VIRGINIA:

In the Supreme Court of Virginia held at the Supreme Court Building in the City of Richmond on Friday *the* 21st *day of* August, 2015.

Federico Alfonso Umana-Barrera, Appellant,

against Record No. 141122
Court of Appeals No. 1268-13-4

Commonwealth of Virginia, Appellee.

Upon an appeal from a judgment rendered by the Court of Appeals of Virginia.

Upon consideration of the record, briefs, and argument of counsel, the Court is of opinion that there is error in the disposition by the Court of Appeals, but that such error is harmless because the judgment must be affirmed on other grounds.

I.

Federico Umana-Barrera pled guilty to rape in violation of Code § 18.2-61 and was sentenced to twenty years with five years suspended. The circuit court entered its original Final Sentencing Order on January 2, 2013. On January 23, 2013, along with an order substituting Umana-Barrera's counsel, the circuit court entered its first unopposed Suspending Order, requiring that "the Final Sentencing Order entered on January 2, 2013 be suspended for an additional thirty (30) days for defendant to file any motions. This Order tolls the running of the twenty-one (21) day provision in Rule 1:1, thus allowing fifty-one (51) days for the entry of a Final Sentencing Order."

On February 1, 2013, Umana-Barrera moved to withdraw his guilty plea. On February 12, 2013, the circuit court, noting no objection,

entered an order continuing the motion and further suspending the entry of the Final Sentencing Order for an additional ten days. On February 21, 2013, the circuit court entertained argument on the motion to withdraw and orally extended the suspension order for an additional 30 days. However, no written order was entered until March 27, 2013. This order observed that a hearing on the motion to withdraw the guilty plea had taken place on February 21, 2013, that the matter was taken under advisement, and that the Final Sentencing Order was again suspended for thirty days.

On April 15, 2015, another hearing took place, at which point the circuit court's intention had been to hear evidence that, due to a miscommunication, defense counsel was not prepared to present. The parties therefore agreed to reschedule:

> THE COURT: All right. Let's go ahead and set a date, then, to do this. You need a month out?
> [COUNSEL]: That would be fine, Your Honor. Of course, I would need another order.
> The COURT: Yes.

On April 22, 2013, a clerk's form order was entered, signed by the judge, continuing the case from April 15, 2013, to May 30, 2013. On May 30, 2013, the motion was heard, and on June 6, 2013, the order denying Umana-Barrera's withdrawal of his guilty plea was entered.

Umana-Barrera appealed the denial of his motion to withdraw the guilty plea to the Court of Appeals, which issued a per curiam decision determining that his sentencing order became final on March 4, 2013. The Court of Appeals found that the delay of the written order following the February 21, 2013, hearing resulted in entry of the suspended Final Sentencing Order on March 4, 2013, and any order

of the circuit court entered after March 25, 2013 – 21 days after the entry of the final order – was a nullity. Umana-Barrera v. Commonwealth, Record No. 1268-13-4, slip op. at 1 (Dec. 17, 2013) (unpublished). Umana-Barrera sought leave from the Court of Appeals to amend the circuit court orders, requesting remand to allow the circuit court to amend clerical mistakes or correct errors in the record nunc pro tunc pursuant to Code § 8.01-428(B). The Court of Appeals, noting a lack of objection on the part of the Commonwealth, granted the motion and remanded the case.

The circuit court entered two orders on April 14, 2014. The first contains the same substantive content as the circuit court's March 27, 2013, order: it observes that argument was heard, states that the matter was taken under advisement, and extends the Final Sentencing Order "for an additional THIRTY (30) DAYS, running consecutive to the suspension memorialized in this Court's order of January 23, 2013." This order was entered nunc pro tunc to February 21, 2013, the day of the actual hearing, and states that the date of the March 27, 2013 order "is in error in that the date the motion to suspend was granted contains a clerical error."

The second order was dated nunc pro tunc to April 15, 2013. It stated that the form order entered April 22, 2013, contained "a clerical error in not addressing the motion to suspend." The corrected order observes that the motion to withdraw the guilty plea was taken under advisement, that the matter had been continued to May 30, 2013, and that the Final Sentencing Order was to be further "suspended for an additional SIXTY (60) DAYS, running consecutive to the suspension memorialized in this Court's order of January 23,

2013." The Commonwealth signed both of these orders as "Seen and Agreed."

Umana-Barrera again appealed, challenging the circuit court's denial of his motion to withdraw his guilty plea and the court's refusal to grant an evidentiary hearing. A three-judge panel once again dismissed the appeal, specifically finding that the second order "does not fall within the parameters of the nunc pro tunc power." Umana-Barrera v. Commonwealth, Record No. 1268-13-4, slip op. at 4 (June 20, 2014) (unpublished). The Court of Appeals reasoned:

> [T]he trial court states that its order of April 22, 2013 erroneously failed to address a motion to suspend made at the April 15, 2013 hearing. Yet the record of the April 15, 2013 hearing reveals no motion to suspend. . . . A nunc pro tunc order . . . only allows the trial court to make the record speak the truth and reflect judicial action actually taken.

Id. (citing Davis v. Mullins, 251 Va. 141, 149, 466 S.E.2d 90, 94 (1996) (citations and quotations omitted)). The opinion continued, "[i]f a party does not obtain a written order 'clearly and expressly' suspending the final order within the time allotted, he must at least establish that the trial court granted a suspension but omitted it from a timely order." Id. The Court of Appeals therefore concluded that the circuit court lacked jurisdiction as of the date of entry of the order denying withdrawal of the guilty plea and, as a result, the Court of Appeals lacked jurisdiction to consider the appeal. Umana-Barrera now appeals to this Court.

II.

A court can, pursuant to Code § 8.01-428(B), correct "[c]lerical mistakes in all judgments or other parts of the record and errors therein arising from oversight or from an inadvertent omission." Trial courts have the "inherent power, independent of statutory authority, to correct errors in the record so as to cause [their] acts and proceedings to be set forth correct. In short, the court has the power, independent of statute, upon any competent evidence, to make the record 'speak the truth.'" Davis, 251 Va. at 149, 466 S.E.2d at 94 (citation omitted).

This Court reviews issues of statutory interpretation, Rules of Court, and legal conclusions de novo. Belew v. Commonwealth, 284 Va. 173, 177, 726 S.E.2d 257, 259 (2012). "Whether a record shall be corrected by entry nunc pro tunc is addressed to the discretion of the [trial] court." Council v. Commonwealth, 198 Va. 288, 293, 94 S.E.2d 245, 248 (1956) (citation omitted). With respect to this discretion, "the evidence constituting the basis for the correction of the record [should] be clear and convincing." Id. (citation omitted). Thus, clear and convincing evidence is required to persuade the circuit court that an error requires correction and that such correction reflects the truth of the record. Upon review, this Court ensures that the circuit court did not abuse its discretion in correcting the record nunc pro tunc: that is, that the record reflects the truth of its original ruling and is not created anew from whole cloth.

In Davis, this Court emphasized the distinction between the circuit court's power to correct its orders to reflect the truth of the record and impermissible alterations of the record:

> When acting nunc pro tunc, the court does not reacquire jurisdiction over the case. Rather, the trial court merely corrects the record by entry of an order nunc pro tunc, under the accepted fiction that the order relates back to the date of the original action of the court "now for then." Nonetheless, we have carefully noted that the power to amend should not be confounded with the power to create.

Davis, 251 Va. at 149, 466 S.E.2d at 94 (internal citation and quotation marks omitted). The power to act nunc pro tunc "is restricted to placing upon the record evidence of judicial action which has actually been taken, and presupposes action taken at the proper time." Council, 198 Va. at 292, 94 S.E.2d at 248.

As stated above, a review of the original April 15, 2013, transcript finds no explicit reference to a granted motion for a "suspending order." The Court of Appeals concluded that the lack of an explicit reference to a "suspending order" in the hearing transcript indicated that the circuit court erred by retroactively granting a motion that was never in fact granted. The lack of an explicit textual reference using those specific words, however, should not end the inquiry.

The failure of counsel to specifically articulate the word "suspending" is not necessarily fatal: as in many areas of review, an appellate court is required to consider not merely operative legal terms but also the text as a whole and the context in which those words arise. See, e.g., Lim v. Soo Myung Choi, 256 Va. 167, 172, 501 S.E.2d 141, 144 (1998) ("[U]se of technical words . . . is not necessary to effect a transfer if the language used 'plainly shows' on the face of the document a clear intent to convey title."); Commonwealth v. Bakke, 46 Va. App. 508, 527, 620 S.E.2d

107, 116 (2005) (holding that an appellate court "will not substitute form over substance by requiring a physician to use the magic words 'to a reasonable degree of medical certainty'").

In the present case, counsel did state on the record at the April 15, 2013 hearing that he "would need another order," and the circuit court granted this request. The Court therefore must consider whether there is sufficient evidence for the circuit court to have found later that this exchange referred to or included a request for a suspending order and that it was, at the time, the circuit court's intent to grant a further suspension of its Final Sentencing Order.

Here, the record is replete with contextual evidence to this effect. Initially, on January 23, 2013, the circuit court entered both a motion substituting counsel and the initial suspending order. On February 12, 2013, the circuit court in a single order granted both a continuance and a suspending order. On March 27, 2013, in a single order (later corrected nunc pro tunc to reflect entry as of February 21, 2013), the court took a matter under advisement and granted a suspending order. Time and again, at each hearing or motion, as the circuit court addressed the pending matters it simultaneously extended the Final Sentencing Order to allow the circuit court time to address these matters.

By far the most rational reading of counsel's request for "another" order, coupled with the circuit court's granting of that request without even needing to ask for clarification, is that the exchange referred to what was now counsel's fourth application for a suspending order. Neither counsel nor the circuit court had doubt regarding to what they were referring. The lack of

objections on the part of the Commonwealth to the entry of the nunc pro tunc orders further indicates that all parties involved were aware of the status of the proceedings. To prevent the circuit court from correcting its own order nunc pro tunc to reflect its own reasonable construction of its own transcript and proceedings would be to elevate form over substance and violate the justice this Court strives to achieve. See Fredericksburg Construction Co. v. J.W. Wyne Excavating, Inc., 260 Va. 137, 143-44, 530 S.E.2d 148, 152 (2000) (circuit courts have the authority to interpret their own orders, and appellate courts should give deference to the lower court's interpretation).

There is ample evidence in the present record that the circuit court intended to and in fact did orally grant another suspension of the Final Sentencing Order. The consistent behavior of the circuit court in retaining jurisdiction to resolve Umana-Barrera's motion to withdraw his guilty plea, along with the hearing transcript itself, support this conclusion. It was therefore within the circuit court's discretion to correct the form order to reflect the ruling actually made at the time of the April 15, 2013 proceedings.

The Court of Appeals thus erred in concluding that it was outside the circuit court's discretion to enter the suspending order nunc pro tunc in this instance.

III.

Although the circuit court had the authority to enter the nunc pro tunc order at issue today, the Court must still review the dates of the suspending orders, as corrected nunc pro tunc, to determine whether the circuit court in fact still had jurisdiction

as of the date of the June 6, 2015 final order. In this inquiry, the Court looks to the plain meaning of the orders as initially entered or as corrected, if corrected nunc pro tunc, to calculate the date at which the jurisdiction of the circuit court terminated.

Rather than vacating the current Final Sentencing Order until resolution of the issue at hand and entering a new final sentencing order or suspending the Final Sentencing order indefinitely pending further order of the court, the circuit court opted for a series of self-executing suspending orders. Each would, by its own terms, result in the entry of a final judgment by a date certain if not interrupted by another order. The circuit court's original suspending order, entered on January 23, 2013, suspended entry of the Final Sentencing Order for 30 days, expiring on February 22. The first nunc pro tunc order extended the suspension for an additional thirty days, consecutive to this original order. The second nunc pro tunc order extended the suspension for sixty days, again consecutive to the original January 23, 2013 order. Thus, the second nunc pro tunc order, on its face, only extended the circuit court's authority through April 23, sixty days after February 22. Even assuming that the Rule 1:1 twenty-one day period started anew on April 23,[1] the circuit court's authority expired on May 14, 2013, rather than on or after June 6, due to the plain language of the second nunc pro tunc order.

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[1] Whether the Rule 1:1 twenty-one day period of jurisdiction should be restarted is complicated by ambiguous language present in the original suspending order. Because even the most generous construction does not reach June 6, 2013, the Court will not address this language today.

The judgment of the Court of Appeals is therefore affirmed on different grounds. Appellant shall pay to the Commonwealth of Virginia two hundred and fifty dollars damages.

This order shall be certified to the Court of Appeals of Virginia and the Circuit Court of Arlington County.

JUSTICE KELSEY, with whom JUSTICE MCCLANAHAN joins, concurring in the result.

I concur with the result reached by the majority, but not its reasoning.

In this case, the majority concludes that an express 45-day continuance order running from an April 15, 2013 hearing can be retroactively deemed by a nunc pro tunc order — entered a year later — to be an implied 60-day suspension order running from an earlier suspension order entered on January 23, 2013. This after-the-fact judicial interpretation, in my opinion, is considerably more nunc than tunc.

The majority then renders its nunc pro tunc reasoning immaterial by holding that the retroactive 60-day suspension order did not accomplish what the trial court apparently intended it to do. The time period provided in the order was simply not long enough; it needed to be at least 83 days. Presumably had it been so, the majority would reverse, not affirm, the Court of Appeals.

Though we reach the same result, my reasoning ends where the majority's begins: At no time during the pendency of this case did Umana-Barrera ask for, nor did the trial judge ever grant, a 60-day suspension to be tacked on to an earlier suspension granted in the January 23, 2013 order — as the nunc pro tunc order claimed. Thus,

the Court of Appeals correctly held that the trial court had no authority to backdate a judicial decision that it never previously made.

I.

The trial court entered the final sentencing orders on January 2, 2013. If nothing else had happened, Rule 1:1 would have withdrawn the trial court's authority over the case on January 23.[2] However, the defendant properly asked for, and the trial court correctly granted, three temporary suspensions. On January 23, the trial court first suspended the final orders for 30 days (that is, until February 22). Then, on February 12, the trial court further suspended the final orders for an "additional 10 days."[3]

The third suspension was effective for another 30 days, which would have extended the trial court's authority to April 3. The

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[2] Rule 1:1 does not implicate subject-matter jurisdiction. See Cabral v. Cabral, 62 Va. App. 600, 606-07, 751 S.E.2d 4, 8 (2013) ("Though sometimes called a limitation on 'subject matter jurisdiction,' Rule 1:1 serves only as a mandatory procedural precondition to the trial court's lawful exercise of its authority." (citation omitted)); John L. Costello, In Favor of Second Bites at the Apple: Attacking Final Judgments in Virginia, 18 Va. B. Ass'n J., no. 3, Summer 1992, at 12, 16 ("If there is one rule about the power of courts which has no contradictions, it is the rule that a court may not increase or decrease its own or another court's [subject-matter] jurisdiction by exercise of its 'inherent' rule making power.").

[3] The February 12 order does not specify whether the additional 10 days ran consecutively to or concurrently with the January 23 order. See J.A. at 49. However, the parties and the courts below have apparently assumed that it ran consecutively and that, on February 12, the suspension was extended from February 22 to March 4.

trial court's first nunc pro tunc order, however, stated that the 30-day suspension ran "consecutive to the suspension memorialized in this Court's order of January 23, 2013." J.A. at 68.[4] Under that nunc pro tunc order, the temporary suspension expired on March 25, 2013.

At the April 15, 2013 hearing, the trial court continued the case to May 30 but did not couple the continuance with an order further extending the suspension. The written order entered on April 22, 2013, stated only that the case was continued, and the period of the continuance was expressly set for 45 days, from April 15 to May 30, 2013.

A year later, in April 2014, the trial court entered a nunc pro tunc order identifying a "clerical error" in the continuance order entered on April 22, 2013. The "clerical error," however, was not clerical at all. This second nunc pro tunc order added a new provision that "suspended" the final sentencing order "for an

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[4] At a hearing on February 21, 2013, the trial court responded to counsel's request for an additional suspension order and stated, "I'll extend that for 30 days." J.A. at 121. The trial court's written order reflecting that extension, however, was not entered until March 27, and it included language that the suspension would run "consecutive to the suspension memorialized in this Court's order of January 23, 2013." Id. at 51. On April 14, 2014, the trial court entered a correction to the date of the March 27 suspension order, to be effective nunc pro tunc on February 21, 2013. This first nunc pro tunc order maintained the language that the 30-day suspension ran "consecutive to" the January 23 order and is not challenged on appeal. In effect, the running of the 30-day suspension as consecutive to the January 23 order, rather than to the February 12 order, means that the February 12 order is either disregarded or considered to have run concurrently with the January 23 order.

additional SIXTY (60) DAYS, running consecutive to the suspension memorialized in this Court's order of January 23, 2013." J.A. at 69. This 60-day suspension was backdated to April 15, 2013 (the date of the hearing) rather than April 22, 2013 (the date of the order being amended nunc pro tunc).

II.

Although the narrative of this case is convoluted, the legal principles are clear. In Virginia, the function of a nunc pro tunc order is to make the record speak the truth about "judicial action which has actually been taken." Davis v. Mullins, 251 Va. 141, 149, 466 S.E.2d 90, 94 (1996) (quoting Council v. Commonwealth, 198 Va. 288, 292, 94 S.E.2d 245, 248 (1956)). The governing burden of proof requires "clear and convincing" and "most conclusive" evidence establishing "beyond all doubt" that such earlier judicial action was actually taken. Council, 198 Va. at 293, 94 S.E.2d at 248 (citation omitted).

The power to correct a clerical error does not include an after-the-fact "power to create" judicial action that the trial judge earlier meant to take, forgot to take, or should have taken. Id. at 292, 94 S.E.2d at 248. Plainly put, a nunc pro tunc order cannot employ "a fiction to antedate the actual performance of an act which never occurred, to represent an event as occurring at a date prior to the time of the actual event, 'or to make the record show that which never existed.'" Id. at 293, 94 S.E.2d at 248 (citation omitted).[5]

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[5] See also Kent Sinclair & Leigh B. Middleditch, Virginia Civil Procedure § 14.2[C], at 1176 (6th ed. 2014) (noting that under this

Because the new 60-day suspension was the only change the trial court made with its nunc pro tunc order, we have only two questions to answer: Did the trial court ever issue a 60-day suspension consecutive to the 30-day suspension in its January 23, 2013 order? And, if so, did the court simply fail, due to some inexplicable clerical error, to enter an order providing for this 60-day extension?

The evidence is neither clear nor convincing that the trial court, in April 2013, issued (either orally or in writing) a 60-day suspension of the final judgment, running from an earlier suspension order entered on January 23, 2013. What it issued was a 45-day continuance order for the proceedings, running from the April 15, 2013 hearing. The 60-day suspension order was never previously mentioned in the trial court by anyone, at any time, in any context. Rather, it was created a year later in the nunc pro tunc order. This fact alone is dispositive. Under settled nunc pro tunc principles, the trial court simply had no authority to backdate a judicial decision that it never made.

III.

The Court justifies its uncharacteristic misapplication of nunc pro tunc principles by admonishing that we should not "elevate form over substance and violate the justice this Court strives to achieve." Ante at 9. At one level, this abstraction is high wisdom

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Court's holding in Morgan v. Russrand Triangle Assocs., 270 Va. 21, 26, 613 S.E.2d 589, 591 (2005), a nunc pro tunc order cannot be "inconsistent with the affirmative acts of the trial court and counsel" and must "conform the record to reflect what actually took place in the trial court").

forged by the great chancellors of the past. When overused, however, it becomes little more than a cliché. If "form" means legal principles that draw clear, predictable boundaries, and "substance" simply means selectively ignoring those boundaries, I do not see the justice in it at all.

This is no pedantic debate. Taking the form-over-substance rhetoric too far jeopardizes the concept of neutrality — not of the judge as the decisionmaker, but of the law as the rule of decision. No competitive contest takes place without time limits, boundaries, and predetermined methods of recording the score. The existence of these rules is a truism we accept as inherent in the adversarial process.

Truly neutral procedural rules allow courts to set limits and mark off boundaries without regard to which side stands to gain or lose. The official clock stops at the appointed moment no matter which side has the higher score. And wherever the out-of-bounds lines have been marked, there they remain wholly immovable regardless of who steps over them.[6]

This is as it should be, for procedural rules lose their legitimacy the moment they lose their neutrality. Selectively suspending procedural rules in the hope of achieving some abstract

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[6] I have no doubt that some procedural default principles may need to be recalibrated, either more tightly or loosely, to better balance the equities of particular forms of waiver. But whether that is true or not, this much is certain: No procedural default principle has ever produced even the slightest injustice to litigants who know the principles well enough to stay out of trouble. The benign goal of procedural default law, therefore, is to render itself harmless by being so well known.

notion of as-applied fairness in every case ends up devolving into an ad hoc exercise of subjective justice and places our sometimes conscious, sometimes not, result-oriented predispositions into open conflict with neutral principles of law. As Blackstone warned, "the liberty of considering all cases in an equitable light must not be indulged too far, lest thereby we destroy all law, and leave the decision of every question entirely in the breast of the judge." 1 William Blackstone, Commentaries *62.

But there are other, equally compelling reasons to apply procedural principles in a predictable manner. When courts apply procedural rules dispassionately and neutrally to every litigant, every lawyer, and every case — without even a hint of partiality — everyone else knows exactly what is expected of them and, hopefully, will rise to the occasion. After all, there is little point in having procedural rules "if they amount to nothing more than a juristic bluff — obeyed faithfully by conscientious litigants, but ignored at will by those willing to run the risk of unpredictable enforcement." Rahnema v. Rahnema, 47 Va. App. 645, 658, 626 S.E.2d 448, 455 (2006).

Similar incentives and disincentives impact trial courts. In Virginia, a trial court's nunc pro tunc power historically has been curbed by a clearly marked boundary: "A nunc pro tunc order cannot be used to pretend that [an] order was made earlier than it actually was." W. Hamilton Bryson, Virginia Civil Procedure § 1A[2] (4th ed. 2005).

The nunc pro tunc order in this case crossed that boundary by pretending the trial court did a judicial act a year earlier that in fact never happened. If this aberrant practice ever became the

norm, litigants would be forever uncertain of when, and sometimes if, their rights and liabilities had been securely declared by the courts. This would be the unnerving, inevitable consequence of allowing a loose form-over-substance platitude to displace traditional legal principles governing nunc pro tunc orders.

IV.

In sum, I join in the result, but not the reasoning, of the Court's unpublished, per curiam order affirming the Court of Appeals.

A Copy,

Teste: Patricia L Harrington

Clerk