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. 2019-084

OCTOBER TERM, 2019

In re Courtney E. Herrick*	}	APPEALED FROM:
	}	
	}	Superior Court, Rutland Unit,
	}	Civil Division
	}	
	}	DOCKET NO. 560-10-17 Rdcv
		Trial Judge: Samuel Hoar, Jr.

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

Petitioner appeals the trial court's decision dismissing his petition for post-conviction relief (PCR). We affirm.

In December 2001, petitioner pleaded nolo contendere to three counts of aggravated sexual assault, two counts of lewd and lascivious conduct with a child, two counts of lewd and lascivious conduct, and one count of disseminating indecent materials to a minor. The counts involved six different minor victims. Pursuant to his plea agreement, he was sentenced to twenty-five years to life, to be served consecutively to a sentence that he was then serving in New York.

In October 2017, petitioner filed a PCR petition alleging that the plea colloquy violated Rule 11 of the Vermont Rules of Criminal Procedure. The State moved to dismiss the petition, arguing that the motion and the files and records of the case conclusively showed that petitioner was not entitled to relief. See 13 V.S.A. § 7133. Petitioner then amended his petition, and the State filed a supplemental motion to dismiss. The PCR court concluded that the record did not show that petitioner was entitled to relief and granted the motion to dismiss. This appeal followed.

"In a PCR proceeding, the petitioner has the burden of proving that fundamental errors rendered his conviction defective." In re Hemingway, 2014 VT 42, ¶ 7, 196 Vt. 384 (quotation omitted). "A motion to dismiss [a PCR petition] for failure to state a claim may not be granted unless it is beyond doubt that there exist no facts or circumstances that would entitle the plaintiff to relief." In re Russo, 2013 VT 35, ¶ 10, 193 Vt. 594 (quotation omitted). In reviewing petitioner's claims, we accept the factual allegations in the petition as true. Id.

On appeal, petitioner first contends that his plea colloquy violated Rule 11(c) because the judge did not ask petitioner if he understood the charges or state the factual basis for the charges and did not answer petitioner's question about his sentence. At the time of petitioner's plea, Rule 11(c) stated in pertinent part:

> The court shall not accept a plea of guilty or nolo contendere without first, by addressing the defendant personally in open court, informing him of and determining that he understands the following:
>
> (1) the nature of the charge to which the plea is offered;
>
> (2) the mandatory minimum penalty, if any, and the maximum possible penalty provided by law for the offense to which the plea is offered and, when applicable, that the court may also order the defendant to make restitution to any victim of the offense . . . .

V.R.Cr.P. 11(c) (Supp. 2000). The purpose of Rule 11(c), like the other requirements in Rule 11, is to ensure that a defendant's plea is truly voluntary. State v. Yates, 169 Vt. 20, 25 (1999).

The transcript of the change-of-plea hearing shows that petitioner indicated that he had gone over the plea agreement with his attorney and that he understood it.[*] The court then described the elements of each count to defendant in language closely tracking the informations filed by the State. Petitioner pleaded nolo contendere to each count. The court then asked petitioner, "[D]o you agree that, in each of those cases, that the affidavit of [the detective] in each of the eight counts sets forth the specific elements of each of those crimes?" Petitioner responded, "Yes, I do, your Honor." Although the court did not explicitly ask defendant if he understood the nature of each charge, the record provided a sufficient basis for the court to conclude that Rule 11(c)(1) was satisfied. See In re Thompson, 166 Vt. 471, 476 (1997) (affirming PCR court's conclusion that defendant understood nature of charges where prosecutor detailed facts underlying charges in language closely tracking informations containing elements of crimes).

Petitioner argues that the above exchange was insufficient to satisfy Rule 11(c)(1) because he has a learning disability. However, petitioner did not mention his disability at the change-of-plea hearing, and there is no indication from the record that his disability affected the voluntariness of his plea. To the contrary, petitioner told the court that he understood the plea agreement, that it had been explained to him, and that he had signed it freely and voluntarily.

We reject petitioner's argument that the court was required to inquire into the factual basis for his plea of nolo contendere. See In re Barber, 2018 VT 78, ¶ 23 ("Rule 11(f) is not applicable in cases where a defendant pleads nolo contendere because it states that the factual basis requirement is required prior to accepting 'a plea of guilty.' " (quoting V.R.Cr.P. 11(f)). "The rule recognizes that a defendant who enters such a plea [nolo] may have sound reasons for wishing to avoid trial, such as fear of the evidence or desire to avoid public display." State v. Peck, 149 Vt. 617, 622 (1988). A factual-basis inquiry would undermine these goals. See Reporter's Notes, V.R.Cr.P. 11. Accordingly, the sentencing court did not err by failing to inquire into the factual basis for petitioner's plea.

Petitioner next claims that he did not fully understand the plea agreement because he did not have the correct information or facts about the sentences he was facing. Specifically, he claims that the court did not answer his question regarding his New York sentence. The record shows that when the court asked petitioner if he had any questions regarding the plea agreement,

[*] Petitioner attached the transcript of the plea colloquy as an exhibit to his amended petition. It was therefore proper for the trial court to consider the transcript in deciding the State's motion to dismiss. See Kaplan v. Morgan Stanley & Co., 2009 VT 78, ¶ 10 n.4, 186 Vt. 605 (mem.) (explaining that court may properly consider documents attached to complaint in considering motion to dismiss).

petitioner asked if his Vermont sentence would begin after he had served his minimum New York sentence. The court responded, "Don't know." After some discussion between the parties, the court asked petitioner if he wanted to discuss the issue with his attorney. After a break, petitioner's counsel stated that they had discussed the issue, he had informed petitioner that there were no guarantees being made about when his Vermont sentence would begin, and petitioner was willing to go forward despite the uncertainty about how the sentences would be calculated. The court asked petitioner if he was satisfied, and defendant stated, "Yes. I understand that there's at this time, no set time when the time may start running." The court asked if petitioner understood that the sentencing hearing could be delayed so that petitioner could find out when the sentence would begin, and petitioner said, "I'm willing to continue today with the plea. . . . To proceed, yes." The court responded, "Are you sure about that? You're not going to wake up tomorrow morning and say this was a terrible thing you did and you want it back?" Petitioner responded, "There's several reasons why I'd rather make the plea today."

The above discussion does not support petitioner's claim that his plea was rendered involuntary by the uncertainty regarding when his sentence would begin. To the contrary, the record shows that the court afforded petitioner an opportunity to discuss the issue with his attorney and to delay sentencing if he wished. Instead, the petitioner indicated that he understood that the start date of his Vermont sentence was uncertain and that he wished to enter his plea that day anyway, for reasons of his own.

To the extent that petitioner alleges a violation of Rule 11(c)(2), the record offers no support for his claim. The transcript shows that the court explained the maximum possible sentences for the aggravated assault charges separately from its discussion of the elements of the charges. Petitioner stated that he understood those sentences. The court then explained the maximum penalties for the remaining charges as part of its discussion of each charge. This was adequate to satisfy Rule 11(c)(2).

Finally, petitioner argues that the colloquy failed to satisfy Rule 11(d), which states that the court shall not accept a nolo contendere plea "without first, by addressing the defendant personally in open court, determining that the plea is voluntary and not the result of force or threats or of promises apart from a plea agreement." V.R.Cr.P. 11(d). The rule also requires the court to "inquire as to whether the defendant's willingness to plead guilty or nolo contendere results from prior discussions between the prosecuting attorney and the defendant or his attorney." V.R.Cr.P. 11(d).

The transcript shows that the court explicitly asked petitioner whether he signed the plea agreement "freely and voluntarily," and petitioner answered, "Yes, I have, your Honor." Although the court did not specifically ask about coercion, threats, or promises, it offered petitioner numerous opportunities to tell the court that he was under improper pressure, asking him whether he had any questions about the plea agreement and whether there was anything he wanted to tell the court. See Hemingway, 2014 VT 42, ¶ 15 (holding Rule 11(d) satisfied despite lack of specific inquiry into voluntariness where record as whole showed plea was voluntary). Furthermore, "[t]hat petitioner's guilty pleas resulted from discussions between his attorney and the prosecutor was evident from the written plea agreement presented to the court." Id. ¶ 13. The totality of the circumstances surrounding the plea demonstrate that Rule 11(d) was satisfied.

Petitioner points to what he alleges is a relatively short amount of time—forty days—between when he was charged and when the change-of-plea hearing took place as evidence that he was coerced into entering his plea. We fail to see how the timing of the hearing supports his claim, and even if it did, petitioner's argument is contradicted by the fact that he declined to accept

the court's offer to delay the hearing so petitioner could find out more information. Petitioner also asserts that his attorney told him that if he backed out of the plea agreement, he would likely get a far worse deal or have to go to trial. However, "mere advice regarding which plea to enter or pressure upon a client to elect one alternative or the other based on the prosecution's case generally does not constitute undue coercion by the attorney." In re Quinn, 174 Vt. 562, 564 (2002) (mem.) (quotation omitted). Furthermore, "a petitioner's assertions in open court of voluntariness and lack of coercion, while not binding on a post-conviction proceeding, are cogent evidence against later claims to the contrary." Id. (quotation omitted). Petitioner answered affirmatively at the hearing when asked if he was satisfied with the advice of his counsel and if he was signing the agreement freely and voluntarily. While petitioner asserts that he was severely depressed at the time of his plea, he denies that he was incompetent to understand the plea process or the terms of the agreement that day. Thus, even assuming petitioner's assertions are true, his allegations are insufficient to demonstrate coercion.

Finally, we have held that a sentencing court's failure to explicitly inquire as to threats or promises or discussions with the prosecutor did not amount to fundamental error requiring reversal without proof of prejudice, and the petitioner therefore had to show that but for the error, he would not have pleaded guilty. Hemingway, 2014 VT 42, ¶ 21. The same holds true here. Petitioner was required to show that but for the alleged defects in the Rule 11(d) inquiry, he would not have pleaded nolo contendere. Petitioner did not make any such allegation in his complaint. The PCR court therefore did not err in dismissing his claim under Rule 11(d).

Affirmed.

BY THE COURT:

_____
Paul L. Reiber, Chief Justice

_____
Beth Robinson, Associate Justice

_____
Harold E. Eaton, Jr., Associate Justice