Note: In the case title, an asterisk (*) indicates an appellant and a double asterisk (**) indicates a cross-appellant. Decisions of a three-justice panel are not to be considered as precedent before any tribunal.

ENTRY ORDER

SUPREME COURT DOCKET NO. 2018-144

JANUARY TERM, 2019

In re Brian Shannon (State of Vermont*)	}	APPEALED FROM:
	}	
	}	Superior Court, Essex Unit,
	}	Civil Division
	}	
	}	DOCKET NO. 34-8-15 Excv
		Trial Judge: Thomas J. Devine

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

In this post-conviction-relief (PCR) proceeding, the State appeals the civil division's order granting partial summary judgment to petitioner and vacating his pleas on thirteen counts in two criminal dockets based on its determination that there was an inadequate colloquy establishing petitioner's admission of a factual basis to one of the charges pursuant to Vermont Rule of Criminal Procedure 11(f). In arriving at this determination, the civil division relied on our decision in In re Bridger, 2017 VT 79. Thereafter, we issued our decision in In re Barber, 2018 VT 78, regarding the retroactive application of Bridger. We conclude that, based on our controlling law at the time petitioner entered his pleas, the colloquy regarding petitioner's admission to a factual basis to the charge in question was adequate. Accordingly, we reverse the civil division's decision and remand the matter for further proceedings regarding petitioner's other claims.

Between June 2012 and June 2013, petitioner was charged with a total of thirteen counts in two criminal dockets: aggravated assault with a deadly weapon; driving under the influence of alcohol, third or subsequent offense; operating a vehicle with a suspended license; interference with access to emergency services; reckless endangerment; simple assault; unlawful mischief; two counts of contempt of court; and four counts of second-degree aggravated assault. In February 2014, petitioner entered into a plea agreement under which he pled guilty to six of the counts, including the reckless endangerment count at issue in this appeal, and no contest to the remaining seven counts. The plea agreement provided that ten of the charges would result in deferred sentences, the length of which would be determined by the trial court. The trial court accepted petitioner's pleas at a February 6, 2014 change-of-plea hearing. In October 2014, the court sentenced petitioner to serve one-to-five years on three counts, two of them being consecutive, and entered deferred sentences on the other ten charges for a period of five years.

In August 2015, petitioner filed a pro se PCR petition. In August 2017, while the petition was still pending, this Court issued Bridger, in which we held that: (1) Rule 11(f) requires a plea colloquy to include the defendant's personal admission of the facts underlying the offense; (2) oral or written stipulations cannot satisfy the Rule 11(f) requirement; and (3) substantial compliance does not apply in determining whether a Rule 11(f) colloquy was adequate. 2017 VT 79, ¶¶ 14, 19-24; see also In re Gabree, 2017 VT 84, ¶¶ 9-11 (concluding that petitioner's plea did not comply with Rule 11(f) because

petitioner did not independently agree that factual basis to charge existed as required by Bridger). Shortly after Bridger and Gabree issued, petitioner, now represented by counsel, amended his petition by adding a claim that the trial court's colloquy concerning his plea to count six—the reckless endangerment count—did not satisfy the requirement in Rule 11(f) in that the court should not enter a judgment based on a guilty plea "without making such inquiry as shall satisfy it that there is a factual basis for the plea." He further claimed that because of the defective plea as to count six, the entire plea agreement had to be vacated.

On April 4, 2018, petitioner moved for partial summary judgment with respect to the added claim concerning Rule 11(f). The State conceded that the plea colloquy for count six did not satisfy the standard established in Bridger but argued that because Bridger established new law, it should not be applied retroactively to this case. The civil division granted petitioner's motion, ruling that the trial court failed to elicit petitioner's admission that there was a factual basis to his plea with respect to the reckless endangerment count. In so ruling, the court concluded that Bridger merely reiterated and clarified existing law. The court also concluded that, given the inadequate Rule 11(f) colloquy on one of the charges, the entire plea agreement had to be vacated.

The State appealed. During the pendency of the State's appeal, this Court issued Barber, which addressed whether our decision in Bridger regarding the requirements of Rule 11(f) applied "retroactively to cases where direct review was over, but a collateral proceeding was pending." 2018 VT 78, ¶ 3. We held "that Bridger announced a new criminal procedural rule" that "does not apply to cases where direct review was concluded at the time Bridger was decided," and that "in those cases, pending or future collateral proceedings must be evaluated under pre-Bridger standards." Barber, 2018 VT 78, ¶ 1. Specifically, we held that although Bridger did not establish a new rule with respect to its holding that our "[e]xisting precedent interpreting Rule 11(f) required a recitation of facts underlying the charges and some admission or acknowledgement by defendant of those facts," Bridger did establish a new rule "on the question of whether oral or written stipulations or waivers could satisfy the factual basis requirement of Rule 11(f)" and also on its "holding that substantial compliance does not apply to evaluating claims under Rule 11(f)." Id. ¶¶ 11-13.

On appeal, the State argues that the trial court's colloquy on the reckless endangerment count satisfied the then-existing law concerning Rule 11(f). "We review the PCR court's summary judgment decision de novo and apply the same standard as the trial court." Gabree, 2017 VT 84, ¶ 7. "Summary judgment is proper when there is no genuine issue of material facts and the movant is entitled to judgment as a matter of law." Id. (quotation omitted). We agree with the State that the plea colloquy concerning count six satisfied the then-existing law on Rule 11(f). Accordingly, we reverse the civil division's grant of partial summary judgment to petitioner and remand the matter for further proceedings for the court to consider petitioner's other claims.

At the change-of-plea hearing in this case, the trial court engaged petitioner and his attorney in an extensive colloquy, covering over fifty pages of transcript, regarding the proposed plea agreement. After confirming that petitioner had looked over and understood the agreement, the court went through the various charges in the two Informations. When the court arrived at the reckless endangerment count, it first read the information—that defendant had "recklessly engaged in conduct which placed, or may have placed, another person in danger of death or serious bodily injury." The court then explained to petitioner that the prosecutor was claiming that petitioner had recklessly endangered two boys, whom the prosecutor named, "by throwing or disposing of his knife in the near proximity of [the two] boys." Petitioner acknowledged that he understood the charge.

Shortly thereafter, after going over the proposed sentences under the plea agreement, the court explained to petitioner, in referring to the charges in general, that, "[b]y pleading guilty, you're saying,

'Yes, I admit I did just what the state [said I] did.' " Petitioner responded in the affirmative when the court asked him if he understood.

After confirming that petitioner was voluntarily and knowingly giving up his right to a jury trial and that he was aware of the potential consequences of his pleas, the court again addressed the various individual charges to determine if petitioner understood them and agreed that there was a factual basis for each of them. When the court reached the docket that included the ten counts, it explained how the prosecutor was amending the first count, an aggravated domestic assault charge, and then asked petitioner's attorney, "as to this and the other nine charges in this docket number, is it agreed that there is adequate factual basis?" Petitioner's attorney, in petitioner's presence, responded: "Yes. Based on the colloquy the [c]ourt had to give better clarification to the Information, there is." The court then stated "that based on [petitioner's attorney's] statement and the other statements made of record relating to the factual circumstances of these ten charges, we'll find that there's adequate factual basis for each and all the counts in this docket."

The court then went over each individual charge again to ensure that petitioner wanted to plea either guilty or no contest to each charge. With regard to the reckless endangerment charge, petitioner acknowledged that he was pleading guilty to "acting recklessly" and "engag[ing] in conduct which placed [the two named boys] in danger of death or serious bodily injury" by "throwing a knife in the[ir] direction."

We conclude that this colloquy satisfied Rule 11(f) under our then-current law. As we stated in Barber, "under pre-Bridger law the stipulations of defendant's attorney satisfied Rule 11(f) and provided a factual basis for the charge." 2018 VT 78, ¶ 31. In this case, petitioner's attorney agreed that there was a factual basis for the reckless endangerment charge based on the colloquy a few minutes earlier that the court had had with petitioner describing what the State was accusing him of doing with respect to that charge. Petitioner notes that the attorney representing him at the change-of-plea proceeding was not his attorney for the set of charges that included the reckless endangerment charge and thus was not familiar with the facts underlying that charge. But the attorney stated at the hearing that he was authorized by petitioner's attorney to resolve this case as part of the global resolution of the cases pending against petitioner, and petitioner answered in the affirmative when the court asked him if he and his other attorney wanted the cases resolved on that day with the attorney attending the hearing. Furthermore, when petitioner's attorney at the hearing acknowledged the factual basis for the reckless endangerment charge, he did so based on the rendition of the facts that the court had just recently stated to petitioner. Under these circumstances, Rule 11(f) was satisfied pursuant to the the-current law.

Reversed and remanded.

BY THE COURT:

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Marilyn S. Skoglund, Associate Justice

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Beth Robinson, Associate Justice

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Karen R. Carroll, Associate Justice