

VIRGINIA:

In the Supreme Court of Virginia held at the Supreme Court Building in the City of Richmond on Wednesday the 7th day of February, 2018.

Joseph Okoh,

Appellant,

against

Record No. 170714

Court of Appeals No. 0409-16-2

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 and in opposition to the granting of an appeal, the Court refuses the petition for appeal.

A Copy,

Teste:

Patricia L. Harrington, Clerk

By:



Deputy Clerk

VIRGINIA:

*In the Supreme Court of Virginia held at the Supreme Court Building in the
City of Richmond on Thursday the 10th day of May, 2018.*

Joseph Okoh,

Appellant,

against

Record No. 170714

Court of Appeals No. 0409-16-2

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 the 7th day of February, 2018 and grant a rehearing thereof, the prayer of the
said petition is denied.

A Copy,

Teste:

Patricia L. Harrington, Clerk

By:



Deputy Clerk

VIRGINIA:

In the Court of Appeals of Virginia on Tuesday the 26th day of July, 2016.

Joseph E. Okoh,

Appellant,

against

Record No. 0409-16-2

Circuit Court No. CR08000169-00

Commonwealth of Virginia,

Appellee.

From the Circuit Court of Louisa County

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 reasons:

I. through V. On June 1, 2009, appellant was convicted of computer solicitation of a minor in violation of Code § 18.2-374.3 and sentenced to fourteen years.¹ On December 5, 2014, he asked the trial court to “review and amend” the sentencing order and indictment “to be in compliance with the fact that Va. Code § 18.2-361 is now UNCONSTITUTIONAL and provide [him] with an updated Sentencing Order with the correct subsection under Va. Code § 18.2-374.3” under which he was charged and convicted. On March 30, 2015, the trial court denied appellant’s motion.

¹ The indictment charged appellant as follows:

On or about January 25, 2008, in the County of Louisa, Virginia, Joseph E. Okoh did, while being a person over the age of 18, use a communications system or other electronic means, for the purpose of soliciting, with lascivious intent, where the person accused is at least seven (7) years older than the child he knew or had reason to believe was less than 15 years of age and to knowingly and intentionally proposed that such child fee or fondle the sexual or genital parts of the accused or propose that the accused feel or fondle the sexual or genital parts of such child or propose to such child the performance of an act of sexual intercourse or any act constituting an offense under Section 18.2-361.

On April 21, 2015, appellant filed a petition for rehearing regarding the trial court's ruling on the basis that the trial court did not specify the section in Code § 18.2-374.3 under which he was convicted. On May 6, 2015, the trial court denied the petition for rehearing.

On June 8, 2015, appellant noted his appeal from the trial court's decision on May 6, 2015. On appeal, he asserts "[t]he trial court erred when, upon finding that the appellant's conviction under [] Code § 18.2-374.3 was not dependent upon an attempt to violate [] Code § 18.2-361, it subsequently found that the conviction could stand, because if any of the legal theories submitted to the jury is [sic] a general verdict of guilty cannot stand." He also maintains "[t]he trial court erred when, upon finding that [Code §] 18.2-361 was constitutional as applied to [a]ppellant, it subsequently found that the jury's general verdict of guilty could stand against [a]ppellant for a violation of [Code §] 18.2-374.3, because the United States Court of Appeals for the [Fourth] Circuit has held that [Code §] 18.2-361 is unconstitutional on its face."

While appellant's appeal was pending in this Court, appellant filed a motion to suppress² on September 22, 2015, as well as a request that counsel be appointed to represent him in connection with the motion. The trial court held the motion in abeyance pending the resolution of the appeal.

On January 26, 2016, this Court dismissed appellant's appeal because the trial court no longer had jurisdiction to consider appellant's motions in December 2014 and in April 2015, and therefore, the trial court's orders denying appellant's motions were void *ab initio*.

On February 16, 2016, appellant filed a request with the trial court seeking a ruling on his motion to suppress. On February 22, 2016, the trial court denied the motion. The trial court noted that appellant's case had been concluded by a sentencing order on June 1, 2009, and that the trial court lacked any basis for considering the motion. Because the trial court had no basis on which to hear appellant's motion, it denied appellant's request for court-appointed counsel.

² In the motion appellant asked that the trial court "suppress the disclosure of the intercepted electronic communication used in a grand jury proceeding to indict Defendant, or such disclosure having already occurred, dismissal of the indictment which relied on such disclosure" Appellant moved to suppress "the disclosure of the intercepted electronic communication used in all other proceedings in th[e] case against [him]," and sought dismissal of his conviction.

Appellant noted his appeal to the trial court's February 22, 2016 ruling, the subject of the instant appeal.

He contends that the trial court erred by denying his motion to suppress on several grounds, and by denying his request for counsel. He also asserts that the trial judge erred by not recusing himself.

Rule 1:1 provides that "[a]ll final judgments, orders, and decrees . . . shall remain under the control of the trial court and subject to be modified, vacated, or suspended for twenty-one days after the date of entry, and no longer." Appellant's motion to suppress did not assert that his sentencing order in 2009 was void *ab initio*.³ Thus, because more than twenty-one days had passed since the entry of appellant's 2009 sentencing order, the trial court was without jurisdiction to address appellant's motion to suppress. Cf. Singh v. Mooney, 261 Va. 48, 52, 541 S.E.2d 549, 551 (2001) (Rule 1:1 does not apply to an order which is void *ab initio*).

Because the trial court lacked authority to entertain appellant's motion to suppress and his request for counsel to represent him in connection with that motion, the trial court did not err by denying appellant's motion and request for counsel.

As to appellant's assertion that the trial judge erred by his failure to recuse himself from considering appellant's motion and request for counsel, appellant raises this argument for the first time on appeal. Thus, he has failed to preserve this argument under Rule 5A:18. "Although Rule 5A:18 contains exceptions for good cause or to meet the ends of justice, appellant does not argue these exceptions and we will not invoke them *sua sponte*." Williams v. Commonwealth, 57 Va. App. 341, 347, 702 S.E.2d 260, 263 (2010).

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.

³ "An order that is void *ab initio* is 'a complete nullity and it may be impeached directly or collaterally by all persons, anywhere, at any time, or in any manner.'" Grafmuller v. Commonwealth, 290 Va. 525, 528 n.1, 778 S.E.2d 114, 115 n.1 (2015) (quoting Singh v. Mooney, 261 Va. 48, 52, 541 S.E.2d 549, 551 (2001)).

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

This Court's records reflect that appellant is proceeding *pro se* in this matter.

A Copy,

Teste:

Cynthia L. McCoy, Clerk

By:

Mary K.P. Ring

Deputy Clerk