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 NOS. 2018-331, 2018-337 & 2019-052

OCTOBER TERM, 2019

In re Allen Rheaume*	}	APPEALED FROM:
	}	
	}	Superior Court, Franklin Unit,
	}	Civil Division
	}	
	}	DOCKET NOS. 100-3-18 Frcv
	}	(2018-331/2019-052) & 56-2-15 Frcv
	}	(2018-337)
		Trial Judges: A. Gregory Rainville (2018-331/2019-052) & Thomas Carlson (2018-337)

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

Petitioner appeals from decisions of the civil division denying his petitions to vacate his 2004 conviction for lewd and lascivious conduct. We affirm.

In 2004, petitioner was charged with exposing and fondling his penis in the presence of B.H., who was a minor at the time. He pleaded guilty to violating 13 V.S.A. § 2601, which prohibits "open and gross lewdness and lascivious behavior."

In 2013, petitioner filed a petition for post-conviction relief (PCR) alleging that the plea colloquy was defective because he never admitted the factual basis for the charge as required by Vermont Rule of Criminal Procedure 11(f). The trial court granted summary judgment to the State, and we affirmed. In re Rheaume (Rheaume I), No. 2015-078, 2016 WL 181668 (Vt. Jan. 7, 2016) (unpub. mem.), http://www.vermontjudiciary.org/sites/default/files/documents/eo15-078.pdf [https://perma.cc/4HF8-V7N9].

In 2015, petitioner filed another PCR petition (docket number 56-2-15 Frcv) alleging that "openness" was an element of the charge and that the evidence did not support that element because the incident took place in a private home and not in a public place. The trial court granted summary judgment to the State, and we affirmed. In re Rheaume (Rheaume II), No. 2016-220, 2016 WL 6562431 (Vt. Nov. 4, 2016) (unpub. mem.), https://www.vermontjudiciary.org/sites/default/files/documents/eo16-220.pdf [https://perma.cc/Y83E-WGD4].

In June 2018, petitioner filed a motion for relief from judgment under Vermont Rule of Civil Procedure 60(b) alleging the State had made fraudulent representations to the court. The trial court denied the motion and petitioner appealed.

Separately, in March 2018 petitioner filed a petition for writ of habeas corpus (docket number 100-3-18 Frcv), asserting that the sentencing court violated Rule 11(f) because it did not make a finding that there was a factual basis for the element of "public place." The State moved to dismiss the petition as successive. The court granted the motion in July 2018, stating that the issue had been litigated on the merits in Rheaume II. Shortly afterward, petitioner filed a notice of appeal as well as a motion to alter or amend. The court denied the latter. In September 2018, petitioner moved for relief from judgment from the court's July 2018 decision. The court denied the motion for relief from judgment in December 2018, citing its earlier denial of petitioner's motion to alter or amend as well as its denial of the similar motion for relief from judgment in docket number 56-2-15 Frcv. Petitioner then filed another notice of appeal. We consolidated all three appeals for review.

Petitioner argues that the trial court abused its discretion by denying his motion for relief from judgment in docket number 56-2-15 Frcv and dismissing his petition for habeas corpus in 100-3-18 Frcv.[*] We address each argument in turn.

In his Rule 60(b) motion in docket 56-2-15 Frcv, petitioner alleged that the State perpetrated a fraud upon the court by mischaracterizing petitioner's arguments in his first amended complaint. He claimed that the alleged misrepresentations influenced the court to decide incorrectly that the "element of open" and the "element of public" were the same under 13 V.S.A. § 2601, leading the court to grant summary judgment to the State. On appeal, he argues the trial court erred by denying his Rule 60(b) motion without addressing his fraud claim.

We review the trial court's decision to deny a Rule 60(b) motion for abuse of discretion, and we find none here. See Kotz v. Kotz, 134 Vt. 36, 40 (1975) (explaining that Supreme Court will not disturb decision on Rule 60(b) motion "unless it clearly and affirmatively appears that such discretion has been abused or withheld"). Contrary to petitioner's claim, the trial court did address his argument below. It determined that the fact that it and this Court agreed with the State's argument regarding the elements of lewd and lascivious conduct under 13 V.S.A. § 2601 did not constitute a fraud upon the court. The court's decision is consistent with our caselaw. As we have explained, the fraud-upon-the-court "doctrine has generally been reserved for only the most egregious misconduct evidencing . . . an unconscionable and calculated design to improperly influence the court." Godin v. Godin, 168 Vt. 514, 519 (1998) (citing as example fabrication of evidence by counsel). Petitioner's motion was effectively an attempt to relitigate the merits of the case. This is not an acceptable basis for granting a Rule 60(b) motion. See M. Kane, 11 Federal Practice and Procedure, Civil § 2860 (3d ed. 2012) (explaining that Rule 60(b) motion alleging fraud "will be denied if it is merely an attempt to relitigate the case. . . ."); accord Martin v. Chemical Bank, 940 F. Supp. 56, 59 (S.D.N.Y. 1996). We therefore affirm the court's denial of petitioner's Rule 60(b) motion in 56-2-15 Frcv.

We turn next to the court's decision dismissing petitioner's habeas petition as successive in docket 100-3-18 Frcv. The PCR statute provides that "[t]he court is not required to entertain a second or successive motion for similar relief on behalf of the same prisoner." 13 V.S.A. § 7134.

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[*] Petitioner's sole argument in connection with his appeal in docket number 2019-052 was that the civil division lacked jurisdiction to decide his Rule 60(b) motion in 100-3-18 Frcv because the matter was then on appeal to this Court. After receiving petitioner's brief in 2019-052, this Court consolidated the three appeals for review, placed all of them on waiting status, and remanded the matter for the trial court to decide the motion pursuant to Kotz v. Kotz, 134 Vt. 36, 39-40 (1975). In May 2019, the trial court again denied the motion for relief from judgment, and this Court resumed jurisdiction over the appeals. Accordingly, the alleged error has been cured.

We have held that "§ 7134 bars relitigation of claims actually raised and decided on the merits in an earlier PCR." In re Laws, 2007 VT 54, ¶ 11, 182 Vt. 66. The fact that petitioner labeled his second petition as a habeas corpus petition does not preclude a determination that it is successive. Id. ¶ 4 n.1 (noting that "the federal case law on which we rely makes no distinction between previous petitions brought in accordance with PCR statutes and general habeas corpus petitions when considering successive petitions").

In his 2018 habeas petition, petitioner alleged that he never personally admitted that there was a factual basis for the element of "public place," and therefore the plea colloquy failed to comply with Rule 11(f). He asserts that the trial court erred in dismissing his petition as successive because his 2015 PCR petition did not raise this issue.

It is true that petitioner's 2015 PCR petition did not mention Rule 11(f). However, the trial court did not abuse its discretion in dismissing petitioner's 2018 habeas petition as successive. Petitioner's claim that the plea colloquy violated Rule 11(f) was previously litigated and decided on the merits in favor of the State in Rheaume I. In that decision, we affirmed the civil division's decision that the change-of-plea court complied with Rule 11(f) in determining that there was a factual basis for petitioner's plea. Accordingly, § 7134 barred relitigation of this claim. See Gilwee v. Town of Barre, 138 Vt. 109, 111 (1980) (explaining this Court will affirm if record "indicates any legal ground for justifying the result").

Petitioner argues that our decision in Rheaume I does not bar his 2018 petition because in that case he argued that the court did not elicit a factual basis for the "lewd and lascivious" element, while in this case he alleges that the court did not elicit a factual basis for the "public place" element. Even if the issue whether the plea colloquy satisfied Rule 11(f) had not been fully litigated already, petitioner's argument would fail because it is founded upon an assumption that we have already rejected, namely, that the offense of lewd and lascivious behavior requires proof that the behavior occurred in a public place. In Rheaume II, we addressed this specific argument. See 2016 WL 6562431, at *1 ("We agree with the trial court that the law does not require that behavior occur in a public place to be a violation of § 2601."). Our analysis focused on the same case law that petitioner cites in his briefs in the instant appeals in support of his arguments. Because we have conclusively answered the question of whether the offense requires proof that the behavior occurred in a "public place" in the negative, petitioner's claim that his plea lacked a factual basis for this element fails as a matter of law. Accordingly, we affirm the civil division's dismissal of the habeas petition.

Affirmed.

BY THE COURT:

Paul L. Reiber, Chief Justice

Beth Robinson, Associate Justice

Harold E. Eaton, Jr., Associate Justice