

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

ENTRY ORDER

SUPREME COURT DOCKET NO. 2002-498

AUGUST TERM, 2003

In re John White

}	APPEALED FROM:
}	
}	Rutland Superior Court
}	
}	DOCKET NO. 283-5-00 RdCv
}	
}	Trial Judge: Richard W. Norton
}	
}	
}	

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

Defendant appeals from a superior court order denying his petition for post-conviction relief. Defendant contends the court should have vacated his conviction of aggravated sexual assault because the charging information omitted the requisite element of non-consent. We affirm.

In August 1998, defendant was charged by information with the crimes of sexual assault, in violation of 13 V.S.A. 3252(a)(3), and aggravated sexual assault, in violation of 13 V.S.A. 3253(a)(9). In February 1999, pursuant to a plea agreement, defendant entered a plea of nolo contendere to the aggravated sexual assault charge, and was later sentenced to a term of fifteen to forty years, all suspended. He was subsequently convicted of a violation of probation and sentenced to serve ten to forty years.

In May 2000, defendant filed a petition for post-conviction relief, alleging that trial counsel had rendered ineffective assistance by failing to alert the court to defendant's history of mental problems at the change of plea hearing, and failing to conduct an adequate factual investigation prior to the hearing. He also alleged that he did not understand the nature of the plea due to his mental state and medications, and that as a consequence of his mental status and counsel's shortcomings his plea was not knowing or intelligent.

At the PCR hearing, defense counsel raised the additional claim that the charging information was defective because it failed to allege the requisite element of non-consent in connection with the charge of aggravated sexual assault. Following the hearing, the court issued a written decision, denying the petition. With respect to the new claim, the court found that the information had adequately informed defendant of the charge and the elements of the crime. This appeal followed.

Defendant renews his assertion that the charging information was defective because it failed to allege the element of non-consent. As noted, the information charged defendant with both sexual assault, in violation of 13 V.S.A. §3252(a)(3) (sexual act with a person under the age of sixteen) and aggravated sexual assault, in violation of 13 V.S.A. §3253(a)(9) (sexual assault under circumstances where "[t]he victim is subjected by the actor to repeated nonconsensual sexual acts as part of the same occurrence or . . . as part of the actor's common scheme and plan."). With respect to the latter charge, the information had alleged that defendant " engaged in repeated sexual acts as part of a common scheme and plan with a person under the age of 16 years."

Because the information omitted the allegation that the acts of aggravated sexual assault were " nonconsensual," defendant maintains that the information was defective and could not support the conviction. The State counters that because lack of consent is presumed in cases involving sexual assault upon a minor, see State v. Thompson, 150 Vt.

640, 644 (1989), the charging information was complete, notwithstanding the specific language of §3253(a)(9) referencing " nonconsensual sexual acts."

We need not resolve the legal issue as framed because the record is clear that defendant neither alleged nor proved that he was unaware of the nature and elements of the aggravated sexual assault charge and entered the no-contest plea based upon such a misunderstanding. In post-conviction relief proceedings the defendant has the burden of proving that any defect in the charge and plea process resulted in prejudice. In re Thompson, 166 Vt. 471, 475 (1997). Thus, to demonstrate prejudice in this case defendant was required to plead and prove that he was unaware of the nature and elements of the aggravated sexual assault charge as a result of the omission in the information, and that his lack of understanding caused him to plead no contest. Id.; see In re Stevens, 146 Vt. 6, 9-10 (1985) (defendant failed to prove that he was prejudiced by information's failure to allege essential " deadly weapon" element of aggravated assault charge); In re Bentley, 144 Vt. 404, 410 (1984) (defendant not prejudiced by court's failure to explain nature of charges where defendant failed to demonstrate that he was unaware of nature of charges and entered plea based on such misunderstanding).

Although defendant here claims that the information was defective, he neither argues nor cites to any record evidence demonstrating that he actually misunderstood the nature of the aggravated sexual assault charge and entered the no-contest plea as a result. Accordingly, there is no basis for a finding of prejudice, and therefore no ground to disturb the judgment.

BY THE COURT:

Jeffrey L. Amestoy, Chief Justice

Denise R. Johnson, Associate Justice

Marilyn S. Skoglund, Associate Justice