IN THE SUPREME COURT OF THE STATE OF FLORIDA
CASE NO. SC18-681
Lower Court Case Nos: 4D16-2815 & 16-2816

STATE OF FLORIDA,)
)
Petitioner,)
)
vs.)
)
VERNSON EDWARD DORTCH,)
)
Respondent.)
)
)

RESPONDENT'S BRIEF ON JURISDICTION

On Discretionary Review From a Decision
of the Fourth District Court of Appeal

CAREY HAUGHWOUT
Public Defender
Fifteenth Judicial Circuit
421 Third Street
West Palm Beach, Florida 33401
(561) 355-7600

Benjamin Eisenberg
Assistant Public Defender
Florida Bar No. 0100538
beisenberg@pd15.state.fl.us
appeals@pd15.org

Attorney for Respondent

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases

Other Authorities

Rules

Constitutional Provisions

STATEMENT OF THE CASE AND FACTS

Respondent[1] accepts Petitioner's statement of the case and facts.

SUMMARY OF THE ARGUMENT

Contrary to the certification, the Fourth District Court of Appeal's opinion in this case does not conflict with the First District's decision in *Pressley v. State*, 227 So. 3d 573 (Fla. 1st DCA 2017), or the Third District's decision in *Garcia-Manriquez v. State*, 146 So. 3d 134 (Fla. 3d DCA 2014). Although the instant case does conflict with the Fifth District's decision in *Hicks v. State*, 915 So. 2d 740 (Fla. 5th DCA 2005), this Court should decline to exercise its discretionary jurisdiction under article V, section 3(b)(4) of the Florida Constitution.

In the past year, the First, Second, and Fourth Districts have held that a trial court's failure to comply with Florida Rule of Criminal Procedure 3.210(b) while accepting a plea constitutes fundamental error. *See Sheheane v. State*, 228 So. 3d 1178 (Fla. 1st DCA 2017); *Carrion v. State*, 235 So. 3d 1051 (Fla. 2d DCA 2018); *Dortch v. State*, 4D16-2815, 2018 WL 1617082 (Fla. 4th DCA Apr. 4, 2018). Given that more than a decade has passed since *Hicks* was decided, this Court should provide the Fifth District the opportunity to clarify its legal position in light of these more recent decisions and *Dougherty v. State*, 149 So. 3d 672 (Fla. 2014).

[1] Petitioner was the Appellee in the Fourth District Court of Appeal and the prosecution in the lower tribunal. Respondent, Vernson Edward Dortch, was the respondent and the defendant, respectively.

ARGUMENT

ALTHOUGH THE FOURTH DISTRICT COURT OF APPEAL CERTIFIED THAT THIS CASE IS IN CONFLICT WITH A DECISION OF ANOTHER DISTRICT COURT OF APPEAL, THIS COURT SHOULD NOT EXERCISE ITS DISCRETIONARY JURISDICTION UNDER ARTICLE V, SECTION 3(B)(4) OF THE FLORIDA CONSTITUTION

"One thing is certain: competency requires strict adherence to the Florida Rules of Criminal Procedure 3.210–212." *Dortch v. State*, 4D16-2815, 2018 WL 1617082, at *1 (Fla. 4th DCA Apr. 4, 2018). Such a notion was cemented in *Dougherty v. State*, 149 So. 3d 672, 677 (Fla. 2014), when this Court held that the provisions of Rule 3.210(b)—including the competency hearing and judicial adjudication of competency—are mandatory. *See also Williams v. State*, 169 So.3d 221, 223 (Fla. 2d DCA 2015) ("Under the plain language of rule 3.210(b), the terms 'shall' and 'immediately' reflect that a hearing is mandatory.").

There is no dispute that, in the instant case, the trial court failed in its obligations under Rule 3.210(b) by ordering an evaluation of Mr. Dortch's competency but then accepting his plea without conducting a competency hearing or making a competency determination. Had Mr. Dortch proceeded to trial, every district court of appeal would agree that the trial court's procedural missteps comprised fundamental error. *See, e.g., Sheheane v. State*, 228 So. 3d 1178 (Fla. 1st DCA 2017); *Carrion v. State*, 235 So. 3d 1051 (Fla. 2d DCA 2018); *Rodriguez*

v. State, 112 So. 3d 618 (Fla. 3d DCA 2013); *Baker v. State*, 221 So. 3d 637 (Fla. 4th DCA 2017); *Lewinson v. State*, 230 So. 3d 901 (Fla. 5th DCA 2017).

The wrinkle in this case is that Mr. Dortch entered into an open plea. Because Mr. Dortch—who may have been and may still be incompetent—did not move to withdraw his plea, the State seeks to have his conviction affirmed. Such position would, as the Fourth District explained, lead to unjust consequences:

> To require a criminal defendant, who may be incompetent, to file a motion to withdraw a plea before raising the issue on appeal is unwarranted. If a defendant is incompetent, confining him to post-conviction relief, without the assistance of counsel, is not a remedy designed to do justice.

Dortch, 4D16-2815, 2018 WL 1617082, at *2.

Mr. Dortch acknowledges the opinion in his case was certified to be in conflict with a decision of another district court of appeal, providing this Court with jurisdiction under article V, section 3(b)(4) of the Florida Constitution. In its opinion, the Fourth District certified conflict with *Pressley v. State*, 227 So. 3d 573 (Fla. 1st DCA 2017); *Garcia-Manriquez v.* State, 146 So. 3d 134 (Fla. 3d DCA 2014); and *Hicks v. State*, 915 So. 2d 740, 741 (Fla. 5th DCA 2005).

However, jurisdiction under article V, section 3(b)(4) is discretionary and, given the current legal landscape, this Court should decline to exercise discretion to review this case for a few reasons. First, the instant opinion does not expressly conflict with the First District's decision in *Pressley* or the Third District's

decision in *Garcia-Manriquez.* Second, to the degree *Hicks* presents conflict, this Court should provide the Fifth District an opportunity to reconsider the issue in light of the instant case and this Court's decision in *Dougherty*.

Legal Backdrop

The instant case concerns whether the trial court's failure to comply with Rule 3.210(b) can be raised on direct appeal from a plea. As a general rule, "[o]nce a defendant enters a plea of guilty, the only points available for an appeal concern actions which took place contemporaneously with the plea." *Robinson v. State*, 373 So. 2d 898, 902 (Fla. 1979). Accordingly, Florida Rule of Criminal Procedure 9.140(b)(2)(A)(ii) provides that a defendant who pleads guilty or no contest "may otherwise directly appeal only (a) the lower tribunal's lack of subject matter jurisdiction; (b) a violation of the plea agreement, if preserved by motion to withdraw; (c) an involuntary plea, if preserved by a motion to withdraw plea; (d) a sentencing error, if preserved, or (e) as otherwise provided by law."

The last exception—"as otherwise provided by law"—is a catchall provision that "leaves open the possibility that there may be a statutory or constitutional right to appeal in circumstances not specifically listed in the rule." Phillip J. Padavano, 2 *Florida Appellate Practice* § 27:16 (2017 ed.). Typically, this exception has been applied in situations of fundamental error, such as where a plea violates double

jeopardy[2] or where the record affirmatively demonstrates the crime to which the defendant pled guilty could not have occurred.[3] The question is whether a trial court's failure to comply with Rule 3.210(b)—which all district courts agree is fundamental error when a defendant proceeds to trial—falls within this exception.

I. The First District Court of Appeal

Viewing the issue through this prism and turning to the certified conflict, the First District Court of Appeal 's decision in *Pressley v. State*, 227 So. 3d 573 (Fla. 1st DCA 2017), comprises one sentence that provides in full as follows:

> In this Anders appeal in which appellant's competency due to intellectual disability was at issue during the entire proceedings—a matter unpreserved by counsel as dispositive prior to entry of the plea—we affirm the judgment and sentence but without prejudice to the appellant's opportunity to file a rule 3.850 motion to challenge his plea as involuntary. See Williams v. State, 134 So.3d 975, 977 (Fla. 1st DCA 2012) (Benton, J., concurring).

Id. (footnote omitted). From the opinion, it is unclear whether the issue trial counsel failed to preserve as dispositive involved the trial court's failure to comply with Rule 3.210(b). Therefore, *Pressley* is distinguishable and not in conflict.

---

[2] *See Kilmartin v. State*, 848 So. 2d 1222, 1224 (Fla. 1st DCA 2003); *see also Griffith v. State*, 208 So. 3d 1208 (Fla. 5th DCA 2017); *Holubek v. State*, 173 So. 3d 1114, 1116 (Fla. 5th DCA 2015); *Hernandez v. State*, 112 So. 3d 572 (Fla. 4th DCA 2013); *Bailey v. State*, 21 So. 3d 147 (Fla. 5th DCA 2009); *Sibley v. State*, 955 So. 2d 1222, 1225 (Fla. 5th DCA 2007).

[3] *See Miller v. State*, 988 So. 2d 138 (Fla. 1st DCA 2008); *Bruce v. State*, 993 So. 2d 155, 156 (Fla. 1st DCA 2008).

That there is no conflict was demonstrated by the First District's more recent decision in *Sheheane v. State*, 228 So. 3d 1178 (Fla. 1st DCA 2017), which issued four months after *Pressley*. In *Sheheane*, defense counsel requested a competency evaluation during violation of probation proceedings. 228 So. 3d at 1179. The trial court ordered a competency evaluation, but failed to conduct a hearing. *Id.* Thereafter, the defendant entered an open plea to the probation violations. *Id.* During the colloquy, defense counsel stated his belief that the defendant was competent based upon the evaluations and agreed to waive a hearing and judicial determination of competency. *Id.* "[T]here [wa]s no indication that the trial judge had the competency evaluations; and the evaluators were not present." *Id.*

Although the defendant never moved to withdraw his plea, the First District held that neither the procedures of Rule 3.210 nor the adjudication of competency could be waived. *Id.* at 1180. Because "[t]he nature of competency goes to the heart of whether a defendant has the capacity to make a cogent, legally binding decision," the First District held the case presented "a denial of due process, resulting in a fundamental error that require[d the appellate court's] intervention despite [the defendant's] failure to preserve it below." *Id.* at 1181.

The First District's holding in *Sheheane* is entirely consistent with the Fourth District's analysis in the instant case. Clearly, the First District does not view *Sheheane* as being in conflict with *Pressley*, as the latter was neither cited nor

addressed. However, even if there is an internal conflict, the First District will need to proceed en banc to resolve the impasse, just as the Fourth District did in this case. At most, this Court should allow the First District to clarify its legal stance.

II. The Third District Court of Appeal

Although conflict was certified, the Third District's decision in *Garcia-Manriquez v. State*, 146 So. 3d 134 (Fla. 3d DCA 2014), is distinguishable from the instant case because it neither involved competency nor compliance with Rule 3.210(b). In *Garcia-Manriquez*, the defendant argued on direct appeal "that the [trial court] erred in accepting a plea with which he did not entirely agree." *Id.* In other words, the defendant asserted that his plea was involuntary. "Because the issue was not presented to the trial court in a timely motion to withdraw his plea," the Third District held it was "without jurisdiction to consider this claim . . . . " *Id.*

Mr. Dortch does not dispute the general principle that a motion to withdraw plea is a prerequisite to any challenge to the voluntariness of a plea on appeal. *See Velez v. State*, 725 So. 2d 1280 (Fla. 4th DCA 1999). However, a defendant's competency is distinct from the issue of voluntariness. To be incompetent means that the defendant lacks a "sufficient present ability to consult with his lawyer with a reasonable degree of rational understanding-and whether he has a rational as well as factual understanding of the proceedings against him." *Hill v. State*, 473 So. 2d 1253, 1257 (Fla. 1985). And "[t]o hold criminal proceedings against a mentally

incompetent defendant denies that defendant his constitutional right to a fair trial." *Mairena v. State*, 6 So. 3d 80, 85 (Fla. 5th DCA 2009) (citations omitted).

For jurisdictional purposes, "'[c]onflict between decisions must be express and direct, i.e., it must appear within the four corners of the majority decision.' In other words, inherent or so called 'implied' conflict may no longer serve as a basis for this Court's jurisdiction." *State, Department of Health v. National Adoption Counseling Service, Inc.*, 498 So. 2d 888, 889 (Fla. 1986) (quoting *Reaves v. State*, 485 So. 2d 829, 830 (Fla. 1986)). Until the Third District equates a defendant's lack of competency to the voluntariness of a plea, there is no direct conflict.

III. The Fifth District Court of Appeal

Mr. Dortch concedes the instant case is in conflict with the Fifth District's decision in *Hicks v. State*, 915 So. 2d 740 (Fla. 5th DCA 2005). There, the defendant argued on direct appeal that "the trial court erred by failing to hold a competency hearing prior to accepting his plea." *Id.* at 741. "Because the issue was not presented to the trial court in a timely motion to withdraw . . . plea," the Fifth District held it lacked jurisdiction to consider the defendant's claim. *Id.* This was because, accordingly to the Fifth District, "[a] defendant's competency at the time he enters a guilty or no contest plea is an issue bearing upon the voluntary and intelligent character of the defendant's plea." *Id.* (citation omitted).

In reaching this result, the Fifth District explained that, "[f]ollowing a guilty or no contest plea, a defendant may appeal only the trial court's lack of subject matter jurisdiction; a violation of a plea agreement, if preserved by a motion to withdraw the plea; an involuntary plea, if preserved by a motion to withdraw the plea; and a sentenced error, if preserved." *Id.* (citations omitted). Curiously, the opinion omits the catchall provision of Rule 9.140(b)(2)(A)(ii), which allows defendants on direct appeal to raise issues "as otherwise provided by law."

While the Fifth District has not receded from *Hicks*, its moorings have been destabilized. In *Vestal v. State*, 50 So. 3d 733 (Fla. 5th DCA 2010), the trial court entered an order to determine the defendant's competency but failed to hold a competency hearing or make a competency determination. The Fifth District relied upon *Hicks* to hold that it lacked jurisdiction to consider the defendant's arguments related to the plea. *Id.* at 734-35. However, the court agreed with the defendant "that the trial court erred in proceeding with [his] sentencing hearing." *Id.* at 735.

Of equal importance is that the Fifth District has not been called upon to revisit *Hicks* since this Court decided *Dougherty v. State*, 149 So. 3d 672 (Fla. 2014).[4] In *Dougherty*, this Court quashed a Fifth District opinion that held a

[4] In *Murphy v. State*, 181 So. 3d 574 (Fla. 5th DCA 2015), the Fifth District dismissed an appeal from a plea where the defendant argued, among other things, he "was incompetent to enter a plea." However, it is uncertain from the opinion whether the trial court had invoked Rule 3.210(b).

defendant could stipulate to his competency. In so ruling, this Court emphasized the mandatory nature of Rule 3.210 and the necessity of strict adherence.

CONCLUSION

There are times where "you don't need to be a weatherman to know which way the legal wind blows." *McGraw v. State*, 44 Fla. L. Weekly D618 (Fla. 4th DCA Mar. 21, 2018) (Gross, J., concurring in part and dissenting in part). In the past year, the First, Second, and Fourth Districts have held that a trial court's failure to comply with Rule 3.210(b) while accepting a plea comprises fundamental error. *See Sheheane*, 228 So. 3d 1178; *Carrion v. State*, 235 So. 3d 1051, 1053-54 (Fla. 2d DCA 2018); *Dortch*, 4D16-2815, 2018 WL 1617082. Clearly, within the spectrum of Florida jurisprudence, fundamental error for failure to conduct a competency hearing is the current legal trend.

At present, only the Fifth District in *Hicks* has expressly declined relief under circumstances identical to the present. However, *Hicks* was decided years before this Court's opinion in *Dougherty* and more than a decade before the instant case. Time and developments in the law can change legal perspectives. This Court should provide the Fifth District the opportunity—in light of the instant opinion and *Dougherty*–to clarify its legal position to discern whether it will remain in conflict. For these reasons, Petitioner requests that this Court exercise its discretion and decline jurisdiction of this cause for review.

CERTIFICATE OF FONT

I certify that this brief was prepared with 14 point Times New Roman type in compliance with Florida Rule of Appellate Procedure 9.210(a)(2).

/s/ BENJAMIN EISENBERG
BENJAMIN EISENBERG

CERTIFICATE OF SERVICE

I certify that this brief was electronically filed with this Court and served to Joseph Coronato, Assistant Attorney General, Office of the Attorney General, Ninth Floor, 1515 N. Flagler Drive, West Palm Beach, Florida 33401-3432, by e-service at CrimAppWPB@MyFloridaLegal.com this 4th day of June, 2018.

/s/ BENJAMIN EISENBERG
BENJAMIN EISENBERG