NOT FINAL UNTIL TIME EXPIRES FOR REHEARING
AND, IF FILED, DETERMINED

IN THE CIRCUIT COURT OF THE SIXTH JUDICIAL CIRCUIT
OF THE STATE OF FLORIDA IN AND FOR PINELLAS COUNTY

RICHARD A. ULRICH

Appellant,

v.

Appeal No. CRC 08-00058APANO
Lower Court No: CTC07-4448RGEANC
UCN522007CT173181XXXXXX

STATE OF FLORIDA
Appellee.
_____/

Opinion filed _____.

Appeal from a judgment and sentence
entered by the Pinellas County Court,
County Judge James V. Pierce

Lynda B. Barack, Esquire
Attorney for Appellant

Jacqueline Brown, Esquire
Attorney for Appellee

ORDER AND OPINION

ANDREWS, Judge.

THIS MATTER is before the Court on Appellant, Richard Ulrich, appeal from a conviction, after a jury trial, of Reckless Driving, in violation of §316.192 Fla. Stat. (2008). After review of the record and the briefs, this Court affirms the judgment and sentence.

Factual Background and Trial Court Proceedings

On January November 27th, 2007 Appellant was cited for reckless driving, failure to obey a law enforcement officer and crossing an unprotected fire hose. At the May 20th, 2008 pre-trial conference Appellant asked to speak to the court and the following exchange occurred:

THE DEFENDANT:	Your Honor, may I say something?
THE COURT:	Well, you might want to consult your attorney first and see --
THE DEFENDANT:	No, it's all right.
THE COURT:	You sure? Go ahead.
THE DEFENDANT:	I have some concerns about my representation.
THE COURT:	Okay.
THE DEFENDANT:	From the very beginning, I asked him to subpoena the Largo Department Police Department for some information --
THE COURT:	Uh-huh.
THE DEFENDANT:	-- that I felt would be beneficial to the case. It's never been done. I think if I'm not going to have competent representation, I'd like a change of attorney.
THE COURT:	Okay. Well, let's chat about that for a second. I don't really have any authority to give you a different lawyer. Okay?
THE DEFENDANT:	Okay. How would I go about that?
THE COURT:	You do have a absolute right to either hire counsel --
THE DEFENDANT:	Okay.
THE COURT:	You can go hire a lawyer. And you have a right to represent yourself, which certainly I don't encourage you to do that. Okay? But certainly we can look into if there's any issues here, you know, that you want to discuss. Now, you're talking about discovery. When was -- has discovery been demanded and has it been received?
MR. FEGER:	We have discovery, Your Honor.
THE COURT:	Okay. All right. Well, was there anything else, sir, that you were concerned about other than the fact that you didn't have -- what you do have at this point sounds like. Is there anything else.

MR. FEGER:	He also wants a video and I'm going to try to get that, a video of the actual arrest, not the incident, but.
THE DEFENDANT:	Yeah, it goes to the character of the officers that were arresting me. I actually was --
THE COURT:	Well, you don't have to get into the merits of the case.
THE DEFENDANT:	Okay.
THE COURT:	I'm just trying to determine if there's any issues between you and your attorney at this point.
THE DEFENDANT:	No. None whatsoever.
THE COURT:	You know?
THE DEFENDANT:	I just -- I don't feel that I'm being properly represented, so.
THE COURT:	Right. Well, you understand this is a process here.
THE DEFENDANT:	Sure.
THE COURT:	And there's certain expectations.
THE DEFENDANT:	If at the trial I don't feel that I'm being represented at that point, can I choose to represent myself?
THE COURT:	At the trial? During the middle of the trial could you choose to do that?
THE DEFENDANT:	Yeah. Yeah.
THE COURT:	You probably could choose to do that. The question is will I allow you to do that.
THE DEFENDANT:	Okay.
THE COURT:	You know?
THE DEFENDANT:	All right.
THE COURT:	You may not even want that yourself, in fact. You know? But we'll cross that hurdle when we get there.
THE DEFENDANT:	All right. Thank you.
THE COURT:	Okay?

Subsequently this matter was tried on June 24th, 2008 and ended in a mis-trial on the misdemeanor charges although the Appellant was found guilty of the infraction that was tried

non-jury along with the criminal case. On August 7th, 2008 the matter was retried resulting in a guilty verdict on the charge of reckless driving. This appeal ensued.

Issues

The issue in this case is whether the trial court conducted an adequate *Nelson,* hearing when the Appellant expressed his displeasure with the efforts of trial counsel. We have jurisdiction Fla. R. App. P. 9.140(a)(1)(A).

Standard of Review

"When a trial court conducts a *Nelson* inquiry, the appellate court applies an abuse of discretion standard to determine whether the *Nelson* inquiry was adequate." *Milkey v. State* 2009 WL 2194707 (Fla. 2d DCA 2009). *See also, Augsberger v. State,* 655 So.2d 1202, 1204 (Fla. 2d DCA 1995); *Wilson v. State,* 889 So.2d 114, 118-19 (Fla. 4th DCA 2004).

Argument and Analysis of the Present Case.

The Appellant asserts the lower court failed to conduct a proper *Nelson* hearing. If a defendant indicates a desire to discharge appointed counsel the trial court is required to conduct a *Nelson* inquiry. *Branch v. State,* 685 So.2d 1250, 1252 (Fla.1996); *Dunn v. State,* 730 So.2d 309 (Fla. 4th DCA 1999); *Jackson v. State*, 979 So.2d 442, 444 (Fla. 4th DCA 2008). A defendant is not entitled to the appointed counsel of his choice; however he is entitled to an inquiry by the trial court when he asserts that his trial counsel is not providing adequate representation. *Ewing v. State,* 996 So.2d 871, 872 (Fla. 1st DCA 2008). "The trial court's inquiry 'can only be as specific as the defendant's complaint.' For that reason, a *Nelson* hearing is not necessary if the defendant expresses generalized dissatisfaction with his attorney or asserts 'general complaints about defense counsel's trial strategy' without making any formal allegations of incompetence." *Milkey v. State,* 2009 WL 2194707 (Fla. 2d DCA 2009) (citations omitted). It is rare that a

defendant's initial statement clearly and unequivocally request the dismissal of appointed counsel. *Id.* When a defendant expresses some "unhappiness" with counsel the trial court is obliged to conduct a "preliminary inquiry" to determine the basis of the defendant's unhappiness. *Id.; Maxwell v. State,* 892 So.2d 1100, 1102 (Fla. 2d DCA 2004). If the defendant asserts that the reason for his displeasure is trial counsel's incompetence the court must inquire of the defendant and counsel to determine if there is reasonable cause to believe that counsel is not rendering effective assistance. *Maxwell,* at 1102.

> A proper *Nelson* inquiry begins with ascertaining the reason for an attempt to change attorneys; usually it is based on the defendant's belief that court-appointed counsel is not rendering effective assistance. If reasonable cause is found to believe that court-appointed counsel is ineffective, the court should make such finding and appoint a substitute attorney who should be given time to prepare. If it appears that counsel is rendering effective assistance, the court should also so state on the record and advise the defendant that he may discharge his court-appointed counsel but that the State will not be required to appoint a substitute.

Rios v. State, 696 So.2d 469, 471 (Fla. 2d DCA 1997). The failure to conduct a proper *Nelson* hearing is reversible error. *See Johnson v. State,* 629 So.2d 1050, 1051 (Fla. 2d DCA 1993).

There are no magic words that must first be uttered to signal the start of a *Nelson* inquiry. The trial judge must make a sufficient inquiry of both the defendant and trial counsel. In *Morrison v. State,* 818 So.2d 432 (Fla. 2002) the supreme court found that the trial court did not conduct a "full" *Nelson* hearing. *Id.* at 442. However, the Court found that during the colloquy between the defendant and the trial judge each of the defendant's complaints were explained by trial counsel and addressed by the trial court. *Id.* at 441. The defendant was given the opportunity to raise any other issues but remained silent. *Id.* The supreme court concluded that the trial court conducted a "sufficient" inquiry to determine if counsel was "rendering effective assistance" and that the "court had every reason to assume that Morrison's concerns had been addressed and alleviated by the inquiry that occurred and the explanations given to him." *Id.* at

441-442. Additionally, as further evidence that the defendant's concerns had been sufficiently addressed, the court noted that no further motions or complaints about the assistance of trial counsel were raised by the defendant between the three months from the date of the initial motion and the actual trial date. *Id.* at 441. It was only after the trial that the defendant again raised the issue of counsel's effectiveness. *Id.* In *Davis v. State*, 703 So.2d 1055 (Fla. 1997) the defendant complained to the trial court about his counsel's representation. The trial court required trial counsel to explain the various things he was doing to prepare the case for trial. *Id.* at 1058. Upon hearing the steps trial counsel had taken to prepare for trial the defendant stood silent and raised no other issues regarding the assistance of counsel. *Id.* at 1059. The supreme court noted: "Davis's silence after hearing what his attorney had been doing to ready the case for trial would lead one to believe that Davis felt his concerns had been heard by the judge and his lawyer and he was content to proceed." *Id.*

At bar, while the trial judge did not specifically announce that he was conducting a *Nelson* hearing the record reflects the his inquiry was the type of inquiry necessary to determine if trial counsel is and has been effective in his representation of this particular defendant. Moreover, the trial judge addressed the very issue raised by the defendant in his assignment of incompetence. Appellant complained that trial counsel had failed to obtain specific item of discovery from the Largo Police Department. The trial judge asked counsel if discovery had been received to which counsel responded: "We have discovery, Your Honor." The trial judge then ask Appellant if there is "anything else sir, that you were concerned about other than the fact that you didn't have -- what you do have at this point sounds like." In response Appellant stated that he did not feel that he was being "properly represented." Appellant did not explain what was improper about counsel representation. Instead he asked the court to essentially allow

him to reserve the right to represent himself if at trial he felt he was not being appropriately represented. Where, as is the case here, the specific issue or concern raised by the Appellant as evidence of incompetence is found not to exist there is no requirement under *Nelson* or its progeny that the trial judge search for other reasons that would justify the Appellant's suggestion that counsel is incompetent. Appellant advising the court that he does not feel that he is being "properly represented" is insufficient. Suggesting the he is not being "properly represented" without more is the type of generalized complaint that lacks sufficient specificity to require a *Nelson* inquiry. *See Wilson v. State,* 753 So.2d 683, 687 n. 2 (Fla. 3d DCA 2000) (finding that an expression of general loss of confidence or trust, standing alone, does not equate to ineffective assistance and does not require withdrawal of counsel).

Additionally, at no time subsequent to the pretrial hearing did the Appellant again address the competency of counsel. This matter proceeded to trial, was mistried and retried without the Appellant again raising the question of trial counsel's competence or his failure to obtain requested discovery. Similar to the delay in *Morrison and Davis,* it is only after trial and a finding of guilt that the Appellant complains of the adequacy of the *Nelson* inquiry. Appellant's complaint is untimely. If Appellants believed or continued to believe trial counsel was incompetent after the pretrial hearing of May 20th, 2008 Appellant had some obligation to advise the trial court of the same prior to the initial trial and the retrial of this case. Appellant's silence thru two trials is acquiescence and acknowledgment of counsel's competence and effectiveness. *See Morrison* at 441-442.

Conclusion

The trial court's *Nelson* inquiry was adequate to determine that trial counsel's representation of Appellant was competent and effective. Appellant's decision to wait until after

two trials to readdress the question of competency is acquiescence and acknowledgment of competency by silence. For the reasons set forth above, this Court concludes that the judgment and sentence of the trial court were lawfully entered and should be affirmed.

IT IS THEREFORE ORDERED that the judgment and sentence of the trial court is affirmed.

ORDERED at Clearwater, Pinellas County, Florida this ____ day of September, 2009.

Original opinion entered by Circuit Judges Michael F. Andrews, Raymond O. Gross, & R. Timothy Pete

cc: Honorable James V. Pierce
Office of the State Attorney
Lynda B. Barack, Esquire