FIRST DISTRICT COURT OF APPEAL
STATE OF FLORIDA

No. 1D19-2562

ITANZHIA JARARIYAH-WALIYA
BOWIE,

Appellant,

v.

STATE OF FLORIDA,

Appellee.

On appeal from the Circuit Court for Duval County.
Bruce R. Anderson, Jr., Judge.

October 6, 2021

PER CURIAM.

AFFIRMED. *See State v. Dortch*, 317 So. 3d 1074, 1084 (Fla. 2021) (holding that for a defendant appealing a conviction based on alleged incompetency at his guilty plea, "there is no fundamental-error exception to the preservation requirement of rule 9.140(b)(2)(A)(ii)(c)"); *see also* Fla. R. App. P. 9.140(b)(2)(A)(ii)(c) (allowing appeal from "involuntary plea, *if preserved by a motion to withdraw plea*," as an exception to general preclusion against appeals from pleas (emphasis supplied)).

ROWE, C.J., and TANENBAUM, J., concur; MAKAR, J., concurs with opinion.

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

MAKAR, J., concurring.

In November 2019, appointed appellate counsel for Itanzhia Jarariyah-Waliya Bowie initially filed an *Anders* brief, saying that no good faith errors existed, but was subsequently ordered sua sponte by this Court to address the following question: "Whether the trial court erred by not holding a competency hearing and making an independent finding as to Appellant's competency to proceed." *See State v. Causey*, 503 So. 2d 321 (Fla. 1987).

In response, Bowie's counsel filed a supplemental brief positing that fundamental error—one that can be raised for the first time on appeal (in this case by this Court)—occurred because the trial court did not "hold a competency hearing, make an independent determination of competency, and issue a written order of its findings . . . before the trial court accepted Ms. Bowie's plea." The State's answer brief countered that the record lacked a sufficient factual basis for the trial court to have been required to conduct competency proceedings; alternatively, a remand for a nunc pro tunc competency order was necessitated.

On the record presented, it is a close question whether fundamental error occurred. Both Bowie's counsel and the trial judge were aware that Bowie had mental health issues necessitating a range of medications, and that her mental health had deteriorated to the point that a competency issue became obvious, which was first mentioned in her motion to withdraw her guilty plea. Bowie's motion explicitly says that "[b]ased on the foregoing [recitation of prescription drugs that Bowie failed to take before the plea hearing] and a conference Counsel had with [Bowie] on July 15, 2018, Undersigned *has serious concerns about* [*Bowie's*] *competence to proceed*." (Emphasis added). The trial court, on the basis of Bowie's motion and its concern about her competency, ordered that her plea be withdrawn, *noting that the*

"State stipulates" to this relief. (Emphasis added). Less than a week later, Bowie moved for a psychological examination, which the trial judge granted the following day.

The record does not reflect the results of the psychological examination or what role it may have played. Bowie subsequently pled guilty to charges in an amended information; neither Bowie nor her counsel mentioned or raised concerns about Bowie's competence at sentencing when Bowie averred that she was not taking medications affecting her judgment and that she was not suffering from any physical, mental, or emotional condition that interfered with her judgment.

Given a competency issue was raised that resulted in the trial court's grant of Bowie's motion to withdraw guilty plea, and that a psychological evaluation was requested and granted, the question of competency deserved a final determination even though Bowie and her counsel did not raise it at sentencing. *Sheheane v. State*, 228 So. 3d 1178, 1179 (Fla. 1st DCA 2017) (holding that trial court must hold hearing on competency even if defendant "agreed to waive a hearing and judicial determination of competency" and had entered a "written plea agreement [that] reflected [his] agreement that he believed he was competent"); *see also Dortch v. State*, 242 So. 3d 431, 433 (Fla. 4th DCA 2018) ("Once a trial court has reasonable grounds to believe the defendant is incompetent and orders an examination, it must hold a hearing, and it must enter a written order on the issue. Failure to do so is fundamental error and requires reversal." (citation and footnote omitted)), *quashed*, *State v. Dortch*, 317 So. 3d 1074 (Fla. 2021).

Under these circumstances, where the trial court agreed to allow withdrawal of Bowie's plea based on mental health and competency issues, the State stipulated to withdrawal as proper, and a psychological examination was requested and judicially approved, precedent has allowed for a limited remand for a nunc pro tunc determination of competency to remove lingering doubt. *See, e.g.*, *Milton v. State*, 268 So. 3d 933, 934 (Fla. 1st DCA 2019) (remanding for nunc pro tunc determination as to plea where trial court "noted the evaluation ultimately found Milton competent to proceed" but did not formalize findings in written order); *Hicks v. State*, 288 So. 3d 782 (Fla. 1st DCA 2020) (finding of trial court's

fundamental error in not adjudicating defendant's competency and remanding for nunc pro tunc proceeding); *Walker v. State*, 279 So. 3d 1283 (Fla. 1st DCA 2019) (same).

During the pendency of this case, however, our supreme court by a four-three vote overturned the unanimous en banc decision of the Fourth District as well as decisions of all other districts that would have allowed for a limited remand where an unresolved issue of competency existed despite the defendant having not filed a motion to withdraw plea (here, Bowie's second guilty plea) and having to rely on the fundamental error doctrine. *Dortch*, 317 So. 3d at 1074.[1] In *Dortch*, the majority held that "there is no fundamental-error exception to the preservation requirement of [the rule of criminal procedure specifying what direct appeals are allowed from a guilty plea]," *id.* at 1084, thereby wiping clean the tote board of statewide precedents that would allow for remands for nunc pro tunc consideration of situations—such as Bowie's—where lingering and unresolved doubt exists about a criminal defendant's competency. Now, as the majority in *Dortch* notes, potentially valid but unpreserved claims of incompetency that previously were resolved in direct appeals will not be considered and, instead, are shifted to post-conviction/collateral proceedings, if they are considered at all. *Id.*; *see also id.* at 1086 ("The question is whether Dortch can seek relief on appeal. In my view, rule 3.210 [entitled 'Incompetence to Proceed: Procedure for Raising the Issue'] and the due process right it was adopted to protect are meaningless unless they can be enforced.") (Lawson, J., dissenting).

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[1] The Legislature's codification of the fundamental error doctrine in criminal cases was not addressed in *Dortch*. *See* § 924.051(3), Fla. Stat. (2021) ("An appeal may not be taken from a judgment or order of a trial court unless a prejudicial error is alleged and is properly preserved or, if not properly preserved, would constitute fundamental error. A judgment or sentence may be reversed on appeal only when an appellate court determines after a review of the complete record that prejudicial error occurred and was properly preserved in the trial court or, if not properly preserved, would constitute fundamental error.").

Dortch reflects the type of judicial policy choice that our supreme court makes whenever it adopts, revises, or (as here) interprets its own rules. The two rules at play in *Dortch* were adopted pursuant to the supreme court's powers under the state constitution: one rule governs appellate procedure (Rule 9) and the other rule governs criminal procedure (Rule 3). As a judicial policy matter, by close vote, the majority placed primacy in the former, i.e., the language of Rule 9.140(b)(2)(A)(ii)(c), which states "[a] defendant who pleads guilty or nolo contendere may otherwise directly appeal only: c. an involuntary plea, *if preserved by a motion to withdraw plea*." (Emphasis added). In contrast, the dissenters placed primacy on the due process and fair trial rights of a defendant to not be subject to criminal sanction while legally incompetent. *Dortch*, 317 So. 3d at 1089 ("Today's decision renders our procedures effectively inadequate to protect the due process right recognized in *Pate* [*v. Robinson*, 383 U.S. 375, 378 (1966)] by barring appellate counsel from seeking relief on appeal where the trial court does not fulfill its obligation under rule 3.210 to hold a required competency hearing, proceeds to accept a plea, and the potentially incompetent defendant does not move to withdraw the plea.") (Lawson, J., dissenting).

Florida's judicial procedures must be adequate to protect these constitutional rights, *see Pate*, 383 U.S. at 378, and time will tell whether they are in light of *Dortch*'s shift of unpreserved incompetency claims into the post-conviction courts; claims in post-conviction proceedings generally will focus on whether counsel was ineffective for failing to raise or resolve lingering incompetency claims, which differ from claims on direct appeal and (justifiably) must meet higher thresholds for relief in the post-conviction context. In the interim, it may be that discussion and analysis is worthwhile to consider tweaking the applicable procedures and rules so that anomalous situations are avoided, such as requiring a potentially incompetent defendant to have filed—independent of his legal counsel—a motion to withdraw plea in order to preserve a claim of incompetence for direct appeal. *See Dortch*, 317 So. 3d at 1087 ("It should not require legal training to recognize the fundamental unfairness of a rule that would require independent action by a potentially incompetent criminal defendant before appointed appellate counsel can vindicate a clear violation of the procedure constitutionally required to assure that

the defendant was competent to enter his plea in the first instance.") (Lawson, J., dissenting). The supreme court handled *Dortch* as a litigation case involving the interpretation of a rule (one that it could change)[2] rather than as a rule modification/adoption case, but nothing precludes the court and its rules committees from considering rule changes that advance principles of judicial administration and protect due process rights.

Jessica J. Yeary, Public Defender, and Megan Long, Assistant Public Defender, Tallahassee, for Appellant.

Ashley Moody, Attorney General, and Sharon S. Traxler, Assistant Attorney General, Tallahassee, for Appellee.

[2] For example, if the supreme court was inclined to preserve the fundamental error doctrine as it applies to involuntary pleas—but was troubled by language in Rule 9.140(b)(2)(A)(ii)(c) that says appellate review is permitted "if preserved by a motion to withdraw plea"—it could eliminate or modify this phrase, rather than retain it and interpret it to bar the doctrine.