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

IN THE DISTRICT COURT OF APPEAL
OF FLORIDA
SECOND DISTRICT

DAVID A. YZAGUIRRE,

Appellant,

v.

STATE OF FLORIDA,

Appellee.

Case No. 2D19-1180

Opinion filed April 15, 2020.

Appeal from the Circuit Court for Collier County; Elizabeth V. Krier, Judge

David A. Yzaguirre, pro se.

Ashley Moody, Attorney General, Tallahassee, and Cerese Crawford Taylor, Assistant Attorney General, Tampa, for Appellee.

MORRIS, Judge.

David A. Yzaguirre appeals from the order dismissing his amended motion for Nelson[1] hearing. Because the order under review is nonfinal and nonappealable,[2] the claims made in this appeal would have been more appropriately raised in a petition for writ of certiorari. Thus we hereby convert this appeal into a petition for writ of certiorari. See Alcantaro v. State, 397 So. 2d 1236 (Fla. 2d DCA 1981). And because we conclude that Yzaguirre has demonstrated that the dismissal was a departure from the essential requirements of law resulting in irreparable harm for which Yzaguirre would have no remedy on appeal, we hereby grant the petition and quash the order of dismissal.

I. Facts

Yzaguirre was civilly committed pursuant to the Jimmy Ryce Act in 2007. In 2018, Yzaguirre filed a motion and amended motion for Nelson hearing, wherein he raised claims of ineffective assistance of counsel. In the interim between the filing of the two motions, the trial court entered two orders on annual review. The orders were both signed and filed on November 26, 2018, but they appear to be directed at the annual review for two different years (2017 and 2018).

In his amended motion, Yzaguirre alleged that his family had attempted to contact his appointed counsel to inquire why he had not consulted with Yzaguirre about

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[1]Nelson v. State, 274 So. 2d 256, 259 (Fla. 4th DCA 1973) (holding in relevant part that where a defendant asks to discharge his court appointed counsel based on incompetence of counsel, the trial court "should make a sufficient inquiry of the defendant and his appointed counsel to determine whether or not there is reasonable cause to believe that the court appointed counsel is not rendering effective assistance to the defendant").

[2]Nothing in Florida Rule of Appellate Procedure 9.130 permits review by way of an appeal of an order dismissing a motion for a Nelson hearing.

his case, informed him of the status of representation, and explained why he did not seek relief pursuant to section 394.918, Florida Statutes (2017-2018). Yzaguirre also alleged that on November 2, 2018, his family was informed by counsel's secretary that counsel no longer represented Yzaguirre, and he alleged that counsel had not been in contact with him for almost two years. Notably, the record before this court indicates that while the State's 2017 Motion for Annual Review expressly reflects that counsel was appointed as Yzaguirre's attorney, the State's 2018 Motion for Annual Review does not contain the same express notation, though the certificate of service reflects that it was served on counsel. Further, neither the trial court's 2017 order on annual review nor the 2018 order on annual review mention whether Yzaguirre and/or his counsel were present at the probable cause hearings pursuant to section 394.918(3) or whether Yzaguirre presented any evidence at the hearings.

Yzaguirre additionally argued that counsel was ineffective due to lack of diligence, failure to communicate, and lack of competence, which Yzaguirre contended constituted a violation of several of the rules regulating the Florida Bar. Yzaguirre explained that he was prejudiced due to counsel's deficient performance in failing to seek relief under section 394.918 on Yzaguirre's behalf; Yzaguirre asserted that his due process and equal protection rights had been denied, including:

- The right to be present during the 2017 and 2018 probable cause hearings.
- The right to be evaluated by his own forensic psychologist in 2017 and 2018.
- The right to present evidence at the probable cause hearings in 2017 and 2018.
- The right to present evidence at a bench trial in 2017 and 2018.
- The right to file a petition for release in 2017 and 2018.

Yzaguirre contended that because he was alleging that his counsel was incompetent, the trial court was required to "make a sufficient inquiry of [Yzaguirre] and his court appointed counsel to determine whether or not there is reasonable cause to believe that court appointed counsel is not rendering ineffective assistance to [Yzaguirre]." He asserted that he was entitled to the appointment of new counsel if the trial court determined that there was reasonable cause to believe that counsel had been ineffective.

In dismissing Yzaguirre's amended motion, the trial court concluded that "[Yzaguirre] does not present any formal allegations of incompetence by his court-appointed counsel." The trial court then cited various cases standing for the proposition that Nelson hearings are not warranted if a defendant makes general complaints about counsel's trial strategy or complaints about lack of communication, and the trial court deemed Yzaguirre's complaints to be "general" in nature.

II. Analysis

We conclude that the trial court departed from the essential requirements of the law in dismissing Yzaguirre's amended motion because the allegations in his amended motion were sufficient to warrant further inquiry under Nelson. See Mansfield v. State, 227 So. 3d 704, 708 (Fla. 2d DCA 2017) (acknowledging that where defendant makes unequivocal request to discharge his counsel and where the reason is court appointed counsel's incompetence, the court must further inquire of the defendant and his counsel to determine if there is reasonable cause to believe that counsel is not rendering effective assistance (citing Maxwell v. State, 892 So. 2d 1100, 1102 (Fla. 2d DCA 2004))); see also Torres v. State, 42 So. 3d 910, 912 (Fla. 2d DCA 2010) (same).

While " 'general allegations of dissatisfaction' are insufficient to trigger the need for a full Nelson hearing, '[w]hen a defendant requests that the trial court discharge his court-appointed attorney for ineffective assistance, the court is obligated to determine whether adequate grounds exist for the attorney's discharge.' " Finfrock v. State, 84 So. 3d 431, 433 (Fla. 2d DCA 2012) (alteration in original) (citation omitted) (quoting Trease v. State 768 So. 2d 1050, 1053 (Fla. 2000)). Thus where a defendant alleges that he has "irreconcilable difference[s]" with his counsel, that his counsel had violated rules of professional conduct, or that his counsel was acting indifferent to the defendant's wishes, this court has concluded that such allegations "were detailed enough that any reader should have understood he was dissatisfied with [counsel's] representation" for purposes of being entitled to a further inquiry. Id. at 433, 434; see also Torres, 42 So. 3d at 911, 913 (concluding that defendant's allegations that his counsel was ineffective for failing to obtain transcripts or call witnesses with exculpatory evidence, failing to obtain an expert witness to explore Torres' physical condition, and failing to adequately communicate with Torres or file a motion to suppress as requested "were more than generalized complaints about trial preparation or strategy or a general loss of confidence in defense counsel"). Trial courts are not permitted to assume that a defendant's dissatisfaction with counsel is not based on incompetence "or that a Nelson hearing, if conducted, would dispel any notion of counsel's incompetency." Mansfield, 227 So. 3d at 709 (quoting Milkey v. State, 16 So. 3d 172, 176 (Fla. 2d DCA 2009)); see also Torres, 42 So. 3d at 913. A trial court's failure to conduct a preliminary inquiry in such cases is per se error. Mansfield, 227 So. 3d at 708; Finfrock, 84 So. 3d at 434.

The order of dismissal also results in irreparable harm to Yzaguirre because Yzaguirre was not provided with the Nelson hearing to which he was entitled in order to determine the validity of his ineffective assistance of counsel claims. This is not something that can be rectified on appeal from a final order because Yzaguirre is being forced to remain represented—at least on paper—by counsel with whom he alleges he has had no contact for an extended period of time. And based on Yzaguirre's allegations and the record before this court, there is some question as to whether counsel is still representing Yzaguirre.

Accordingly, because the dismissal was a departure from the essential requirements of the law resulting in irreparable harm, we grant the petition for writ of certiorari and quash the trial court's order.

Petition granted; order quashed.

NORTHCUTT and SLEET, JJ., Concur.