Note: Decisions of a three-justice panel are not to be considered as precedent before any tribunal.

ENTRY ORDER

SUPREME COURT DOCKET NO. 2001-314

JUNE TERM, 2002

In re Charles Mashtare	}	APPEALED FROM:
	}	Franklin Superior Court
	}	DOCKET NO. S 36-00
	}	Trial Judge: Ben W. Joseph

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

Petitioner Charles Mashtare sought post-conviction relief in superior court claiming that his guilty plea to a charge of lewd and lascivious conduct with a child was constitutionally deficient under V.R.Cr.P. 11(c), (d), and (f), and that he did not receive effective assistance of counsel. The court dismissed petitioner's claims on summary judgment, and we now reverse.

On appeal, we use the same summary judgment standard as the trial court: summary judgment is proper where the record reveals no genuine issue of material fact and any party is entitled to judgment as a matter of law. O'Donnell v. Bank of Vermont, 166 Vt. 221, 224 (1997); see also V.R.C.P. 56(c)(3) (setting forth summary judgment standard). In this case, the parties do not dispute the facts, which appear in the transcript of the plea agreement hearing.

Present at the hearing were petitioner, his counsel, counsel for the State, and petitioner's probation officer, Jimmie Sexton. At the outset of the hearing, the court asked Mr. Sexton whether he was comfortable with the plea agreement, which called for a suspended sentence of three and one-half to five years. The officer explained his misgivings about the proposed sentence due to his concern that petitioner would not admit his responsibility for touching the victim as charged. The court then addressed defense counsel, who advised that he had spent some time with petitioner explaining the elements of the offense and the evidence against him, and that petitioner executed a waiver of rights form at that time. The court turned to petitioner and asked whether he had any questions. Petitioner responded by asking whether he would have to go to jail. The court responded, "It's going to be up to you," to which petitioner replied, "I don't want nothing like that. I'd go crazy if I was locked up."

The court next read the charge against petitioner and stated the minimum and maximum penalties for the offense. Petitioner stated that he understood the charge and the corresponding penalties and that he pleaded guilty to the charge. The court asked the State's attorney to explain the facts underlying the charge, which she did. When asked whether he wanted to say anything about the facts, petitioner stated:

Well, if this is what you mean, I didn't mean anything in a sexual way, Your Honor. This all I did, you know, that I had the feeling and that was why I touched him. But I didn't have no feeling of that. But I touched him on the butt and told him that he should ask his mother, because his skin was a little rough, to ask his mother to get him some lotion to put on him, and that was it. But they seem to have made a big deal out of it. I don't know.

(Emphasis added.) Petitioner and the victim are cousins, and petitioner explained that the victim was sleeping with him at the time. The following exchange then took place:

THE COURT: You're charged with touching his genital area. Do you know what that is? Genital area?

MR. MASHTARE: Yeah, yeah. His penis?

THE COURT: Yes.

MR. MASHTARE: Hmm. I don't understand that one.

THE COURT: You don't understand that?

MR. MASHTARE: Well, if I did, I may - I might have. I mean you know (inaudible). Maybe I did. I'll plead guilty to it, anyway.

MS. GILLAN: Your Honor, just for clarification, J.B. [the victim] would testify that Charles at times would put lotion on him, and that this touching occurred over fifteen times.

THE COURT: So do you admit or deny that, Mr. Mashtare?

MR. MASHTARE: Well, I suppose I'll have to admit it, but I don't remember doing it that many times.

THE COURT: Is that going to be sufficient for your purposes, Mr. Sexton? Is there a possibility that with an assessment that there might be more revelation?

MR. SEXTON: There's always a possibility that there - there might be more revelation, but what I've heard this afternoon, Your Honor, Mr. Mashtare would not be viable for an outpatient community treatment.

THE COURT: So we shouldn't waste our time, then?

MR. SEXTON: That's correct.

THE COURT: Okay. That's good enough for me.

MR. MASHTARE: Well, I didn't mean to do anything the way -

THE COURT: Sorry. Unless you are willing to admit that you touched this young boy -

MR. MASHTARE: I did, yeah.

THE COURT: - and that you touched him in an area that was private --

MR. MASHTARE: Yes.

THE COURT: - and that you did so because you wanted to for your purposes, -

MR. MASHTARE: Yeah.

THE COURT: - I can't accept your plea.

MR. MASHTARE: Yes. I'll plead guilty to it. I mean, that I touched him for my purposes, you mean?

THE COURT: Uh-huh.

MR. MASHTARE: Is that what you're saying?

THE COURT: For your pleasure.

MR. MASHTARE: Yeah, okay. I'll plead guilty to it.

THE COURT: Do you admit that?

MR. MASHTARE: Yeah. Well, I don't want to - I don't want to be locked up. I can go crazy if I ever went to jail.

THE COURT: I think this is - I think this is close enough, Mr. Sexton, so that - because of my concern for this gentleman if he were to be incarcerated, I think I'll take this admission and accept this as being sufficient.

(Emphasis added.)

While the probation officer and the court discussed the possibility that petitioner might not admit the offense to a treatment provider, resulting in a probation violation soon after his conviction, petitioner interjected that he'd "go along with anything." The court then inquired whether defense counsel had anything further to add. In response, counsel offered to file a document with the court, which he had prepared for petitioner and which petitioner had signed, that enumerated petitioner's rights and outlined what would happen at the plea hearing. Counsel explained that it was unusual for him to prepare such a document, but he did so because petitioner "sometimes [has] trouble with his - with his memory." The court declined counsel's offer, and entered a finding and judgment of guilty on the lewd and lascivious conduct charge without addressing the defendant further on the charge or the consequences of his plea.

Entering a guilty plea involves waiver of important constitutional rights; therefore a court must satisfy itself that the defendant knowingly and voluntarily waives his constitutional rights before accepting a plea of guilty. In re Hall, 143 Vt. 590, 594 (1983). The colloquy V.R.Cr.P. 11(c) requires "seeks to assure that decisions to plead guilty . . . are knowing and voluntary." State v. Thompson, 167 Vt. 383, 386-87 (1998). Although the court need not read the rights enumerated in Rule 11(c) verbatim to the defendant, it must engage the defendant in an open dialogue regarding all of the elements under Rule 11(c) so the record demonstrates that "the defendant knows and understands the full array of legal consequences that attach to a guilty plea." In re Hall, 143 Vt. at 594-95. Further, the court's discussion with the defendant must establish that the defendant admits to the underlying facts as they relate to the law on all elements of the charge to which the defendant pleads guilty. State v. Yates, 169 Vt. 20, 24 (1999); see also V.R.Cr.P. 11(f) (court may not accept guilty plea absent an inquiry into the factual basis of the plea). If the defendant does not admit to all the elements of the offense, the factual basis for the guilty plea is suspect, and ultimately the plea may not be considered voluntary. See Yates, 169 Vt. at 26 ("The accuracy of the factual basis goes to the defendant's understanding of the relationship between the law and the facts, which ultimately goes to voluntariness.").

In this case, the district court failed to substantially comply with V.R.Cr.P. 11(c) by failing to advise defendant that he had the right to persist in his plea of not guilty, and that no further trial of any kind would take place. See V.R.Cr.P. 11(c)(3) & (4). The court also did not inform defendant that by pleading guilty, he waived his privilege against self incrimination and his right to confront the witnesses against him. See V.R.Cr.P. 11(c)(4). Standing alone, those omissions might not be reversible error in the absence of a showing of prejudice. See In re Hall, 143 Vt. at 596 (technical violations of V.R.Cr.P. 11(c) will not release a defendant from a guilty plea absent a showing of prejudice). In the context of the plea colloquy that took place, however, those omissions were significant. The record casts serious doubt about whether petitioner admitted that he touched the victim with the requisite criminal intent, see 13 V.S.A. 2602 (lewd and lascivious conduct requires a touching "with the intent of arousing, appealing to, or gratifying the lust, passions or sexual desires" of the perpetrator or victim), and thus whether there was a sufficient factual basis underlying the plea. Petitioner twice attempted to deny having a sexual intent when touching his cousin, and qualified his response when the court asked him directly if he had done so for his own pleasure. Ultimately, petitioner simply stated that he would plead guilty to the charge because he did not want to go to jail. In light of this, it is especially worrisome that petitioner was not informed he was waiving his right to have the matter determined by a jury.

In addition, the court failed to make any inquiry about petitioner's mental state at the time of the plea colloquy after defense counsel informed the court that petitioner had problems with his memory.[(1)] Notably, petitioner's complaint for post-conviction relief stated that he was placed in the Mental Health Unit at the Northwest State Correctional Facility when he was incarcerated for violating the conditions of his release. That fact was undisputed, but the superior court apparently did not consider it relevant even though the transcript of the hearing revealed a question about petitioner's

mental abilities.

The transcript of the plea agreement hearing also raises a concern about the court's reason for accepting the guilty plea. Instead of accepting the plea because it was satisfied that petitioner entered the plea voluntarily, with a full understanding of the charges and the consequences of the plea, the court stated that the colloquy was "close enough," and the plea would be accepted due to the court's "concern for [petitioner] if he were to be incarcerated."

The superior court erroneously ignored all of the above factors when it entered rendered summary judgment for the State. The record does not provide adequate assurance that petitioner entered his guilty plea, and waived his constitutional rights, knowingly and voluntarily. Accordingly, the court should have granted petitioner summary judgment and set his conviction aside. See 13 V.S.A. 7133.

Petitioner also argues on appeal that the court failed to address his claim that he did not receive effective assistance of counsel. In light of our disposition of this matter, we do not decide that issue.

Reversed and remanded for entry of judgment consistent with this opinion.

BY THE COURT:

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John A. Dooley, Associate Justice

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James L. Morse, Associate Justice

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Marilyn S. Skoglund, Associate Justice

1. In his motion to reconsider the summary judgment order, petitioner's counsel explained that petitioner "suffers from pronounced and ever advancing stages of Alzheimer's disease."