VERMONT SUPERIOR COURT
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CIVIL DIVISION
Case No. 22-CV-01047

Mehmed Devac v State of Vermont

ENTRY REGARDING MOTION

Title: Motion for Summary Judgment; Memorandum in Opposition , Partial ; State's Reply to Defendant's Motion for Summary Judgement and to PCR Petition (Motion: 4;)
Filer: Annemarie Manhardt; Maria L. Byford
Filed Date: January 15, 2024; February 20, 2024

The motions are DENIED.

Petitioner Devac has filed the present Post Conviction Relief (PCR) Petition seeking to vacate both his plea agreement as well as his sentence entered on May 7, 2020 on the charge of kidnapping for ransom. Petitioner has asserted three challenges to his underlying conviction, but he has moved for summary judgment on only two. Petitioner contends that his plea colloquy improperly omitted the factual basis for his habitual offender enhancement and constituted an improper review of voluntariness under V.R.Cr.P. 11(c) and (f). In the alternative, Petitioner also contends that his plea agreement should be voided based on a subsequent statutory change effected by the legislature, which has rendered him ineligible for earned-time credit. Petitioner projects will extend the length of his sentence by approximately 20% and undermines that basis of the bargain that he originally struck with the State.

The State disputes both of Petitioner's points and seeks judgment on a third issue of whether the Court, in its plea colloquy, should have raised and addressed Defendant's understanding of the available affirmative defense. The State contends that it is not the Court's responsibility to review available affirmative defenses during a plea colloquy as that is the role of defense counsel.

The Court finds that neither premise from Petitioner is sufficient to call into question the voluntary and intelligent choice behind Petitioner's plea agreement. Petitioner's partial motion for summary judgment is **Denied.** The State's motion to dismiss is also **Denied** as the claim is larger

than a challenge to Petitioner's plea colloquy and will require additional factual determination to resolve.

Undisputed Facts

The facts of this matter are largely undisputed. In August 2016, Petitioner Devac was serving a sentence in the Newport correctional facility when he and another prisoner took a corrections officer hostage with a shiv. Devac and the other inmate held the corrections officer for nearly an hour. They demanded cigarettes and a transfer to another facility as ransom. When Devac and the other inmate received cigarettes and a promise to transfer, they released the corrections officer, unharmed, and ended their stand-off. The State's Attorney then charged Devac with three counts including kidnapping–ransom; aggravated assault on a corrections officer; and carrying a dangerous weapon. Each of the three charges against Devac carried a sentence enhancement under Vermont's habitual offender statute. 13 V.S.A. § 11. Following his arraignment, Devac challenged the legal basis for this enhancement and made arguments including a motion to dismiss and a motion for interlocutory appeal challenging the basis for this enhancement.[1]

In May 2020, Petitioner and the State reached a plea agreement. The terms of this agreement included Petitioner pleading guilty to the first count of kidnapping–ransom and agreeing to a sentence of fifteen years minimum and fifty years maximum, to be served concurrent to his then-existing sentence. In exchange, the State dropped the other two pending felony charges. On May 7, 2020, the Orleans Superior Court heard the plea agreement and conducted a plea colloquy pursuant to V.R.Cr.P. 11.

At the outset, the Court stated that "because of your status with having other felonies, they've charged you as a habitual offender, which would have a potential sentence of up to life." (Plea Trans. 4:16–18.) Petitioner assented and agreed with this statement, but the Court did not go through any other element of 13 V.S.A. § 11 or explore on the record whether Petitioner did, in fact, have the necessary three prior felonies necessary to sustain Section 11 or review the elements of Section 11. The Court did conduct a review of the factual allegations behind the kidnapping–

[1] The basis for these challenges arose from whether two of Devac's prior convictions should be counted separately or considered as a single felony charge. Apart from this legal challenge, there does not appear to have been any factual challenge as to whether Devac had been convicted of three prior felonies or whether convictions were properly attributed to him.

ransom charge, but it did not conduct a separate review of the sentence or take testimony on the sentence. The Court did not raise or discuss the available affirmative defenses—particularly the provisions under 13 V.S.A. § 2405(b), which can reduce the penalty associated with a kidnapping charge if a defendant releases the victim without harm prior to the arraignment. Devac now contends that he was unaware of this defense and that he would not have agreed to the stipulated sentence if he had known of its applicability to him.

Neither the plea agreement nor the colloquy involved any discussion of good-time or earned-time credit. At the time, the legislature had recently enacted 28 V.S.A. § 818, but no rules or program for "good-time" or "earned-time" credit had been established. No guarantees of such credit were in effect. While initial versions of the good-time credit rule, which came into effect after the plea agreement, gave Devac some good time credit, the Vermont General Assembly subsequently amended Section 818 to exclude individuals convicted of kidnapping, among other crimes, from earning good time credit. 28 V.S.A. § 818(c)(1). Since the passage of this change, Devac has not earned any additional credit off his sentence. He estimates that over the course of his sentence, he will lose the opportunity to reduce both his minimum and maximum sentences by approximately 20%.

Standard of Review

The present motion contains two separate standards. Petitioner seeks partial summary judgment based on the Court's failure to comply with V.R.Cr.P. 11 in omitting any explanation or review of the factual basis for the habitual offender charge and on the legislative amendment to 28 V.S.A. § 818, which have removed Petitioner's opportunity to earn sentence reducing credits. A motion for summary judgment under V.R.C.P. 56 is appropriate where there is no genuine issue of material fact, and the moving party is entitled to judgment as a matter of law. *In re Pinheiro*, 2018 VT 50, ¶ 8.

As to the State's cross-motion to dismiss, the Court must apply heightened standard that applies to a V.R.C.P. 12(b) motion to dismiss. To determine whether a complaint survives a motion to dismiss, the court assumes the factual allegations in the complaint are true. *Colby v. Umbrella Inc.*, 2008 VT 20, ¶ 5. The court will only grant the motion if there are no facts or circumstances that would grant plaintiff relief. Id. This is because the purpose of a motion to dismiss for failure to state a claim is "to test the law of the claim, not the facts which support it." *Brigham v. State of*

Vermont, 2005 VT 105, ¶ 11 (quoting *Powers v. Office of Child Support*, 173 Vt. 390, 395 (2002)). Courts rarely grant motions to dismiss for failure to state a claim. *Colby*, 2008 VT 20, at ¶ 5; see also *Kaplan v. Morgan Stanley & Co., Inc.*, 2009 VT 78, ¶ 7.

As to the more specific standard of review for a PCR, the Vermont Supreme Court has held that "Post-conviction relief is a limited remedy, intended to correct fundamental errors in the judicial process. It is not designed to be a substitute for a merit-based appeal, nor should it be a vehicle for the introduction of legal arguments not raised below. . . Just as we are not permitted to judge an attorney's competence based on whether a tactical decision was ultimately successful, we decline to stand on hindsight and decide whether a given tactic would have been ultimately successful had it been pursued." *In re Kirby*, 2012 VT 72, ¶ 9 (internal citations omitted).

For the purpose of the present motion, the parties have framed their primary positions in terms of the legal efficacy of the plea colloquy conducted on May 7, 2020. In examining whether a party is entitled to relief from plea agreement, the Court looks to whether the agreement was entered into as a voluntary and intelligent choice of the alternative options available to the petitioner. *In re Mossey*, 129 Vt. 133, 139 (1971). This may be further broken down as the Vermont Supreme Court has more recently determined between a "substantial compliance" review of the technical components of a plea colloquy under V.R.Cr.P. 11(c) and (d) and the higher standard of review of sufficiency of the evidence under V.R.Cr.P. 11(f). *In re Pinheiro*, 2018 VT 50, at ¶ 15; *In re Bridger*, 2017 VT 79, ¶¶ 20, 21; see also *In re Barber*, 2018 VT 78, ¶¶ 11, 12.

Legal Analysis

I. Plea Colloquy and 13 V.S.A. § 11

Petitioner's first argument is that the Court failed to examine any element of the habitual offender charge that attached to the kidnapping–ransom charge. In this respect, Petitioner seeks to equate a habitual offender enhancement to the same level of scrutiny that a separate criminal charge would garner under a Rule 11 colloquy. In support of this position, Petitioner notes that a habitual offender charge must be made and proven to a jury beyond a reasonable doubt. *State v. Cameron*, 126 Vt. 244, 249 (1967).

Yet, a habitual offender charge is not a charge in the same sense as other crimes. In both how this provision is charged and brought forward to a jury, the habitual offender statute is

substantively different. In the present case, Petitioner was not separately charged with violations of 13 V.S.A. § 11. *State v. Ingerson*, 2004 VT 36, ¶ 3 ("The statute does not, however, define a separate or new offense. Rather, the statute provides an enhanced penalty for repeat offenders.") (citing *State v. Kasper*, 137 Vt. 184, 213 (1979)). Instead, the information for each substantive charge (kidnapping, aggravated assault, and weapons possession) included in the proposed penalty provisions a notice that each carried the potential for up to life imprisonment because of Petitioner's status as a habitual offender. As both *Cameron* and *Ingerson* note, the issue of whether the habitual offender provision applies is separate from the prosecution of the principal offense, and the enhanced charge must, in fact, be kept from the jury until the principal charge is tried. *Camercon*, 126 Vt. at 249–50; *Ingerson*, 2004 VT 36, at ¶ 5.

The factual question for an enhanced sentence under 13 V.S.A. § 11 is limited to whether the defendant was convicted three prior felonies or attempted felonies in Vermont or any other state. 13 V.S.A. § 11. Se *State v. Spalding*, 61 Vt. 505, 17 A. 844, 848 (1889). Unlike other criminal statutes, the question of whether one qualifies as a habitual offender, while a question of fact, is also one that can usually be established by the Defendant's criminal record. In this case, Devac does not deny his prior convictions. Rather he has previously raised legal arguments regarding the sufficiency and timing of these convictions to qualify as triggers for Section 11.

Other jurisdictions that have been confronted with this question of whether a plea colloquy must, as a matter of law, include such findings have generally held that a court does not have to make findings on the record when the defendant agrees to a habitual offender sentence as part of his plea agreement. *State v. Will*, 645 So.2d 91, 93 (Fla. App. 1994); see also *Bridgeman v. State*, 525 S.W.3d 459, 463–64 (Ark. App. 2017) (affirming denial of PCR when Petitioner had notice of the statutory enhancement and there is sufficient factual record of the underlying charges to conclude that defendant entered the plea in a voluntary and intelligent manner); *Townsend v. State*, 344 So.3d 858, 863–64 (Miss. App. 2022) (affirming imposition of heightened sentence based on both advance notice that the State was seeking a habitual offender and from defendant's general acknowledgement that the statute applied). These courts have also noted that where there is no showing that the habitual offender status is in question, there is no manifest injustice if the plea colloquy does not specifically discuss the issue of enhancement. *Will*, 645 So.2d at 93. As the Court in *Will* notes, the primary concern with a habitual offender statute or similar enhanced sentencing statute is to ensure that the defendant is on notice of the potential for a higher sentence and to raise any factual issues

with underlying allegations that the defendant has prior convictions. When the offender has agreed to an enhanced sentence as part of his plea agreement, it answers these questions.

In this case, Petitioner was aware that he was being charged with an enhanced sentence under 13 V.S.A. § 11. He had, in fact, raised several challenges to this enhancement, none of which disputed the existence of the underlying convictions but challenged whether they should be counted separately to trigger the habitual offender provisions. Petitioner had further agreed in his plea agreement to a sentence structure that incorporated the enhanced penalties of Section 11. Compare *Watson v. State*, 605 So.2d 581, 581–82 (Fla. App. 1992) (finding reversible error where the trial court noted the maximum sentence under the statute, failed to mention the habitual offender enhancement, and imposed a heightened sentence). Finally, the Court noted on the record that the charges and sentence incorporated the enhanced sentencing of Section 11, and Petitioner acknowledged and agreed with this fact.

The Court finds that this record demonstrates substantial compliance with Rules 11(c) and (d), and it meets the threshold of Rule 11(f) given that Petitioner expressly accepted that he was subject to the enhanced sentencing, which was premised on prior convictions of record. To the extent that the Court did not run through the specific prior convictions is not a fatal error to the plea agreement and does not cause the Court to doubt either the voluntariness of Petitioner's plea agreement or the intelligence behind his choice. *In re Mossey*, 129 Vt. at 139. The record demonstrates that Petitioner had sufficient knowledge and awareness of the basis for imposing an enhanced penalty, that he was aware of its impact, and that there was no breakdown in judicial process such that the Court has question as to whether Petitioner was adequately aware of the charges that he was facing, the basis for such charges, or the foundation for the enhanced sentence. See *In re Lewis*, 2021 VT 24, ¶ 14 ("[C]ourts have held that the absence of a statement that the defendant intends to plead guilty 'after each charge is inconsequential where the circumstances compel the conclusion that the defendant did enter a plea of guilty and that the plea was accepted by the judge.'") (quoting *Commonwealth v. Tavernier*, 922 N.E.2d 166, 173 (Mass. App. 2010)). As such, the Court finds no violation of V.R.Cr.P. 11 or manifest injustice in the plea colloquy concerning the habitual offender enhancements to Petitioner's sentence. Petitioner's Motion for Summary Judgment on this issue is **Denied.**

II. Statutory Amendments to 28 V.S.A. § 818

Petitioner's second argument seeks recission of his plea agreement based on the Vermont General Assembly's amendments to 28 V.S.A. § 818. After Petitioner's plea agreement but prior to the 2021 amendments, Petitioner was eligible for good-time credit under 28 V.S.A. § 818. This ceased when the legislature added kidnapping to the list of convictions, which are not eligible for earned-time credit. Petitioner calculates that this change will deprive him of an overall 20% reduction in both him minimum and maximum sentences.

Plea agreements are contractual in nature and interpreted according to the law of contract. *State v. Coleman* , 160 Vt. 638, 640 (1993) (mem.). While the plea agreement and colloquy are silent on the issue of good time or earned-time credit, it is not unreasonable to conclude that parties would rely upon existing statutory provisions affecting the overall calculation and length of sentence. *Weaver v. Graham*, 450 U.S. 24, 32 (1981). As the parties admit, if Petitioner had entered his plea agreement after the establishment of earned-time credit but before the amendment excluding him from receiving such credit, then the statute would face an *ex post facto* challenge to its constitutionality. Id. at 28–29. Given that such interests were not established, the Court must analyze this under the principles of contract.

The lack of express mention of earned-time or good-time credit in either plea agreement or plea colloquy requires the Court to examine the record for any evidence of an implied contract term. *Morse v. Kenney*, 87 Vt. 445, 89 A. 865, 866 (1914). As *Morse* holds, there are two types of implied contracts, those where the parties have had a meeting of the minds, which results in an unexpressed agreement or term, and those where the law implies an agreement or term. Id. An example of the latter is the covenant of good faith and fair dealing, which is implied in every contract as a matter of law. *Carmichael v. Adirondack Bottled Gas Corp. of Vermont*, 161 Vt. 200, 208 (1993). The first type of implied contracts creates an issue of fact. *Taylor v. National Life Ins. Co.*, 161 Vt. 457, 465 (1993). In such cases, the evidence must demonstrate that both parties intended for the implied term to be incorporated into the contract. Id. This is shown by some evidence of the parties' intent, generally through statements, actions, or circumstances. Id. In *Taylor*, for example, the issue was whether an employee handbook, with a graduated disciplinary system and language suggesting that it was mandatory, extended a promise to only terminate an employee for cause. Id.

In the present case, the facts admit to no such implication for earned-time credit as a matter of law. Petitioner cannot cite to any existing statutory or regulatory framework other than 28 V.S.A. § 818, or any promises or statements made by the State or the Court, that would reasonably imply that good-time or earned-time credit was a part of the parties' agreement. As noted above, the promise of credit under Section 818 fall far short of either a statutory guarantee or fully fleshed out promise. To the extent that Petitioner banked on the potential that Section 818 would eventually render him eligible for such credits, it appears to be a unilateral believe and mistake. Restatement (First) of Contracts § 503 (1932). Under Vermont law, where one party makes a unilateral mistake that is not attributable to the other party's actions or representations, the Court will not allow recission. *Town of Lyndon v. Burnett's Contracting Co., Inc.*, 138 Vt. 102, 107 (1980). The exception is cases where except where there is a demonstration of "unusual circumstances that would make enforcement of the agreement manifestly unjust." Id. In this case, it is undisputed that the result of this mistake was to effectively increase in Petitioner's sentence, but there is no evidence that the State made any representations or held any expectations. There is also no evidence that Petitioner or his counsel attempted to lock-down any representations about good-time credit or perform any due diligence on the status of this program or became misled by representations or circumstances that would render the resulting bar from credit manifestly unjust. The good-time/earned-time credit program was in flux and unsettled at the time of the agreement, and the resulting categorical ban of certain offenses from eligibility, while perhaps unexpected, should not have been received as an entire surprise by either party in the circumstances.

For these reasons, the Court finds no basis for recission or reformation of the plea agreement or any legal support to void the bargain struck between the State and Petitioner. Petitioner's Motion for Summary Judgment on this issue is **Denied.**

III. Knowledge of Affirmative Defense under 13 V.S.A. § 2405

The State has moved to dismiss the portion of Petitioner's complaint concerning his knowledge and awareness of the affirmative defenses available under 13 V.S.A. § 2405. The State argues that the Court did not have the obligation as part of the Rule 11 inquiry to determine whether Petitioner was aware or familiar with this affirmative defense, and the lack of any such inquiry in the plea colloquy cannot, as a matter of law, constitute a basis to overturn the plea agreement. Petitioner's response is that for purposes of the motion to dismiss, the Court must accept his

statement that he was unaware of the affirmative defense and the impact of such lack of knowledge is a issue of fact that should be developed at trial.

From the record, the Court can draw conclusions on several undisputed points. It is undisputed that the plea colloquy did not discuss the available affirmative defense under Section 2405, and it is also undisputed that based on the factual record that Petitioner would have been eligible to assert this defense at trial if he had gone forward. It is also undisputed that Petitioner had substantial grounds on which to assert this defense, which if established would have capped his maximum sentence at 30 years—instead of life. Despite these facts, there are two strong reasons to understand the limited impact that the affirmative defense would have had on Petitioner's plea agreement.

First, Petitioner's charges were subject to the habitual offender provisions, which effectively enlarged the potential liability under its sentencing enhancement provisions to a level equal to the full potential criminal liability under section 2405 as it included life imprisonment. 13 V.S.A. § 11. This meant that the affirmative defense, even if proven, would not necessarily have saved Petitioner from exposure to a longer sentence.

Second, there is the issue of whether a court has an obligation to review and inform a party of their affirmative defense. Nothing in Rule 11 suggests that a court must review affirmative defenses as part of its inquiry into the plea agreement. While the Court must explain the elements of each offense to the defendant, there is nothing in our case law that would require the Court to instruct on a potential affirmative defense. See *In re Pinheiro*, 2018 VT 50, at ¶ 10 (outlining the function and parts of a plea colloquy).

In reviewing the plea colloquy in the present case, the court went through the elements of the kidnapping charge with Petitioner and discussed both the collateral consequences of entering into the plea agreement as well as the practical effect on his ability to maintain any challenges to the charges. This would necessarily and by implication include the assertion of any affirmative defenses or other litigation issues. Petitioner was aware of this fact given that he had sought to litigate the habitual offender charges and was aware that he had the right to make these legal and factual challenges. Based on the plea colloquy, the Court finds no fundamental errors that would render it defective, and the absence of any specific discussion about the affirmative defense does not meet this necessary threshold as a matter of law. *State v. Bowen*, 2018 VT 87, ¶ 7.

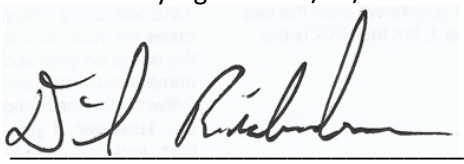
Notwithstanding this conclusion, the State's motion sets up a false dichotomy. While there was no obligation for the court to review the affirmative defense as part of the plea colloquy, this does not resolve the question of what impact the Defendant's purported ignorance of his affirmative defense had on his decision to enter the plea agreement. There remains a question of whether Petitioner's counsel properly reviewed this affirmative defense and the implications to the plea agreement. These facts have not been developed but are reasonably implicated in Petitioner's amended petition. For these reasons, the State's request to dismiss is **Denied** at this time.

ORDER

Based on the foregoing, Petitioner's motion for partial summary judgment is **Denied** as a matter of law, and the State is entitled to judgment on these issues. The State's motion to dismiss is **Denied** as there remain disputed factual issues.

The Court shall schedule a status conference with the parties to address the remaining claims, whether any discovery remains to be completed, and when to set this matter for a trial on the merits.

Electronically signed on 4/19/2024 6:02 PM pursuant to V.R.E.F. 9(d)



Daniel Richardson
Superior Court Judge