VIRGINIA:

In the Supreme Court of Virginia held at the Supreme Court Building in the City of Richmond on Monday the 14th day of June, 2021.

Christopher Michael Hitt, Appellant,

against Record No. 200374
Court of Appeals No. 0564-19-4

Commonwealth of Virginia, Appellee.

From the Court of Appeals of Virginia

On March 11, 2020 came court-appointed counsel and by motion requested leave to withdraw. The Court, finding that counsel has complied with the requirements of *Anders v. California*, 386 U.S. 738, 87 S.Ct. 1396 (1967), in filing the requisite brief and in furnishing the appellant with a copy thereof, hereby grants the motion to withdraw.

The Court, upon further consideration of the entire record, finds no legal issues arguable on their merits and therefore refuses the petition for appeal without appointment of additional counsel.

The Circuit Court of Stafford County shall allow court-appointed counsel the fee set forth below and also counsel's necessary direct out-of-pocket expenses. And it is ordered that the Commonwealth recover of the appellant the costs in this Court and in the courts below.

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

Attorney's fee $400.00 plus costs and expenses

A Copy,

Teste:

Douglas B. Robelen, Clerk

By: Deputy Clerk

Appendix C

VIRGINIA:

In the Court of Appeals of Virginia on **Thursday** *the* **2nd** *day of* **January, 2020.**

Christopher Michael Hitt,

Appellant,

against Record No. 0564-19-4
Circuit Court Nos. CR18-850-00 and CR18-850-01

Commonwealth of Virginia,

Appellee.

From the Circuit Court of Stafford County

Before Senior Judges Annunziata, Clements and Haley

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 *pro se* supplemental petition for appeal, fully examined all of the proceedings, and determined the case to be wholly frivolous for the following reasons:

Under the terms of a written plea agreement, appellant entered Alford[1] pleas of guilty to aggravated sexual battery and attempted rape.[2] The agreement did not provide for a specific sentence or sentence recommendation. The trial court sentenced appellant to a total active sentence of five years' incarceration.

I. Appellant, by counsel, contends that the trial court abused its discretion "by declining to utilize the sentencing guidelines" to which the Commonwealth and he agreed.

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[1] "An individual accused of crime may voluntarily, knowingly, and understandingly consent to the imposition of a prison sentence even if he is unwilling or unable to admit his participation in the acts constituting the crime." North Carolina v. Alford, 400 U.S. 25, 37 (1970). Alford pleas allow "criminal defendants who wish to avoid the consequences of a trial to plead guilty by conceding that the evidence is sufficient to convict them, while maintaining that they did not participate in the acts constituting the crimes." Carroll v. Commonwealth, 280 Va. 641, 644-45 (2010) (quoting Parson v. Carroll, 272 Va. 560, 565-66 (2006)).

[2] In exchange for appellant's Alford pleas, the Commonwealth amended an original charge of rape to attempted rape and moved to *nolle prosequi* a charge of object sexual penetration.

Appendix A

Although appellant offered two alternative sets of sentencing guidelines to the trial court, he did not object to the sentencing guidelines upon which the trial court relied after considering his counsel's argument concerning what he contended was the proper calculation for the guidelines. In fact, when given the express opportunity to withdraw his guilty pleas because the sentencing guidelines had changed, appellant declined that opportunity and instead stated, "I would like to go ahead and proceed to sentencing."

"No ruling of the trial court . . . will be considered as a basis for reversal unless an objection was stated with reasonable certainty at the time of the ruling, except for good cause shown or to enable the Court of Appeals to attain the ends of justice." Rule 5A:18. Appellant does not invoke the good cause or ends of justice exceptions to Rule 5A:18, and the Court will not apply the exceptions *sua sponte*. Edwards v. Commonwealth, 41 Va. App. 752, 761 (2003) (*en banc*). Moreover, the record does not reflect any reason to invoke the good cause or ends of justice exceptions to Rule 5A:18. "In all felony cases, other than Class 1 felonies, the court shall (i) have presented to it the appropriate discretionary sentencing guidelines worksheets and (ii) review and consider the suitability of the applicable discretionary guidelines." Code § 19.2-298.01. Thus, the trial court lacked the authority to accept incorrect proposed guidelines and was required to consider only the "applicable" discretionary guidelines. The trial court did not err in insisting upon an accurate set of guidelines in this case. Accordingly, Rule 5A:18 bars our consideration of this assignment of error on appeal.

II. Appellant, by counsel and in his *pro se* supplemental petition for appeal, contends that the trial court's failure to utilize the sentencing guidelines to which the Commonwealth and appellant initially agreed constituted a rejection of the plea agreement from which the trial court should have recused itself. Appellant, *pro se*, further argues that he should have been permitted to withdraw his Alford pleas once the trial court determined that the sentencing guidelines upon which he relied were not accurate.

Appellant's written plea agreement with the Commonwealth included "no agreement as to the sentence" appellant would receive and did not reference any sentencing guidelines. The parties presented no other plea agreement to the trial court. The trial court accepted the plea agreement after an extensive colloquy with appellant to ensure that his pleas were knowingly, freely, and intelligently made.

During his plea colloquy, appellant stated that he fully understood the charges against him and had sufficient time to review them with his attorney. He understood what the Commonwealth was required to prove before he could be found guilty. Appellant confirmed that he had discussed the possible pleas to the charges with his attorney and had decided for himself to enter Alford pleas. Appellant said that he entered his pleas freely and voluntarily. He said he was not under the influence of any drugs or alcohol. Appellant assured the trial court that no one coerced his guilty pleas or threatened him in any manner. Appellant acknowledged that, in entering his pleas, he was giving up rights, including the right not to incriminate himself, the right to confront and cross-examine witnesses against him, and the right to a jury trial. Appellant expressly acknowledged that, although the trial court had to consider sentencing guidelines, it was not required to follow them. He understood that the trial court could sentence him to up to thirty years' incarceration. Appellant said that he was entirely satisfied with the services of his attorney.

At a subsequent hearing, the trial court found that the sentencing guidelines that the Commonwealth and appellant initially proposed were incorrect and replaced them with a corrected set of guidelines.[3] After making that determination, the trial court gave appellant the opportunity to withdraw his guilty pleas, but he declined that opportunity and elected to proceed to sentencing. Having already accepted the plea agreement between the parties, the trial court then proceeded to sentencing.

Although he never moved the trial court to recuse itself from the proceedings, appellant urges the Court to apply the ends of justice exception to Rule 5A:18. Rule 3A:8 only requires recusal of a trial judge upon rejection of a plea agreement. The sentencing guidelines at issue in this case were not part of the written plea agreement; thus, the trial court did not reject that agreement. Accordingly, the trial court did not err in failing to recuse itself from the proceedings. Finding no error in the trial court's judgment, we decline

[3] The trial court also did not accept the sentencing guidelines prepared by probation and parole; it instead considered and adopted appellant's argument that those guidelines also had been calculated incorrectly.

to invoke the exception. Accordingly, Rule 5A:18 bars our consideration of this assignment of error on appeal.

III. Appellant, in his *pro se* supplemental petition for appeal, contends that the trial court erred in trying his case outside the time limitations required under the "speedy trial" statute, Code § 19.2-243.

By entering a voluntary and intelligent guilty plea, the accused "waives all non-jurisdictional defects that occurred prior to entry of the guilty plea." Miles v. Sheriff of Va. Beach City Jail, 266 Va. 110, 113 (2003). The facts that form the basis of appellant's speedy trial claim were known to him before the entry of his plea on January 31, 2019; however, he raises this issue for the first time on appeal.[4] Because appellant entered guilty pleas voluntarily and intelligently, he has waived his claim concerning speedy trial. Therefore, we deny appellant's *pro se* supplemental petition for appeal on that basis. See Garza v. Idaho, 139 S. Ct. 738 (2019); Trevathan v. Commonwealth, 297 Va. 697 (2019); Miles, 266 Va. at 116 ("Although the range of potential grounds for appeal following a guilty plea is limited in Virginia, a defendant who has pled guilty still retains the statutory right to file a notice of appeal and present a petition for appeal to the Court of Appeals of Virginia.").

IV. and V. Appellant, in his *pro se* supplemental petition for appeal, contends that the trial court erred in failing to dismiss the charges against him after the Commonwealth lost evidence in the form of blood samples taken from the victim in the case. He specifically contends that such loss of evidence violated the rules of evidence and of his due process rights.

Again, by entering voluntary and intelligent guilty pleas, appellant "waive[d] all non-jurisdictional defects that occurred prior to entry of the guilty plea." Miles, 266 Va. at 113. Appellant's plea colloquy included an acknowledgement that he gave up the right to confront and cross-examine the witnesses against

[4] Even had this claim been timely raised in the trial court, it is without merit because the original trial date set in this matter, December 10, 2018, fell within the time limitations established by Code § 19.2-243, and appellant moved for or acquiesced in continuances that delayed the trial's commencement.

him. Because he forfeited those rights through pleading guilty pursuant to Alford, appellant cannot now complain of evidentiary issues on appeal. We find no error in the trial court's judgment.

VI. Appellant, in his *pro se* supplemental petition for appeal, contends that the trial court erred in finding that the Commonwealth met its burden of proof. Specifically, he contends that, in failing to test the victim's blood to determine her level of intoxication, the Commonwealth failed to prove that the victim was physically helpless or mentally incapacitated as required to sustain his convictions for both aggravated sexual battery and attempted rape.

Before accepting his pleas, the trial court heard a summary of the Commonwealth's evidence against appellant. Although the factual summary did not include evidence of the alcohol content of the victim's blood, it included the fact that the victim ingested large quantities of alcohol in the presence of multiple witnesses throughout the evening. Due to her level of intoxication, she needed help to walk to a bedroom and to change her clothes. Finally, when other individuals in the house went to check on her during the night, they found her unresponsive with appellant standing over her with his penis exposed.

"Mental incapacity" as defined in Code § 18.2-67.10(3) can include "a transitory circumstance such as intoxication if the nature and degree of the intoxication has gone beyond the stage of merely reduced inhibition and has reached a point where the victim does not understand 'the nature or consequences of the sexual act.'" Molina v. Commonwealth, 272 Va. 666, 673 (2006). A reasonable fact finder could conclude, from the Commonwealth's factual summary as presented at trial, that alcohol consumption rendered the victim temporarily mentally incapacitated within the meaning of Code § 18.2-67.10(3) as applied to the charged offenses. We find no error in the judgment of the trial court. Further, appellant indicated that he was entering his Alford pleas because of the factual summary from the Commonwealth along with the supplements his counsel provided. In so doing, he implicitly acknowledged the sufficiency of the Commonwealth's evidence against him.

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 Christopher Michael Hitt 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 Vanessa R. Jordan, 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 $400.00 plus costs and expenses

A Copy,

Teste:

Cynthia L. McCoy, Clerk

By: Kristen M. McKenzie

Deputy Clerk