

NOT FINAL UNTIL TIME EXPIRES TO FILE REHEARING
MOTION AND, IF FILED, DETERMINED

IN THE DISTRICT COURT OF APPEAL
OF FLORIDA
SECOND DISTRICT

KERVINS THELUS,)
)
 Appellant,)
)
 v.)
)
 STATE OF FLORIDA,)
)
 Appellee.)
 _____)

Case No. 2D18-4357

Opinion filed June 26, 2020.

Appeal from the Circuit Court for
Hillsborough County; Vivian T. Corvo,
Judge.

Howard L. Dimmig, II, Public Defender,
and Megan Olson, Assistant Public
Defender, Bartow, for Appellant.

Ashley Moody, Attorney General,
Tallahassee, and Jonathan P. Hurley,
Assistant Attorney General, Tampa, for
Appellee.

BLACK, Judge.

Kervins Thelus challenges his judgments and sentences in two cases. He
raises two issues, both of which require further action by the trial court.

During the pendency of his cases, Thelus was found incompetent to proceed. He was subsequently deemed competent, and the findings associated with that determination are not at issue. However, Thelus argues that remand is required for the entry of a written order of competency, reflecting the trial court's July 26, 2017, oral pronouncement of competency. The State correctly concedes that remand is necessary. See Johnson v. State, 266 So. 3d 234, 235 (Fla. 2d DCA 2019); Holland v. State, 185 So. 3d 636, 637 (Fla. 2d DCA 2016); see also Fla. R. Crim. P. 3.212(b).

Subsequent to the determination of competency, Thelus entered open pleas in both cases but was not sentenced immediately. Prior to sentencing, Thelus filed a motion to withdraw his pleas. The motion was to be heard on the same date as Thelus's sentencing; however, at the beginning of the hearing, Thelus's counsel moved to strike the motion to withdraw pleas, stating that she "would need [Thelus's] testimony in order to proceed with" the motion and was "unable to put that testimony on." The trial court then struck the motion to withdraw pleas and moved to sentencing. When the court addressed Thelus with regard to sentencing, Thelus repeatedly stated that he had not received deposition transcripts prior to entering his pleas, that he was not "in the right state of mind" when he entered the pleas because he was "in a state of panic" after having been late to court and arrested upon his appearance thirty minutes later, and that counsel had never explained that he was waiving the right to appeal the denial of his motion to suppress by entering his pleas. Finally, and despite the court's repeated statements that the pleas were not at issue and only sentencing was at issue, Thelus stated that he "would at least like to have a chance at trial." Without acknowledging or

ruling upon Thelus's request to withdraw his pleas where it was clear that Thelus and his counsel were at odds, the trial court moved forward with sentencing.

"When a defendant files a motion to withdraw a plea before sentencing under [rule] 3.170(f), the trial court must either deny the motion for facial insufficiency or grant an evidentiary hearing to develop the facts supporting the entry of the plea."

Benjamin v. State, 230 So. 3d 953, 954 (Fla. 2d DCA 2017) (alteration in original) (quoting Lee v. State, 875 So. 2d 765, 766 (Fla. 2d DCA 2004)). At a minimum, Thelus established a question regarding discovery in his case and alleged coercion with regard to the pleas. The trial court's failure to consider Thelus's request to withdraw his pleas and, in doing so, to appoint conflict-free counsel is error: "[N]ew counsel is required . . . when the defendant alleges erroneous advice or misconduct on the part of his current lawyer as the basis for the motion to withdraw plea—so that the lawyer becomes a potential witness at any hearing on the motion." Boaz v. State, 135 So. 3d 506, 508 (Fla. 5th DCA 2014) (quoting Gonzales v. State, 993 So. 2d 55, 57-58 (Fla. 5th DCA 2008)). "When it becomes apparent that the defendant and his counsel are on opposite sides on the question of whether a plea should be withdrawn, the defendant is entitled to conflict-free counsel." Jones v. State, 74 So. 3d 118, 121 (Fla. 1st DCA 2011). In this case, the court's failure to appoint conflict-free counsel to consider Thelus's motion to withdraw his pleas where counsel had moved for and the court agreed to strike counsel's motion "completely denied representation and assistance with regard to his motion to withdraw plea[s]." See Tipler v. State, 149 So. 3d 1192, 1193 (Fla. 1st DCA 2014).

Accordingly, we reverse Thelus's judgments and sentences and remand for further proceedings consistent with this opinion. If the trial court denies Thelus's motion to withdraw his pleas, the judgments and sentences should be reinstated. See Wisniewski v. State, 177 So. 3d 70, 72 (Fla. 2d DCA 2015).

Reversed and remanded with instructions.

CASANUEVA and VILLANTI, JJ., Concur.