CORRECTED

VIRGINIA:

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

Brian David Hill, Appellant,

against Record No. 1295-20-3
Circuit Court No. CR19000009-00
(Appeal of November 18, 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 accepted his withdrawal of his misdemeanor appeal "without ascertaining whether [he] was accepting the general district court's judgment voluntarily and with an understanding of the consequences of his withdrawal[.]" Appellant contends that allowing him to withdraw his appeal without making such an inquiry 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. He 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. Th trial court entered an order affirming the district court's judgment and assessing costs on November 18, 2019.

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.

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 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 trial court is required to take any action other than to enter an order affirming the district court's judgment, if the appellant notifies the court that he is withdrawing the appeal. Indeed, appellant himself notes in his *pro se* supplemental petition for appeal that he did not plead guilty or concede his guilt. 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*, contends that the trial court erred by "entering the Final Conviction" because it "ignor[ed]" his other *pro se* filings, but "entertain[ed]" his "motion" to withdraw his appeal.[1] Appellant contends that the trial court violated his rights to due process and equal protection rights by "pick[ing] and choos[ing]" which of his *pro se* motions it would act upon. We find no error in the trial court's judgment.

Initially, we note that the trial court did not enter a "final conviction." Rather, the trial court merely affirmed the district court's stayed but valid conviction and sentence. Diaz, 266 Va. at 265.

The record demonstrates that after the trial court set the case for a jury trial,[2] appellant, who was represented by counsel, filed a series of *pro se* motions; those motions were: motion for an insanity defense alleging that he was insane at the time of the offense but was sane and competent when he filed the motion; motion for new counsel, asserting trial counsel was ineffective; motion for discovery seeking footage from the arresting officer's body worn camera; motion to suppress evidence of his prior federal conviction for possession of child pornography; and, a motion to dismiss for insufficient evidence. The trial court had entered a discovery order on July 15, 2019, which required the Commonwealth to permit appellant's counsel "to inspect and copy or photograph, within a reasonable time, before the trial or sentencing, . . . [a]ny relevant written or recorded statements or confessions made by the Defendant, or copies thereof, or the substance of any oral statements or confessions made by the Defendant to any law enforcement officer . . . ." The record

[1] We grant appellant's motion to treat his *pro se* petition for appeal, filed on March 25, 2021, as his *pro se* supplemental petition for appeal.

[2] The Commonwealth requested a jury trial.

further indicates that the trial court appointed appellant new counsel by order of August 19, 2019. Additionally, the trial court granted new counsel's motion for a continuance of the trial. Appellant's remaining *pro se* motions addressed trial matters, *i.e.*:

- an affirmative defense, see Riley v. Commonwealth, 277 Va. 467, 479 (2009) ("When asserting an affirmative defense, such as insanity, . . . the burden is on the defendant to present evidence establishing such defense to the satisfaction of the *fact finder*." (emphasis added));

- the admissibility of evidence, see Baldwin v. Commonwealth, 69 Va. App. 75, 89 (2018) (noting prior convictions are "admissible and relevant during sentencing") and Epps v. Commonwealth, 59 Va. App. 71, 79 n.7 (2011) (noting that a "convicted felon or perjurer may be impeached with his prior conviction"); and,

- the sufficiency of the evidence, see Smith v. Commonwealth, 72 Va. App. 523, 523 (2020) (noting that "[w]hether the required intent exists is generally a question of fact for the *trier of fact*") (emphasis added) (quoting Brown v. Commonwealth, 68 Va. App. 746, 787 (2018) (alteration in original)).

Thus, the trial court did not "ignore" appellant's *pro se* motions; they simply were not ripe for consideration when appellant elected to withdraw his misdemeanor appeal.

III. Appellant, *pro se*, contends that the trial court erred and abused its discretion "by entering the Final Conviction" and not considering his assertions of innocence. The question of appellant's factual innocence was a question for the jury; however, appellant elected to forgo a jury trial when he 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

[3] 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).

own wrong." Alford v. Commonwealth, 56 Va. App. 706, 709 (2010) (quoting Rowe v. Commonwealth, 277 Va. 495, 502 (2009)).

IV. Appellant, *pro se*, contends that the trial court erred and abused its discretion "by entering the Final Conviction" without conducting an evidentiary hearing into his allegations that he had not been "medically and psychologically cleared," in contradiction to a statement in the criminal complaint. As noted above, the opportunity to challenge the arresting officer's account was at a jury trial, where appellant could have confronted the officer and presented his mental health evidence.

V. Appellant, *pro se*, contends that the trial court erred and abused its discretion "by entering the Final Conviction" because the evidence presented to the district court was insufficient to prove the requisite intent to sustain the misdemeanor conviction. As noted above, "[w]hether the required intent exists is generally a question of fact for the *trier of fact*." Smith, 72 Va. App. at 523 (emphasis added) (quoting Brown, 68 Va. App. at 787 (alteration in original)).

VI. Appellant, *pro se*, contends that he was denied the effective assistance of counsel in the trial court. "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