APPENDIX
1a

VIRGINIA:

In the Supreme Court of Virginia held at the Supreme Court Building in the City of Richmond on Tuesday the 27th day of July, 2021

Brian James Talbot, Appellant,

against Record No. 210072
Court of Appeals No. 0453-20-1

Commonwealth of Virginia, Appellee.

From the Court of Appeals of Virginia

Upon review of the record in this case and consideration of the argument submitted in support of the granting of an appeal, the Court refuses the petition for appeal.

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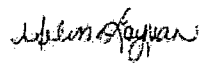
Teste:

Muriel-Theresa Pitney, Acting Clerk

By: 

Deputy Clerk

APPENDIX
1d

VIRGINIA:

In the Court of Appeals of Virginia on **Friday** *the* **20th** *day of* **November, 2020.**

Brian James Talbot, Appellant,

against Record No. 0453-20-1
Circuit Court No. CR19-982

Commonwealth of Virginia, Appellee.

From the Circuit Court of the City of Virginia Beach

Per Curiam

This petition for appeal has been reviewed by a judge of this Court, to whom it was referred pursuant to Code § 17.1-407(C), and is denied for the following reason:

The trial court convicted appellant of rape of a victim under the age of thirteen. He contends that the trial court abused its discretion by denying his motion to withdraw his guilty plea. Appellant argues that his motion, presented before sentencing, was made in good faith and presented a "legitimate defense."

We review a court's decision whether to allow a defendant to withdraw a guilty plea for an abuse of discretion and will "reverse only upon 'clear evidence that [the ruling] was not judicially sound.'" Coleman v. Commonwealth, 51 Va. App. 284, 289 (2008) (quoting Jefferson v. Commonwealth, 27 Va. App. 477, 488 (1998)). "An abuse of discretion occurs only when 'reasonable jurists' could not disagree as to the proper decision." Thomas v. Commonwealth, 62 Va. App. 104, 111 (2013) (quoting Brandau v. Brandau, 52 Va. App. 632, 641 (2008)).

> A motion to withdraw a plea of guilty . . . may be made only before sentence is imposed or imposition of a sentence is suspended; but to correct manifest injustice, the court within twenty-one days after entry of a final order may set aside the judgment of conviction and permit the defendant to withdraw his plea.

Code § 19.2-296. "Under Virginia law, motions to withdraw a guilty plea are governed by two separate standards. The timing of the motion to withdraw determines which standard a court will apply to review the motion." Brown v. Commonwealth, 297 Va. 295, 299 (2019). "Under the more forgiving pre-sentencing standard, a motion to withdraw should be granted if the guilty plea was 'made involuntarily' or 'entered inadvisedly, if any reasonable ground is offered for going to the jury.'" Id. (quoting Parris v. Commonwealth, 189 Va. 321, 325 (1949)); see also Justus v. Commonwealth, 274 Va. 143, 152-54 (2007).

The standard articulated in Parris has two requirements. First, "a defendant has the burden of establishing that his motion is made in good faith." Spencer v. Commonwealth, 68 Va. App. 183, 187 (2017); see also Velazquez v. Commonwealth, 292 Va. 603, 616 (2016) (noting that "a defendant who moves to withdraw a guilty plea *before* sentencing need only show that his motion was made in good faith and premised upon a reasonable basis"). Second, the defendant "must proffer evidence of a reasonable basis for contesting guilt." Id. The proffered defense must be "'substantive' and 'reasonable,' not 'merely dilatory or formal.'" Id. at 188 (quoting Justus, 274 Va. at 155-56); see also Ramsey v. Commonwealth, 65 Va. App. 593, 600-02 (2014). "The first requirement protects the integrity of the judicial process by precluding defendants from using a guilty plea as a subterfuge to manipulate the court. The second requirement defeats motions to withdraw which would result in an essentially futile trial." Cobbins v. Commonwealth, 53 Va. App. 28, 34 (2008).

"[T]o warrant withdrawal of a guilty plea, the motion must be 'made in good faith *and sustained by proofs.*'" Williams v. Commonwealth, 59 Va. App. 238, 249 (2011) (quoting Justus, 274 Va. at 153-54). A "reasonable defense" that justifies the withdrawal of a guilty plea must be based upon a "proposition of law," *e.g.*, a defendant who "could not be guilty of breaking and entering her own home," or upon "credible testimony, supported by affidavit[.]" Id.; see also Spencer, 68 Va. App. at 189 ("[A] defendant [proffering a reasonable defense in support of a motion to withdraw a guilty plea] has the initial burden of presenting

evidence in support of his contention."). A reasonable defense "is not a defense that is based solely upon a challenge to the credibility of a victim's testimony . . . ." Williams, 59 Va. App. at 249.

Here, appellant's attorney proffered to the trial court that he and appellant had been "exploring" an alibi defense and that they had spoken with experts who would be "willing and able to . . . testify about repressed memories and how they can alter a victim's perception of who did this to them . . . ." Defense counsel stressed that the victim had been sexually assaulted in the past and noted that "these experts would . . . testify if there's been any second . . . sexual assault that it could trigger memories especially where she didn't report this until years and years later -- that are inaccurate." He stated, "The crux of our defense is that repressed memories can alter the victim's perception of events such that they could misidentify the person who actually did this to them along with the alibi defense if we're able to completely tie up all of these loose ends." However, he conceded that an alibi defense "[wa]s extremely difficult given the broad range of dates," and acknowledged that there were still "a couple of weekends that we're trying to put together . . . ." Appellant presented no evidence substantiating his claim that he "almost" had an alibi defense, or that he possessed admissible evidence relating to the child victim's sexual history.

The defenses proffered by appellant do not support the withdrawal of his guilty plea. First, although he proffered that he had spoken with experts who could testify about the impact of repressed memories, he did not proffer that the experts could opine that the victim in this case was not credible because her account resulted from repressed memories of an earlier assault. Even assuming that appellant could have successfully presented evidence of the child's sexual history and assuming further that the experts would have testified that her accusation of appellant resulted from repressed memories of an earlier assault, such evidence would have amounted to an attack on the victim's credibility. "[A] challenge to the credibility of a victim's testimony" is not a "reasonable defense" for purposes of withdrawing a guilty plea. Id. Second, appellant did not proffer that he had an alibi defense—only that he was "exploring" such a defense. Therefore, the record

supports the trial court's implicit ruling[1] that appellant's motion was not supported by a "reasonable basis" for contesting his guilt.

The record also supports the trial court's implicit factual finding that appellant's motion was not made in good faith. "A trial court's finding on the issue of 'good faith' is a finding of fact." Branch v. Commonwealth, 60 Va. App. 540, 547-48 (2012) (quoting Johnston v. First Union Nat'l Bank, 271 Va. 239, 248 (2006)). Appellant testified that he told his former defense counsel that he was opposed to entering a guilty plea, but his attorney "refused" to provide him with "any possibilities of his ability to defend [him]." He stated that his former attorney failed to explain the concept of reasonable doubt to him or the trial process. Appellant noted that that he was "very reluctant" to plead guilty and needed a recess from the hearing to consider whether to enter a guilty plea. According to appellant, he agreed to plead guilty at the urging of his parents so that he might be released from prison during their lifetimes. In addition to entering a guilty plea, appellant signed a written plea agreement whereby the Commonwealth agreed that his active sentence would not exceed ten years. Appellant also signed a written stipulation that the Commonwealth's evidence would establish that he had sexual intercourse with H.H. at her grandparents' house between May 1, 2010 and June 30, 2010. In conjunction with the plea agreement and the stipulation, appellant executed a plea questionnaire in which he acknowledged that he had had sufficient time to discuss any possible defenses with his attorney and that he was "entirely satisfied" with the representation of his retained attorney. Appellant stated in the questionnaire that he was entering a guilty plea because he was, in fact, guilty of rape.

To establish that a motion for the withdrawal of a guilty plea has been made in good faith, a defendant must demonstrate that the plea was submitted "under an honest mistake of material fact or facts" or "induced by fraud, coercion or undue influence and would not otherwise have been made." Parris, 189 Va. at 324. Although appellant testified that his attorney did not fully explain the trial process to him and that his parents

[1] The trial court denied appellant's motion without comment.

pressured him to enter a guilty plea, the trial court was entitled to reject his testimony. As appellant himself admitted, he was granted a recess to deliberate further before deciding whether to enter a guilty plea. Further, in addition to the written plea agreement,[2] the written stipulation, and the plea questionnaire executed by appellant, the trial court engaged in a careful colloquy with appellant before accepting his plea. During that colloquy, appellant agreed that he had had the "opportunity to discuss the charges and the elements of the charges with [his] attorney," including any defenses, and that he had decided to enter his guilty plea "freely and voluntarily." He also agreed that he was pleading guilty because he was, in fact, guilty. Thus, the record supports a rational finding that appellant's motion was not made in good faith. Accordingly, because appellant failed to satisfy either of the Parris requirements for the withdrawal of his guilty plea, the trial court's denial of his motion did not constitute an abuse of discretion.

This order is final for purposes of appeal unless, within fourteen days from the date of this order, there are further proceedings pursuant to Code § 17.1-407(D) and Rule 5A:15(a) or 5A:15A(a), as appropriate. If appellant files a demand for consideration by a three-judge panel, pursuant to those rules the demand shall include a statement identifying how this order is in error.

The Commonwealth shall recover of the appellant the costs in the trial court.

This Court's records reflect that Matthew T. Morris, Esquire, is counsel of record for appellant in this matter.

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Teste:

[2] Although the trial court did not address whether the withdrawal of the plea would prejudice the Commonwealth, the parties' execution of a plea agreement requires that we consider it in assessing whether the trial court abused its discretion. See Thomason v. Commonwealth, 69 Va. App. 89, 95-96 (2018). Under the terms of the plea agreement, the Commonwealth's sole concession in exchange for appellant's guilty plea was that appellant's active sentence would not "exceed" ten years. Thus, as the record does not indicate that the Commonwealth had fulfilled its obligations in the plea agreement when appellant sought to withdraw his

Cynthia L. McCoy, Clerk

By: Marty K P. Ring

Deputy Clerk

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guilty plea, we find no merit in the Commonwealth's assertion that it would have been prejudiced by the withdrawal of the plea. See Pritchett v. Commonwealth, 61 Va. App. 777, 787 (2013); see also Hubbard v. Commonwealth, 60 Va. App. 200, 211 n.4 (2012) (recognizing that "a motion to withdraw a guilty plea may be appropriately denied where the record indicates . . . some form of significant prejudice to the Commonwealth . . . [such as evidence] that the Commonwealth has partially or fully fulfilled its obligations in a plea agreement by dismissing or amending charges . . .").

APPENDIX

1e

VIRGINIA:

In the Court of Appeals of Virginia on **Thursday** *the* **17th** *day of* **December, 2020.**

Appellant,

Brian James Talbot,

against

Record No. 0453-20-1
Circuit Court No. CR19-982

Appellee.

Commonwealth of Virginia,

From the Circuit Court of the City of Virginia Beach

Before Judges Beales, Huff and Senior Judge Annunziata

For the reason previously stated in the order entered by this Court on November 20, 2020, the petition for appeal in this case hereby is denied.

This order shall be certified to the trial court.

A Copy,

Teste:

Cynthia L. McCoy, Clerk

By: Kristen M. McKenzie

Deputy Clerk

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