

STATE OF FLORIDA  
DISTRICT COURT OF APPEAL  
SECOND DISTRICT

ROMEN JUNICHOLAS CALLAWAY

Case No.: 2D18-0598

Appellant,

v.

STATE OF FLORIDA,

Appellee.

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**INITIAL BRIEF ON THE MERITS**

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*Appeal from the Circuit Court of the  
Sixth Judicial Circuit, in and for  
Pinellas County, Florida*

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## **INTRODUCTION**

Mr. Callaway moved to dismiss his appointed defense counsel. R. 32-34. The trial court failed to hold a *Nelson*<sup>1</sup> hearing on the motion. This Court has recognized, as recently as two weeks ago, that failing to hold a *Nelson* hearing after a defendant has requested dismissal of appointed counsel is per se reversible error. *Daniels v. State, 2018 Fla. App. LEXIS 9866, at \*4-5 (Fla. 2d DCA July 13, 2018)*. As discussed in more detail below, this Court should reverse and remand for a new trial.

## **PRELIMINARY STATEMENT**

Appellant will be called “Mr. Callaway” or “Appellant.” Appellee will be called “the State” or “Appellee.” References to record on appeal will be designated by “R.” followed by the relevant page number. References to the transcript will be designated by “T.” followed by the relevant page number. References to the supplemental record will be designated by “SR.” followed by the relevant page number. References to the supplemental transcript will be designated by “ST.” followed by the relevant page number.

## **STATEMENT OF THE CASE AND FACTS**

The State charged Mr. Callaway with two counts: 1) robbery with a firearm or deadly weapon violating *sections 812.13(2)(a), Florida Statutes (2018)*, and *775.087(2), Florida Statutes (2018)*; and 2) carjacking with a firearm or deadly

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<sup>1</sup> *Nelson v. State, 274 So. 2d 256 (Fla. 4th DCA 1973)*.

weapon violating *sections 812.133(2)(a) and 775.087(2)(a), Florida Statutes*. R. 21-22. Mr. Callaway filed an affidavit that he was indigent, R. 18, and the trial court appointed the Office of the Public Defender to represent him. R. 20.

Before trial, Mr. Callaway filed a pro se motion to dismiss appointed counsel. R. 32-34. In this motion, Mr. Callaway requested the trial court dismiss his appointed counsel and appoint new counsel because he was not receiving “adequate assistance of counsel.” R. 32. He requested an order “dismissing counsel of records (sic) in this cause from representing the defendant” because he would be “better served if another legal counsel [was] appointed[.]” R. 32-34. Based on a review of the docket, R. 2-15, the record, and undersigned’s communication with defense counsel<sup>2</sup>, the trial court failed to hold a hearing to consider this motion. Even so, the docket shows that a copy of the motion was forwarded to the trial court. R. 9. This was one of the two pro se documents filed with the trial court.

Mr. Callaway’s two pro se filings included his motion to dismiss, R. 32-34, and a notice of expiration of speedy trial. R. 35-40. Both were forwarded to the trial court. R. 9-10. Yet the trial court addressed only the notice of expiration of speedy trial as shown by the trial court’s order striking the notice. R. 10; 42. The docket

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<sup>2</sup> Undersigned counsel communicated telephonically and by email with Mr. Callaway’s appointed trial counsel, Mr. David Moran. Although not officially part of the record, undersigned counsel represents that he confirmed with Mr. Moran that he does not recall the trial court ever addressing Mr. Callaway’s motion to dismiss.

does not reflect the trial court took any action on Mr. Callaway's motion to dismiss. R. 2-15.

Mr. Callaway went to trial with appointed defense counsel. T. 1-186; ST. 1-604. Following a jury trial, the jury returned a verdict of guilty as charged to both counts. R. 74-77. Before trial, the State had noticed Mr. Callaway as qualified for an enhanced sentence as a prison released reoffender under *section 775.082, Florida Statutes*. R. 25-26. At sentencing, the trial court imposed the mandatory minimum Life without the possibility of parole sentence for both counts. R. 142-146; 201-243. Following the imposition of his sentence, Mr. Callaway filed his notice of appeal. R. 150. This appeal follows.

### **SUMMARY OF ARGUMENT**

The trial court's failure to hold a *Nelson* hearing after it was notified of Mr. Callaway's request to dismiss his appointed counsel is per se reversible error requiring a new trial. The record evidence shows Mr. Callaway filed his pro se motion to dismiss counsel and it was forwarded to trial court. But the trial court failed to act on his request. Because failing to hold a *Nelson* hearing when a defendant has requested to dismiss his appointed counsel is per se reversible error, this Court should reverse and remand for a new trial.

## ARGUMENT

### I. THE TRIAL COURT REVERSIBLY ERRED BY FAILING TO HOLD A *NELSON* HEARING.

#### A. *Preservation*

A defendant must preserve issues for appellate review by first raising them in the trial court. *Harrell v. State*, 894 So. 2d 935, 939 (Fla. 2005). Here, Mr. Callaway moved to dismiss counsel, but the trial court never acted on his motion. R. 9; 32-34. This issue is preserved.

#### B. *Standard of Review*

The failure to conduct an adequate *Nelson* inquiry is reviewed for an abuse of discretion. *Jackson v. State*, 33 So. 3d 833, 836 (Fla. 2d DCA 2010). But the failure to conduct *any* inquiry is per se reversible error. *Daniels*, 2018 Fla. App. LEXIS 9866, at \*4-5.

#### C. *The Trial Court Erred When It Failed to Conduct a Preliminary Inquiry and Hold a Hearing Regarding Mr. Callaway's Motion to Dismiss Counsel.*

In this Court, “[t]he law concerning the need for a hearing when a defendant seeks to discharge appointed counsel is clear.” *Daniels*, 2018 Fla. App. LEXIS 9866, at \*1. In *Hardwick v. State*, 521 So. 2d 1071, 1074-75 (Fla. 1988), the Florida Supreme Court adopted a procedure, based on *Nelson*, for inquiring into a defendant’s complaints about appointed counsel. The “first step in the procedure is

the preliminary *Nelson* inquiry in which the court ascertains whether the defendant unequivocally requests court-appointed counsel's discharge and the court asks the reason for the request." *Maxwell v. State*, 892 So. 2d 1100, 1100 (Fla. 2d DCA 2004). The preliminary step is "a critical step in the procedure for handling a request to discharge counsel." *Mansfield v. State*, 227 So. 3d 704, 708 (Fla. 2d DCA 2017). A trial court's reliance on a defendant's motion is not enough, the trial court must conduct a preliminary inquiry into the reasons why the defendant seeks to dismiss his counsel to comply with *Nelson* and this Court's precedent. *Nash v. State*, 53 So. 3d 1208, 1211 (Fla. 2d DCA 2011). Failing to perform this initial inquiry "constitutes a structural defect that requires reversal as per se error." *Daniels*, 2018 Fla. App. LEXIS 9866, at \*4 (citations omitted).

Exactly two weeks ago, this Court reversed and remanded a case on this very issue. *Id.* . In *Daniels*, the defendant raised a single issue. *Id.* . He requested that this Court reverse his three convictions for sale or delivery of cocaine within 1,000 feet of a park because the trial court failed to conduct a *Nelson* hearing. *Id.* . The defendant filed a pro se motion entitled, "Petition for *Nelson* Hearing." *Id.* at \*1. He claimed that his appointed counsel had violated his due process rights "by agreeing to an early trial date for which counsel would not prepared." *Id.* . The trial court denied the motion without a hearing. *Id.* at \*4.

This Court held the trial court erred by not holding a hearing. *Id. at \*4-5*. In doing so, it reasoned that “once [the trial court] reviewed the petition, rather than denying it without a hearing, the trial court should have convened a preliminary *Nelson* inquiry to allow [the defendant] to be heard concerning whether he was unequivocally requesting that his court-appointed counsel be discharged and to ascertain all the reasons for the request.” *Id. at \*4*. The trial court’s failure to do so warranted reversal. *Id. at \*5*.

Here, like in *Daniels*, and many other cases before this Court have held, the trial court erred by failing to hold a preliminary hearing to determine the basis for the defendant’s motion to dismiss counsel. R. 32-34. Mr. Callaway’s sent his pro se motion to the trial court, R. 9, however, unlike his other pro se notice, R. 35-40, the trial court did not even respond to this motion. However, based on the trial court’s response to Mr. Callaway’s notice, had the trial court considered the motion, it would have at least issued an order like it did in response to his notice. R. 42. Because the trial court erred in failing to hold a preliminary hearing based on Mr. Callaway’s motion to dismiss counsel, the trial court reversible erred.

***D. The Appropriate Remedy is a New Trial.***

When a trial court fails to hold a hearing on a defendant’s motion to dismiss appointed counsel, the appropriate remedy is remand for a new trial. *Davis v. State*, 230 So. 3d 948, 9452 (Fla. 2d DCA 2017). Here, the trial court failed to hold a

hearing, and no adequate inquiry into the basis of the motion to dismiss occurred, Mr. Callaway is entitled to a new trial.

### **CONCLUSION**

The trial court per se reversibly erred by failing to hold a *Nelson* hearing, accordingly, this Court should reverse and remand for a new trial.

Respectfully submitted,

/s/ Rocco J. Carbone, III

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**CERTIFICATE OF SERVICE**

I HEREBY CERTIFY that a copy of the above has been furnished, by electronic mail on this 27th day of July 2018 to the Office of the Attorney General at [crimaptpa@myfloridalegal.com](mailto:crimaptpa@myfloridalegal.com).

/s/ Rocco J. Carbone, III  
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**CERTIFICATE OF COMPLIANCE**

The undersigned hereby certifies that this brief complies with the font requirements set forth in [Florida Rule of Appellate Procedure 9.210](#) by using Times New Roman 14-point font.

/s/ Rocco J. Carbone, III  
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