

STATE OF VERMONT

SUPERIOR COURT
Rutland Unit

CIVIL DIVISION
Docket No. 785-12-14 Rdcv

In re DAWN DOVIAK,
Petitioner

FILED

APR 22 2016

VERMONT SUPERIOR COURT
RUTLAND

DECISION

Petitioner's Motion for Summary Judgment
State's Cross Motion for Summary Judgment

This matter is a petition for post-conviction relief pursuant to 13 V.S.A. §§ 7131-37 filed by the incarcerated petitioner, Dawn Doviak. The Petitioner is represented by Attorney Mark E. Furlan. Deputy State's Attorney John D. G. Waszak represents the State. Both parties have moved for summary judgment. For the reasons set forth below, the court grants summary judgment in favor of the State and dismisses the petition.

The Petitioner pled guilty to driving with a suspended license and two counts of forgery on May 19, 2010, and received a three-year deferred sentence. The Petitioner now alleges that her guilty plea should be vacated because the plea colloquy conducted by the court that accepted her guilty plea did not include material sufficient to establish a factual basis for the plea.

Summary judgment is appropriate where 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(c)(3). Here, the parties do not dispute any of the material facts, all of which relate to the content of the plea colloquy conducted by the Honorable Michael C. Pratt in the Criminal Division of the Rutland Unit of the Superior Court on May 19, 2010. The sole question presented by the petition is the legal sufficiency of the plea colloquy.

Prior to the entry of her guilty plea, as part of the plea agreement paperwork, the Petitioner signed a waiver of rights indicating that she had read and understood the State's information and supporting affidavit, that she was aware of the evidence to support the charges, and that by pleading guilty to an offense, she admitted the

essential part of the offense. The plea court accepted the plea agreement paperwork. The plea colloquy proceeded, in relevant part, as follows:

THE COURT: I'm going to ask you what your plea is individually. On docket number 93-1, Count I, forgery charge, you may plead not guilty, guilty or no contest, what do you plead?

THE DEFENDANT: No contest.

THE COURT: No contest is your plea?

THE DEFENDANT: Um-hum. Yes.

MR. BRIERRE: I think the plea agreement does indicate guilty.

THE DEFENDANT: Then do I say guilty?

THE COURT: It does indicate guilty.

THE DEFENDANT: That's hard to say, but guilty.

MR. ENZOR: It does indicate guilty.

THE DEFENDANT: Okay. Guilty.

THE COURT: Is it true? Are you guilty?

THE DEFENDANT: Yes, I am.

THE COURT: Docket number 93-1, Count II, also a forgery charge, what is your plea?

THE DEFENDANT: Guilty.

THE COURT: Count 93-1 Count -- excuse me -- docket number 93-1 Count III, driving license suspended, what is your plea?

THE DEFENDANT: Guilty.

THE COURT: The Court finds the guilty pleas are knowing and voluntary. The charges are factually supported. The adjudication will be entered on all three. Anything else from the State?

MR. BRIERRE: Judge, we'd ask the Court to accept the agreement and just wanted to confirm that Ms. Doviak admits the State could prove each of the offenses. I think the Court covered it, but I --

THE COURT: No harm. With regard to the two forgery charges and the driving license suspended charge, do you agree that, if this case went to trial and the State

presented all of its -- all of its evidence, do you agree that the State could prove that you were guilty beyond a reasonable doubt on each and every element of each of the three charges?

THE DEFENDANT: Yeah. I'm guilty.

The Petitioner now contends that this plea colloquy was insufficient under V.R.Cr.P. 11(f). V.R.Cr.P. 11(f) provides that “[n]otwithstanding 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.” A violation of Rule 11(f), even without a showing of prejudice, would be sufficient for the court to grant the petitioner relief. *In re Stocks*, 2014 VT 27, ¶ 21 (citing *In re Miller*, 2009 VT 36, ¶ 9).

There is no per se rule as to how a trial court must ascertain the factual basis for a plea because the inquiry will necessarily vary from case to case. *State v. Whitney*, 156 Vt. 301, 302 (1991). The record must, however, “affirmatively show sufficient facts to satisfy each element of an offense.” *Stocks*, 2014 VT 27 at ¶ 21 (quoting *In re Miller*, 2009 VT 36, ¶ 11). The trial court must also directly inquire into the factual basis of the plea, and the defendant must “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.” *Stocks*, 2014 VT 27 at ¶ 18 (quoting *State v. Yates*, 169 Vt. 20, 27 (1999)).

Substantial compliance with the rule is sufficient. *State v. Cleary*, 2003 VT 9, ¶ 15, 175 Vt. 142. A colloquy with a defendant who stipulates to the factual basis of the plea substantially complies with Rule 11(f). *Id.* at ¶ 29 (citing *State v. Morrissette*, 170 Vt. 569, 571 (1999) (mem.)). The complexity of the charged offense and the factual circumstances are factors to consider in determining whether a plea colloquy substantially complied with Rule 11(f). See *Whitney*, 156 Vt. at 303.

The charges of forgery and driving with a suspended license to which the Petitioner pled guilty are not factually complex offenses that require careful clarification as to what specific facts satisfy specific necessary elements of the offenses. This is in contrast to the cases where the Vermont Supreme Court has found a Rule 11(f) violation. See *Yates*, 169 Vt. at 24 (finding Rule 11(f) violation where court failed to make any inquiry into the facts of an aggravated domestic assault charge); *State v. Dunham*, 144 Vt. 444, 448 (1984) (finding Rule 11(f) violation where court failed to make any inquiry into the facts relating to the willfulness element of a second degree murder charge).

The Petitioner relies principally on *Yates*, 169 Vt. at 24, but in *Yates*, the plea court completely neglected to make any inquiry as to the factual basis of the defendant's guilty plea. But here, the plea court directly inquired of the Petitioner, "[i]s it true? Are you guilty?" The Petitioner responded, "[y]es, I am." Later, the plea court directly asked the Petitioner whether the State could prove her guilt beyond reasonable doubt, and the Petitioner responded, "[y]eah. I'm guilty." In the latter instance, the Petitioner did not merely assent to the plea court's question, but in fact affirmatively volunteered a clear statement of her own factual guilt.

In assessing the circumstances surrounding the plea, the court notes also the signed waiver of rights. While the waiver alone would not be sufficient to establish a factual basis for the plea, it does establish that the Petitioner read and understood the State's allegations of fact.

This case is controlled by *Cleary*, 2003 VT 9 at ¶ 29, and *Morrisette*, 170 Vt. at 571, which establish that a defendant's stipulation to the factual basis of the charge is sufficient substantial compliance with Rule 11(f). It is clear here from the language of the plea colloquy and the context of the Petitioner's words that the Petitioner, by her statements "yes, I am" and "I'm guilty," stipulated to the factual basis of the charges, and the court accepted that stipulation in substantial compliance with the rule.

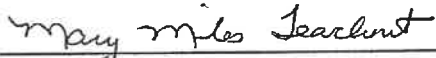
The plea court substantially complied with Rule 11(f) and made sufficient inquiry into the factual basis for the plea. Accordingly, summary judgment is granted in favor of the State and the Petition is dismissed.

ORDER

For the reasons set forth above:

1. The Petitioner's Motion for Partial Summary Judgment is *denied*,
2. The State's Motion for Summary Judgment is *granted*, and
3. The Petition is *dismissed*.

Dated this 21st day of April, 2016.



Mary Miles Teachout
Superior Court Judge