

VIRGINIA:

In the Supreme Court of Virginia held at the Supreme Court Building in the City of Richmond on Wednesday the 14th day of November, 2018.

Lorenzo Gerald Ferebee, Jr.,

Appellant,

against

Record No. 171762

Circuit Court No. CL17-1951

Harold W. Clarke, Director,
Virginia Department of Corrections,

Appellee.

From the Circuit Court of the City of Chesapeake

Upon review of the record in this case and consideration of the argument submitted in support of the granting of an appeal, the Court is of the opinion there is no reversible error in the judgment complained of. Accordingly, the Court refuses the petition for appeal.


Upon consideration whereof, appellant's September 24, 2018 "motion for default judgment, etc.," and October 29, 2018 motion for discovery are denied.

A Copy,

Teste:

Patricia L. Harrington, Clerk

By:



Deputy Clerk

APPENDIX

EXHIBIT R - R (S)

Appendix / Exhibit

VIRGINIA:

IN THE CIRCUIT COURT FOR THE CITY OF CHESAPEAKE

LORENZO-GERALD FEREBEE, JR.

V.

CL17-1951

HAROLD CLARKE, VIRGINIA DEPARTMENT OF CORRECTIONS

FINAL ORDER

Upon mature consideration of the pleadings and controlling legal authority and a review of the record in the case of (Case Nos. CR06-119, CR06-152, CR06-127) the Court dismissed petitioner's motion to vacate his convictions for the following reasons:

Ferebee is confined pursuant to a final judgment of this Court entered October 5, 2007 wherein petitioner was convicted of possession of a firearm by a convicted felon, use of a firearm in the commission of a felony and malicious wounding. The Court sentenced Ferebee to 25 years in prison. (Case No. CR06-119, CR06-152, CR06-127).

On July 24, 2008, the Court of Appeals of Virginia affirmed Ferebee's convictions, rejecting his arguments that his identification procedure was

unduly suggestive, and that the evidence was insufficient to convict him of malicious wounding. (Record No. 2490-07-1).

Ferebee's appeal to the Supreme Court of Virginia was refused on the merits on February 3, 2009. (Record No. 081651).

Ferebee filed a petition for writ of habeas corpus in this Court alleging ineffective assistance of counsel and trial error claims. On August 2, 2010, the Court dismissed his habeas petition. (Case No. CL09-3407). The Supreme Court of Virginia dismissed Ferebee's appeal of this Court's habeas decision on October 6, 2011 because he had not assigned error to the Court's habeas rulings. (Record No. 101847)

On July 13, 2017, Frerbee filed this motion to vacate his convictions based on a lack of subject matter jurisdiction. In support thereof he alleges:

- (a) The police officer erred and violated Rule 5A:3 when he failed to state in his sworn affidavit or complaint that he intentionally signed the "unsure victim's first photo array."
- (b) The magistrate erred when in violation of Rule 3A:2 he failed to provide a "just determination in movants' criminal procedure, in order to promote uniformity and simplicity in this procedure for the fairness in administration and his or her error, defects and irregularities or variance" and affected "movant's substantial rights to be free from illegal detention" under *Franks v. Delaware*.
- (c) The Commonwealth's Attorney erred when she violated Rule "6II3.8(a)" by maintaining a criminal charge

against movant while knowing the detective never admitted or recorded in his sworn complaint to the magistrate judge that he signed an unsure victim's 1st photo array and deliberately places defendant's photo in the second photo array.

- (d) Movant's defense counsel erred by failing to present mitigating circumstances and evidence in the suppression hearing involving irregularities involving the photo array.
- (e) The Court of Appeals of Virginia erred and violated Rule 5A:16 when it dismissed appellate counsel's motion to withdraw when counsel told the Court that she had a conflict of interest.
- (f) Movant's defense counsel erred when she violated Rule 5:17(c)(2)(iii), 5:17(c)(2)(ii), Rule 5A:26(a) and Rule 5:23 by her failure to perfect movant's direct appeal resulting in a dismissal of petitioner's direct appeal.
- (g) Chesapeake Circuit Court "dismissal of movant's first habeas petition in is violation of the Supreme Court's "ruling in *Martinez v. Ryan*, when the United States Supreme Court made 'retroactive for collateral review in equitable ruling' that movant and any petitioner in their initial collateral review by circuit court to be assigned a counselor when movant claimed ineffective assistance of counselor (sic).
- (h) The Virginia Supreme Court's dismissal of movant's habeas corpus appeal is in violation of Rule 5:23 because movant was hindered from perfecting his appeal by Red Onion State Prison and its "Governmental Interference" because the prison refused to provide movant with Rule 5:17 and his appeal was dismissed for failure to comply with the rule.

The Court finds that it is without jurisdiction to vacate Ferebee's convictions under Rule 1:1. Rule 1:1 provides that final judgments, orders, and decrees remain under the trial court's control for twenty-one days after entry, and no longer. At the expiration of that twenty-one day period, the trial court loses jurisdiction to disturb a final judgment, order, or decree except for the limited authority conferred by Code § 8.01-428. *See In Re: Department of Corrections*, 222 Va. 454, 463-64, 281 S.E.2d 857, 862 (1981).

While a violation of subject matter jurisdiction may be raised at any time and may not be waived, the alleged defects that the petitioner complains of does not involve subject matter jurisdiction. "Jurisdiction is authority to hear and determine a cause, or it may be defined to be the right to adjudicate concerning the subject matter in the given case." *Porter v. Commonwealth*, 276 Va. 203, 230 661 S.E.2d 415, 428 (2008) (holding that term "jurisdiction" in Code § 19.2-239 referred to territorial jurisdiction and not subject matter jurisdiction; thus failure to comply with statute did not render judgment void). As the Supreme Court of Virginia stated in *Porter*, "All the Circuit Courts in the Commonwealth 'have original jurisdiction of all indictments for felonies and of presentments, informations and

indictments for misdemeanors.” *Id.* at 229, 661 S.E.2d at 427. (quoting Code § 17.1-513).

The Supreme Court of Virginia explained that “one consequence of the non-waivable nature of the requirement of subject matter jurisdiction is that attempts are sometimes made to mischaracterize other serious procedural errors as defects in subject matter jurisdiction to gain an opportunity for review of matters not otherwise preserved.” *Id.*

The Court finds that the alleged errors in this case do not involve “subject matter jurisdiction”; this Court had subject matter jurisdiction over Ferebee’s felonies charges because they were committed in the Commonwealth of Virginia. Instead, Ferebee’s complaints about alleged police misconduct, procedural error by the magistrate, prosecutorial misconduct, ineffective assistance of trial and appellate counsel, and procedural errors by this Court, the Court of Appeals of Virginia, and the Supreme Court of Virginia on direct appeal and in habeas corpus are allegations which would not render the judgment void and cannot now be challenged. Indeed, “Virginia law does not permit a motion to vacate that is filed in a trial court long after the court lost active jurisdiction over the criminal case to serve as an all-purpose pleading for collateral review of criminal convictions[,] [j]ust as habeas corpus cannot be used as a substitute

for a direct appeal.” *Jones v. Commonwealth*, 293 Va. 29, 53, 795 S.E.2d 705, 719 (2017) (holding that a claim that a sentence violated the Supreme Court’s prohibition of juvenile life without parole is not void and cannot be raised in a state motion to vacate). Moreover, “if a criminal defendant fails to preserve an issue in the trial court, he can waive claimed violations of his constitutional right to be free of unreasonable searches and seizures under the Fourth Amendment, of his *Miranda* rights under the Fifth Amendment, of his confrontation and speedy trial rights under the Sixth Amendment, and even of his right to a jury trial under the Sixth Amendment,” and “none of these claims, even if conceded to be valid, renders the underlying judgment void ab initio.” *Id.* at 47-48, 795 S.E.2d at 715-16.

Ferebee appears to raise claims more properly addressed in habeas corpus, to the extent Ferebee intends his pleading to be a petition for writ of habeas corpus, the Court finds that this pleading is time barred and procedurally defaulted. *See* Va. Code §§ 8.01-654 (a)(2) (habeas must be filed within two years of final judgment in criminal case); 8.01-654 (b)(2) (petitioner cannot file successive habeas petitions). Beyond this, Ferebee’s claims regarding the prosecutor, the police and the magistrate are not cognizable in habeas corpus. *See Slayton v. Parrigan*, 215 Va. 27, 30, 205 S.E.2d 680, 682 (1974)(“A prisoner is not entitled to use habeas corpus to

circumvent the trial and appellate processes for an inquiry into an alleged non-jurisdictional defect of a judgment of conviction.”). Ferebee is not entitled to raise claims he failed to properly raise in those contexts in a motion to vacate; nor can he ask for a rehearing of claims he did raise, but did not prevail in, in a motion to vacate. Nor does this Court have jurisdiction to invalidate the ruling of Virginia’s appellate Courts. To be sure, none of these involve “subject matter jurisdiction” and must be dismissed.

Accordingly, this action is not reviewable under Rule 1:1 and should be dismissed on that ground. The Court finds that the record is sufficient and no hearing is necessary to determine this case.

The Court thus is of the opinion that the motion to vacate should be denied and dismissed; it is therefore

ADJUDGED and **ORDERED** that the motion to vacate be, and is hereby, denied and dismissed.

It is further **ORDERED** that Ferebee’s endorsement on this Order is dispensed with pursuant to Rule 1:13 of the Supreme Court of Virginia.

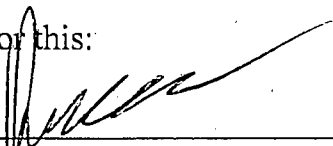
The Clerk is directed to forward a certified copy of this Order to the movant, Lorenzo Gerald Ferebee, Jr., and Rosemary V. Bourne, Senior Assistant Attorney General, counsel for the respondent.

Entered this 6th day of Nov., 2017

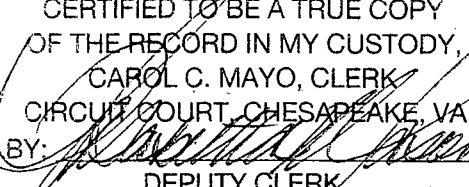


Judge

I ask for this:



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CERTIFIED TO BE A TRUE COPY
OF THE RECORD IN MY CUSTODY,
CAROL C. MAYO, CLERK
CIRCUIT COURT, CHESAPEAKE, VA
BY: 
DEPUTY CLERK

**Additional material
from this filing is
available in the
Clerk's Office.**