VIRGINIA:

In the Supreme Court of Virginia held at the Supreme Court Building in the City of Richmond on Thursday the 13th day of January, 2022.

Present: All the Justices

Christopher DePaul Fowler, Appellant,

against Record No. 201255
Circuit Court No. CL19-1099

Commonwealth of Virginia, Appellee.

Upon an appeal from a judgment rendered by the Circuit Court of Roanoke County.

Christopher DePaul Fowler contends that the Circuit Court of Roanoke County erred in finding that it lacked jurisdiction to expunge protective orders entered against him. Upon consideration of the record, briefs, and argument of counsel, the Court is of opinion that there is no error in the judgment of the circuit court.

I. BACKGROUND

On March 15, 2017, the Roanoke County Juvenile and Domestic Relations District Court ("JDR court") entered an emergency protective order finding that Fowler subjected A.W., the minor child of Fowler's girlfriend, to an act of violence, force, or threat. Subsequently, the JDR court entered two preliminary protective orders and a final child protective order against Fowler. Fowler was directly indicted for object sexual penetration of A.W. and child abuse and neglect. The indictments listed an offense date of March 14, 2017 for both charges. Ultimately, a jury acquitted Fowler on both indictments.

The circuit court dissolved the protective order on July 10, 2019. Citing the outcome of Fowler's jury trial, the circuit court found that "there [had] been a material change of circumstances, and that the [p]rotective [o]rder [wa]s no longer necessary to protect the child's life, health, safety or normal development."

Thereafter, Fowler filed a petition in the circuit court seeking the expungement of the "police, jail, and Court records relating to the aforesaid charges and the [p]rotective [o]rders." The circuit court granted Fowler's petition and entered an order on March 17, 2020. Subsequently, the JDR clerk informed the circuit court judge that, according to her manual, she was "only able to expunge the criminal charge" and not the protective orders.

Following a telephone hearing on the issue of whether authority existed to expunge the protective orders,[1] the circuit court entered a "corrected order" on April 28, 2020, holding that it lacked jurisdiction under Code § 19.2-392.2 to expunge the protective orders. The circuit court "amended [the March 17 order] so as not to include the [protective orders in question]." In the alternative, the circuit court held that the March 17 order "constituted a clerical error pursuant to Code § 8.01-428(B)."

On May 18, 2020, Fowler filed a motion to reconsider, alleging that the circuit court admitted that that it "had not read the expungement order carefully before entering it." Fowler argued that the circuit court "would not have entered the [March 17 order] had it read the [March 17 order] more carefully," and that the circuit court's "failure to read the document does not permit modification of a final [o]rder." Fowler further argued that the March 17 order became final on April 7, 2020 pursuant to Rule 1:1, rendering the April 28 order void ab initio. The circuit court did not rule on Fowler's motion. Fowler appealed.

II. ANALYSIS

On appeal, Fowler contends that the circuit court's April 28 corrected order is void ab initio pursuant to Rule 1:1 because it was entered more than 21 days after the March 17 order. Fowler also argues on appeal that the circuit court had subject matter jurisdiction and statutory authority under Code § 19.2-392.2 to expunge the protective orders relating to his criminal charges of object sexual penetration and child abuse and neglect.

A. RULE 1:1

Fowler contends that Rule 1:1 barred the entry of the April 28 order. Rule 1:1(a) (2020)[2] provided, in pertinent part,

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[1] Fowler does not include a transcript or written statement of facts of the telephone hearing in the record.

[2] Since 2020, Rule 1:1 has been the subject of amendments, none of which alter the substance of the Rule as it was worded in 2020 when the circuit court acted in this case.

> All final judgments, orders, and decrees, irrespective of terms of court, 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.

Orders that are entered in violation of Rule 1:1 are void. *See, e.g.*, *Kosko v. Ramser*, 299 Va. 684, 689 (2021); *Super Fresh Food Mkts. of Va., Inc. v. Ruffin*, 263 Va. 555, 563 (2002).

On March 16, 2020, in response to the COVID-19 pandemic, this Court entered a Declaration of Judicial Emergency ("DJE"), which suspended all non-essential court proceedings and "tolled and extended" all "deadlines." *See* March 16, 2020, Order Declaring a Judicial Emergency in Response to COVID-19 Emergency. The DJE was later extended to "all applicable deadlines, time schedules, and filing requirements," and tolled case-related deadlines. *See* March 27 and April 22, 2020, Orders Extending Declaration of Judicial Emergency. Because the 21-day deadline for modifying the March 17 order was tolled during the period between the entry of the March 17 order and the April 28 order, the circuit court retained its authority to enter the April 28 order.[3]

B. JURISDICTION

Code § 19.2-392.2(A), Virginia's expungement statute, states that when a person is charged with a crime and is subsequently acquitted, they "may file a petition setting forth the relevant facts and requesting expungement of the police records and the court records relating to the charge." Fowler argues on appeal that the protective orders are court records relating to his criminal charges, and therefore, the circuit court had the authority to order the expungement of the protective orders. The Commonwealth contends that Fowler waived this argument because he failed to include in the record a transcript or statement of facts of the circuit court's relevant

[3] We note that even if the Rule 1:1 deadline was not tolled by the DJE, Code § 19.2-392.2 (M) provides an exception allowing an expungement order that was entered "contrary to law" to be voided "upon motion and notice made within three years of the entry of such order." Code § 19.2-392.2(M). Assuming without deciding that the circuit court lacked the authority to expunge the protective orders and entered the March 17 order in error, it would have then had the authority under Code § 19.2-392.2(M) to void the March 17 order and enter the corrected April 28 order excluding the protective orders from expungement. *See Haynes v. Haggerty*, 291 Va. 301, 305 (2016) ("[W]here a trial court's decision is correct, but its reasoning is incorrect, and the record supports the correct reason, we uphold the judgment pursuant to the right result for the wrong [or a different] reason doctrine.").

expungement proceedings. While an appellant's failure to timely file a transcript or written statement of facts is not automatically fatal to an appeal, the failure to file a transcript that is necessary to the Court's consideration of the assigned errors may result in waiver. Rule 5:11.

"[T]he onus is upon the appellant to provide the reviewing court with a sufficient record from which it can be determined whether the trial court erred as the appellant alleges." *White v. Morano*, 249 Va. 27, 30 (1995); *see also* Rules 5:10(a)(7) and 5:11.[4] Fowler failed to include a transcript or written statement of facts from the hearing that precipitated the "corrected" April 28 order, which stated that the circuit court had no jurisdiction to expunge the protective orders in question. The absence of such a transcript or written statement of facts in the record, in violation of Rules 5:10(a)(7) and 5:11, renders it impossible to reliably determine whether Fowler adequately preserved this issue for appeal.

Instead of a transcript or written statement of facts, Fowler relies on his own motion to reconsider and objections filed in the circuit court, which were never ruled upon, to demonstrate that he properly preserved his argument. "A motion to reconsider is insufficient to preserve an argument not previously presented unless the record establishes that the court had an opportunity to rule on the motion." *Westlake Legal Grp. v. Flynn*, 293 Va. 344, 352 (2017) (citing *Brandon v. Cox*, 284 Va. 251, 256 (2012)). Rule 5:25 states, in relevant part: "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." The purpose of this Rule is to afford the "trial judge an opportunity to rule intelligently on objections." *Maxwell v. Commonwealth*, 287 Va. 258, 264-65 (2014). There exists no indication in the record that Fowler's motion to reconsider was ever

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[4] Rule 5:10(a)(7) states that the contents of a "record on appeal from the trial court" should include the "transcript of any proceeding or a written statement of facts, testimony, and other incidents of the case when made a part of the record as provided in Rule 5:11." Rule 5:10(a)(7). Rule 5:11 goes on to explain that

> [i]t is the obligation of the petitioner/appellant to ensure that the record is sufficient to enable the Court to evaluate and resolve the assignments of error. When the appellant fails to ensure that the record contains transcripts or a written statement of facts necessary to permit resolution of appellate issues related to the assignments of error, any assignments of error affected by the omission will not be considered.

Rule 5:11(a)(1).

addressed by the circuit court. Therefore, we are unable to conclude whether this issue was ever presented to or considered by the circuit court, and therefore, it is also barred by Rule 5:25.

III. CONCLUSION

For the foregoing reasons, the judgment of the circuit court is affirmed.

This order shall be certified to the Circuit Court of Roanoke County.

A Copy,

Teste:

Clerk