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. 2020-103

OCTOBER TERM, 2020

In re James Rivers*	}	APPEALED FROM:
	}	
	}	Superior Court, Caledonia Unit,
	}	Civil Division
	}	
	}	DOCKET NO. 195-8-18 Cacv
		Trial Judge: Mary Miles Teachout

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

Petitioner appeals a civil division order granting summary judgment to the State in this post-conviction relief (PCR) proceeding. On appeal, petitioner argues that the criminal court abused its discretion in accepting his nolo contendere plea because there were insufficient credible facts to support the charge and that the plea was not entered voluntarily. We affirm.

The following facts were undisputed for purposes of summary judgment.[1] In 1986 petitioner was convicted of second-degree murder based on a plea of nolo contendere. The charges were based on the following facts. Petitioner and Gregory Reed both participated in the arson of a building in St. Johnsbury in 1984. Another individual, Rene Savage, was apparently involved. His body was later found in a sand pit with two gunshot wounds to the head. All three men had been in the sand pit together and Mr. Reed had brought a gun. Petitioner was originally charged with murder, but the charge was dismissed and in 1985 he pled nolo contendere to two counts of arson and received a sentence of three-to-ten years.

Mr. Reed faced a first-degree murder charge. He entered a plea agreement, receiving favorable sentence in return for agreeing to testify against petitioner. Petitioner was then recharged with first-degree murder, which carried a possible sentence of life imprisonment. The affidavit in support of the charge relied on Mr. Reed's testimony that petitioner shot Mr. Savage. Petitioner reached a plea agreement with the State whereby the charge was amended to second-degree murder and the State recommended a sentence of no less than twelve years and no more than fifty years with credit for time served since the arrest in 1984. Petitioner agreed to give the State a full account of the arson and death of Mr. Savage. The State filed a memorandum in support of this plea agreement, explaining that although the State was not entirely convinced that Mr. Reed was being

[1] Petitioner has moved to strike a paragraph from the State's brief on the ground that it describes facts that were not presented below. The State contends that this Court can take judicial notice of the facts contained in its brief. Insofar as the facts in the State's brief were not presented below and are not relevant to determining the issues in this appeal, the motion to strike is granted.

totally candid, the State felt that the agreement was fair and just.[2] The plea colloquy was conducted in September 1986. There is no transcript of the hearing, but the state's attorney kept handwritten notes.

In 2018, petitioner filed this PCR petition claiming that the plea colloquy did not satisfy the requirements of Vermont Rule of Criminal Procedure 11(b) and the plea was not entered voluntarily. As to the Rule 11(b) challenge, petitioner claimed that there was insufficient evidence to support a nolo contendere plea because the State's case rested on the testimony of Mr. Reed and there were issues with his credibility. The State moved for summary judgment. The PCR court concluded that even if a witness's credibility might be challenged, this did not alter the admissibility of the State's evidence and there was enough to support a guilty verdict. This evidence included the following: Mr. Reed was present when petitioner fired two shots and afterwards Mr. Savage lay dead on the ground, and the medical examiner concluded that Mr. Savage died from two gunshot wounds to the head. As to the voluntariness of the plea, the PCR court relied on the notes of the state's attorney, which were submitted as an exhibit. These notes showed that the criminal court engaged in a lengthy colloquy with petitioner, petitioner had two attorneys, who both signed a detailed plea agreement prior to the colloquy, and petitioner indicated at the hearing that he was satisfied with the representation of his attorneys. The criminal court also confirmed that petitioner had not consumed any alcohol or drugs, reviewed the meaning of a nolo plea, and confirmed that there had not been any threats or promises related to the plea. Overall, the PCR court concluded that the facts indicated that the plea was voluntary—there was a lengthy colloquy and there was nothing to indicate that petitioner lacked necessary information or was under undue pressure to enter the plea. The PCR court granted judgment in favor of the State.

Petitioner appeals. We review de novo the grant of summary judgment, "applying the same standard as the trial court." In re Stocks, 2014 VT 27, ¶ 11, 196 Vt. 160. Summary judgment is appropriate when there is no issue of material fact and a party is entitled to judgment as a matter of law. V.R.C.P. 56(a).

The requirements for a nolo contendere plea come from the criminal rules, which provide that the court may accept a plea of nolo contendere "only after due consideration of the views of the parties and the effective administration of justice." V.R.Cr.P. 11(b). Because a plea waives important constitutional rights, the court "must review with the defendant the circumstances surrounding the plea in order to satisfy itself that the plea is voluntary and made with an understanding of its consequences." In re Moulton, 158 Vt. 580, 583 (1992) (quotation omitted). To satisfy Rule 11, "the trial court must engage in an open dialogue with defendant and satisfy itself that the defendant knows and understands the full array of legal consequences that attach to a guilty plea." Id. (quotation omitted). Unlike a guilty plea, a nolo contendere plea does not require the defendant admit to a factual basis supporting the charge. V.R.Cr.P. 11(f); State v. Peck, 149 Vt. 617, 622 (1988) (explaining that plea of nolo contendere "does not require a factual inquiry").

On appeal, petitioner first argues that the criminal court abused its discretion in accepting the plea because the evidence presented by the State was so insufficient it rendered the outcome of the case unfair. There was no abuse of discretion. The criminal court in this case was not required to conduct a factual inquiry before accepting petitioner's nolo contendere plea. Moreover, the evidence supporting the charge was not so deficient as to render petitioner's plea unfair or to

[2] This memorandum acknowledged that Mr. Reed had not passed a polygraph test and that Mr. Reed brought the gun to the murder scene.

"weaken public confidence in the judicial or law enforcement system." See Reporter's Notes, V.R.Cr.P. 11(b) (explaining that nolo contendere plea "should not be accepted when the effect will be to weaken public confidence in the judicial or law enforcement system"). The State had testimony from Mr. Reed regarding petitioner's participation in the crime and this evidence supported all elements of the charges. Although Mr. Reed's testimony would be subject to challenge, the issues with his credibility did not affect the admissibility of his testimony if there was a trial. Contrary to petitioner's assertion, the State's memo did not indicate that the State believed Mr. Reed's testimony was false; rather, the memo acknowledged the challenges that it would have proving its case at trial and explained why the compromise in the plea agreement was fair and just.

We also reject petitioner's argument that the lack of credible evidence supporting the charges against him rendered his plea involuntary. Petitioner asserts that a nolo plea is not voluntary unless the defendant understands that the State's evidence is sufficient to satisfy the essential elements of the charge. To assess the voluntariness of a nolo contendere plea, the criminal court must engage in a colloquy with the defendant and ensure that the defendant understands the items enumerated in Rule 11(c) and has entered the plea willingly and not as a result of force or promises under Rule 11(d). See In re Parks, 2008 VT 65, ¶ 9, 184 Vt. 110 (setting forth requirements for colloquy to be knowing and voluntary). As explained above, the criminal court was not required to assess the strength of the State's case or to assure that petitioner agreed that there was a factual basis for the plea. See Peck, 149 Vt. at 622 (recognizing that court is not required to make factual inquiry for nolo contendere plea). The record indicates that the criminal court engaged petitioner in a full colloquy as required by Rule 11 prior to accepting the plea agreement. The colloquy included an oral presentation by the State of the State's evidence. The colloquy demonstrated that petitioner had full representation by counsel, was satisfied by that representation, was not influenced by threats or promises, and that he had not taken alcohol or drugs. Petitioner has not shown any facts that demonstrate a lack of voluntariness.

Affirmed.

BY THE COURT:

_____
Beth Robinson, Associate Justice

_____
Harold E. Eaton, Jr., Associate Justice

_____
William D. Cohen, Associate Justice