Filing # 82149523 E-Filed 12/14/2018 03:07:08 PM

RECEIVED, 12/14/2018 03:08:25 PM, Clerk, Supreme Court

IN THE SUPREME COURT OF FLORIDA

STATE OF FLORIDA,

Petitioner,

v.

VERNSON EDWARD DORTCH,

Respondent.

Case No. SC18-681
4th DCA Case Nos. 4D16-2815, 4D16-2816

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PETITIONER'S REPLY BRIEF

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PRELIMINARY STATEMENT

Petitioner was the prosecution and Respondent was the defendant in the Criminal Division of the Circuit Court of the Nineteenth Judicial Circuit, in and for Okeechobee County, Florida.

In this brief, the parties will be referred to as they appear before this Honorable Court, except that the Petitioner may also be referred to as the State.

The following symbols will be used:

R1 = Record on Appeal for case 4D16-2815 and 4D16-2816

R2 = Supplement filed November 9, 2016

R3 = Record on Appeal from Fourth District Court

STATEMENT OF THE CASE

Petitioner relies upon the statement of the case presented in the initial brief.

STATEMENT OF THE FACTS

Petitioner relies upon the statement of the facts presented in the initial brief.

SUMMARY OF THE ARGUMENT

The Fourth District Court of Appeal erred in finding fundamental error for a procedural error without allowing the trial court to develop the record. Such a finding was incorrect and undermined the avenue to appeal the voluntary and intelligent nature of a plea set forth by this Court in *Robinson v. State* and codified in Florida Rule of Appellate Procedure 9.140. Instead of making a premature finding of fundamental error, the Fourth District Court should have relinquished jurisdiction for the trial court to develop the record to determine the nature of any error.

ARGUMENT

THE FOURTH DISTRICT COURT OF APPEAL ERRED IN FINDING FUNDAMENTAL ERROR WITHOUT ALLOWING THE TRIAL COURT TO DEVELOP THE RECORD.

The circumstance of Respondent's plea limited the appellate record as to why the trial court failed to conduct a competency hearing requiring a motion to withdraw plea to properly develop the record. Thus, Respondent's analysis is faulty because (1) the Fourth District Court's finding of fundamental error is for a procedural error; (2) relinquishment of jurisdiction is the proper remedy in Respondent's case; (3) defense counsel failed to obtain a ruling on the competency motion; and (4) competency is not independent of voluntariness for the purposes of a plea; this Court has provided means for challenging the voluntary and understanding nature of a plea. In making the above arguments, Respondent relies heavily on *State v. T.G.*, 800 So. 2d 204 (Fla. 2001).

In *T.G.*, a juvenile defendant pled no contest without counsel. *Id*. at 211. Although the defendant stated he did not want counsel, the trial court failed to conduct a thorough inquiry to see if the defendant freely and intelligently waived his right to counsel. *Id.* In remanding the case, this Court held:

> We conclude that the policy underlying *Robinson* that requires a motion to withdraw the plea to be filed before challenging the validity of the plea is not served where a juvenile enters into a guilty plea without the benefit of counsel and the juvenile has not knowingly and

> intelligently waived the right to counsel.

Id. at 212. This Court continued,

> We again emphasize that in all other cases involving a challenge to the voluntariness of the plea, including those cases where the appellate court cannot determine the voluntariness of the waiver from the face of the record, the procedure of *Robinson* should be followed.

Id.

In his reliance on *T.G.*, Respondent fails to acknowledge two main distinguishing principles, *T.G.* involved a juvenile without counsel, and the record in the present matter is devoid of what occurred between the motion for competency and the plea hearing. (R-Index). In the present matter, Respondent was present with counsel throughout the trial proceedings. Moreover, requiring a motion to withdraw plea or relinquishing jurisdiction would allow the trial court to properly develop the record for the appellate process. As this Court stated in *T.G.*, the procedure of *Robinson* should be followed in all cases where the appellate court cannot determine the voluntariness of the waiver from the face of the record. *T.G.*, 800 So. 2d at 212. The lack of a record and the unknown nature of the error are essential in addressing the remainder of Respondent's arguments.

First, Respondent states that the error of the trial court is fundamental because a defendant has a right to a fair trial under the due process clause which includes the right to be competent at all critical stages. However, although

Respondent's assertion is correct, it blurs the line between procedure and a substantive determination of competency. *See Fowler v. State*, 255 So. 2d 513, 515 (Fla. 1971) (holding "our finding [that the trial court's procedure was inadequate] does not require vacation of the judgment and sentence entered against defendant at this time" and relinquishing jurisdiction for the trial court to conduct a competency hearing). The Fourth District Court's holding that the failure to hold a competency hearing is fundamental ignores the simple fact that that Respondent may be found competent at all critical stages of the case. *See Mason v. State*, 597 So. 2d 776, 778 (Fla. 1992) ("In light of quantity and quality of this evidence, we find that due process was not violated by the nunc pro tunc competency determination."). In Respondent's circumstance, the record on appeal is incomplete as to competency. (R1-Index). Hence, the very nature of the error is unknown until the retroactive determination of competency hearing occurs. A hearing may correct the error of the trial court. *See Thomas v. Cunnignham*, 313 F.2d 934, 938 (4th Cir. 1963) (stating "[p]rocedural due process requires that a state shall afford [the defendant] [an] adequate opportunity to raise the issue" of mental competency in order to ensure a defendant's right to a fair trial.). Whether the procedural error reaches into the validity of the trial itself to the extent that a verdict of guilty could not have been obtained without the assistance of the alleged error is unknown and the error cannot be fundamental until the hearing occurs.

Second, Respondent states that his only avenue of relief is through post-conviction should this Court require a motion to withdraw plea. However, Respondent undermines relinquishment, as is the practice of the Second District Court and this Court, to effectively eliminate the possibility of a defendant without relief or being left to post-conviction court. *See Carrion v. State*, 235 So. 3d 1051 (Fla. 2d DCA 2018) (*citing Fowler v. State*, 255 So. 2d 513 (Fla. 1971)). The relinquishment practice of this Court was set forth in *Fowler*, 255 So. 2d at 513. In *Fowler*, this Court discussed the proper way for an appellate court to treat the lack of a competency hearing following a finding of reasonable grounds in a trial court:

> [W]here, as here, there are reasonable grounds to believe defendant insane, [a]nd defense counsel requests a hearing, it is error not to provide such a hearing. *However, our finding in this regard does not require vacation of the judgment and sentence entered against defendant at this time. Knight v. State*, 164 So.2d 229 (Fla.App.3rd, 1964); *United States v. Walker*, 301 F.2d 211 (6 Cir. 1962). Instead, the cause is temporarily remanded to the Circuit Court of Pinellas County with directions that the claim of insanity at the time of trial be determined in a full hearing as required by CrPR 1.210(a). If upon such hearing the trial Court determines that the defendant was sane at the time of trial, the Court is ordered to forthwith transmit the entire record of the case, including a transcript of the sanity hearing, and a copy of the trial judge's order finding defendant sane, back to this Court. At such time we will consider defendant's remaining points on appeal as raised by the briefs and argument previously submitted to the Court. We decline to adjudicate defendant's remaining contentions at this time because a finding of insanity at the time of trial would invalidate the entire trial

> proceeding and thereby render defendant's remaining arguments moot.

Fowler, 255 So. 2d at 515 (*emphasis added*). Not only does this practice make practical sense, but it also makes logical sense as more information is needed to determine the very nature of the error committed by the trial court. Accordingly, requiring a motion to withdraw plea and using relinquishment to provide a means relief is the correct practice of this Court. The Fourth District's decision was error.

Third, although Respondent notes the trial courts are responsible for the ultimate error; Respondent neglected to obtain a ruling from the trial court for nine months prior to the plea, October 30, 2015 through August 3, 2016. (R1-20, R2-78). Respondent placed the language in his motion, "That the defendant hereby waives the required 20 day hearing, pursuant to Fla. R. Crim. P. 3.210(b)." (R1-30). "As a general rule, the failure of a party to get a timely ruling by a trial court constitutes a waiver of the matter for appellate purposes." *Rose v. State*, 787 So. 2d 786, 797 (Fla. 2001) Thus, it is unfair to totally penalize the trial court (and thereby Petitioner) for Respondent's lack of action. Requiring Respondent to file a motion to withdraw plea or to relinquish jurisdiction allows the trial court to correct the error with the least effect on either party to the action without rewarding a defendant for failing to obtain a ruling on a motion. *See Buggs v. State*, 640 So. 2d 90 (Fla.1st DCA 1994) (holding a party may not make an error at trial and then take advantage of the error on appeal).

Fourth, Respondent alleges that competency is separate from a finding that a plea was involuntary or unintelligent. However, Respondent's circumstance is no different than that of a typical defendant filing a motion to withdraw plea on grounds the plea was involuntary and unintelligent. After all, the lack of competency and lack of voluntariness encompass the same basic principles, whether the defendant actually understands the charges and what is occurring during the trial proceedings. *See Henderson v. Morgan*, 426 U.S. 637, 645 n. 13 (1976) ("[a] plea may be involuntary either because the accused does not understand the nature of the constitutional protections that he is waiving, or because he has such an incomplete understanding of the charge that his plea cannot stand as an intelligent admission of guilt."); *Peede v. State*, 955 So. 2d 480, 488 (Fla. 2007) (holding a competency determination is "whether [the defendant] has sufficient present ability to consult with [the defendant's] lawyer with a reasonable degree of rational understanding—and whether [the defendant] has a rational as well as factual understanding of the proceedings against [the defendant]."). The Fourth District is attempting to circumvent the requirements this Court has set forth for challenging the voluntary and intelligent requirement which a defendant may raise on appeal from a guilty or no contest plea. *See Robinson v. State*, 373 So.2d 898, 902 (Fla. 1979) (holding the voluntary and intelligent nature of a plea may be challenged after specifically reserving the right to do so through a motion

to withdraw plea.); *Hicks v. State*, 915 So. 2d 740 (Fla. 5th DCA 2005) (holding failure to hold a competency hearing falls within the voluntary and intelligent nature of a plea which must be preserved by a motion to withdraw plea); *Vestal v. State*, 50 So. 3d 733, 735 (Fla. 5th DCA 2010) (stating defendant's alleged incompetency at the time of entry of guilty or no contest plea is an issue bearing upon the voluntariness of defendant's plea and may not be raised on appeal where no motion to withdraw plea has been filed with trial court).

In conclusion, as stated in the initial brief, this Court should adopt a hybrid of the Second, Third, and Fifth District Court's holdings requiring Respondent to file a motion to withdraw plea, or, if left with no remedy, relinquish jurisdiction from the district court for the trial court to conduct a competency hearing. The suggested hybrid allows the trial court to quickly and efficiently correct a possible error while at the same time providing a proper avenue for Respondent that is not a post-conviction proceeding and is consistent with prior holdings of this Court.

CONCLUSION

WHEREFORE based on the foregoing arguments and authorities, Petitioner respectfully requests this Honorable Court to reverse the decision of the Fourth District Court of Appeal.

Respectfully submitted,

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CERTIFICATE OF TYPEFACE COMPLIANCE AND SERVICE

I HEREBY CERTIFY (1) that this brief has been prepared in Times New Roman font, 14 point, and double spaced and (2) that a true and accurate copy of the foregoing was sent by email to Benjamin Eisenberg, Esq., Assistant Public Defender, 421 Third Street, West Palm Beach, Florida 333401 at beisenberg@pd15.state.fl.us, gztaylor@pd15.state.fl.us, appeals@pd15.org on December 14, 2018.

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