

THE STATE OF NEW HAMPSHIRE
SUPREME COURT

State of New Hampshire

v.

Robert Graham

2020-0506

Appeal from Denial of
Motion to Vacate by
10TH CIRCUIT COURT - DISTRICT
DIVISION - BRENTWOOD

BRIEF OF APPELLANT

Respectfully Submitted,
Robert Graham,
By his attorney,

/s/ Sven D. Wiberg

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15 Minutes Oral Argument Requested
to be presented by Sven D. Wiberg

TABLE OF CONTENTS

QUESTION PRESENTED..... 4

STATEMENT OF THE CASE AND THE FACTS..... 4

SUMMARY OF ARGUMENT 6

ARGUMENT 7

 I. APPELLANT’S MOTION SHOULD HAVE BEEN GRANTED OR GIVEN A
 HEARING..... 7

CONCLUSION.....9

TABLE OF AUTHORITIES

NEW HAMPSHIRE SUPREME COURT CASES

State v. Arsenault, 153 N.H. 413, 415 (2006)6, 7

State v. Ortiz, 163 N.H. 506, 509 (2012)6, 7

State v. Thornton, 140 N.H. 532, 536 (1995)..... 6, 7

UNITED STATES SUPREME COURT CASES

Bousley v. United States, 523 U.S. 614, 618 (1998).....7

Boykin v. Alabama, 395 U.S. 238, 243 (1969).....6, 7

CONSTITUTIONAL PROVISIONS

U.S. Const. amend. V.....3, 6

U.S. Const. amend. IV.....3, 6

N.H. CONST. pt. I, art. 15.....3, 6

QUESTION PRESENTED

- I. Where Appellant's Motion to Vacate set forth facts and legal precedent supporting his right to have the trial court vacate his conviction, including, *inter alia*, the absence of an element of the offense and failure to advise him of all of the elements of the offense, where the State did not object to the motion, where the trial court did not hold a hearing or indicate that it had reviewed the recorded record of the plea hearing, or make written findings of facts and rulings of law to support its denial, was Appellant denied his right to due process under Part I, Article 15 and the 5th and 14th Amendments?

STATEMENT OF THE CASE AND THE FACTS

Appellant, Robert Graham, was arrested on October 18, 2019 and charged with Driving After Revocation or Suspension contrary to RSA 263:64 and Driving After Suspension of Registration of Vehicle contrary to RSA 261:178. Both charges were brought as Class B misdemeanors. Arraignment was scheduled for December 14, 2019.

At what was supposed to be the arraignment hearing on December 14, 2019, the State Trooper handling the case suggested a plea to an amended complaint (the hearing transcript does not appear to include any actual arraignment by the trial court or any waiver of arraignment by Appellant). Appellant submits (as he alleged in his Motion to Vacate) that he was never advised that the State would have to prove that he knew that his license was suspended to get a conviction.

Appellant submits that he was not aware or advised that to be guilty, he would have

had to be sent notice of the suspension of his license which was the basis for the charge of Operating After Suspension contrary to RSA 264:64. In his motion, he stated further that he did not receive notice of the alleged suspension until after the stop which resulted in his arrest in this case (by being informed by the arresting office and the eventual Class B misdemeanor complaint form filed in the case). He stated further that the suspension he did not know about was for failure to provide obtain a proof of insurance form following an accident, however, if a notice was sent to him by mail or otherwise, it was never received. He asserted in the motion he could not be guilty of the offense, since he was unaware of the suspension and had he been advised of the state of mind element which the State would have had to prove, he would not have changed his plea, since he did not have the requisite *mens rea*.

The District Court held a short discussion with Appellant and sentenced him to a fine. Hearing Transcript (“HT”) at 2-4. This discussion was not a proper plea colloquy since the court did not go through each of the individual rights on the acknowledgement form, but simply referred to what may have been an earlier discussion with another defendant. HT at 2. Appellant was not represented by counsel at the hearing, nor was he specifically and explicitly advised that he had the right to consult with an attorney before changing his plea.

After this minimal and insufficient discussion with Appellant, the trial court asked the trooper for an offer of proof and the trooper said this:

Yes, Your Honor. Date and time alleging a complaint, Tpr. Kevin Dobson conducted a motor vehicle stop on 101 in the town of Stratham for a use of (indiscernible), identified the operator as Mr. Graham. In checking Mr. Graham's license status found out his license was suspended, Your Honor, (indiscernible). HT at 3-4.

This offer of proof was insufficient since it did not cover all the necessary elements of the offense (*e.g.*, the mental state of knowing that the license had been suspended). The trooper indicates that he discovered the license was suspended, but offered no basis to suspect, much less prove, that Appellant was aware of this situation. This was made worse by the trial court's failure to ask for the offer of proof before taking Appellant's unknowing plea and by its failure to ask Appellant whether the offer of proof was true.

Appellant submits that he subsequently learned that to be guilty of the offense of conviction, the State would have had to prove that he knew his license was under suspension at the time of operation of his vehicle, which he was not. He then filed his Motion to Vacate Conviction, since his change of plea was not knowing, intelligent, and voluntary. This motion was filed by mail on September 2, 2020 and stamped received by the court on September 4, 2020. The docket record of the trial court shows that no objection was filed by the State.

On September 29, 2020 (Clerk's Notice dated October 6, 2020) the district court denied the motion without a hearing. See Notice of Decision and order, NOA at 8-11. The trial court's order consisted of the following short phrase handwritten on page 3 of Appellant's motion: "Motion respectfully denied," along with the signature of the judge and the date "9/29/2020." *Id.*, at 11. There were no findings of fact or rulings of law, despite the factual assertions in the motion and the citations to caselaw supporting Appellant's position.

SUMMARY OF ARGUMENT

Appellant's motion should have been granted since its allegations were sufficient and based on the record and since it was unopposed. At the least, the trial court should have held a hearing to

allow further testimony and argument.

ARGUMENT

A. The Issue and the Standard

Appellant's motion should have been granted based on the facts alleged and supported by the record of the hearing. since its allegations were sufficient and based on the record and since it was unopposed. The original charge was a misdemeanor, and it was reduced to a violation for the plea offer by the State, but the same constitutional standards apply to a plea to a noncriminal violation level offense as apply to a criminal offense. *State v. Arsenault*, 153 N.H. 413, 415 (2006). The trial court's failures went contrary to well established law and this Court reviews questions of constitutional law *de novo*. *Id.*

The process followed (or not followed) violated Part I, Article 15 of the State Constitution and the Due Process Clause of the Fourteenth Amendment to the United States Constitution. A defendant may not waive his rights by a change of plea unless he does so knowingly, voluntarily, and intelligently. *Boykin v. Alabama*, 395 U.S. 238, 243 (1969); *State v. Ortiz*, 163 N.H. 506, 509 (2012). The deficient and abbreviated colloquy did not involve a full discussion of the differences between a violation level offense and a misdemeanor.

It is well established that a guilty plea must be knowing, intelligent, and voluntary to be valid. See, e.g., *State v. Thornton*, 140 N.H. 532, 536 (1995). For a change of plea to qualify as intelligent, the defendant must first receive "real notice of the true nature of the charge against

him." *Bousley v. United States*, 523 U.S. 614, 618 (1998) (quotations omitted). For his guilty plea to be knowing, intelligent, and voluntary, a defendant must understand the essential elements of the crime to which he pleads guilty. *Thornton*, 140 N.H. at 537.

The United States Supreme Court held that because a defendant waives numerous constitutional rights, including the rights against compelled self-incrimination, to a jury trial, and to confront adverse witnesses, trial courts must create an adequate record to establish that a defendant's plea is knowing, intelligent, and voluntary. *Boykin*, 395 U.S. at 242-44.

To determine that a plea was knowing and intelligent, the trial court must ascertain that the defendant understood his rights and that he would waive those rights by entering a plea, the elements of the charged offense, the potential sentencing range, and the direct consequences of his guilty plea. See, e.g., *Id.* at 243 (discussing rights waived in pleading guilty); *Ortiz*, 163 N.H. at 510 (a defendant must be advised of direct consequences of guilty plea); *Arsenault*, 153 N.H. at 419 (a defendant must understand the elements of the charged offense).

Here, Appellant was deprived of his rights both when the original change of plea was entered without a proper colloquy (or even an arraignment) and when the trial court denied his Motion to Vacate without a hearing, in the absence of an objection by the State, and without explanation.

CONCLUSION

The trial court's order should be reversed, and the conviction vacated. In the alternative, the case should be remanded for a full hearing and proper ruling on Appellant's motion.

Dated: April 9, 2021

Respectfully Submitted,
Robert Graham,
By his attorney,

/s/ Sven D. Wiberg

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WORD COUNT

I certify that the word count in this brief does not exceed the limit set out in Rule 16.

/s/ Sven D. Wiberg

CERTIFICATE OF SERVICE

I certify that a copy of forgoing was served this 9th day of April, 2021 through the electronic-filing system on counsel for the State.

/s/ Sven D. Wiberg

ADDENDUM

ORDER ON MOTION TO VACATE 10

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THE STATE OF NEW HAMPSHIRE
JUDICIAL BRANCH
NH CIRCUIT COURT

BY:

10th Circuit - District Division - Brentwood
PO Box 1149
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NOTICE OF DECISION

**SVEN DAVID WIBERG, ESQ
WIBERG LAW OFFICE PLLC
2456 LAFAYETTE RD STE 11
PORTSMOUTH NH 03801**

Case Name: **State v. Robert A Graham, JR**
Case Number: **435-2019-CR-01623**

Please be advised that on September 29, 2020 the Court made the following Order relative to:
Motion to vacate conviction.

October 06, 2020

LoriAnne Hensel
Clerk of Court

(43599)

C: Robert A Graham, JR; KEVIN DOBSON

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BY:

THE STATE OF NEW HAMPSHIRE

ROCKINGHAM, ss

10th CIRCUIT - DISTRICT
DIVISION - BRENTWOOD

THE STATE OF NEW HAMPSHIRE

v.

ROBERT GRAHAM

No. 435-2019-CR-01623

MOTION TO VACATE CONVICTION

Now comes the defendant, Robert Graham, by and through counsel, and moves to this Court to vacate his plea and conviction in this case, since the change of plea was not fully knowing, intelligent and voluntary due to, *inter alia*, the failure to inform him of the *mens rea* requirement in the State's burden of proof or to advise him of the potential consequences under the Habitual Offender statute.

In support of this motion:

1. To be valid and constitutionally sound, a conviction based on a change of plea must be entered knowingly, intelligently, and voluntarily. *Boykin v Alabama*, 395 US 238, 243 (1969). *Boykin* involved a guilty plea where the trial court failed to mention the constitutional rights defendant was waiving (*e.g.*, the right to trial by jury, the right to confront one's accusers and the privilege against self-incrimination). *Id.* at 241-242. Trial courts have a responsibility to ensure that a defendant who pleads guilty makes a knowing, voluntary, and intelligent choice among alternative courses of action. *People v Harris*, 61 NY2d 9, 19 (1983).

2. Here, because the defendant did not have an opportunity to discuss the plea with

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10th Circuit at Brentwood

an attorney, to know and consider all the elements that formed the State's burden of proof, or to be aware of and consider all of the consequences of a conviction, his plea was invalid.

3. Mr. Graham submits that he was not aware or advised that to be guilty, he would have had to be sent notice of the suspension of his license which was the basis for the charge of Operating After Suspension contrary to RSA 264:64. He states further that he did not receive notice of the alleged suspension until after the stop which resulted in his arrest in this case (by being informed by the arresting office and the eventual complaint form). Upon information and belief, the suspension was for failure to provide obtain a proof of insurance form following an accident, however, if a notice was sent to him by mail or otherwise, it was never received. Consequently, he could not be guilty of the offense.

4. The original charge in this case was a Class A misdemeanor (alleging a prior conviction for Operating After Suspension), but the charge was amended to a violation for the purpose of the plea and sentencing. Had he been advised of the state of mind element which the State would have had to prove, Mr. Graham would not have changed his plea, since an element of that offense (the *mens rea*) was missing.

5. Upon information and belief, the Acknowledgment and Waiver form signed by the defendant was partially completed by someone else and handed to him for signing where the other person placed an X. Mr. Graham submits that he was unaware that there could be serious collateral consequences beyond the fine assessed.

6. To the extent that the State may argue that the reduced charge did not require proof of a state of mind element, in *State v. Kardonsky*, 144 A.3d 58 (2016), the New

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Hampshire Supreme Court found that such an element was necessary, stating:

" The very structure of RSA 263:64 indicates that the legislature did not intend that only the misdemeanors set forth therein include a mens rea requirement." *Id.*

7. Acceptance of the guilty plea under the circumstances of this case constituted reversible error because the record does not establish that the Mr. Graham voluntarily and understandingly entered the plea of guilty. See *Boykin*, 395 U. S. at 244.

WHEREFORE, Mr. Graham asks this Honorable Court grant this motion and vacate his plea and conviction.

Respectfully submitted,
Robert Graham,
By his Attorney,

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NH Bar No. 8238

Motion respectfully
denied.
P. Hall
9/29/2020

Polly L. Hall, Judge

CERTIFICATE OF SERVICE

I, Sven D. Wiberg, hereby certify that a true copy of the foregoing motion has been mailed to the Prosecution Unit of the State Police on this date.

Dated: September 2, 2020

Sven D. Wiberg

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