CORRECTED

VIRGINIA:

In the Court of Appeals of Virginia on **Thursday** *the* **2nd** *day of* **September, 2021**.

Brian David Hill, Appellant,

against Record No. 1294-20-3
Circuit Court No. CR19000009-00
(Appeal of November 25, 2019 order)

Commonwealth of Virginia and
City of Martinsville, Appellees.

From the Circuit Court of the City of Martinsville

Before Senior Judges Annunziata, Clements and Frank

Counsel for appellant has moved for leave to withdraw. The motion to withdraw is accompanied by a brief referring to the part of the record that might arguably support this appeal. A copy of this brief has been furnished to appellant with sufficient time for appellant to raise any matter that appellant chooses.

The Court has reviewed the petition for appeal and appellant's *pro se* supplemental petitions for appeal, fully examined all of the proceedings, and determined the case to be wholly frivolous for the following reasons:

I. Appellant, by counsel, argues that the trial court committed reversible error when it denied what he characterizes as a "post-trial" motion to vacate its order affirming the district court's judgment following appellant's withdrawal of his misdemeanor appeal under Code § 16.1-133. Appellant contends that the denial of his motion violated Rule 3A:8(2) and Rule 7C:6(a).

On December 21, 2018, the General District Court for the City of Martinsville convicted appellant of misdemeanor indecent exposure and sentenced him to thirty days in jail. Appellant timely noted an appeal to the trial court. See Code § 16.1-132. Although he had court-appointed counsel, nearly a year after noting his appeal to the trial court, appellant filed a *pro se* motion to withdraw his appeal on November 12, 2019. The trial court entered an order affirming the district court's judgment and assessing costs on November 18,

2019.[1] See Code § 16.1-133. Within days of withdrawing his appeal, however, appellant filed a pleading styled, "Motion to Vacate Fraudulent Begotten Judgment." Appellant asserted that the trial court lacked jurisdiction and that the conviction was the result of fraud; he asked the trial court to vacate the judgments of both that court and the general district court. The trial court denied the motion to vacate by order of November 25, 2019. This appeal follows.

Appellant, by counsel, argues that a withdrawal of a misdemeanor appeal from the general district court is, "[f]or all practical purposes concerning guilt or innocence, . . . indistinguishable from a circuit court's acceptance of a guilty or no contest plea to the same charge." He therefore posits that the trial court was obligated under Rule 3A:8(2) and Rule 7C:6(a), which govern guilty and *nolo contendere* pleas, to "determine whether [he] was withdrawing his appeal 'voluntarily' and 'with an understanding of the nature of the charge and the consequences' of his withdrawal." We disagree.

The withdrawal of a properly noted appeal from the general district court to the circuit court in a criminal case is governed by Code § 16.1-133. That statute provides, in pertinent part, as follows:

> [A]ny person convicted in a general district court, a juvenile and domestic relations district court, or a court of limited jurisdiction of an offense not felonious may, at any time before the appeal is heard, withdraw an appeal which has been noted, pay the fine and costs to such court, and serve any sentence which has been imposed.
>
> A person withdrawing an appeal *shall give written notice of withdrawal* to the court and counsel for the prosecution prior to the hearing date of the appeal. If the appeal is withdrawn more than ten days after conviction, the circuit court shall forthwith enter an order affirming the judgment of the lower court and the clerk shall tax the costs as provided by statute. Fines and costs shall be collected by the circuit court, and all papers shall be retained in the circuit court clerk's office.

(Emphasis added). The Supreme Court has explained that the statutory requirement that the circuit court enter an order "affirming" the district court judgment "indicates that the general district court judgment in the withdrawn appeal remains in effect and is ratified by the circuit court order." Commonwealth v. Diaz, 266

[1] Appellant noted a separate appeal to that order. See Hill v. Commonwealth, Record No. 1295-20-3.

Va. 260, 265 (2003). Indeed, until the appeal "is heard" in the circuit court, the general district court's judgment, although stayed, remains a valid judgment while the appeal is pending. Id. Thus, the general district court's judgment convicting appellant of indecent exposure "remained in effect throughout the proceedings in this case." Id.

"[W]here a misdemeanant withdraws his appeal *de novo* from the district court before it is heard in the circuit court, his conviction and sentence by the district court are affirmed . . . ." Turner v. Commonwealth, 49 Va. App. 381, 389 (2007). Nothing in the statute, or the precedents applying it, mandates or even suggests that the circuit court is required to take any action other than to enter an order affirming the district court's judgment, once the appellant notifies the court that he is withdrawing the appeal. Code § 16.1-133. Indeed, appellant himself notes in his *pro se* supplemental petition for appeal that he did not plead guilty or concede his guilt. To be sure, appellant expressly asserted his innocence in his motion to withdraw the appeal. Thus, we find appellant's argument that the Rules of Court governing guilty pleas applied under the circumstances of this case is without merit.

II. Appellant, *pro se*, argues that the trial court erred and abused its discretion when it denied his motion to vacate because it "overlooked" evidence he filed *pro se* that, according to appellant, established that the Commonwealth and arresting officer committed fraud upon the court.[2] The gravamen of appellant's argument is that the record does not support the statement in the police officer's criminal complaint that he "was medically and psychologically cleared" after officers took him to the hospital on the night of his arrest "due to knee pain." Appellant asserts that the officers failed to investigate whether he had been drugged or suffered from carbon monoxide poisoning. He contends that the officers' failure to secure an analysis of his blood draws amounts to spoliation of evidence and, thus, a fraud on the court. Appellant further contends that the mental health evaluation the district court ordered was incomplete and that the record demonstrated that

[2] We grant appellant's motion to treat his *pro se* petition for appeal, filed on March 29, 2021, as his *pro se* supplemental petition for appeal.

he was suffering from an "unspecified psychosis." Therefore, he asserts that the evaluator wrongly determined that he was sane and competent to stand trial.

In appellant's view, if he was not in fact "medically cleared" by hospital staff on the night of his arrest, "then the charge and conviction are erroneous." Appellant asserts that the trial court's failure to review his *pro se* filings before he withdrew his appeal violated his right to due process and equal protection. We disagree.

Appellant cites no authority, and we are aware of none, to support his contention that the trial court was required to pre-judge the case. The record reflects that the Commonwealth requested a jury trial, which was scheduled for December 2, 2019. The scheduled trial represented appellant's opportunity to present his evidence to the fact-finder (in this case, the jury), challenge the Commonwealth's evidence, and confront the police officer. It is well-established that "the Commonwealth, like the defendant, is entitled to a fair trial, which includes 'the right to a fair rebuttal of mental health evidence presented by the defendant.'" Grattan v. Commonwealth, 278 Va. 602, 622 (2009) (quoting Muhammad v. Commonwealth, 269 Va. 451, 507 (2005)).

Rather than proceeding to trial, appellant exercised his right under Code § 16.1-133 to withdraw his appeal. Having exercised that right, appellant will not now be heard to complain that the trial court erred.[3] "A party may not approbate and reprobate by taking successive positions in the course of litigation that are either inconsistent with each other or mutually contradictory." Cody v. Commonwealth, 68 Va. App. 638, 665 (2018) (quoting Cangiano v. LSH Bldg. Co., 271 Va. 171, 181 (2006)). "Nor may a party invite error and then attempt to take advantage of the situation created by his own wrong.'" Alford v. Commonwealth, 56 Va. App. 706, 709 (2010) (quoting Rowe v. Commonwealth, 277 Va. 495, 502 (2009)).

III. Appellant, *pro se*, contends that the trial court erred and abused its discretion in denying his motion to vacate without holding an evidentiary hearing. He contends that the trial court's failure to hold a

[3] We note that Code § 16.1-133 does not vest the circuit court with the discretion to deny the withdrawal of an appeal from the district court. Rather, upon notice of the withdrawal, "the circuit court shall *forthwith* enter an order affirming the judgment of the lower court and the clerk shall tax the costs as provided by statute." Id. (Emphasis added).

hearing concerning the "cumulative evidence" he filed *pro se*, which he contends proves fraud on the court, deprived him of due process and equal protection. Appellant asserts that he presented "clear and convincing evidence" that he was "not medically cleared" and that the evidence "should have been debated, argued, and discussed" concerning his discharge from the hospital on the night of his arrest. Appellant further argues that the Commonwealth committed a fraud on the court by pursuing the charge where he asserts the evidence was insufficient to prove intent. He concludes that the judgment is "void."

Even assuming that appellant was not "medically cleared" or that the Commonwealth's evidence was not sufficient to prove appellant's intent—notwithstanding the district court's contrary conclusion—those circumstances did "not constitute misconduct that tampered with the judiciary's machinery and subverted the integrity of the court itself." State Farm Mutual Auto. Ins. Co. v. Remley, 270 Va. 209, 218 (2005). Thus, there was no fraud on the trial court and no need for an evidentiary hearing.

IV. Appellant, *pro se*, contends that the trial court erred and abused its discretion in not recognizing its inherent authority to vacate fraudulent judgments. The record reflects that the trial court denied appellant's motion to vacate. The order does not state that the trial court found it lacked the authority to grant relief; rather, it denied the motion on the merits. As noted above, there was no fraud on the court and therefore, the trial court's ruling was not in error.

V. Appellant, *pro se*, contends that he was denied the effective assistance of counsel in the trial court and on appeal. "Claims raising ineffective assistance of counsel must be asserted in a habeas corpus proceeding and are not cognizable on direct appeal." Lenz v. Commonwealth, 261 Va. 451, 460 (2001). See also 1990 Va. Acts, ch. 74 (repealing Code § 19.2-317.1).

Accordingly, we deny the petition for appeal and grant the motion for leave to withdraw. See Anders v. California, 386 U.S. 738, 744 (1967). This Court's records shall reflect that Brian David Hill is now proceeding without the assistance of counsel in this matter and is representing himself on any further proceedings or appeal.

The trial court shall allow John I. Jones, IV, Esquire, the fee set forth below and also counsel's necessary direct out-of-pocket expenses. The Commonwealth shall recover of the appellant the costs in this Court and in the trial court.

Costs due the Commonwealth by appellant in
Court of Appeals of Virginia:

Attorney's fee $300.00 plus costs and expenses

A Copy,

Teste:

A. John Vollino, Clerk

By: Kristen M. McKenzie

Deputy Clerk