STATE OF RHODE ISLAND AND PROVIDENCE PLANTATIONS

PROVIDENCE, SC. **SUPERIOR COURT**

(FILED: September 3, 2014)

FRANS URIBE	:	
	:	
V.	:	**C.A. No. PM-2012-0086**
	:	
STATE OF RHODE ISLAND	:	

DECISION

MCGUIRL, J. Before this Court is the application of Frans Uribe[1] (Mr. Uribe or Petitioner) for postconviction relief. Mr. Uribe seeks to vacate his plea of nolo contendere, entered on May 2, 1991, on grounds that it failed to meet the requirements of Rule 11 of the Superior Court Rules of Criminal Procedure. The State of Rhode Island (State) objects to Mr. Uribe's application. Jurisdiction is pursuant to G.L. 1956 §§ 10-9.1-1, et seq.

I

Facts and Travel

On January 4, 1990, the Rhode Island State Police executed a search warrant at Mr. Uribe's residence. See Hr'g Tr. at 4 (Tr.), May 2, 1991. During that search, the police found drug-related paraphernalia and nine plastic bags containing cocaine. See id. The State filed a criminal information on March 1, 1990, charging Mr. Uribe with one count of possession of one ounce to one kilogram of cocaine and one count of possession of cocaine with intent to deliver. See State v. Uribe-Mejia, Criminal Information No. P2-90-0850A (R.I. Super. 1990). At his

[1] In the record from Petitioner's underlying conviction, his name alternatively appears as "Frans Uribe-Mejia" and "Frans Uribe." See State v. Uribe-Mejia, Criminal Information No. P2-90-0850A (R.I. Super. 1990). This Court uses "Frans Uribe," the name appearing on Petitioner's Verified Application for Post-Conviction Relief Pursuant to Rhode Island General Laws, § 10-9.1-1, et seq.

arraignment, Mr. Uribe pled not guilty to both counts. See Tr. at 3. On May 2, 1991, Mr. Uribe, with the assistance of counsel, changed his not guilty plea to a plea of nolo contendere. See Plea Aff., State's Mem. of Law in Opp'n of Pet'r's Appl. for Post-Conviction Relief, Ex. 1. After accepting Mr. Uribe's nolo contendere plea, the hearing justice[2] imposed concurrent sentences on both counts of fifteen years imprisonment, with four years to serve and eleven years suspended, with probation. See Tr. at 11. At the time of his conviction, Mr. Uribe was a legal permanent resident of the United States. See id. at 9. As a result of his plea and conviction, Mr. Uribe was deported to Columbia in August 2011. See Pet'r's Mem. of Law in Supp. of Appl. for Post-Conviction Relief, at 2.

Mr. Uribe, represented by new counsel, filed the instant application for postconviction relief on January 6, 2012. He seeks to vacate his nolo contendere plea on the grounds that it did not comply with Rule 11 of the Superior Court Rules of Criminal Procedure (Rule 11). In particular, Mr. Uribe argues that the hearing justice lacked a sufficient factual basis for acceptance of his plea.

II

Standard of Review

"Once a defendant has entered a plea of guilty or nolo contendere and sentence has been imposed, any issue relating to the validity of the plea must be raised by way of postconviction relief." State v. Vashey, 912 A.2d 416, 418 (R.I. 2006) (quoting State v. Desir, 766 A.2d 374, 375 (R.I. 2001) (superseded by statute on other grounds)). Postconviction relief is a statutory remedy available to a previously convicted defendant who now contends that his or her

[2] As the hearing justice is no longer a member of the Rhode Island Superior Court, this Court considers Mr. Uribe's application pursuant to Rhode Island Superior Court Rule of Practice 2.3(d)(4).

conviction was in violation of the state or federal constitution. See State v. Laurence, 18 A.3d 512, 521 (R.I. 2011) or the laws of this State; Sec. 10-9.1-1.[3]

"A plea of nolo contendere is the substantive equivalent of a guilty plea in Rhode Island." State v. Figueroa, 639 A.2d 495, 498 (R.I. 1994) (citing State v. Feng, 421 A.2d 1258, 1266 (R.I. 1980)). "Guilty pleas are valid only if voluntarily and intelligently entered, and the record must so affirmatively disclose." Id. (citing Boykin v. Alabama, 395 U.S. 238, 242 (1969)). Thus, a defendant who enters a plea of nolo contendere "waives several federal constitutional rights and consents to judgment of the court." Feng, 421 A.2d at 1266 (citing Johnson v. Mullen, 120 R.I. 701, 390 A.2d 909 (1978)).

In a postconviction relief procedure, the "applicant bears the burden of proving, by a preponderance of the evidence, that he [or she] is entitled to postconviction relief." Burke v. State, 925 A.2d 890, 893 (R.I. 2007) (citing Larngar v. Wall, 918 A.2d 850, 855 (R.I. 2007)). Thus, the applicant bears the burden of proving by a preponderance of the evidence that he or she did not intelligently and understandingly waive his or her rights. Figueroa, 639 A.2d at 498 (citing Cole v. Langlois, 99 R.I. 138, 142-43, 206 A.2d 216, 218-19 (1965)). "[A] plea will be vacated when it is shown to have been obtained from a defendant unaware and uninformed as to its nature and its effect as a waiver of his fundamental rights." Id. (citing Cole, 99 R.I. at 141,

[3] Section 10-9.1-1 provides, in relevant part:

> "Any person who has been convicted of, or sentenced for, a crime . . . and who claims:
> (1) That the conviction or the sentence was in violation of the constitution of the United States or the constitution or laws of this state[]
> . . . .
> may institute . . . a proceeding under this chapter to secure relief." Sec. 10-9.1-1.

206 A.2d at 218). Since postconviction relief proceedings are "civil in nature[,]" Ouimette v. Moran, 541 A.2d 855, 856 (R.I. 1988), the rules and statutes applicable in civil proceedings shall apply. See § 10-9.1-7.

III

Law and Analysis

Mr. Uribe maintains that he is entitled to postconviction relief because the hearing justice lacked a sufficient factual basis for acceptance of his nolo contendere plea to either Count I, possession of one ounce to one kilogram of cocaine, or Count II, possession of cocaine with intent to deliver. As such, he contends that the plea failed to meet the requirements of Rule 11.

Rule 11 sets out the requirements for a trial court's acceptance of a plea of nolo contendere. See Super. R. Crim. P. 11. It provides in pertinent part:

> "A defendant may plead not guilty, guilty or, with the consent of the court, nolo contendere. The court may refuse to accept a plea of guilty, and shall not accept such plea or a plea of nolo contendere without first addressing the defendant personally and determining that the plea is made voluntarily with understanding of the nature of the charge and the consequences of the plea . . . . The court shall not enter a judgment upon a plea of guilty or nolo contendere unless it is satisfied that there is a factual basis for the plea." Super. R. Crim. P. 11.

If a trial court has accepted a plea "without conforming to the requirements of the rule, the defendant's plea must be set aside[.]" State v. Frazar, 822 A.2d 931, 935 (R.I. 2003) (internal quotation omitted). Under Rule 11, a justice may not "enter a judgment upon a plea of . . . nolo contendere unless [he or she] is satisfied that there is a factual basis for the plea."[4] Super. R. Crim. P. 11. A defendant "may know what he or she has done, but not be sufficiently

[4] The Rhode Island Supreme Court has stated that Rule 11's mandate that the hearing justice ascertain whether there is a factual basis for a nolo plea is a prudential, rather than a constitutional, requirement. See Johnson v. Mullen, 120 R.I. 701, 707, 390 A.2d 909, 912 (1978).

knowledgeable about the law to recognize that these acts do not constitute the offense he is accused of committing." Wright and Leipold, 1A Federal Practice and Procedure: Criminal § 179 (4th ed. 2008).[5]

The factual basis requirement of Rule 11 aims to "prevent a defendant who committed no crime from pleading guilty to one, and to prevent a defendant who is guilty of a lesser offense from pleading guilty to a higher charge." Id. Thus, the hearing justice must be satisfied that a factual basis exists for the plea in order to "determine that the conduct which the defendant admits constitutes the offense charged in the indictment . . . or an offense included therein to which the defendant has pleaded guilty." McCarthy v. U.S., 394 U.S. 459, 467 (1969) (internal quotation omitted).

The trial court may make the requisite factual determination at any time prior to imposing sentence. See Feng, 421 A.2d at 1269 (citing U.S. v. Bradin, 535 F.2d 1039 (8th Cir. 1976)). Rule 11 does not require a "'written, sworn, and filed stipulation of evidence,' but only that the court make an inquiry 'factually precise enough and sufficiently specific to develop that [the defendant's] conduct . . . was within the ambit of that defined as criminal.'" State v. Williams, 122 R.I. 32, 44, 404 A.2d 814, 821 (1979) (quoting U.S. v. Bethany, 489 F.2d 91, 92 (5th Cir. 1974) (internal quotation omitted)). Furthermore, Rule 11 "does not specify the extent or content of the colloquy, the record and the circumstances in their totality must demonstrate to a reviewing court that the defendant's plea was voluntary and intelligent." Moniz v. State, 933 A.2d 691, 695 (R.I. 2007) (citing Feng, 421 A.2d at 1267). However, although Rule 11 is intended to safeguard the rights of criminal defendants, it is not intended to "serve as a trap for

[5] Rhode Island's Rule 11 "is the same as its federal counterpart except for the requirement . . . that before entering judgment on a plea the court be satisfied that there exists a basis for a plea of nolo contendere as well as guilty." Reporter's Notes, Super. R. Crim. P. 11. The Federal Rule only imposes a factual basis requirement for acceptance of guilty pleas. See Fed. R. Crim. P. 11.

those justices who fail to enumerate each fact relied on to accept . . . a plea." Camacho v. State, 58 A.3d 182, 186 (R.I. 2013). The reviewing court will "'not vacate a plea unless the record viewed in its totality discloses no facts that could have satisfied the [hearing] justice that a factual basis existed for a defendant's plea.'" Id. at 188 (quoting Frazar, 822 A.2d at 935-36).

The Court addresses the factual basis for Mr. Uribe's plea to each of the two charges in seriatim.

A

Count I: Possession of One Ounce to One Kilogram

Mr. Uribe argues that there was an insufficient factual basis for his plea to Count I because the prosecutor's recitation of the State's evidence failed to give any indication of the quantity or weight of the drugs seized. In response, the State asserts that Count I was a straightforward charge, the elements of which were clearly set out in the Information. The State therefore argues that the hearing justice's summary of the charge, coupled with Mr. Uribe's admission of the facts, was sufficient to establish a factual basis for Mr. Uribe's plea to possession of one ounce to one kilogram of cocaine.

When used in a criminal statute, the term "possess" is defined as "an intentional control of a designated object with knowledge of its nature." State v. Gilman, 110 R.I. 207, 215, 291 A.2d 425, 430 (1972) (citation omitted). In a possession case, a jury may return a verdict of guilty if it finds, beyond a reasonable doubt, that the defendant knowingly possessed any quantity of a controlled substance, and that the amount possessed by the defendant was less than a usable quantity is not a defense to the charge of possession. See Richardson v. People, 25 P.3d 54 (Colo. 2001).

During the plea hearing, the prosecution recited the evidence that the State was prepared to prove if Mr. Uribe's case went to trial. See Tr. at 4. In that recitation, the prosecutor stated,

> "the State's prepared to prove on the fourth day of January 1990, the State Police executed a search warrant at this defendant's home, 5 and 1/2 Nicholson Street. During that search, police officers located [eight] clear plastic bags containing cocaine. They also found various drug related paraphernalia and an additional clear plastic bag of cocaine in a man's shoe in this defendant's apartment." Id.

As Mr. Uribe points out, the prosecutor stated that there were eight or nine plastic bags of cocaine seized from Mr. Uribe's home, but failed to give any information about the weight or size of each bag.[6] However, Mr. Uribe appears to mistakenly assume that the recitation of the State's evidence is the only source that may be relied upon to establish the factual basis for a plea under Rule 11.[7] A prosecutor's recitation of the State's evidence is only one of several sources

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[6] During the plea hearing, Mr. Uribe stated that he understood the prosecutor's presentation of the State's evidence and admitted the facts contained therein:

> "THE COURT: Now [the prosecutor] gave us a brief description of the facts of this case and on these two charges, did you understand what he was saying?
> "MR. URIBE: Yes, I understand.
> "THE COURT: Do you admit to what he said, the facts of the case? You admit them?
> "MR. URIBE: Yes." (Tr. at 6-7).

[7] In his Memorandum of Law in Support of his Application for Post-Conviction Relief, Mr. Uribe exclusively discusses the prosecutor's recitation of the State's evidence. He does not address his plea colloquy with the hearing justice or the plea affidavit form that he executed.

In support of his argument that the prosecutor's recitation of the State's evidence was insufficient to establish a factual basis, Mr. Uribe relies on two extra-jurisdictional cases, Ritacca v. Kenosha County Court, 280 N.W.2d 751 (Wis. 1979) and Osborne v. State, 643 S.W.2d 251 (Ark. 1982). Both cases are readily distinguishable. In Ritacca, the Supreme Court of Wisconsin held that a complaint failed to establish probable cause that the defendant had marijuana in his possession or control. Id. at 83-84. The court reasoned that the complaint did "not even state that the defendant was the owner of the house or a tenant." Id. at 84. In Mr. Uribe's case, the recited facts clearly stated that the cocaine was found "at this defendant's home, 5 and ½ Nicholson Street." (Tr. at 4.) In Osborne, the Arkansas Supreme Court overturned a defendant's conviction for possession with intent to deliver controlled substances. See 643 S.W.2d at 254. The court concluded that there was insufficient evidence for the jury to

of record upon which a hearing justice may rely to ascertain whether there is a factual basis for each element of a charged offense. See Camacho, 58 A.3d at 186 (citing Feng, 421 A.2d at 1266); see also Williams 122 R.I. at 40, 404 A.2d at 819 (explaining simply that a hearing justice, at the conclusion of a plea hearing, "should be able to say with assurance that the accused is fully aware of the nature of the charge and the consequences of the plea"). Thus, this Court must look at the record in its totality to determine if there was a factual basis for the hearing justice's acceptance of the plea. See Camacho, 58 A.3d at 188 (reiterating that the Court "'shall not vacate a plea unless the record viewed in its totality discloses no facts that could have satisfied the [hearing] justice that a factual basis existed for a defendant's plea'") (quoting Frazar, 822 A.2d at 935–36).

The State cites Feng, 421 A.2d at 1258 for the proposition that the reading of an indictment to a defendant, and the defendant's admission of the charged conduct, may be used to establish a factual basis in cases where the offense is "'straightforward and the elements of the crime are clearly set out.'" Feng, 421 A.2d at 1270 (quoting Seiller v. United States, 544 F.2d 554, 565 (2d Cir. 1977)). Our Supreme Court explained in Feng that "reading a straightforward indictment to a defendant will inform him of the specific conduct underlying the offense with

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have found that the defendant had control of the premises from which the substances were seized. See id. In contrast, Rule 11's factual basis requirement does not require a hearing justice to satisfy him or herself that the evidence is sufficient for a jury to find the defendant guilty beyond a reasonable doubt. See United States v. Preston, 499 Fed. App'x 70, 72 (2d Cir. 2012) (citing United States v. Maher, 108 F.2d 1513, 1524 (2d Cir. 1997)); see also United States v. Matos-Quinones, 456 F.3d 14, 21 (1st Cir. 2006) (Federal Rule 11 does not require proof beyond a reasonable doubt). Rather, Rule 11 requires that the hearing justice "assure [him or herself] simply that the conduct to which the defendant admits is in fact an offense under the statutory provision under which he is pleading[.]" Id. (internal quotation omitted). To do so, the trial court "'may rely on defendant's own admissions, information from the government, or other information appropriate to the specific case.'" Id. (quoting United States v. Andrades, 169 F.3d 131, 136 (2d Cir. 1999)).

which he is charged. The [hearing[justice may then rely on a defendant's admission of that conduct to satisfy himself that a factual basis exists for his guilty or nolo plea." Id.

In Feng, the trial court summarized the charges rather than reading the indictment to the defendant. See 421 A.2d at 1270-71. There, the hearing justice summarized the charge as possession of "a controlled substance" but did not specifically mention that one of the controlled substances that the defendant was accused of possessing was lysergic acid diethylamide (LSD). See id. The Supreme Court noted that the list of substances classified by statute as "controlled" is extensive and that each substance possessed could form the basis for a separate offense. See id. at 1271. The court further pointed out that authorities had seized several different controlled substances from Mr. Feng's residence. See id. Under these circumstances, the court concluded that the hearing justice's reference to "controlled substances" did not constitute a straightforward statement of "the elements of the offense of possession of the particular controlled substance LSD." Id.

Count I of the Information in the present case alleges that Mr. Uribe "did unlawfully, with knowledge and intent possess a certain enumerated quantity of a controlled substance, to wit, one (1) ounce to one (1) kilogram of a mixture or substance containing a detectable amount of cocaine . . . ." State v. Uribe-Mejia, Criminal Information No. P2-90-0850A (R.I. Super. 1990). It appears, however, that in lieu of reading the Information into the record, the clerk summarized the charges contained therein:

> "THE CLERK: Waiving the reading of this Information which charges you with two counts, Count I, possession of one ounce to one kilo of a controlled substance; and Count II, possession of a controlled substance,[8] what say you to these charges?

[8] The clerk misstated the second charge by omitting the element of intent to deliver. The factual basis for Mr. Uribe's plea to Count II is discussed infra.

> "[DEFENSE COUNSEL]: Your Honor, at this time the defendant will withdraw his plea of not guilty and enter a plea of nolo contendere to each count." (Tr. at 3).

The hearing justice also summarized Count I when he questioned Mr. Uribe about his understanding of the charges and the penalty for each offense:

> "THE COURT: Now the first count of this Information, possession of cocaine in an amount over one ounce, do you understand that?
> "MR. URIBE: Yes.
> ". . . .
> "THE COURT: And the second count, possession with intent to deliver carries a maximum penalty of up to 30 years at the ACI.
> "MR. URIBE: I understand, your Honor."[9] Id. at 6.

While a defendant's possession of more than one type of controlled substance may form the basis for more than one offense, a defendant's possession of any quantity of cocaine that falls within the statutory range of one ounce to one kilogram forms the basis for only one substantive offense. See G.L. 1989 § 21-28-4.01.1(A)(2)(b).[10] Thus, unlike in Feng, the summary of the charged offense as possession of "one ounce to one kilo" of cocaine was a straightforward statement of the quantity possessed in Count I of the charges. See Camacho, 58 A.3d at 186 (a hearing justice need not give a detailed explanation of a charge, element by element, and fact by

[9] At the commencement of the plea colloquy, the hearing justice inquired of Mr. Uribe's ability to understand spoken English:

> "[COUNSEL FOR DEFENDANT]: Your Honor, for the record, Mr. Uribe speaks enough English to understand. Some of the words are difficult.
> "THE COURT: Is that correct?
> "MR. URIBE: Yes, your Honor.
> "THE COURT: So what we'll do is use both methods. I'll use English until you indicate you don't understand then we'll have the interpreter interpret, okay?
> "MR. URIBE: I agree." (Tr. at 2.)

[10] The Information cites to the 1982 Reenactment of the General Laws. See State v. Uribe-Mejia, Criminal Information No. P2-90-0850A (R.I. Super. 1990). It appears, however, that § 21-28-4.01.1 was not enacted until 1988. See P.L. 1988, ch. 651, § 1. Thus, this Court cites to the 1989 Reenactment.

fact). Both the hearing justice and the clerk conveyed to Mr. Uribe that he was admitting to possessing at least one ounce of cocaine. Mr. Uribe's plea to such a charge is therefore precise enough and "sufficiently specific to develop that [his] conduct . . . was within the ambit of that defined as criminal" by § 21-28-4.01.1(A)(2)(b). Williams, 122 R.I. at 44, 404 A.2d at 821 (internal quotation omitted). Thus, this Court finds that the record discloses sufficient facts to satisfy the hearing justice that Mr. Uribe's plea to possession of one ounce to one kilogram of cocaine was based on fact.

B

Count II: Possession with Intent to Deliver

Mr. Uribe maintains that in the absence of any indication of the quantity of cocaine seized, the prosecutor's recitation of the State's evidence could not have established a factual basis for Count II, possession with intent to deliver. In response, the State argues that the prosecutor's recitation of the evidence, when considered along with Mr. Uribe's signed plea affidavit, provides an adequate factual basis for the hearing justice's acceptance of Mr. Uribe's plea.

Possession is a lesser included offense of the crime of possession with intent to deliver. State v. Ahmadjian, 438 A.2d 1070, 1087 (R.I. 1981) ("[T]he offense of simple possession of a controlled substance . . . is a lesser included offense of delivery of a controlled substance . . . ."); State v. Sundel, 121 R.I. 638, 402 A.2d 585, 590 (1979). For the state to prove possession of a controlled substance with intent to deliver, it "must show that a defendant was in possession of drugs, had the requisite control over them, and intended to deliver the drugs to others." State v. Williams, 656 A.2d 975, 978 (R.I. 1995) (further citation omitted). Furthermore, in Rhode

Island, intent to deliver illegal narcotics can be inferred "solely on the basis of the amount of the drugs found." Id. (citing State v. Colbert, 549 A.2d 1021, 1024-25 (R.I. 1988)).

The actual quantity that a defendant is accused of possessing is not an element of the offense of possession with intent to distribute. See 25 Am. Jur. 2d Drugs and Controlled Substances § 160 (2012). ("[I]n a prosecution . . . [for] possession with intent to distribute controlled substances, although the drug quantity is relevant at trial as circumstantial evidence of intent, it is not an element of the offense of possession with intent to distribute in violation of the statute.") (internal footnote omitted); see also People v. Marion, 647 N.W.2d 521, 523 (Mich. Ct. App. 2002) (knowledge of quantity was not an element of possession with intent to deliver and the defendant was not entitled to instruction that required the prosecution to prove, beyond a reasonable doubt, the defendant's knowledge of the quantity of the controlled substance she or he was charged with possessing with intent to deliver).

Both parties rely on Feng, 421 A.2d 1258. There, our Supreme Court held that a presentence report was sufficient to establish a factual basis for the defendant's pleas to charges of possession of marijuana and cocaine with intent to deliver.[11] Id. at 1270. The report stated that the police had "'seized a large quantity of cocaine, marijuana, CNS, hashish, and other narcotic implements" from Feng's dormitory room. Id. at 1270.

The State suggests that the facts contained in the prosecutor's recitation of the State's evidence in Mr. Uribe's case are extremely similar to the facts in the presentence report relied upon in Feng. The generic reference to "drug related paraphernalia" in the recited facts in Mr. Uribe's case is similar to the generic reference to "narcotic implements" in the presentence report in Feng. See Tr. at 4. Mr. Uribe points out, however, that the presentence report in Feng also

[11] Mr. Uribe waived a presentence report. See Tr. at 11.

stated that there was a "large quantity" of several different controlled substances seized from the defendant's residence. In Rhode Island, intent to deliver illegal narcotics can be inferred "solely on the basis of the amount of the drugs found." State v. Williams, 656 A.2d 975, 979 (R.I. 1995) (citing State v. Colbert, 549 A.2d 1021, 1024-25 (R.I. 1988)). The recited facts, as opposed to the summary of the charged offense, in the present case do not indicate the quantity of cocaine found in Mr. Uribe's residence.

However, the State's evidence in this case contains a significant fact that was not present in the presentence report in Feng. In addition to the reference to drug paraphernalia, the prosecutor also indicated that the State was prepared to prove that the cocaine found in Mr. Uribe's residence was separately packaged in nine clear plastic bags. See Tr. at 4. Our Supreme Court has stated on more than one occasion that "separate packaging of illegal narcotics may be indicative of an intent to deliver." See Williams, 656 A.2d at 979 (citing State v. Eiseman, 461 A.2d 369, 382 (R.I. 1983) (internal citation omitted) (overruled on other grounds)). Moreover, it need not be shown that the separate packages contain equal amounts of the controlled substance. See id. Thus, while the recited facts in Mr. Uribe's case lack the evidence of quantity that was in the presentence report in Feng, they include an additional significant piece of evidence that was not present in Feng.

The State urges that this Court need not rely solely on the recited facts to find a factual basis for Mr. Uribe's plea to Count II. According to the State, when the recited facts are considered along with Mr. Uribe's plea affidavit, the record as a whole discloses sufficient facts to satisfy the hearing justice that there was a factual basis for Mr. Uribe's plea to possession with intent to deliver. The plea affidavit, entitled "Request to Enter Plea of Nolo Contendere or Guilty," provides a blank space for a handwritten description of the charges against the

defendant. See Plea Aff., State's Mem. of Law in Opp'n of Pet'r's Appl. for Post-Conviction Relief, Ex. 1. On the form that Mr. Uribe executed, Count II is described as "Poss with Intent to Deliver[.]" Id. In typed print, the form recites, "I understand the plea of Nolo Contendere is for all purposes the same as a plea of Guilty and that I will be admitting sufficient facts to substantiate the charge(s) which has (have) been brought against me[.]" Id. Both Mr. Uribe and his attorney signed the plea form on May 2, 1991. See id.

Our Supreme Court has cautioned that plea affidavits containing similar language are a kind of "boilerplate litany" that, standing alone, are ordinarily insufficient to satisfy the requirements of Rule 11. See Williams, 122 R.I. at 42, 404 A.2d at 820. Nonetheless, in Feng, the Supreme Court looked to the defendant's signed plea affidavit to hold that the hearing justice had a sufficient factual basis for accepting a plea to possession of LSD. See 421 A.2d at 1271. In the plea form, the defendant swore, "I . . . understand that . . . I am admitting sufficient facts to substantiate the charge(s) which has (have) been brought against me in the indictment(s) to which these pleas relate." Id. The indictment charged that the defendant "did unlawfully, with knowledge and intent possess a controlled substance to wit, Lysergic Acid Dithylamide (sic) . . ." Id. It appears that the indictment is the only place where it was specifically indicated that one of the substances that the defendant was charged with possessing was LSD. See id. The Court noted that Mr. Feng was an intelligent individual with a college education. Id. at 1269. The Court reasoned that in light of Mr. Feng's education and intellect, the hearing justice could have inferred from Mr. Feng's signature on the plea form that he had read and understood the indictment's accusation of possession of LSD. See id. at 1271. The Court therefore held that the hearing justice "could have relied on the indictment together with Feng's implicit admission of

the conduct alleged in the affidavit to satisfy himself that Feng's plea [to possession of LSD] was based on fact." Id.

The plea form that Mr. Uribe signed was more straightforward than the form that the defendant executed in Feng. Here, it is squarely written across the top of the form that Mr. Uribe was charged with possession "with Intent to Deliver[.]" Plea Aff., State's Mem. of Law in Opp'n of Pet'r's Appl. for Post-Conviction Relief, Ex. 1. Thus, the hearing justice did not need to make any assumptions or draw any inferences about whether Mr. Uribe had cross-referenced the indictment. Under such circumstances, the hearing justice could straightforwardly conclude that Mr. Uribe was admitting to possession with intent to deliver when he signed the form.

However, the hearing justice also inquired of Mr. Uribe's understanding of Count II during the plea colloquy, informing Mr. Uribe that Count II charged him with "intent to deliver[.]"[12] Thus, the following exchange took place:

[12] In contrast to the highly literate defendant in Feng, Mr. Uribe is not a native speaker of the English language. See Tr. at 2. During the plea colloquy, however, the hearing justice questioned Mr. Uribe about his ability to understand the plea form:

> "THE COURT: . . . . Mr. [Uribe], your attorney has handed me this request for change of plea. Did you sign this request?
> "MR. URIBE: Yes, your Honor.
> "THE COURT: Did you read this before you signed it?
> "MR. URIBE: Yes, your Honor.
> "THE COURT: Do you read and write the English language?
> "MR. URIBE: A little bit, your Honor, but I read the form in Spanish.
> "THE COURT: Did you read this in English, also?
> "MR. URIBE: Yes.
> "THE COURT: Was this translated for you from English into Spanish?
> "MR. URIBE: Yes.
> "THE COURT: After the form was translated from English into Spanish, did you understand what this said?
> "MR. URIBE: Yes, I understand." Id. at 3-4.

Based on Mr. Uribe's responses to this inquiry, the hearing justice reasonably could have been assured that language was not a barrier to Mr. Uribe's ability to understand the plea form.

> "THE COURT: Are you today under the influence of either drugs or alcohol?
> "MR. URIBE: No, your Honor.
> "THE COURT: What are the facts, Mr. Ferland?
> "MR. FERLAND: Yes, your Honor. If this matter were to proceed to trial, the State's prepared to prove on the fourth day of January 1990, the State Police executed a search warrant at this defendant's home, 5 and 1/2 Nicholson Street. During that search, police officers located 8 clear plastic bags containing cocaine. They also found various drug related paraphernalia and an additional clear plastic bag of cocaine in a man's shoe in this defendant's apartment.
> . . .
> "THE COURT: . . . the second count, possession with intent to deliver carries a maximum penalty of up to 30 years at the ACI.
> "MR. URIBE: I understand, your Honor.
> "THE COURT: Now Mr. Ferland gave us a brief description of the facts of this case and on these two charges, did you understand what he was saying?
> "MR. URIBE: Yes, I understand.
> "THE COURT: Do you admit to what he said, the facts of the case? You admit them?
> MR. URIBE: Yes." (Tr. at 4 and 6-7).

See also Moniz, 933 A.2d at 696 n.4 (colloquy between hearing justice and defendant in which defendant admitted committing offense was sufficient to establish factual basis for nolo contendere plea to possession of marijuana with intent to deliver).[13]

[13] In Moniz, the hearing justice, the defendant, and the prosecutor had the following exchange:

> "[hearing justice]: I'll ask you to listen as a representative of [the] Attorney General's office describes . . . what . . . the State . . . would stand ready to prove if this case were . . . to proceed to trial. When he concludes, I'll be asking you . . . whether or not you are in substantial agreement with the statement . . . .
> "[prosecutor]: . . . if [this] matter were to proceed to trial, your Honor, the State would prove that on 30 November 1996 in Bristol that [the defendant] did unlawfully possess with an intent to deliver a controlled substance; that substance being marijuana.
> "[hearing justice]: . . . are you in substantial agreement with that statement?
> "[defendant]: Yes, your Honor." Moniz, 933 A.2d at 695.

The recited facts reveal that a total of nine clear plastic bags containing cocaine and various drug-related paraphernalia were found in Mr. Uribe's home. Considering these facts, coupled with the hearing justice's colloquy with defendant and the summary of the charged offense, the Court finds that the record in its totality clearly discloses sufficient facts to satisfy the hearing justice that Mr. Uribe's plea to possession of cocaine with intent to deliver was based on fact.

IV

Conclusion

For the reasons discussed herein, the record in its totality discloses that there was a sufficient factual basis for the hearing justice's acceptance of Mr. Uribe's pleas of nolo contendere to the charges of possession of one ounce to one kilogram of cocaine and possession of cocaine with intent to deliver.[14] Thus, Mr. Uribe has failed to meet his burden of proving by a preponderance of the evidence that he is entitled to postconviction relief. Accordingly, the Court denies Mr. Uribe's application.

Counsel shall submit the appropriate order for entry.

[14] The Court observes that:

> "the standard is not whether the trial court sufficiently made a detailed explanation of the charges, element by element, and fact by fact, but, more importantly, whether the defendant understood them. A finding may be based on the record viewed in its totality. The applicant bear[s] the burden of proving by a preponderance of the evidence that [he or she] did not intelligently and understandingly waive [his or her] rights." Camacho, 58 A.3d at 186-87 (internal citations and quotations omitted).

RHODE ISLAND SUPERIOR COURT
Decision Addendum Sheet

TITLE OF CASE:	**Uribe v. State of Rhode Island**
CASE NO:	**PM-2012-0086**
COURT:	**Providence County Superior Court**
DATE DECISION FILED:	**September 3, 2014**
JUSTICE/MAGISTRATE:	**McGuirl, J.**
ATTORNEYS:	
For Plaintiff:	**John E. MacDonald, Esq.**
For Defendant:	**Jeanine McConaghy, Esq.**