FIRST DISTRICT COURT OF APPEAL
STATE OF FLORIDA

No. 1D19-1106

KYLE DEVIN PEARCE,

Appellant,

v.

STATE OF FLORIDA,

Appellee.

On appeal from the Circuit Court for Santa Rosa County.
Ross M. Goodman, Judge.

December 31, 2020

PER CURIAM.

Following a jury trial, Appellant was convicted and sentenced for sexual battery of a person under twelve years of age, and lewd and lascivious molestation of a person under twelve years of age. On direct appeal, this Court reversed and remanded for a retroactive determination of competency, if possible, and a new trial if a retroactive determination was not possible. *Pearce v. State*, 250 So. 3d 791, 792 (Fla. 1st DCA 2018).

On remand, the trial court retroactively found Appellant competent to proceed at the time of his trial, but it ordered another competency evaluation before proceeding to resentencing. Although the trial court orally found Appellant competent to

proceed before resentencing, it failed to enter a written order on its competency determination.

Appellant's sole argument in this appeal is that the trial court erred by failing to memorialize in writing its oral finding that Appellant was competent to proceed at his resentencing. In its answer brief, the State initially conceded that the trial court failed to enter a written order and that remand for entry of a written order was required under well-established Florida law. ("Given the applicable rules and caselaw, the trial court's failure to enter a written order after conducting a hearing requires that the instant case be remanded with directions for the trial court to enter a nunc pro tunc written order adjudicating Appellant competent to proceed."). The State cited *Dougherty v. State*, 149 So. 3d 672 (Fla. 2014), and a number of cases requiring this result.

In the interim, our state supreme court in a capital case, *Santiago-Gonzalez v. State*, 301 So. 3d 157 (Fla. 2020), addressed whether remand for a written competency order is always required. The court stated the following:

> Santiago-Gonzalez asserts that his case must be remanded to the trial court for the entry of a written nunc pro tunc order finding him competent to proceed. Although this Court has read Florida Rule of Criminal Procedure 3.212(b) as requiring issuance of a written order of competency, *see Mullens v. State*, 197 So. 3d 16, 38 (Fla. 2016); *Dougherty v. State*, 149 So. 3d 672, 679 (Fla. 2014), ***the failure to enter a written order was not brought to the trial judge's attention and should therefore be remediable on appeal only if the failure constitutes fundamental error.*** *See, e.g.*, *Calloway v. State*, 210 So. 3d 1160, 1191 (Fla. 2017) ("Unpreserved errors ... are reviewed for fundamental error."). ***Given the trial court's oral competency finding in this case, which is fully supported by the record, Santiago-Gonzalez has not demonstrated fundamental error and is therefore not entitled to relief on this issue.*** *See id.* ("Fundamental error must amount to a denial of due process, and consequently, should [only] be found to apply where prejudice follows.").

Id. at 175 (emphasis added) (footnote omitted). As the emphasized portions of *Santiago-Gonzalez* demonstrate, the supreme court held that an unpreserved claim that a trial judge failed to enter a written order of competency is subject to fundamental error analysis, which requires a showing of a due process violation and prejudice. *Id.* We requested, and the parties have submitted, supplemental briefs addressing *Santiago-Gonzalez*.

As in *Santiago-Gonzalez*, Pearce did not bring the lack of a written competency order to the trial judge's attention; but he cites *Dougherty* for the proposition that the lack of a written order can be raised on appeal for the first time. *Dougherty* did not directly address the preservation question, however. Indeed, the supreme court in *Santiago-Gonzalez* noted that the question of preservation was not addressed in either of its opinions in *Mullins* and *Dougherty*:

> In *Mullens*, the Court did not address preservation, and therefore, did not discuss the applicability of the fundamental error standard of review. Similarly, in *Dougherty*, this Court did not address the fundamental error standard of review. Although unpreserved, Dougherty's claim that the trial court did not enter a written order of competency was procedurally barred because Dougherty did not raise the issue on direct appeal.

301 So. 3d at 175 n.5. Although Dougherty failed to preserve the issue of the lack of a written competency order, the majority—despite recognizing that it was not applying its "holding to the specific circumstances of his case"—nonetheless laid out in detail the specific procedures that should be followed due to the "importance of competency determinations to criminal proceedings." *Dougherty*, 149 So. 3d at 676; *see id.* at 680 ("The majority's discussion of the incompetency issue—which is the basis for our conflict jurisdiction—thus constitutes an abstract legal discussion that has no application to the case on review.") (Canady, J., dissenting).

We conclude, as in *Santiago-Gonzalez*, that an unpreserved claim that a trial judge has failed to enter a written order finding a criminal defendant competent to proceed is subject to fundamental error analysis. The record in this case reflects that the trial judge held a hearing, heard expert testimony on Pearce's competence, and received and reviewed reports before making a verbal ruling. Like the situation in *Santiago-Gonzalez*, we find that the trial judge's verbal findings as to Pearce's competency to be resentenced are fully supported by the record and that Pearce has not demonstrated either a due process violation or prejudice. He is thereby not entitled to relief on this issue as fundamental error has not been established.

AFFIRMED.

RAY, C.J., and MAKAR and NORDBY, JJ., concur.

Not final until disposition of any timely and authorized motion under Fla. R. App. P. 9.330 or 9.331.

Kathryn Lane, Assistant Public Defender, Tallahassee, for Appellant.

Ashley Moody, Attorney General, Steven Edward Woods, Assistant Attorney General, Tallahassee, for Appellee.