STATE OF RHODE ISLAND AND PROVIDENCE PLANTATIONS

PROVIDENCE, SC. **SUPERIOR COURT**

[FILED: August 14, 2014]

CHARLES C. BROWN	:	
	:	
	:	
V.	:	**Case Numbers: PM-2004-2769**
	:	**PM-2004-2148**
	:	
STATE OF RHODE ISLAND	:	

DECISION

MCGUIRL, J. Before this Court are the two consolidated applications of Charles C. Brown (Mr. Brown or Petitioner) for post-conviction relief. Mr. Brown seeks to vacate his pleas of nolo contendere, entered on July 17, 1995, on the grounds that they failed to meet the requirements of Rule 11 of the Superior Court Rules of Criminal Procedure. Jurisdiction is pursuant to chapter 9.1 of title 10.

I

Facts and Travel

On September 23, 1994, Mr. Brown, then age twenty-three, was arrested by the Providence Police Department after a traffic stop. The police seized from the vehicle three large zip-lock bags of marijuana containing a combined weight of 2.98 pounds. In addition, the police seized two large manila envelopes, inside each of which were two more envelopes containing a total amount of $16,110 in cash wrapped in elastic bands. The Petitioner was charged, by information, with one count of possession of marijuana with intent to deliver (Count I), one count of conspiracy to deliver (Count II), and one count of possession of one ounce to one kilogram of marijuana (Count III). (P2/1994-3584B).

While on bail on the aforementioned charges, the Providence Police Department arrested Mr. Brown on November 9, 1994, for possession of a package containing ten pounds, twelve ounces of marijuana. Mr. Brown was charged, by information, with possession of one to five kilograms of marijuana. (P2/1995-0103A).

On July 17, 1995, Mr. Brown, with the assistance of privately retained counsel, entered pleas of nolo contendere to the counts contained in the consolidated P2-1994-3584B and P2-1995-0103A cases. The Superior Court Justice, who heard and accepted Mr. Brown's pleas, sentenced him to ten years of imprisonment at the Adult Correctional Institutions (ACI), three years to serve and seven years suspended, with probation, in the P2-1994-3584B case, and fifteen years of imprisonment at the ACI, three years to serve, and twelve years suspended, with probation, in P2-1995-0103A. (Hr'g Tr. (Tr.) 5, July 17, 1995.) Each sentence was to run concurrently.

On June 3, 2003, eight years after Mr. Brown's nolo contendere pleas in the two state drug cases above, Mr. Brown was convicted in the United States District Court for the District of Rhode Island of conspiracy and possession with intent to distribute more than fifty grams of cocaine base in violation of 21 U.S.C. §§ 846, 841(a)(1), (b)(1)(A) (Count I); aiding and abetting possession with intent to distribute more than fifty grams of cocaine base in violation of 21 U.S.C. § 841(a)(1), (b)(1)(A); 18 U.S.C. § 2 (Count II); and, possession with intent to distribute more than five grams of cocaine base in violation of 21 U.S.C. § 841(a)(1), (b)(1)(B). Predicated upon Mr. Brown's prior two state drug convictions, the Federal District Court enhanced Mr. Brown's sentence. Accordingly, it sentenced him to a mandatory term of life imprisonment pursuant to the mandatory minimum of conviction under 21 U.S.C. § 841(b)(1)(A) for a defendant who has two prior drug offense convictions. Mr. Brown obtained leave from the

sentence imposed by the federal court to seek post-conviction relief from the state court convictions.

On April 21, 2004, Mr. Brown, acting pro se, filed applications for post-conviction relief in PM-2004-2148 and PM-2004-2769. He asserted that (1) the convictions were obtained without probable cause; (2) the plea agreements under attack were lacking the requisite factual basis to allow the judge to accept the pleas; and, (3) that he had been denied the effective assistance of counsel as guaranteed by the Constitutions of the United States and Rhode Island. On October 21, 2009, through counsel, Mr. Brown filed a motion to amend the applications to add an additional allegation, namely, that the plea colloquy from 1995 failed to comply with Rule 11 of the Superior Court Rules of Criminal Procedure.[1]

The State of Rhode Island (State) has filed an objection to Mr. Brown's applications for post-conviction relief. The State urges the Court to deny Mr. Brown's applications, arguing the plea colloquy complied with Rule 11. The State contends that the transcript clearly shows that Mr. Brown knowingly, voluntarily, and intelligently entered his pleas with full knowledge of the constitutional rights he was giving up. Additionally, the State raises the defense of laches.

[1] Mr. Brown failed to brief or argue the lack of probable cause and ineffective assistance of counsel issues that he initially raised in his appeals; consequently, the Court considers those issues as waived. See Cavanaugh v. Palange, 111 R.I. 680, 683, 306 A.2d 182, 184-85 (1973) (reiterating "any point of appeal which is not briefed and argued is deemed to have been waived"); see also Bucci v. Hurd Buick Pontiac GMC Truck, LLC, 85 A.3d 1160, 1170 (R.I. 2014) (declaring "an issue to be waived when a [p]arty simply stat[es] an issue for appellate review, without meaningful discussion thereof or legal briefing of the issues . . . .") (quoting State v. Chase, 9 A.3d 1248, 1256 (R.I. 2010)).

II

Standard of Review

"Once a defendant has entered a plea of guilty or of nolo contendere and sentence has been imposed, any issue relating to the validity of the plea must be raised by way of post-conviction 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)). Post-conviction relief is a statutory remedy available to a previously convicted defendant who now contends that his or her 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. See § 10-9.1-1. The filing of an application can be made at any time. See § 10-9.1-3 ("An application may be filed at any time.").

"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." Figueroa, 639 A.2d at 498 (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 post-conviction relief procedure, the "applicant bears the burden of proving, by a preponderance of the evidence, that he [or she] is entitled to post-conviction 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. See 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 140-41, 206 A.2d at 218). Since post-conviction relief proceedings are "civil in nature[,]" Ouimette v. Moran, 541 A.2d 855, 856 (R.I. 1988), the rules and statutes that are applicable in civil proceedings shall apply to post-conviction relief applications. See § 10-9.1-7 ("All rules and statutes applicable in civil proceedings shall apply except that pretrial discovery proceedings shall be available only upon order of the court.")

III

Law and Analysis

A

Laches

The State asserts that Mr. Brown's application for post-conviction relief should be barred under the doctrine of laches. It contends that the nine-year delay in filing the instant applications prejudices the State because it would be unable to effectively reprosecute charges due to the fact that the physical evidence in these cases have been destroyed pursuant to Providence Police Department policy.

It is well established that "[c]ourts . . . will not assist one who has slept upon his rights [] and shows no excuse for his laches in asserting them." A.C. Aukerman Co. v. R.L. Chaides Constr. Co., 960 F.2d 1020, 1029 (Fed. Cir. 1992) (en banc) (quoting Lane & Bodley Co. v. Locke, 150 U.S. 193, 201 (1893)). Although a post-conviction relief "application may be filed at any time[,]" (§ 10-9.1-3), the lack of an explicit statutory limitation "does not preclude the application of the doctrine of laches." Raso v. Wall, 884 A.2d 391, 394 (R.I. 2005).

Accordingly, "[t]he state may invoke the defense of laches as an affirmative defense to an application for post-conviction relief." Santos v. State, 91 A.3d 341, 344 (R.I. 2014).

To prevail on the affirmative defense of laches, the State must satisfy a two-prong test: it must prove "by a preponderance of the evidence that the applicant unreasonably delayed in seeking relief and that the state is prejudiced by the delay." Id. (emphasis added). The underlying rationale of this test is based on the fact that:

> "[l]aches, in legal significance, is not mere delay, but delay that works a disadvantage to another. So long as parties are in the same condition, it matters little whether one presses a right promptly or slowly, within limits allowed by law; but when, knowing his rights, he takes no steps to enforce them until the condition of the other party has, in good faith, become so changed that he cannot be restored to his former state, if the right be then enforced, delay becomes inequitable and operates as an estoppel against the assertion of the right." Id. at 344-45 (quoting School Comm. of City of Cranston v. Bergin-Andrews, 984 A.2d 629, 644 (R.I. 2009)).

Determining the existence of unreasonable delay and prejudice "are both questions of fact, which require that specific determination[s] be made in light of the circumstances of the particular case." Santos, 91 A.3d at 345 (quoting Heon v. State, 19 A.3d 1225, 1225 (R.I. 2010)) (internal quotations omitted).

With respect to the first prong, unreasonable delay, the State has the burden of proving, by a preponderance of the evidence, that the applicant negligently delayed asserting a known right. See Oliver v. United States, 961 F.2d 1339, 1342 (7th Cir. 1992) (stating that the doctrine of laches "requires more than mere delay—the petitioner's delay must be inexcusable as well as prejudicial to the government"). Implicit in this requirement is a showing of a petitioner's knowledge of the existing conditions necessitating a request for post-conviction relief. See, e.g., Baxter v. State, 636 N.E.2d 151, 152 (Ind. Ct. App. 1994) (determining defendant should have

brought post-conviction application within reasonable time, rather than seven years after learning of its availability and twenty-seven years after his conviction); see also Lacy v. State, 491 N.E.2d 520, 521 (Ind. 1986) (ten year delay unreasonable where petitioner knew of grounds for appeal six years prior to filing petition). Petitioner's state of mind sufficiently can be inferred through circumstantial evidence. Perry v. State, 512 N.E.2d 841, 844 (Ind. 1987) ("Laches denotes a conscious indifference or procrastination which is wholly absent in one whose knowledge is constructive only.").

Examples of a petitioner's knowledge of existing conditions would consist of "repeated contacts with the criminal justice system, consultation with attorneys and incarceration in a penal institution with legal facilities." Baxter, 636 N.E.2d at 152; see also Gregory v. State, 487 N.E.2d 156, 158 (Ind. 1986) (evidencing that petitioner had been in and out of penal institutions for thirteen years, had heard talk about "getting a P.C." but never pursued this information, was sufficient proof of unreasonable delay under circumstances permitting diligence); Parrish v. State, 498 N.E.2d 73, 75 (Ind. Ct. App. 1986) (showing that petitioner spent eight out of thirteen years in the penitentiary, had three guilty plea hearings, one trial, and heard other prisoners talk about post-conviction proceedings sufficient to support a finding of laches).

In the instant matter, the State contends that the Petitioner filed his post-conviction relief application "nine years after his admission to the crime, only after he was sentenced to life on criminal charges . . . [and thus the] Petitioner's application is a clear attempt to avoid the mandates of his federal sentence." (Mem. of State of Rhode Island in Response to . . . Def.'s Application for Post-Conviction Relief at 10). However, the State does not provide any evidence that Mr. Brown had knowledge of existing conditions such that his delay was unreasonable.

Accordingly, this Court finds that the State did not meet its burden of proving the first prong of the laches test.

Assuming, arguendo, the State had satisfied the first prong of the test, the State also must show that it has been prejudiced by the delay. See Pukas v. Pukas, 104 R.I. 542, 546, 247 A.2d 427, 429 (1968) ("[It] is well settled, laches does not arise out of delay alone but out of delay which, unexplained, operates to the prejudice of the other party."); see also Heon, 19 A.3d at 1225-26 (rejecting Superior Court's conclusion that "'as a matter of law[,]'" an almost twenty-year delay in filing application, without more, was unreasonable). Thus, under the second prong,

> "[t]he State may prove prejudice by showing it would be extremely difficult or impossible at the time of the post-conviction hearing to reprosecute the charge to which [petitioner] pled guilty. The inability to reconstruct a case against a petitioner is demonstrated by unavailable evidence such as destroyed records . . . or witnesses who have no independent recollection of the event." McCollum v. State of Indiana, 569 N.E.2d 736, 739 (Ind. 1991).

Thus,

> "Prejudice is not merely the impossibility of presenting any case at all or the prospect of difficulty in locating and obtaining physical evidence or witnesses to testify. If reasonable likelihood of successful prosecution is materially diminished by the passage of time attributable to the defendant's neglect, such may be deemed a sufficient demonstration of prejudice." Stewart v. State, 548 N.E.2d 1171, 1176 (Ind. Ct. App. 1990).

An example of prejudice would be where "the only witness who could respond to [the petitioner's] claim is now deceased." Robbins v. People, 107 P.3d 384, 391 (Colo. 2005) (cited with approval in Raso, 884 A.2d at 395). Prejudice also has been found where transcripts of the original hearing had been destroyed pursuant to routine court procedures. See Oliver, 961 F.2d at 1342 (prejudice found when records are routinely destroyed after ten years); Wright v. State, 711 So. 2d 66, 68 (Fla. Dist. Ct. App. 1998) (finding prejudice where "court transcripts [were]

routinely destroyed after 10 years and the State now [had] no transcript in existence to refute, or prove, [the petitioner's] claim").

The destruction of a transcript has particular significance with respect to allegations of a defective plea under Rule 11. See United States v. Coronado, 554 F.2d 166, 170, n.5 (5th Cir. 1977) (stating that "claims of noncompliance with [R]ule 11 must be resolved solely on the basis of the [R]ule 11 transcript. That transcript provides all that is needed and all that is allowed for the resolution of such claims"). However, the destruction of physical evidence, alone, necessarily does not preclude prosecution of a case where said destruction was not conducted in bad faith. See State v. Haibeck, 714 N.W.2d 52 (N.D. 2006) (concluding that the court erred in dismissing charges against the defendant, absent a showing that the drug evidence was destroyed in bad faith).[2]

In the present case, the State has alleged that it is unable to go forward due to the destruction of the physical evidence. However, it has not proffered any evidence that it lacks, for example, witnesses, files, or corroborating evidence such that it would be unable to try the case without the drug evidence. However, considering that Petitioner is seeking post-conviction relief, should he be granted such relief he could not equitably challenge the lack of such physical evidence at a subsequent trial. Thus, the Court finds that the alleged destruction of the physical evidence, without more, is not sufficient to show prejudice.

Based on the foregoing, this Court finds that the State has not satisfied its burden of proving that it has been prejudiced by Mr. Brown's delay. Thus, the Court concludes that the

[2] For purposes of discussion, this Court notes that State v. Haibeck, 714 N.W.2d 52 (N.D. 2006) concerned an alleged Due Process violation as a result of the destruction of evidence where the State was prepared to prosecute the case with a lab report and its author, as well as with the testimony from the arresting officer. Here, the State has not presented any evidence that it is unable go forward without the physical evidence that allegedly was destroyed.

State failed to carry out its burden of proving that the Applicant's delay in filing his petition was unreasonable and that the resulting delay prejudiced the State. Accordingly, its laches defense must fail. The Court, therefore, proceeds to consider the merits of Mr. Brown's post-conviction relief application.

B

Compliance with Rule 11

Mr. Brown asserts that his July 17, 1995 pleas were neither voluntary nor intelligent because the hearing justice failed to ascertain whether he had the mental capacity to understand the nature and the consequences of his pleas. He also maintains that his pleas were defective under Rule 11 because he was not properly informed of the charges and elements of the alleged crimes and that there was an insufficient factual basis for the pleas. As a result, he maintains that the pleas should be vacated.

Rule 11 of the Superior Court Rules of Criminal Procedure 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.

While 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). A plea colloquy must address three areas: the nature of the offense defendant is admitting, see Henderson v. Morgan, 426 U.S. 637, 645 (1976); the constitutional rights he/she is surrendering by not going to trial, see Boykin, 395 U.S. at 243; and the direct consequences of his/her plea, see North Carolina v. Alford, 400 U.S. 25, 29, n.3 (1970); see also Brady v. United States, 397 U.S. 742, 755 (1970). 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).

1

Mental Capacity

Mr. Brown avers that the hearing justice failed to ascertain whether he had the mental capacity to actually understand the nature and the consequences of his pleas, and that had the hearing justice done so, he would have discovered that Mr. Brown had suffered lead poisoning as a child; required special education classes in school because of a learning disability; and that he had quit school in the tenth grade because of his inability to cope. Mr. Brown thus contends that his pleas were defective because he was unable to knowingly, voluntarily, and intelligently waive his rights in accordance with Rule 11.

It is well settled in Rhode Island that "[a] trial justice's decision regarding the defendant's competency will not be disturbed unless he or she clearly abused his or her discretion." State v. Thomas, 794 A.2d 990, 994 (R.I. 2002) (citing State v. Buxton, 643 A.2d 172, 175 (R.I. 1994)). Our Supreme Court has declared that an intelligent plea does not necessarily mean that the plea is wise; "[r]ather, it indicates that defendants are aware of the consequences of their pleas." Moniz, 933 A.2d at 696. The trial court's role "is to ascertain whether petitioner knew of the

effect of the plea and to inform him with respect thereto if he did not." Bishop v. Langlois, 106 R.I. 56, 59, 256 A.2d 20, 21-22 (R.I. 1969). In doing so,

> "the trial justice 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.
> That objective may be attained by:
> (1) an explanation of the essential elements by the judge at the guilty plea hearing;
> (2) a representation that counsel had explained to the defendant the elements he admits by his plea;
> (3) defendant's statements admitting to facts constituting the unexplained element or stipulations to such facts." State v. Williams, 122 R.I. 32, 41, 404 A.2d 814, 819 (1979) (internal quotation omitted).

While this Court may review the hearing justice's determination of Mr. Brown's competency during the plea colloquy, it will not make its own determination of competency based upon the plea colloquy and post-hearing submissions. See Weisberg v. State of Minnesota, 29 F.3d 1271, 1278 (8th Cir. 1994) ("Retrospective determinations of whether a defendant is competent to stand trial or to plead guilty are strongly disfavored.") (citing Drope v. Missouri, 420 U.S. 162, 183 (1975)). The reason for this is that "[s]uch determinations have 'inherent difficulties' even 'under the most favorable circumstances.'" Id. Thus, the Court will look to the record to see if the hearing justice's determination of competency is supported by the evidence. See Coronado, 554 F.2d at 170, n.5 (stating "claims of noncompliance with [R]ule 11 must be resolved solely on the basis of the [R]ule 11 transcript. That transcript provides all that is needed and all that is allowed for the resolution of such claims"). Indeed, "[i]t will be a rare case and one that [the Court] cannot presently envision in which [the Court] look[s] beyond the transcript of the arraignment in passing on an appeal after a guilty plea." United States v. Dayton, 604 F.2d 931, 939 (5th Cir. 1979).

The plea colloquy reveals that the hearing justice did not inquire about Mr. Brown's level of education. Although it would have been prudent for the hearing justice to have made such an inquiry, had he done so, it would have disclosed that Mr. Brown did not leave school until the tenth grade. See Guerrero v. State, 47 A.2d 289, 301 (R.I. 2012) (rejecting a claim for ineffective assistance of counsel where trial counsel did not utilize the services of an interpreter because the record revealed that the defendant "possessed the reading comprehension level of someone in the sixth month of grade nine"). Thus, the error, if any, in failing to inquire about Mr. Brown's level of education was harmless.

Furthermore, although Mr. Brown now alleges that he had learning difficulties since childhood that prevented him from knowingly and voluntarily waiving his rights at the plea hearing, the hearing justice would have been under no obligation to make detailed inquiries about Mr. Brown's competency due to the fact that he was represented by counsel at the plea hearing. See Thomas, 794 A.2d at 994 (recognizing that "a defendant is subjected to a heightened standard of competency" where the defendant appears pro se); see also Rose v. State, 994 A.2d 662, 664 (R.I. 2010) (order) (declaring "that if a defendant waives his right to counsel and, in doing so, creates a legitimate doubt about his mental condition, then 'it [is] incumbent upon the trial justice to conduct a more searching inquiry of defendant's then existing mental health and physical condition'") (quoting State v. Chabot, 682 A.2d 1377, 1380 (R.I. 1996)).

In Thomas, the petitioner disclosed during the plea colloquy that he was "off" his medication and later asserted that this disclosure should have alerted the hearing justice to inquire about a possible mental disability. See Thomas, 794 A.2d at 994. However, our Supreme Court rejected the application for post-conviction relief because, similar to the present case, the record revealed that the applicant "was at all times represented by counsel" and that

"not a scintilla of evidence" indicated that he was laboring under a mental disability during the plea hearing. Id.

Although Mr. Brown indeed may have had difficulties in school, the hearing justice was not made aware of same and did not have an obligation to determine the type of education he received because it is undisputed that during the entire course of the proceedings, Mr. Brown was represented by an attorney. See Brady, 397 U.S. at 756 ("The plea is intelligent and knowing if nothing indicates that the defendant is incompetent or otherwise not in control of his mental faculties, is aware of the nature of the charges, and is advised by competent counsel.") Consequently, the Court concludes from the record evidence that the hearing justice did not err in finding Mr. Brown to have possessed the requisite mental capacity to understand the nature and consequences of his pleas.

2

The Plea Colloquy

Mr. Brown next contends that this Court should vacate his pleas of nolo contendere because the hearing justice did not explain the nature of the charges, the elements of the crimes of which he was accused, and because there was an insufficient factual basis for his pleas.

If a trial court has accepted a plea "without conforming to the requirements of the rule, the defendant's plea must be set aside[.]" Frazar, 822 A.2d at 935 (internal quotation omitted). Under Rule 11, a trial court may not "enter judgment upon a plea of . . . nolo contendere unless it is satisfied that there is a factual basis for the plea."[3] Super. R. Crim. P. 11. A defendant "may know what he or she has done, but not be sufficiently knowledgeable about the law to recognize

[3] The Rhode Island Supreme Court has stated that Rule 11's mandate that the trial court ascertain whether there is a factual basis for a nolo plea is a prudential, rather than a constitutional, requirement. See Johnson, 120 R.I. at 707, 390 A.2d at 912.

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).[4]

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 court must satisfy itself 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. United States, 394 U.S. 459, 467 (1969) (internal quotation omitted).

The 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.'" Williams, 122 R.I. at 44, 404 A.2d at 821 (quoting U.S. v. Bethany, 489 F.2d 91, 92 (5th Cir. 1974) (internal quotation omitted)). However, although Rule 11 is intended to safeguard the rights of criminal defendants, it is not intended to "serve as a trap for 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 trial justice that a factual basis existed for a defendant's plea.'" Id. at 188 (quoting Frazar, 822 A.2d at 935-36).

[4] 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.

During the hearing, the hearing justice made the following statement:

> "Mr. Brown, there are two matters before the Court, 94-3584B you are charged with possession with intent to deliver marijuana. Count 2 is conspiracy to intent to deliver. Count 3 possession of one ounce to one kilogram. In 95-0103 you are charged with possession of marijuana one kilogram to five kilograms." (Tr. 1, July 17, 1995).

The Court is satisfied from the foregoing statement that Mr. Brown properly was apprised of the nature of the charges against him; namely, that he was being charged with two separate counts of possession of specified amounts of a controlled substance, to wit, marijuana; one count of possession with intent to deliver marijuana; and one count of conspiracy to possess with intent to deliver. The next issue is whether there was a sufficient factual basis for each element of the charged offenses.

A prosecutor's recitation of the state's evidence is only one of several sources of record upon which the court 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 that the court, 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"). 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 trial justice that a factual basis existed for a defendant's plea") (quoting Frazar, 822 A.2d at 935–36).

In Feng, 421 A.2d at 1270, our Supreme Court explained that "reading a straightforward indictment to a defendant will inform him of the specific conduct underlying the offense with

which he is charged. The trial 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."

With respect to the charges of possession and possession with intent to deliver, 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). 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 controlled substances 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. at 979 (citing State v. Colbert, 549 A.2d 1021, 1024-25 (R.I. 1988)).

The actual quantity that a defendant is accused of possessing with intent to deliver is not an element of that offense. 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).

With respect to the crime of conspiracy, it is defined as:

> "a combination of two or more persons to commit some unlawful act or do some lawful act for an unlawful purpose. The gravamen of the crime is entry into an unlawful agreement and once that occurs the offense is complete . . . it does not require that any overt acts have been committed in execution of the unlawful agreement." State v. LaPlume, 118 R.I. 670, 677, 375 A.2d 938, 941 (R.I. 1977).

Thus, a conspiracy charge is separate and distinct from the substantive offense and once an unlawful agreement is made, the offense of conspiracy is complete. See State v. Porto, 591 A.2d 791, 795 (R.I. 1991) ("Once the agreement is made, the offense is complete, and therefore, no overt act by a defendant in furtherance of the conspiracy beyond the making of the agreement need occur for the crime to be committed.") (citing State v. Barton, 427 A.2d 1311, 1312-13 (R.I. 1981)).

With regard to the language employed for a specific charge, "the reviewing court may be able to determine that the offense or the relevant element of the offense is a self-explanatory legal term, so simple in meaning that a layperson can be expected to understand it." Miller v. State, 970 A.2d 332, 343 (Md. Ct. Spec. App. 2009); see also United States v. Punch, 709 F.2d 889, 892-94 (5th Cir. 1983) (in non-complex cases, a reading of the indictment may suffice). Accordingly, a detailed explanation of the language may not be required. See, e.g., Easter v. Norris, 100 F.3d 523, 526 (8th Cir. 1996) (holding that terms "enter" and "intent" in context of burglary did not require further explanation at taking of guilty plea); Waits v. People, 724 P.2d 1329, 1334-35 (Colo. 1986) (holding that district court was not required to define terms "intent," "specific intent," and "theft" for crime of burglary).

In the instant matter, after Mr. Brown was informed of the charges, the following exchange took place:

> "THE COURT: Would the State give me the facts in support of these counts.
> MR. DALY: Your Honor, with regard to P2/94-3584B the State was prepared to show in that information on Count 1 that this defendant, Charles Brown, on or about the 23rd of September, 1994, in Providence, did unlawfully possess with intent to deliver a controlled substance in the form of marijuana. With regard to Count 2 of this information the State was prepared to show that this same defendant on or about the same 23rd day of September, 1994, at Providence, did unlawfully conspire with Andrew Brown also known as "Prince Brown" to violate the Rhode Island Uniform Controlled Substances Act by agreeing to possess with intent to deliver a controlled substance in the from [sic] of marijuana. The third Count of that information the State was prepared to show that this same defendant on or about the 23rd day of September, 1994, at Providence, did have in his possession a certain enumerated quantity of a controlled substance, specifically, between one ounce to one kilogram of marijuana . . . Also, with regard to criminal information P2/95-0103A the State was prepared to show that this same Charles Brown on or about the 9th day of November, 1994, at Providence, in Providence County did unlawfully possess a controlled substance in the form of marijuana in an amount in excess of one kilogram but less than five kilograms.
> THE COURT: Now, you heard what he has stated. Do you accept that statement as being true?
> THE DEFENDANT: Yes." (Tr. at 2-3).

The foregoing colloquy, coupled with the previously recited charges, reveals that Mr. Brown was informed that he was being charged, among other things, with two counts of possessing marijuana, one for a quantity in the amount of one ounce to one kilogram, the second in the amount of one kilogram to five kilograms.[5] The summary of the charged possession

[5] The Court observes that although the term kilogram, as used in the charge, "is the designation of a unit of weight in a system not of such common use in this country," it is, however, "still a system well known and understood." Ellsworth v. Knowles, 97 P. 690, 692 (Cal. Ct. App. 1908) (pointing out that the terms pound and kilogram are also defined in the Standard Dictionary of

offenses was a straightforward statement of the elements of said offenses. See Camacho, 58 A.3d at 186 (stating the court need not give a detailed explanation of a charge, element by element, and fact by fact). Furthermore, both the hearing justice and the State conveyed to Mr. Brown that he was admitting to possessing marijuana in the amounts of one ounce to one kilogram and of one kilogram to five kilograms. Mr. Brown's affirmative acceptance of such facts was 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 disclosed sufficient facts to satisfy the hearing justice that Mr. Brown's plea to two counts of possession of marijuana in the amounts specified was based on fact.

Mr. Brown also was charged with possession with intent to deliver a controlled substance. The recited facts in Mr. Brown's case, facts to which he agreed, indicate that he possessed one ounce to one kilogram of marijuana with intent to deliver. As previously stated, "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. . . ." 25 Am. Jur. 2d Drugs and Controlled Substances § 160. Furthermore, intent to deliver illegal narcotics can be inferred "solely on the basis of the amount of the drugs found." Williams, 656 A.2d at 978.

Although the hearing justice did not read the criminal information to Petitioner, during the plea colloquy, Petitioner admitted that he had reviewed the signed plea affidavit with his attorney.[6] The plea affidavit contained the following averment: "I understand the plea of **Nolo**

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the English language). Thus, the Court finds that this aspect of the charge was not a complicated term such that it could not have been easily understood by a layperson.

[6] The following exchange took place during the plea colloquy:

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 in the case to which this plea relates." (Plea Affidavit) (emphasis in original). Considering the fact that Petitioner admitted to reviewing the affidavit with his attorney, the hearing justice could have inferred from that representation that Petitioner had read the Criminal Information, with its accompanying factual allegations, and/or reviewed it with his attorney. See Feng, 421 A.2d at 1271 (stating hearing justice could "have assumed without having read the indictment to Feng that Feng was familiar with the state's factual allegations concerning his purported possession of LSD"). Attached to the Criminal Information were reports that the police seized three large zip-lock bags of marijuana containing a combined weight of 2.98 pounds of marijuana, as well as four envelopes containing $16,110 in cash wrapped in elastic bands.

Although 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), in this case, Petitioner knew from the charges read by the Court, the recited facts in the plea colloquy, and from the charges contained in the plea affidavit, that he was being charged with possession of marijuana with intent to deliver. See Moniz, 933 A.2d at 696, n.4 (colloquy between trial 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).

> "THE COURT: Mr. Brown, if I allow you to change your plea from not guilty to nolo contendere you give up rights that you have. Do you understand that?
> THE DEFENDANT: Yes.
> THE COURT: Those rights are contained in the plea form. Have you reviewed them with your attorney?
> THE DEFENDANT: Yes." (Tr. at 1).

The Court finds that the enumerated amount recited at the plea colloquy, to wit, one ounce to one kilogram, was based upon fact and, if introduced at trial, was sufficient to infer circumstantial evidence of the intent to deliver element of the charge. This finding is further buttressed by the circumstantial evidence of intent to deliver contained in the attachments to the Criminal Information; namely, that the police seized three large zip-lock bags of marijuana containing a combined weight of 2.98 pounds of marijuana, as well as four envelopes containing $16,110 in cash wrapped in elastic bands.

With respect to the charge of conspiracy, the prosecution was required to show that there was an unlawful agreement. In its recitation of the facts, the State indicated that "on or about the same 23rd day of September, 1994, at Providence, [Charles Brown] did unlawfully conspire with Andrew Brown also known as "Prince Brown" to violate the Rhode Island Uniform Controlled Substances Act by agreeing to possess with intent to deliver a controlled substance in the from [sic] of marijuana." (Tr. at 2-3) (emphasis added.) These facts—that Mr. Brown agreed with a named individual to possess with intent to deliver a controlled substance coupled with Mr. Brown's affirmative answer—were sufficient to satisfy the conspiracy charge.

In view of the foregoing, the Court concludes that the hearing justice satisfactorily explained the nature and elements of the charges, and that there was a sufficient factual basis for Mr. Brown's pleas.

IV

Conclusion

After reviewing the record evidence before it, this Court concludes that the Petitioner's nolo contendere pleas were entered in compliance with Rule 11's mandates and comport with constitutional requirements. The Petitioner failed to demonstrate by preponderance of the evidence that he is entitled to post-conviction relief. Accordingly, Petitioner's application for post-conviction relief is denied.

Counsel shall submit the appropriate order for entry.

RHODE ISLAND SUPERIOR COURT

Decision Addendum Sheet

TITLE OF CASE:	Charles C. Brown v. State of Rhode Island
CASE NO:	PM-2004-2769; PM-2004-2148
COURT:	Providence County Superior Court
DATE DECISION FILED:	August 14, 2014
JUSTICE/MAGISTRATE:	McGuirl, J.
ATTORNEYS:	
For Plaintiff:	John E. MacDonald, Esq.; John R. Grasso, Esq.
For Defendant:	James R. Baum, Esq.