VIRGINIA:

In the Supreme Court of Virginia held at the Supreme Court Building in the City of Richmond on Thursday the 7th day of October, 2021.

Patrick Nilo Gil, Appellant,

against Record No. 200796
Court of Appeals No. 1093-19-1

Commonwealth of Virginia, Appellee.

Upon a Petition for Rehearing

On consideration of the petition of the appellant to set aside the judgment rendered herein on April 16, 2021 and grant a rehearing thereof, the prayer of the said petition is denied.

A Copy,

Teste:

Muriel-Theresa Pitney, Acting Clerk

By: Helen Lagman

Deputy Clerk

VIRGINIA:

In the Supreme Court of Virginia held at the Supreme Court Building in the City of Richmond on Friday the 16th day of April, 2021.

Patrick Nilo Gil, Appellant,

against Record No. 200796
Court of Appeals No. 1093-19-1

Commonwealth of Virginia, Appellee.

From the Court of Appeals of Virginia

On June 9, 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.

And it is ordered that the Commonwealth recover of the appellant the costs in this Court and the costs in the courts below.

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

Public Defender $400.00 plus costs and expenses

A Copy,

Teste:

Douglas B. Robelen, Clerk

By: Deputy Clerk

VIRGINIA:

In the Court of Appeals of Virginia on **Monday** *the* **9th** *day of* **March, 2020.**

Patrick Nilo Gil, Appellant,

against Record No. 1093-19-1
Circuit Court Nos. CR18-2886 and CR18-2887

Commonwealth of Virginia, Appellee.

From the Circuit Court of the City of Virginia Beach

Before Senior Judges Annunziata, Clements and Retired Judge Willis*

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

Upon guilty pleas, the trial court convicted appellant of two counts of attempted malicious wounding, felony eluding, reckless driving, and driving without an operator's license. The trial court sentenced appellant to a total of fifteen years and eighteen months of incarceration, with six years and six months suspended.

I. Appellant, by counsel, argues that the trial court abused its discretion by imposing nine years and twelve months of active incarceration "because the sentence was excessive and it failed to take into account: (1) [a]ppellant's mental health diagnosis; (2) [t]he actual facts and injuries associated with the charges/victims

* Retired Judge Willis took part in the consideration of this case by designation pursuant to Code § 17.1-400(D).

and instead focusing on what could have happened rather than what did happen; and (3) [t]he rehabilitative objective of a suspended sentence."

Under settled principles, we state the facts in the light most favorable to the Commonwealth, the prevailing party below. Gerald v. Commonwealth, 295 Va. 469, 472 (2018). Appellant pleaded guilty to felony eluding, reckless driving, and driving without an operator's license. He also entered Alford[1] pleas to two counts of attempted malicious wounding. Before accepting his pleas, the trial court conducted a careful colloquy with appellant to ensure that they were entered "freely and voluntarily with a full and complete understanding of the[ir] nature and consequences." Appellant stated that he understood that an "Alford Plea" is considered "a guilty plea." He understood the charges against him and discussed those charges, their elements, and possible defenses with his attorney. After that discussion, appellant decided "for [himself]" to plead guilty "freely and voluntarily." He stated that he was, "in fact, guilty" of felony eluding, reckless driving, and driving without an operator's license. He further acknowledged that the Commonwealth had "sufficient evidence" to convict him of the two attempted malicious wounding charges, notwithstanding that he maintained his innocence.

Appellant assured the trial court that he could read, write, and understand the English language and that he had reviewed, "truthfully" completed, and signed a "Guilty/Alford/Nolo Contendere Plea" form with his attorney. On that form, appellant indicated that he understood that by pleading guilty that he was waiving several trial rights, including a trial by jury, to confront and cross-examine the witnesses against him, to not incriminate himself, and to appeal certain decisions of the trial court. He further understood that the maximum punishment for the offenses was twenty-five years of incarceration and twenty-four months in jail. Appellant declined the opportunity to ask any questions of the trial court.

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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 (2006)).

The trial court accepted appellant's pleas, and the Commonwealth submitted an agreed "stipulation of evidence." That stipulation stated that on the early afternoon of February 23, 2018, Northampton County police officers were pursuing a vehicle driven by appellant southbound towards the Chesapeake Bay Bridge Tunnel ("CBBT"). Appellant "crashed through the [toll] gate . . . at a high rate of speed," and the pursuit continued onto the CBBT at speeds exceeding one hundred miles per hour. Appellant "almost struck [two] vehicles" as he passed them "on the shoulder" and "maneuver[ed] around other vehicles." A CBBT officer "attempted to pass [appellant] to slow him down," but appellant "swerved at the officer." Appellant maneuvered around an officer at the "Chesapeake Tunnel South," "crashing through a set of construction barrels." Appellant "almost struck a[n oncoming] tractor trailer" in the tunnel, "causing all traffic to come to a complete stop."

Virginia Beach police officers "took lead" in the pursuit as appellant exited the CBBT and entered the City of Virginia Beach. At an intersection, appellant "left the roadway" to avoid "stop sticks." He directed his vehicle "at the [uniformed police] officer on the shoulder of the road" that had deployed the "stop sticks." The officer "had to run and jump to cover behind his vehicle to avoid being struck."

The pursuit entered an "industrial area," where appellant "accelerated" at another police officer's vehicle, which was positioned "to block [appellant's] lane of travel." Appellant "continued on a direct path to hit the officer head on" but "narrowly missed a . . . collision." Appellant continued at "reckless speeds," "running two civilians off the roadway." He also "used the oncoming lane of travel" and "shoulder to pass vehicles." After entering a highway, appellant "weave[d] across all lanes of traffic . . . and traveled in excess of [twenty] mph over the posted speed limit." While attempting a "U-turn," appellant struck a "marked Virginia Beach patrol vehicle, catching his rear bumper on the officer's push bumper." Appellant "accelerated[,] causing his bumper to separate from the frame."

Appellant continued into the Hampton Roads Bridge Tunnel, where the Virginia State Police "had deployed a spike strip across the roadway." Appellant "hit the spike strip" but continued "into the tunnel." Stopped "civilian vehicles" "forced [appellant] to stop," and officers rushed to appellant's vehicle. An officer

attempted to open appellant's driver's-side door, but appellant "accelerated to the left," where the officer was standing, and "into another car." Appellant "pinned" the officer between the two cars, but the officer "escape[d]." Police broke appellant's passenger window and extracted appellant from his vehicle. Appellant told the police that he did not stop because he had "just got [his] t[r]uck out of impound for $350 cash and [he] didn't want to get towed again." He knew the "tags [were] bad" and admitted that he did not have an operator's license.

Appellant told the trial court that he had reviewed the stipulation of the evidence with his attorney and agreed that "the Commonwealth could present evidence and facts that would tend to support and prove [the] stipulation." Based on appellant's pleas and the stipulation of the evidence, the trial court convicted appellant of felony eluding, reckless driving, driving without an operator's license, and two counts of attempted malicious wounding.

At his sentencing hearing, Virginia Beach Police Officer R.S. Pena testified that the pursuit occurred around 3:15 p.m. on a Friday afternoon, extended over twenty-nine miles, and lasted approximately thirty-five minutes. The trial court admitted copies of a report from Dr. David Keenan, who had evaluated appellant's competency to stand trial in March 2018. Keenan reported that appellant "appears to suffer from Bipolar Disorder," to include being "hypomanic," and recommended four weeks of inpatient treatment. "After receiving [that] treatment" at Eastern State Hospital, appellant "demonstrated a strong factual knowledge of the legal system and a basic understanding of his current charge[s] and possible penalties." He also understood the "potential alternative outcomes" and could "make rational decisions regarding his case." Accordingly, Dr. Brittany R. Bak concluded that appellant had been restored to competency. Appellant's counsel also proffered, without objection, that another doctor had "independently evaluated" appellant's sanity but concluded that appellant "was still able to understand right from wrong and the nature and character" of his actions at the time of the offenses.

Appellant asked the trial court to sentence him at the low end of the sentencing guidelines, which had a range of four years and eight months to ten years and six months, with a midpoint of eight years and nine

months. He argued that, after being medicated for his mental illness, he had accepted responsibility for the offenses; he maintained, however, that he did not intend to hit the officers with his vehicle. When "unmedicated," appellant explained, his "impulse control fell by the wayside." Appellant noted that he had "been psychiatrically hospitalized on at least eight occasions" but intended "to stay on his medication from this point forward."

The Commonwealth responded that appellant was not "somebody who just needs to get his mental health symptoms under control" and argued that he had been incarcerated multiple times. The Commonwealth contended that appellant's felony eluding was "one of the most serious [eluding offenses] that anybody could commit." Appellant "narrowly missed numerous cars" and demonstrated a "reckless disregard for human life." The Commonwealth argued that despite driving his vehicle directly at two police officers, appellant refused to accept responsibility. Noting that the guidelines do not consider "the length of the eluding, the time it took, the number of people involved, the number of officers involved, the number of departments involved, or the number of people [appellant had] narrowly missed," the Commonwealth asked the trial court to sentence appellant "closer to the high end" of the guidelines.

In allocution, appellant stated that he was "sorry for causing problems" and "putting civilians" and "law enforcement in danger." He maintained that he had "no intention of hitting anyone." Appellant stated that his mother's death three months before the incident "really affected [him] mentally." He acknowledged that it was wrong not to stop his vehicle but claimed that he was "dealing with mental illness and . . . was a little paranoid." Appellant also asked the trial court to "run [his] sentence" concurrent with his sentence from Northampton County so that he would be released before his father, who was in a nursing home, "passe[d] away."

The trial court held that it was "extraordinarily fortunate" that appellant had not caused "fifty fatalities," which "could easily have happened with the speeds, the locations, and the times of day." The trial court sentenced appellant to a total of fifteen years and eighteen months of incarceration with six years and six months suspended.

"We review the trial court's sentence for abuse of discretion." Scott v. Commonwealth, 58 Va. App. 35, 46 (2011). "[W]hen a statute prescribes a maximum imprisonment penalty and the sentence does not exceed that maximum, the sentence will not be overturned as being an abuse of discretion." Du v. Commonwealth, 292 Va. 555, 564 (2016) (quoting Alston v. Commonwealth, 274 Va. 759, 771-72 (2007)). "[O]nce it is determined that a sentence is within the limitations set forth in the statute under which it is imposed, appellate review is at an end." Thomason v. Commonwealth, 69 Va. App. 89, 99 (2018) (quoting Du, 292 Va. at 565). Here, the sentences imposed by the trial court were within the sentencing ranges set by the legislature. See Code §§ 18.2-10, 18.2-11, 18.2-26(2), 18.2-51, 46.2-817(B), 46.2-852, and 46.2-300.

Additionally, it is within the trial court's purview to weigh any mitigating circumstances presented by appellant. See Keselica v. Commonwealth, 34 Va. App. 31, 36 (2000). Here, the trial court considered appellant's mitigating evidence, including his mental illness and that nobody ultimately was injured. Balanced against those considerations, however, was the aggravated nature of appellant's conduct over an extended pursuit. Appellant "crashed" through the toll gate at the CBBT and fled from the police at speeds exceeding one hundred miles per hour. He recklessly passed "civilian" vehicles using the shoulder and the "oncoming lane of travel[,]" forcing other motorists "off the roadway." As the pursuit continued, appellant struck a police vehicle as he attempted a U-turn on the highway and collided with "civilian" vehicles in the Hampton Roads Bridge Tunnel. Most egregiously, he twice drove his vehicle towards uniformed police officers who were on foot. One officer had to dive out of the way to avoid being struck, and the other was "pinned" between two cars. Throughout the thirty-five-minute pursuit, appellant displayed a reckless and malicious disregard of human life.

"Criminal sentencing decisions are among the most difficult judgment calls trial judges face." Du, 292 Va. at 563. "Because this task is so difficult, [we] must rely heavily on judges closest to the facts of the case——those hearing and seeing the witnesses, taking into account their verbal and nonverbal communication, and placing all of it in the entire context of the case." Id. Here, the trial court considered the

evidence and imposed the sentences that it deemed appropriate. Having reviewed the record, we hold that the sentences represented a proper exercise of discretion.

II. In his *pro se* supplemental petition for appeal, appellant argues that his guilty pleas were not freely and voluntarily entered. He contends that he did not plead guilty, but his trial attorney entered the pleas on his behalf "without advising [him]."

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). However, a guilty plea does not waive claims asserting jurisdictional defects, see Smith v. Commonwealth, 59 Va. App. 710, 725 (2012), or a preserved challenge to the constitutionality of the statute of conviction, see Class v. United States, 138 S. Ct. 798 (2018). Because a defendant who enters a guilty plea waives several rights, a "plea of guilty is constitutionally valid only to the extent it is 'voluntary' and 'intelligent.'" Bousley v. United States, 523 U.S. 614, 618 (1998) (quoting Brady v. United States, 397 U.S. 742, 748 (1970)). Moreover, to withstand scrutiny on appeal, the record must contain "an affirmative showing that [the guilty plea] was intelligent and voluntary." Boykin v. Alabama, 395 U.S. 238, 242 (1969). In making that determination, "the truth and accuracy of representations made by an accused as to . . . the voluntariness of his guilty plea will be considered conclusively established by the trial proceedings, unless the [accused] offers a valid reason why he should be permitted to controvert his prior statements." Anderson v. Warden, 222 Va. 511, 516 (1981).

The record demonstrates that when the trial court asked for appellant's pleas, appellant responded, "I plead --," and his attorney stated, "He pleads guilty, Your Honor, to all of them except the two attempt[ed] malicious [wounding charges]; and on those, he's going forward on a guilty plea under Alford." The trial court then conducted a careful colloquy with appellant and confirmed his understanding of the charges, their elements, and the potential sentences he faced. Appellant assured the trial court that after discussing the charges with his attorney he decided "for [himself]" to plead guilty to felony eluding, reckless driving, and driving without an operator's license because he was "in fact, guilty of those" offenses. He also told the trial

court that he was entering Alford pleas to the two attempted malicious wounding charges because the "Commonwealth ha[d] sufficient evidence" to convict him of those charges. He stated that he understood that Alford pleas had the same effect as "guilty plea[s]."

Appellant told the trial court that he understood "the maximum punishment for [the] crimes [was] twenty-five years imprisonment and twenty-four months in jail plus all fines and court costs." Appellant acknowledged that same understanding in the "Guilty/Alford/Nolo Contendere Plea" form that he advised the trial court that he had reviewed with counsel and signed. He understood that by pleading guilty that he was waiving several trial rights, including a trial by jury, to confront and cross-examine the witnesses against him, to not incriminate himself, and to appeal certain decisions of the trial court. Appellant answered the trial court's questions appropriately and evinced his understanding of the proceedings and the consequences of his pleas. Additionally, he declined the opportunity to ask any questions of the trial court.

Appellant's statements to the trial court during the guilty plea colloquy "conclusively establish[]" that his pleas were entered freely, voluntarily, and intelligently with an understanding of their consequences. Id. And appellant offers no "valid reason why he should be permitted to controvert" those statements. Id. Accordingly, we reject appellant's argument that his pleas were involuntarily entered without his consent.

III. In his *pro se* supplemental petition for appeal and in a subsequently-filed document styled "[C]itation of [S]upplemental [A]uthorities," appellant argues that (1) his trial attorney waived his preliminary hearing in the general district court without his consent, (2) he lacked the requisite intent to support his convictions for attempted malicious wounding, and (3) the Commonwealth violated his "due process" rights by withholding "dash cam video[s]."

By entering guilty pleas, however, appellant waived each of the above issues for appeal. A voluntary and intelligent guilty plea is "an admission of guilt and a waiver of all non-jurisdictional defects. It represents a break in the chain of events which has preceded it in the criminal process." Clauson v. Commonwealth, 29 Va. App. 282, 294 (1999) (quotations omitted) (citing Wayne R. LaFave & Jerold H. Israel, Criminal Procedure § 10.2(d), at 787 (1984)). Accordingly, it "is a 'waiver' of all non-jurisdictional defects that

occurred before entry of the plea." Trevathan v. Commonwealth, 297 Va. 697, 697 (quoting Miles, 266 Va. at 113-14). Such a waiver even applies to "claims relating to the deprivation of constitutional rights that occurred prior to the entry of the guilty plea." Beaver v. Commonwealth, 232 Va. 521, 526-27 (1987) (quoting Tollett v. Henderson, 411 U.S. 258, 267 (1973)).

None of the above arguments alleges a jurisdictional defect; instead, they all address issues arising before appellant entered his pleas. Accordingly, those issues are waived for appeal. Trevathan, 297 Va. at 698 ("[W]hen entry of a guilty plea waives an issue for appeal, the correct disposition is denial, not dismissal.").

IV. In his *pro se* supplemental petition for appeal, appellant argues that the trial court erred by sentencing him under the statute for "malicious wounding[,] not attempted malicious wounding." When announcing appellant's sentences during the sentencing hearing, the trial court stated, "On the two counts of malicious wounding, five years on each. I'm going to suspend two years on each, indefinite supervised probation and payment of court costs and ten years of good behavior." The final sentencing order, however, notes that the trial court convicted appellant of two counts of "Attempt[ed] Malcious Wounding" and sentenced him to five years of incarceration with two years suspended for each conviction.

Malicious wounding is a Class 3 felony, punishable by "a term of imprisonment of not less than five years nor more than 20 years." Code §§ 18.2-10 and 18.2-51. Attempted malicious wounding is a Class 5 felony, punishable by "a term of imprisonment of not less than one year nor more than 10 years." Code § 18.2-10; Code § 18.2-26(2) ("If the felony attempted is punishable by a maximum punishment of twenty years' imprisonment, an attempt thereat shall be punishable as a Class 5 felony."). Appellant's final sentencing order states that the trial court convicted him of attempted malicious wounding, cites the attempt statute—Code § 18.2-26, and sentences appellant within the statutory range authorized for attempted malicious wounding. "A recital of proceedings in a judicial order is an 'absolute verity and it is not subject to collateral attack.'" Kern v. Commonwealth, 2 Va. App. 84, 88 (1986) (quoting Kibert v. Commonwealth, 216 Va. 660, 662 (1976)). "Where a defendant does not object to the accuracy of an order within 21 days

after its entry, an appellate court may 'presume that the order, as the final pronouncement on the subject, rather than a transcript that may be flawed by omissions, accurately reflects what transpired.'" Id. (quoting Stamper v. Commonwealth, 220 Va. 260, 280-81 (1979)). The record does not reflect that appellant objected to the sentencing order within twenty-one days after its entry; thus, we treat that order as a verity on appeal. The sentencing order conclusively establishes that the trial court convicted and sentenced appellant for two counts of attempted malicious wounding.

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 Patrick Nilo Gil is now proceeding without the assistance of counsel in this matter and is representing himself on any further proceedings or appeal.

It is ordered that the Commonwealth recover of the appellant the costs in this Court, which costs shall include a fee of $400 for services rendered by the Public Defender on this appeal, in addition to counsel's necessary direct out-of-pocket expenses, and the costs in the trial court.

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

Public Defender $400.00 plus costs and expenses

A Copy,

Teste:

Cynthia L. McCoy, Clerk

By: Kristen M. McKenzie

Deputy Clerk