrick alleges summarily that the court "violated Rule 11(e)(2), when the trial court did not have the State disclose the reason for the plea agreement." The Rule requires that, "[i]n a felony case, the prosecuting attorney shall . . . disclose the reasons for entry into the plea agreement." Arguably, the State's Attorney made no such disclosure here. Mr. Herrick fails to allege, much less show, however, that he was in any way prejudiced by this omission. Thus, there was at most a technical violation of the rule—insufficient to invalidate the pleas and vacate the conviction, absent a showing of actual prejudice. *Cf. In re Thompson*, 166 Vt. 471, 475 (1997) ("PCR petitioners cannot prevail by merely claiming technical or formal violations of Rule 11."). The court plainly had enough information, from its lengthy discussion of the agreement with the parties, *see* Tr. of Change of Plea *passim*; Mr. Herrick's repeated assertion

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[3] While not necessary to the decision here, the court notes that Mr. Herrick has admitted, in his motion papers, "yes, I signed ***the*** plea agreement freely and voluntarily, it was better than life." Am. Compl. (including "point response" to Motion to Dismiss) 11 (emphasis in original).

that he wanted to proceed with the plea, *see id.*, 11:14–21, 11:23–12:2, 12:3–7, 17:15–17, 18:5–8, 18:12–14; the State's representation that all of the victims were satisfied with the agreement, Mr. Herrick's counsel's statement that "I would ask the court to accept this agreement because I believe that Mr. Herrick wants it to go this way," *id.* at 22:8–10; and Mr. Herrick's own statement, "Your Honor, I'm satisfied with the agreement and everything that's been said," *id.* at 22:13–15, to understand the reasons for entry into the plea agreement. Thus, there may not even have been a technical violation of Rule 11(e)(2); there certainly was no prejudice; and there is therefore no basis for vacating the convictions on Rule 11(e)(2) grounds.

Rule 11(f)

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." Relying on *In re Bridger*, 2017 VT 79, Mr. Herrick alleges that the court violated this provision when it did not make properly establish his admission to the factual basis for each of his pleas. The short answer to this attack is the Rule 11(f) imposes no such requirement in the case of a *nolo* plea. *See* Reporter's Notes, V.R.Cr.P. 11 ("The requirement of a factual inquiry does not apply to pleas of nolo contendere."). The Supreme Court has recently confirmed this observation. *In re Barber*, 2018 VT 78, ¶ 23 ("Rule 11(f) is not applicable in cases where a defendant pleads nolo contendere because it states that the factual basis requirement is required prior to accepting 'a plea of guilty.' "). Thus, Rule 11(f) is inapposite here, and affords no basis for vacating any of Mr. Herrick's convictions.

Rule 11(g)

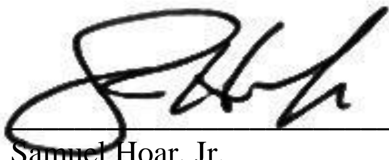
Rule 11(g) requires that the court make a verbatim record of the change-of-plea proceedings. That record "shall include, without limitation, the court's advice to the defendant, the inquiry into the voluntariness of the plea including any plea agreement, and the inquiry into the accuracy of a guilty plea." The transcript here makes clear that the record includes all necessary attributes; indeed, Mr. Herrick makes no suggestion that it is incomplete. Rather, he suggests that the rule requires that the State disclose, on the record, the reason for the plea agreement. Am. Compl. 2. Rule 11(g) imposes no such requirement. Thus, it affords no basis for vacating Mr. Herrick's conviction.

ORDER

Careful review of the transcript of the change of plea proceeding makes abundantly clear that the trial court engaged in a thorough and detailed colloquy with Mr. Herrick and the attorneys involved. At the conclusion of this colloquy, as required by Rule 11(b), the court accepted the plea agreement and imposed the sentences agreed by the parties. The court amply assured itself that Mr. Herrick understood the both the factual and legal nature of the charges to

which Mr. Herrick was pleading and the applicable penalties, that he understood the rights he was foregoing in entering his pleas, and that his pleas were voluntary. The court also made sure that both it and Mr. Herrick fully understood all aspects of the agreement, and offered the parties and the victims the opportunity to provide their input before it accepted the agreement. The court made and kept a fulsome record of the proceedings. In short, the court fully complied with all applicable requirements of Rule 11. The State's Supplemental Motion is **granted**. The case is **dismissed, with prejudice**.

Electronically signed on February 07, 2019 at 12:02 PM pursuant to V.R.E.F. 7(d).



Samuel Hoar, Jr.
Superior Court Judge