

THE STATE OF NEW HAMPSHIRE
SUPREME COURT

No. 2020-0506

State of New Hampshire

v.

Robert A. Graham, Jr.

APPEAL PURSUANT TO RULE 7 FROM A JUDGMENT OF THE
TENTH CIRCUIT COURT – DISTRICT DIVISION – BRENTWOOD

BRIEF FOR THE STATE OF NEW HAMPSHIRE

THE STATE OF NEW HAMPSHIRE

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(Oral argument waived)

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ISSUES PRESENTED

I. Whether this appeal lacks subject matter jurisdiction pursuant to *State v. Jaskolka*, 172 N.H. 468 (2019) because the defendant challenged his guilty plea in circuit court eight months after the statutory appeal period had lapsed.

II. Whether the circuit court violated the defendant's due process rights when it (a) informed him and confirmed his understanding of the essential elements of his plea agreement during the plea colloquy, and (b) denied his motion to vacate his guilty plea without holding a hearing when the defendant did not request a hearing, did not explain why a hearing was necessary, and did not file a motion for reconsideration in the circuit court.

STATEMENT OF THE CASE AND FACTS

A. The defendant's arrest and criminal charges.

On October 18, 2019, State Police Trooper Kevin Dobson (“Officer Dobson”) pulled the defendant over in Stratham, New Hampshire. SD¹35-36; PS2-4. After reviewing the defendant’s driving record, Officer Dobson discovered that the defendant was driving with a suspended vehicle registration and a suspended license. SD35-36; PS2-4.² Officer Dobson arrested the defendant for these offenses. *See* SD33; PS3.

The State subsequently charged the defendant with (1) a Class B misdemeanor for driving with a suspended vehicle registration, SD35; RSA 261:178, and (2) a Class B misdemeanor for driving with a suspended license, SD36; RSA 263:64. If convicted, the defendant faced, among other penalties, a fine of up to \$1200 for each offense. RSA 625:9, IV; RSA 651:2, IV(a).

B. The defendant's negotiated plea agreement and plea hearing.

Rather than dispute the charges of driving with a suspended vehicle registration and driving with a suspended license, the defendant voluntarily

¹ Citations to the record are as follows:

“DB__” refers to the defendant’s brief and page number.

“DD__” refers to the defendant’s addendum and page number.

“NOA__” refers to the defendant’s Rule 7 Notice of Discretionary Appeal and page number.

“PS__” refers to the transcript of the defendant’s plea and sentencing hearing held on December 17, 2019 and page number.

“SD__” refers to the State’s addendum attached to this brief and page number.

² The defendant was previously convicted of driving with a suspended license on November 5, 2013. SD36.

entered into a negotiated plea agreement with the State. SD37-38; PS2. Pursuant to this plea agreement, the State agreed to (1) *nolle pros* the driving with a suspended vehicle registration charge, (2) reduce the driving with a suspended license charge from a Class B misdemeanor to a violation, and (3) lower the fine and penalty assessment of the driving with a suspended license charge from \$1200 to \$310. *See* SD37-38; PS2-3. In exchange, the defendant agreed to plead guilty to the driving with a suspended license charge and to pay the \$310 fine and penalty assessment. *See* SD37-38; PS2-3. Additionally, the defendant agreed to sign an Acknowledgement and Waiver of Rights form. *See* SD37-38; PS2-3.

On December 17, 2019, the Tenth Circuit Court – District Division – Brentwood (the “circuit court”) (*LeFrancois*, J.) held a combined arraignment, plea, and sentencing hearing. PS1; SD33-34. Pursuant to New Hampshire Rule of Criminal Procedure 11(a)(3), the circuit court engaged in a plea colloquy with the defendant to confirm his knowing, intelligent, and voluntary participation in the negotiated plea agreement. PS2-4. The colloquy included the following exchange:

The circuit court: You [the defendant] have . . . reached and negotiated this position with the State, and one charge has been nolle prossed. That leaves you with one charge which, as amended, is a violation that on October 18th, you knowingly drove a motor vehicle on a way, Route 101 in Stratham, after your license to do so had been suspended. So you understand the charge, sir?

The defendant: Yes, I do.

The circuit court: All right. In connection with it you have signed the acknowledgment and waiver form today, and you read the form, sir?

The defendant: Yes.

The circuit court: And you were in the courtroom earlier when I went through your rights regarding a lawyer and a trial?

The defendant: Yes.

The circuit court: Do you understand you give those up today, sir?

The defendant: Yes.

The circuit court: Maximum penalty on this [violation], sir, could be a thousand dollars³. . . . This is negotiated with a fine and penalty assessment of . . . 310 dollars 310 dollars is the proposal, sir.

It does go on your motor vehicle record so it could impact your status as an official offender with the Division of Motor Vehicles.

. . . .

So based on all of that, sir, what is your plea today?

The defendant: Guilty.

PS2-3. Officer Dobson then provided the circuit court with an offer of proof. PS3-4.

The circuit court sentenced the defendant to pay the \$310 fine and penalty assessment for the driving with a suspended license violation. PS4.

³ If the charge for driving with a suspended license had remained a Class B misdemeanor, the maximum fine would have been \$1200. *See* RSA 625:9, IV; RSA 651:2, IV(a).

The defendant thanked the judge and the circuit court concluded the hearing. PS4.

C. The defendant’s collateral challenge to his plea.

On September 4, 2020—nearly nine months after the plea and sentencing hearing, *see* PS1, and nearly eight months after the statutory appeal period had expired, *see* RSA 599:1-c, II—the defendant filed a “Motion to Vacate Conviction” in the circuit court, DD10-13. In that filing, the defendant alleged, in relevant part, that his guilty plea was not knowing, intelligent, or voluntary because he was unaware of the *mens rea* for driving with a suspended license. DD11. The defendant asked the circuit court to “grant [the] motion and vacate his plea and conviction.” DD13. The defendant, however, did not ask the circuit court to hold a hearing on the motion. *See* DD13.

On October 6, 2020, the circuit court (*Hall, J.*) denied the defendant’s motion without holding a hearing. *See* DD10, 13 (denying the defendant’s motion to vacate in a margin order). The defendant did not file a motion for reconsideration in the circuit court. SD33-34; *N.H. R. Crim. P.* 43(a). Instead, on November 5, 2020, the defendant appealed to this Court. NOA1-3.

SUMMARY OF THE ARGUMENT

On December 17, 2019, the defendant knowingly, intelligently, and voluntarily entered into a plea agreement with the State. Rather than risk conviction for two Class B misdemeanors, which could have resulted in up to \$2400 in fines and other penalties, the defendant reasonably decided to accept the State's plea offer, which (1) *nolle prossed* the driving with a suspended vehicle registration charge, (2) reduced the driving with a suspended license charge from a Class B misdemeanor to a violation, and (3) required the defendant to pay a substantially lower fine. Despite the numerous benefits of the negotiated plea agreement, the defendant now contends that he would not have pleaded guilty and would have instead contested the charge of driving with a suspended license.

The defendant raises two claims on appeal.⁴ First, the defendant contends that the circuit court violated his due process rights because it allegedly failed to advise him of all of the elements of the crime of driving with a suspended license during the plea colloquy. *See* DB4-7. Second, the defendant claims that the circuit court violated his due process rights by denying his motion to vacate without holding a hearing. *See* DB5-7

The defendant's due process claims are without merit for three reasons. First, the defendant's appeal lacks subject matter jurisdiction. Pursuant to *State v. Jaskolka*, 172 N.H. 468 (2019), the defendant could

⁴ The State does not address the defendant's arguments that were not sufficiently developed for appellate review. *See Halifax-Am. Energy Co. v. Provider Power, LLC*, 170 N.H. 569, 574-75 (2018). However, to the extent that the Court finds that the defendant developed other claims on appeal, the State respectfully requests the opportunity to address these claims in a supplemental brief.

have either (1) appealed to this Court during the statutory appeal period, or (2) collaterally challenged his guilty plea by filing a petition for writ of coram nobis in superior court after the appeal period had expired. Because the defendant did not pursue either option, this appeal lacks subject matter jurisdiction and should be dismissed.

Second, the circuit court's plea colloquy was constitutionally and legally sufficient. At the defendant's plea and sentencing hearing, the circuit court informed the defendant of the elements of the crime of driving with a suspended license and adhered to the plea colloquy procedure described in New Hampshire Rule of Criminal Procedure 11(a)(3). Further, even if the defendant believed that he could have challenged the driving with a suspended license charge, entering into the negotiated plea agreement was still in the defendant's best interests.

Third, the circuit court did not violate the defendant's due process rights when it denied his motion to vacate without holding a hearing because (1) the defendant did not request a hearing in his motion, (2) the defendant failed to articulate how a hearing would have assisted the circuit court in deciding the motion, and (3) the defendant failed to preserve this claim for appeal because he did not raise this alleged due process violation in a motion for reconsideration.

ARGUMENT

I. THIS APPEAL LACKS SUBJECT MATTER JURISDICTION AND SHOULD BE DISMISSED.⁵

Pursuant to *State v. Jaskolka*, 172 N.H. 468 (2019), the defendant could have and should have challenged his guilty plea by either (1) appealing to this Court during the statutory appeal period, or (2) collaterally challenging his guilty plea by filing a petition for writ of coram nobis in superior court after the appeal period had expired. The defendant, however, did not employ either approach. Consequently, this appeal lacks subject matter jurisdiction and should be dismissed.

First, the defendant failed to appeal his conviction within the statutorily prescribed timeframe. The circuit court is a court of limited jurisdiction for criminal actions. *Jaskolka*, 172 N.H. at 471; RSA 502-A:11; RSA 490-F:18. The New Hampshire legislature “has prescribed strict time limitations upon a defendant’s right to appeal convictions in the circuit courts, which, in turn, impose limitations upon the circuit court’s jurisdiction.” *Jaskolka*, 172 N.H. at 471 (citations omitted); RSA 599:1-c, II (imposing a thirty-day deadline to appeal a violation conviction); *see also State v. Flynn*, 110 N.H. 451, 454 (1970) (concluding that the district court lacked jurisdiction to vacate its guilty finding after the expiration of the statutory period for appeal under RSA 599:1-a). Consistent with its limited powers, a circuit court has no jurisdiction over an action after the statutory appeal period has expired. *See Jaskolka*, 172 N.H. at 471; RSA 599:1-c, II.

⁵ A party may raise subject matter jurisdiction at any time, including on appeal. *See Jaskolka*, 172 N.H. at 471.

Pursuant to RSA 599:1-c, II, the defendant needed to appeal to this Court within thirty days of December 17, 2019—the date of his plea and sentencing hearing. *See* SD33-34; PS1; RSA 599:1-c, II; *see also* RSA 599:3.⁶ The defendant did not do so. *See* SD33-34. Instead, the defendant waited until September 4, 2020—approximately eight months after the statutory appeal period had lapsed—to contest his guilty plea by filing a motion to vacate in circuit court. *See* SD34; DD13. As such, the circuit court lacked jurisdiction over the defendant’s motion. *See Jaskolka*, 172 N.H. at 471.

The defendant also failed to properly mount a collateral challenge to his guilty plea after the statutory appeal period had expired. *Id.* When a defendant “seeks to withdraw a guilty plea and vacate a conviction outside the time limits governing the circuit court’s jurisdiction, the writs of habeas corpus and coram nobis are the proper procedural vehicles by which a party may seek review of the proceeding at which he or she entered a guilty plea.” *Id.* at 473. A defendant must file such a petition in superior court because the circuit court “lacks jurisdiction to consider the merits of a petition for a writ of habeas corpus, and, by comparison, a petition for a writ of coram nobis.” *Id.*

The defendant failed to follow the proper legal procedure for collaterally challenging his guilty plea. Instead of filing a petition for writ

⁶ The defendant may claim in a reply that his collateral challenge to his guilty plea was timely because motions for new trial have a three-year statute of limitations pursuant to RSA 526:4. This argument should be rejected for two reasons. First, the defendant’s motion to vacate was not a motion for a new trial. *See* DD11-13. Second, this Court has never held that RSA 526:4 applies to circuit court decisions. *See Jaskolka*, 172 N.H. at 472-73.

of coram nobis⁷ in superior court as mandated by *Jaskolka*, the defendant filed a motion to vacate in circuit court.⁸ *See* SD34; DD11-13; *Jaskolka*, 172 N.H. at 471. Put simply, the defendant employed the wrong “procedural vehicle[]” in the wrong court. *Jaskolka*, 172 N.H. at 471. The circuit court, therefore, lacked jurisdiction to decide the defendant’s motion.

Because the defendant’s challenge to his guilty plea was jurisdictionally defective, this Court should remand with instructions for the circuit court to dismiss the defendant’s motion to vacate for lack of subject matter jurisdiction. *Id.* at 474.

⁷ A petition for writ of coram nobis, rather than a petition for writ of habeas corpus, would have been the proper form for the defendant to challenge his guilty plea because the defendant “is not in custody and seeks to correct an alleged violation of a constitutional right.” *Jaskolka*, 172 N.H. at 473.

⁸ Even if this Court construes the defendant’s motion to vacate as a petition for coram nobis, it would still be fatally defective because (1) the circuit court does not have jurisdiction to consider petitions for coram nobis, and (2) the defendant has failed “to demonstrate that sound reasons exist for his failure to seek appropriate earlier relief.” *See Jaskolka*, 172 N.H. at 473-74 (quotation omitted).

II. THE CIRCUIT COURT DID NOT INFRINGE THE DEFENDANT’S DUE PROCESS RIGHTS DURING THE PLEA COLLOQUY OR WHEN DENYING HIS MOTION TO VACATE WITHOUT A HEARING.

Even if this Court finds that this appeal is not defective for lack of subject matter jurisdiction, the defendant’s due process claims fail on the merits.

“No subject shall be . . . deprived of his property, immunities, or privileges, put out of the protection of the law, exiled or deprived of his life, liberty, or estate, but by the judgment of his peers, or the law of the land” N.H. Const. pt. I, art. 15. “Law of the land in this article means due process of law.” *State v. Veale*, 158 N.H. 632, 636 (2009) (quotation omitted), *cert. denied*, 130 S.Ct. 748 (2009). In the context of due process, “the State Constitution is more protective . . . than its federal counterpart.” *Id.* at 645; *State v. Davies*, 164 N.H. 71, 77 (2012); *State v. Thornton*, 140 N.H. 532, 536 (1995). “Allowing withdrawal of a plea rests within the sound discretion of the trial court, and [this Court] will not set aside its findings absent an unsustainable exercise of discretion.” *Davies*, 164 N.H. at 74; *State v. Corcoran*, No. 2016-0201, 2017 WL 3468602, at *2 (N.H. July 27, 2017) (unpublished). This Court reviews constitutional questions of law *de novo*. *State v. Kinne*, 161 N.H. 41, 46 (2010).

A. The circuit court did not violate the defendant’s due process rights during the plea colloquy.

The defendant claims that the circuit court erred in denying his motion to vacate because his plea colloquy was insufficient. This is incorrect.

A guilty plea is valid “if it is knowing, intelligent and voluntary.” *Id.* “[A] colloquy is constitutionally required when a defendant pleads guilty because the defendant forfeits not only the right to trial, but also the right to confront accusers as well as the right against self-incrimination.” *State v. Arsenault*, 153 N.H. 413, 418 (2006). Pursuant to New Hampshire Rule of Criminal Procedure 11(a)(3), a plea colloquy for a misdemeanor or an enhanced violation is sufficient if the circuit court personally addresses the defendant and determines on the record that:

- (A) There is a factual basis for the plea;
- (B) The defendant understands the crime charged and the factual basis of that charge;
- (C) The defendant’s plea is knowing, intelligent and voluntary;
- (D) The defendant’s plea is not the result of any unlawful force, threats or promises; and
- (E) The defendant understands and waives the statutory and constitutional rights as set forth in the Acknowledgement and Waiver of Rights form.

N.H. R. Crim. P. 11(a)(3).

i. The defendant fails to meet his initial burden for a collateral attack on a guilty plea.

“A collateral attack is an attack on a judgment in a proceeding other than a direct appeal.” *Wall v. Kholi*, 562 U.S. 545, 552 (2011) (quotations, brackets, and emphasis omitted); *see also Jaskolka*, 172 N.H. at 471 (noting that when a defendant challenges his guilty plea “after the period for filing a direct appeal [has] expired, his . . . challenge constitutes a collateral attack” (citations omitted)). To successfully mount a collateral attack on a

guilty plea, “[t]he defendant must describe the specific manner in which the waiver was in fact involuntary or without understanding, and must at least go forward with evidence sufficient to indicate that his specific claim presents a genuine issue for adjudication.” *Kinne*, 161 N.H. at 47 (quotation omitted). “If the defendant meets this burden, the burden of proof going forward depends upon whether the trial court affirmatively inquired into the knowledge and volition of the defendant’s plea.” *Id.*

The defendant fails to meet his initial burden on collateral attack. The defendant claims that “had he been advised of the state of mind element which the State would have had to prove, he would not have [pleaded guilty], since he did not have the requisite *mens rea*.” DB4; DD12. A cursory review of the plea and sentencing hearing transcript, however, shows that the circuit court informed the defendant of the applicable *mens rea* for the offense of driving with a suspended license. *See* PS2 (The circuit court: “[O]n October 18th, you *knowingly* drove a motor vehicle on a way, Route 101 in Stratham, after your license to do so had been suspended. So you understand the charge, sir?” The defendant: “Yes, I do.” (emphasis added)); *see also* SD36 (the criminal complaint alleging that the defendant “*knowingly* dr[o]ve a motor vehicle upon a way . . . after his license to do so has been suspended” (emphasis added)).

The defendant also contends that the plea colloquy was deficient because the circuit court did not advise him of the collateral consequences of his guilty plea and other nonessential information. *See* DB6; DD12. This argument is unavailing. First, the circuit court does not need to advise the defendant of the collateral consequences of a guilty plea or other nonessential information during a plea colloquy. *See N.H. R. Crim. P.*

11(a)(3); DD12 (the defendant stating that “he was unaware that there could be serious *collateral* consequences beyond the fine assessed” (emphasis added)); *State v. Ortiz*, 163 N.H. 506, 510 (2012) (“[T]he defendant must be advised of the direct consequences of entering a guilty plea, but not the potential collateral consequences, in order for the guilty plea to be considered knowing.”). Additionally, even if such a discussion were required, the circuit court informed the defendant of the collateral consequences of his guilty plea by telling him that the violation for driving with a suspended license “does go on your motor vehicle record so it could impact your status as an official offender with the Division of Motor Vehicles.” PS3; *see also* SD37-38 (defendant signing Acknowledgement and Waiver of Rights form that described, among other things, the potential consequence of being labeled a “habitual offender” for pleading guilty).

The defendant has not presented “evidence sufficient to indicate that his specific claim presents a genuine issue for adjudication.” *See Kinne*, 161 N.H. at 47-48 (finding that the defendant had failed to meet his initial burden when he had “done nothing more than claim he was not advised by the indictment or the court of the elements of [the crime]”). Because the defendant “has not alleged sufficient facts to meet his initial burden and trigger further review,” *see id.*, his due process challenge fails.

ii. The defendant does not and cannot demonstrate that his guilty plea was unknowing, unintelligent, or involuntary.

Even if this Court finds that the defendant has met his initial burden, the defendant’s collateral attack fails because he does not and cannot

demonstrate that his guilty plea was unknowing, unintelligent, or involuntary.

If the record establishes that the circuit court affirmatively inquired into the knowledge and volition of the defendant's guilty plea, "then the burden remains with the defendant to demonstrate by clear and convincing evidence that the [circuit] court was wrong and that his plea was either involuntary or unknowing for the reason he specifically claims." *State v. Offen*, 156 N.H. 435, 438 (2007) (quotation omitted); *State v. Zankowski*, 140 N.H. 294, 296 (1995) (similar).

At the December 17, 2019 plea and sentencing hearing, the circuit court reviewed the charge and the negotiated plea agreement with the defendant:

The circuit court: You [the defendant] have . . . reached and negotiated this position with the State, and one charge has been nolle prossed. That leaves you with one charge which, as amended, is a violation that on October 18th, you knowingly drove a motor vehicle on a way, Route 101 in Stratham, after your license to do so had been suspended. So you understand the charge, sir?

The defendant: Yes, I do.

The circuit court: All right. In connection with it you have signed the acknowledgment and waiver form today, and you read the form, sir?

The defendant: Yes.

The circuit court: And you were in the courtroom earlier when I went through your rights regarding a lawyer and a trial?

The defendant: Yes.

The circuit court: Do you understand you give those up today, sir?

The defendant: Yes.

The circuit court: Maximum penalty on this [violation], sir, could be a thousand dollars. . . . This is negotiated with a fine and penalty assessment of . . . 310 dollars 310 dollars is the proposal, sir.

It does go on your motor vehicle record so it could impact your status as an official offender with the Division of Motor Vehicles.

. . . .

So based on all of that, sir, what is your plea today?

The defendant: Guilty.

PS2-3. Following this exchange, Officer Dobson provided the circuit court with an offer of proof. PS3-4.

The circuit court plainly inquired into the knowledge and volition of the defendant's guilty plea and satisfied the requirements for a plea colloquy under the New Hampshire Rules of Criminal Procedure. *See Ortiz*, 163 N.H. at 509; *N.H. R. Crim. P.* 11(a)(3). The circuit court confirmed that there was a factual basis for the plea by virtue of Officer Dobson's offer of proof.⁹ *See N.H. R. Crim. P.* 11(a)(3); PS3-4. The circuit court reviewed the elements of driving with a suspended license and the factual basis for the

⁹ Although the circuit court's decision to elicit Officer Dobson's offer of proof towards the end of the hearing is disfavored, it does not render the plea colloquy "fatally flawed as a result." *Davies*, 164 N.H. at 76.

crime with the defendant, including the applicable *mens rea* of “knowingly.” *N.H. R. Crim. P.* 11(a)(3)(B); PS2-4; RSA 263:64; *State v. Kardonsky*, 169 N.H. 150, 154 (2016); *see also Arsenault*, 153 N.H. at 418 (suggesting that “if a trial court reads an indictment aloud in open court in conjunction with a plea, such a reading is sufficient to notify a defendant of the nature of the charge when coupled with the defendant’s competent acknowledgment that he understands the charge”); *see also* SD36 (complaint listing all the elements of driving with a suspended license).¹⁰ The circuit court repeatedly confirmed that the defendant understood his plea and that he entered into it volitionally. *See N.H. R. Crim. P.* 11(a)(3)(C)-(D); PS2-3; *see also* SD37-38 (defendant representing in the Acknowledgment and Waiver of Rights form that “[n]o force has been used upon me, nor have any threats made to me, by any member of the Prosecutor’s Office or anyone else to have me enter this plea of GUILTY or *NOLO*” and that he “freely and voluntarily sign[ed] this form”). Finally, the circuit court corroborated the defendant’s understanding that he was waiving his statutory and constitutional rights in the Acknowledgment and Waiver of Rights form. *See N.H. R. Crim. P.* 11(a)(3)(E); PS2-3; *see also* SD38 (defendant’s signature appearing directly below representation that

¹⁰ The defendant also claims that his plea was unknowing, unintelligent, and involuntary because Officer Dobson’s offer of proof did not describe the mental state for the charge of driving with a suspended license. *See* DB4-5. This argument is without merit because (1) the circuit court advised the defendant of the elements of the offense—including the mental state of “knowingly”—earlier in the hearing, PS2; *supra* section II.A.i, and (2) the defendant need not “admit to the facts presented by the State” in order for his guilty plea to be intelligent, knowing, and voluntary, *see State v. Percy*, No. 2013-0648, 2014 WL 11485808, at *3 (N.H. Oct. 21, 2014) (unpublished).

he “understand[s] the entire contents of the Acknowledgement of Rights”).¹¹

The defendant relies, at least in part, upon *State v. Arsenault*, 153 N.H. 413 (2006) to argue that his plea colloquy was inadequate. *See* DB6-7; NOA6-7. But in *Arsenault*, the trial court never discussed with the defendant either the elements or the nature of the offense charged. *Arsenault*, 153 N.H. at 415; *Davies*, 164 N.H. at 76. By contrast, the circuit court recited the charge of driving with a suspended license to the defendant and the defendant confirmed his understanding of the charge. PS2.

Because the circuit court inquired into whether the defendant’s guilty plea was knowing, intelligent, and voluntary, the defendant must “demonstrate by clear and convincing evidence that the [circuit] court was wrong and that his plea was either involuntary or unknowing for the reason he specifically claims.” *Offen*, 156 N.H. at 438. To this end, the defendant notes that he was not represented by counsel and alleges that he did not sufficiently understand the charge of driving with a suspended license. *See* DB4. The defendant’s bases for overturning his guilty plea, however, are insufficient—particularly because the defendant voluntarily waived counsel

¹¹ Even if, for the sake of argument, the circuit court failed to strictly follow Rule 11, this would not be fatal to the adequacy of the plea colloquy given that the circuit court inquired into the knowledge and volition of the defendant’s guilty plea. *See Percy*, No. 2013-0648, 2014 WL 11485808, at *3 (“Despite the requirement that the record reflect the defendant’s knowledge, understanding, and volition before the trial court can accept a guilty plea, no set procedure exists to create a constitutionally adequate record.”); *Fed. R. Crim. P.* 11, Notes of Advisory Committee on Rules, 1983 Amendment (explaining that, in the context of the federal equivalent of New Hampshire Rule of Criminal Procedure 11, the plea colloquy procedure should not be “read as requiring a litany or other ritual which can be carried out only by word-for-word adherence to a set ‘script’”).

for the plea hearing and was already familiar with the court system after having been convicted for driving with a suspended license on November 5, 2013. *See* SD36; *Davies*, 164 N.H. at 72, 76-77 (holding that the defendant failed “to compel a finding that his plea was unknowingly entered” even though the defendant was not represented by counsel at the plea hearing, was nineteen years old when he pleaded guilty, and had “limited prior history and experience with the criminal justice system”). The circuit court, therefore, did not err by denying the defendant’s motion to vacate. *See Davies*, 164 N.H. at 76-77.

Moreover, by deciding to waive his rights and enter into the negotiated plea agreement, the defendant acted in his best interests. Waiver is “the voluntary or intentional abandonment or relinquishment of a known right.” *Debonis v. Warden*, 153 N.H. 603, 605 (2006) (quoting *A.W. Therrien Co. v. Maryland Cas. Co.*, 97 N.H. 180, 181-82 (1951)). “When a defendant knowingly and intelligently enters a plea of guilty, he waives a series of constitutional guarantees” *State v. O’Leary*, 128 N.H. 661, 665 (1986).

The defendant entered into the negotiated plea agreement because it was an exceptionally propitious outcome for him. Pursuant to the plea agreement, the State agreed to reduce the driving with a suspended license charge from a Class B misdemeanor to a violation and to lower the fine and penalty assessment from \$1200 to \$310. SD37-38. Crucially, the State also agreed to *nolle pros* the charge of driving with a suspended vehicle registration, *see* SD37-38; PS2—a crime that the defendant may have had no reasonable grounds to challenge. And, by signing the Acknowledgement

and Waiver of Rights form and choosing to plead guilty, the defendant avoided the uncertainty, expense, and time inherent in litigation and trial.¹²

Even if the circuit court had done precisely what the defendant says should have been done, any rational defendant would have accepted the State's plea offer. The defendant, therefore, cannot sustain his collateral attack on his guilty plea.

B. The circuit court did not violate the defendant's due process rights by denying the defendant's motion to vacate without a hearing.

The defendant erroneously contends that the denial of the motion to vacate was a violation of his due process rights because he was entitled to a hearing on this motion. DB 7.

This Court reviews the circuit court's determination not to hold a hearing on a motion under the unsustainable exercise of discretion standard. *See State v. Tsopas*, 166 N.H. 528, 529 (2014); *State v. Sarette*, 134 N.H. 133, 138 (1991). "[T]he defendant has the burden of proving sufficient grounds for the withdrawal motion, regardless of when it is filed." *Sarette*, 134 N.H. at 138. "No hearing need be granted when the allegations on a motion to withdraw a guilty plea . . . merely contradict the record, are inherently incredible, or are simply conclusory." *Thornton*, 140 N.H. at 539 (quotation omitted); *see also DeCologero v. United States*, 802 F.3d 155,

¹² Additionally, the defendant's decision to wait approximately nine months to challenge his guilty plea suggests he believed that entering into the plea agreement was in his best interests. *See Percy*, No. 2013-0648, 2014 WL 11485808, at *3 ("[The defendant's] decision to wait nearly six years from the date of his conviction to assert the invalidity of his plea, while not dispositive, strongly suggests that he had intended to plead guilty . . .").

167 (1st Cir. 2015) (holding that evidentiary hearings on motions to vacate are “the exception, not the norm, and the petitioner bears the burden of establishing the need for an evidentiary hearing” (quotations and citations omitted)).

The defendant was not entitled to a hearing on the motion to vacate for three reasons.¹³ First, and most obviously, the defendant did not request a hearing on his motion. *See* DD13. The defendant, therefore, cannot now claim that the circuit court erred by denying the motion without scheduling a hearing. *See State v. Richard*, 160 N.H. 780, 785-86 (2010) (explaining that the invited error doctrine precludes appellate review of “error into which a party has led the trial court, intentionally or unintentionally” (brackets and quotation omitted)).

Second, the defendant failed to articulate why holding a hearing was necessary or would have assisted the court. *See* DD11-13 (the defendant not explaining in his motion to vacate why a hearing was justified); *Tsopas*, 166 N.H. at 530 (“To obtain a hearing, the party seeking it must articulate why a hearing would assist the court.”). More fundamentally, the defendant did not provide sufficient justification for the circuit court to grant the motion to vacate. *See* DD11-13. In that motion, the defendant relied almost exclusively on allegations that either contradicted the record or lacked independent factual support. *See* DD11-13 (the defendant alleging, in contradiction of the record, that the circuit court did not advise him of the

¹³ The defendant also argues that the circuit court should have granted the motion to vacate because it was unopposed. *See, e.g.*, DB5, 7. However, under New Hampshire law, “a trial court is not required to grant an unopposed motion.” *State v. Bain*, 145 N.H. 367, 373 (2000).

mens rea for driving with a suspended license, and further alleging, without independent factual support, that he did not receive notice that his license had been suspended); *supra* section II.A.i; *Thornton*, 140 N.H. at 539 (holding that a court may deny a motion to withdraw a guilty plea when the allegations “merely contradict the record, are inherently incredible, or are simply conclusory” (quotation omitted)). By denying the defendant’s motion without a hearing, the circuit court reasonably concluded that it was “too conclusory to warrant a hearing, particularly in light of the full colloquy conducted at the plea hearing.” *See State v. Welch*, No. 2011-0703, 2012 WL 12830669, at *2 (N.H. Aug. 1, 2012) (unpublished) (citing *Thornton*, 140 N.H. at 539).

Finally, the defendant cannot argue on appeal that the circuit court violated his due process rights by denying his motion to vacate without a hearing because he failed to raise this issue in a motion for reconsideration in the circuit court. *See* SD34. Pursuant to New Hampshire Rule of Criminal Procedure 43(a):

To preserve issues for an appeal to the Supreme Court, an appellant must have given the [circuit] court the opportunity to consider such issues; thus, to the extent that the [circuit] court, in its decision, addresses matters not previously raised in the case, a party must identify any alleged errors concerning those matters in a motion under this rule to preserve such issues for appeal.

N.H. R. Crim. P. 43(a). The defendant was required to file a motion for reconsideration to preserve his claim that the circuit court violated his due process rights by denying the motion to vacate without a hearing because this issue was “not previously raised in [this] case.” *See N.H. R. Crim. P.* 43(a). Had the defendant filed a motion for reconsideration with the circuit

court alleging a deprivation of his due process rights, he “could have clarified for the court [his] concerns” and allowed the circuit court to explain why it denied the motion without a hearing. *See Welch*, No. 2011-0703, 2012 WL 12830669, at *2. The defendant did not so, however, and his due process claim fails as a consequence. *See SD34*.

The circuit court’s decision should be affirmed.

CONCLUSION

For the foregoing reasons, the State respectfully requests that this Honorable Court deny the defendant's claims and affirm his conviction.

The State waives oral argument.

Respectfully submitted,

THE STATE OF NEW HAMPSHIRE

By Its Attorneys,

JOHN M. FORMELLA
ATTORNEY GENERAL

June 23, 2021

/s/ Weston R. Sager

Weston R. Sager

N.H. Bar No. 269463

Assistant Attorney General

New Hampshire Department of Justice

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CERTIFICATE OF COMPLIANCE

I, Weston R. Sager, hereby certify that pursuant to Rule 16(11) of the New Hampshire Supreme Court Rules, this brief contains approximately 5,824 words, which is fewer than the words permitted by this Court's rules. Counsel relied upon the word count of the computer program used to prepare this brief.

June 23, 2021

/s/ Weston R. Sager
Weston R. Sager

CERTIFICATE OF SERVICE

I, Weston R. Sager, hereby certify that a copy of the State's brief shall be served on Sven Wiberg, counsel for the defendant, through the New Hampshire Supreme Court's electronic filing system.

June 23, 2021

/s/ Weston R. Sager
Weston R. Sager

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CASE SUMMARY
CASE No. 435-2019-CR-01623

State v. Robert A Graham, JR

§
§
§
§

Location: 10th Circuit - District Division
 - Brentwood
 Filed on: 11/06/2019

CASE INFORMATION

Offense	Statute	Deg	Date	Case Type:	Criminal
Jurisdiction: Stratham					
1. Drive after Rev/Sus	263:64	VIOL	10/18/2019	Case	11/10/2020 Appeal to
ChargeID: 1686951C ACN: 007025J191686951001				Status:	Supreme Court
Filed As: Drive after Rev/Sus	263:64	MISDB	11/6/2019		
Arrest: 10/18/2019					
2. Suspension of Registration of Vehicle	261:178	MISDB	10/18/2019		
ChargeID: 1686952C ACN: 007025J191686952002					
Arrest: 10/18/2019					

PARTY INFORMATION

Defendant	Graham, Robert A, JR <i>P.O. Box 574 York Beach, ME 03910 White Male Height 6' 1" Weight 205 DOB: 04/28/1961 Age: 58 DL: [REDACTED]</i>	<i>Attorneys</i> Wiberg, Sven David, ESQ <i>Retained</i> 603-686-5454(W)
Arresting Agency	DOBSON, KEVIN <i>NH State Police Troop A 315 Calef Hwy Epping, NH 03042</i>	

DATE	EVENTS & ORDERS OF THE COURT	INDEX
10/25/2019	Bail Order	<i>Index #1</i>
11/04/2019	Complaint As Accepted For Filing	
12/17/2019	Arraignment on Complaint (Judicial Officer: LeFrancois, David G)	
12/17/2019	Acknowledgement and Waiver of Rights (Judicial Officer: LeFrancois, David G) Party: Defendant Graham, Robert A, JR <i>Charges: 1</i>	<i>Index #2</i>
12/17/2019	Sentencing Order (Judicial Officer: LeFrancois, David G) Party: Defendant Graham, Robert A, JR <i>Charges: 1</i>	<i>Index #3</i>
12/17/2019	Financial Affidavit Party: Defendant Graham, Robert A, JR	<i>Index #4</i>
12/17/2019	Plea (Judicial Officer: LeFrancois, David G) 1. Drive after Rev/Sus Guilty 2. Suspension of Registration of Vehicle No Plea	
12/17/2019	Disposition (Judicial Officer: LeFrancois, David G) 1. Drive after Rev/Sus Finding of Guilty 2. Suspension of Registration of Vehicle	

CASE SUMMARY
CASE NO. 435-2019-CR-01623

Nolle Prossed

12/17/2019	<p>Sentence (Judicial Officer: LeFrancois, David G) 1. Drive after Rev/Sus Sentenced Fees Fines: \$310.00</p>	
01/24/2020	<p><i>CANCELED</i> Fine Payment Hearing</p>	
03/06/2020	<p><i>CANCELED</i> Fine Payment Hearing</p>	
07/02/2020	<p>Request <i>Certified Copies: Wiberg Law Office, PLLC</i></p>	<p><i>Index #5</i></p>
09/04/2020	<p>Appearance <i>Wiberg</i></p>	<p><i>Index #6</i></p>
09/04/2020	<p>Motion to Vacate <i>motion to vacate conviction</i></p>	<p><i>Index #7</i></p>
09/29/2020	<p>Denied (Judicial Officer: Hall, Polly L)</p>	
10/13/2020	<p>Returned Mail Party: Defendant Graham, Robert A, JR <i>RTS/UTF: Notice of Decision. Resent to Updated Address [P.O. Box 574, York Beach, ME].</i></p>	<p><i>Index #8</i></p>
11/10/2020	<p>Notice of Appeal to Supreme Court Party: Attorney Wiberg, Sven David, ESQ; Defendant Graham, Robert A, JR</p>	<p><i>Index #9</i></p>
11/18/2020	<p>Email-Address Notification or Change Party: Defendant Graham, Robert A, JR</p>	<p><i>Index #10</i></p>
12/07/2020	<p>Other <i>NH Supreme Court: Notice of Docketing and Mandatory E-Filing</i></p>	<p><i>Index #11</i></p>
12/21/2020	<p>Supreme Court Accepts Case Party: Attorney Wiberg, Sven David, ESQ; Defendant Graham, Robert A, JR <i>Charges: 1</i></p>	<p><i>Index #12</i></p>

DATE	FINANCIAL INFORMATION								
	<table border="0" style="width: 100%;"> <tr> <td style="width: 80%;">Defendant Graham, Robert A, JR</td> <td></td> </tr> <tr> <td>Total Charges</td> <td style="text-align: right;">335.00</td> </tr> <tr> <td>Total Payments and Credits</td> <td style="text-align: right;">335.00</td> </tr> <tr> <td>Balance Due as of 6/7/2021</td> <td style="text-align: right;">0.00</td> </tr> </table>	Defendant Graham, Robert A, JR		Total Charges	335.00	Total Payments and Credits	335.00	Balance Due as of 6/7/2021	0.00
Defendant Graham, Robert A, JR									
Total Charges	335.00								
Total Payments and Credits	335.00								
Balance Due as of 6/7/2021	0.00								

The State of New Hampshire
COMPLAINT

35

Case Number: _____

Charge ID: _____

Police Case: A19-16323

<input type="checkbox"/> VIOLATION	MISDEMEANOR	<input type="checkbox"/> CLASS A	<input checked="" type="checkbox"/> CLASS B	<input type="checkbox"/> UNCLASSIFIED (non-person)
	FELONY	<input type="checkbox"/> CLASS A	<input type="checkbox"/> CLASS B	<input type="checkbox"/> SPECIAL <input type="checkbox"/> UNCLASSIFIED (non-person)

You are to appear at the: **10th Circuit - District Division - Brentwood** Court,
 Address: **10 Route 125 - Brentwood, NH** County: **Rockingham** County
 Time: **8:00 AM** Date: **12/17/2019**

Under penalty of law to answer to a complaint charging you with the following offense:
THE UNDERSIGNED COMPLAINS THAT: PLEASE PRINT

GRAHAM	ROBERT	A JR.
Last Name	First Name	Middle
50 ANNALORO BLVD	DANVILLE	NH 03801
Address	City	State Zip
M	W	73
Sex	Race	Height
04/28/1961	██████████	205
DOB	License #	Weight
<input type="checkbox"/> COMM. VEH	<input type="checkbox"/> COMM. DR. LIC.	HAZEL
		Eye Color
		GRAY
		Hair Color
		NH
		OP License State
		<input type="checkbox"/> HAZ MAT.
		<input type="checkbox"/> 16+ PASSENGER

At: **101 EB W X 11 Stratham, NH 03885**
 On **10/18/2019** at **9:09 AM** in **Rockingham** County NH, did commit the offense of:
 RSA Name: **Suspension of Vehicle Registration**
 Contrary to RSA: **261:178**

Inchoate:
 (Sentence Enhancer):

And the laws of New Hampshire for which the defendant should be held to answer, in that the defendant did:
drive a motor vehicle upon a way to wit, Route 101 in Stratham, NH after his registration had been suspended by the director of motor vehicle, on 08/08/2019

against the peace and dignity of the State.

SERVED IN HAND

	DOBSON, KEVIN G #1259	NHSP A Troop
Complainant Signature	Complainant Printed Name	Complainant Dept.

Making a false statement on this complaint may result in criminal prosecution.

Oath below not required for police officers unless complaint charges class A misdemeanor or felony (RSA 592A:7.1).
 Personally appeared the above named complainant and made oath that the above complaint by him/her subscribed is, in his/her belief, true.

Date

Justice of the Peace

Case Number: _____

Charge ID: _____

The State of New Hampshire
COMPLAINT

36

Case Number: _____
Police Case: A19-16323

Charge ID: _____

<input type="checkbox"/> VIOLATION	MISDEMEANOR	<input type="checkbox"/> CLASS A	<input checked="" type="checkbox"/> CLASS B	<input type="checkbox"/> UNCLASSIFIED (non-person)
	FELONY	<input type="checkbox"/> CLASS A	<input type="checkbox"/> CLASS B	<input type="checkbox"/> SPECIAL <input type="checkbox"/> UNCLASSIFIED (non-person)

You are to appear at the: **10th Circuit - District Division - Brentwood** Court,
 Address: **10 Route 125 - Brentwood, NH** County: **Rockingham** County
 Time: **8:00 AM** Date: **12/17/2019**

Under penalty of law to answer to a complaint charging you with the following offense:
THE UNDERSIGNED COMPLAINS THAT: PLEASE PRINT

GRAHAM Last Name	ROBERT First Name	A JR. Middle
50 ANNALORO BLVD Address	DANVILLE City	NH 03801 State Zip
M Sex	W Race	73 Height
04/28/1961 DOB	205 Weight	HAZEL Eye Color
04/28/1961 DOB	[REDACTED] License #	NH OP License State

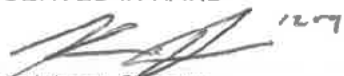
COMM. VEH COMM. DR. LIC. HAZ. MAT. 16+ PASSENGER

At: **101 EB W X 11 Stratham, NH 03885**
 On **10/18/2019** at **9:09 AM** in **Rockingham** County NH, did commit the offense of:
 RSA Name: **Drive after Rev/Sus**
 Contrary to RSA: **263:64**
 Inchoate:
 (Sentence Enhancer):

And the laws of New Hampshire for which the defendant should be held to answer, in that the defendant did:
knowingly drive a motor vehicle upon a way, to wit, Route 101 in Stratham, after his license to do so had been suspended, and after having been previously convicted of operating after suspension on 11/05/2013 out of the Exeter District Court,

against the peace and dignity of the State.

SERVED IN HAND


 Complainant Signature

DOBSON, KEVIN G #1259
 Complainant Printed Name

NHSP .A Troop
 Complainant Dept.

Making a false statement on this complaint may result in criminal prosecution.

Oath below not required for police officers unless complaint charges class A misdemeanor or felony (RSA 592A:7.I).
 Personally appeared the above named complainant and made oath that the above complaint by him/her subscribed is, in his/her belief, true.

Date

Justice of the Peace

Case Number:

Charge ID:

**THE STATE OF NEW HAMPSHIRE
JUDICIAL BRANCH**

http://www.courts.state.nh.us

Court Name: Brentwood District Court
 Case Name: State V. ROBERTA GRAMM JR
 Case Number: 435-2019-CR-1123
 (if known)

**ACKNOWLEDGMENT AND WAIVER OF RIGHTS
VIOLATION**

The statements made below shall apply to each and every complaint, if there be more than one, to which I intend to plead guilty or *nolo*.

I, ROBERTA GRAMM of 50 ANNALORO BLVD DANVILLE have been charged with:

- LICENSE REQUIRED:** RSA 263:1, II. If convicted of the offense for a second time I would be guilty of a class B misdemeanor. THE MAXIMUM PENALTY FOR A CLASS B MISDEMEANOR IS \$1200 FOR EACH OFFENSE AND PENALTY ASSESSMENT AND THE MAXIMUM LOSS OF A DRIVER'S LICENSE/PRIVILEGE TO OPERATE FOR EACH OFFENSE.
- RECKLESS DRIVING:** RSA 265:79. Upon conviction, I shall lose my license and/or right to operate a motor vehicle for a period of sixty (60) days and be fined not less than \$500.00 plus penalty assessment. If convicted of a second offense, I shall lose my license and/or right to operate a motor vehicle for a period of not less than sixty (60) days nor more than a year.
- OPERATING AFTER SUSPENSION/REVOCAION:** RSA 263:64. If convicted of this offense a second time in a seven year period, I would be guilty of a misdemeanor. THE MAXIMUM PENALTY FOR A MISDEMEANOR IS ONE YEAR IN JAIL AND A FINE OF \$2,000.00 plus penalty assessment.
- UNLAWFUL POSSESSION OF ALCOHOL:** RSA 179:10. If convicted, a minimum fine of \$300.00 plus penalty assessment shall be imposed for a first offense and minimum fine of \$600.00 plus penalty assessment for a second or subsequent offense. If I am not yet 21 years of age on the date of the incident, pursuant to RSA 263:56-b, the Court may revoke my license for not less than 90 days nor more than one year for a first offense and not less than 6 months nor more than two years for a subsequent offense.
- OTHER (Specify):** _____

I understand that I may be represented by a lawyer of my own choosing at my own expense.

- I am represented by _____, a lawyer admitted to practice in New Hampshire. I am satisfied with my lawyer and all explanations have been clear.
- I do not want a lawyer. I understand and know what I am doing. I hereby waive being represented by a lawyer.
- I UNDERSTAND that this complaint is brought as a violation and that the Court may impose such sentence as in its discretion it considers appropriate, subject to a maximum penalty of a fine not to exceed \$1,000.00 plus penalty assessment.

I understand that I do not have to plead GUILTY or *NOLO* and that even after signing this form I still do not have to plead GUILTY or *NOLO*.

I understand that by pleading GUILTY or *NOLO* that I am giving up the following constitutional rights as to the charge(s):

MY RIGHT to a speedy and public trial.
MY RIGHT to see, hear, and question all witnesses. This gives me the opportunity and right to face the witnesses against me and question them myself or through my attorney.
MY RIGHT to present evidence and call witnesses in my favor and to testify on my own behalf.
MY RIGHT to remain silent and not testify at a trial.
MY RIGHT to have the judge *ORDER* into court all evidence and witnesses in my favor.
MY RIGHT not to be convicted unless the State proves that I am guilty beyond a reasonable doubt with respect to all elements of the charge(s), which have been explained to me.

Case Name: _____

Case Number: _____

ACKNOWLEDGMENT AND WAIVER OF RIGHTS VIOLATION

**MY RIGHT to keep out evidence, including confessions, illegally obtained.
MY RIGHT to appeal to the Supreme Court on issues of law.
I GIVE UP ALL THE ABOVE RIGHTS OF MY OWN FREE WILL.**

I understand that by pleading GUILTY or NOLO I am admitting to or not contesting the truth of the charge(s) against me in the complaint(s) and that on the judge's acceptance of my GUILTY or NOLO plea, a conviction(s) will be entered against me.

No force has been used upon me, nor have any threats been made to me, by any member of the Prosecutor's Office or anyone else to have me enter this plea of GUILTY or NOLO.

No promises have been made to me by any member of the Prosecutor's Office or anyone else in an effort to have me enter this plea of GUILTY or NOLO to the charge, except as follows:

\$ 250 + \$ 600 = \$ 850.00

However, I understand that the judge is not bound by the prosecutor's recommendation as to sentence, and that I may withdraw my plea if the judge exceeds the limits of a negotiated plea.

I further understand that if the complaint(s) against me is a violation of the motor vehicle laws, and if I should have a record of as few as 2 other motor vehicle convictions, I understand that the State may seek to have me declared a HABITUAL OFFENDER; and as a consequence of being declared a habitual offender, I would lose my license to operate for 1 to 4 years. I realize that if I am found to be a habitual offender, it is my responsibility, at the end of the one to four year period, to petition the Director, Division of Motor Vehicles, to restore my privilege to drive a motor vehicle. I understand that if I were to operate during that revocation period, or any time before my privilege to drive a motor vehicle is restored, then I would be subjecting myself to a mandatory prison term of not more than 5 years.

I understand the nature of the charge(s) against me and the maximum punishment that may be imposed. I am not under the influence of alcohol or drugs.

I understand the entire contents of the Acknowledgment of Rights, and I freely and voluntarily sign this form below. I also understand that I may have a copy of this form upon request.

X [Signature] 12/17/2019
Date

[Signature]
Defendant

Highest Grade / Level of Education Completed

As counsel for the defendant, I have thoroughly explained to the defendant all the above, including the nature of the charge(s), the elements of the offense(s) which the State must prove beyond a reasonable doubt and the minimum and maximum penalties. I believe the defendant fully understands the meaning of the Acknowledgment of Rights, is not under the influence of drugs or alcohol, and knowingly and intelligently waives all rights as set forth in this form.

Date

Counsel for the Defendant

I hereby certify that I have examined the Defendant concerning the plea entered in this case. Based upon that examination I find that the Defendant understands the nature of the charge(s), the minimum and maximum penalties which may be imposed therefore, and the elements of the offense(s); and I find that the Defendant is not under the influence of drugs or alcohol, and that the waiver of each rule set forth on this form is made intelligently, knowingly and voluntarily. I further find there is a factual basis for the Defendant's plea.

12/17/19
Date

[Signature]
Signature of Judge

David G LeFrancois
Printed Name of Judge