

No. 1-11-2459

NOTICE: This order was filed under Supreme Court Rule 23 and may not be cited as precedent by any party except in the limited circumstances allowed under Rule 23(e)(1).

IN THE
APPELLATE COURT OF ILLINOIS
FIRST JUDICIAL DISTRICT

THE PEOPLE OF THE STATE OF ILLINOIS,)	Appeal from the
)	Circuit Court of
Plaintiff-Appellee,)	Cook County.
)	
v.)	No. 05 CR 22969
)	
ANTHONY BROWN,)	Honorable
)	Brian K. Flaherty,
Defendant-Appellant.)	Judge Presiding.

PRESIDING JUSTICE Hoffman delivered the judgment of the court.
Justices Cunningham and Rochford concurred in the judgment.

ORDER

- ¶ 1 *Held:* The circuit court erred in summarily dismissing defendant's post-conviction petition. The State correctly concedes error on claim that aggravated kidnaping convictions must be vacated as predicate to felony-murder convictions. However, the appropriate remedy is remand for further post-conviction proceedings, not vacatur of one of the predicate convictions as the State seeks.
- ¶ 2 Following a jury trial, defendant Anthony Brown was convicted of two counts of first degree murder on a felony-murder theory, two counts of aggravated kidnaping, and one count of aggravated battery. He was sentenced to prison terms of natural life for the murders and kidnapings and 10 years for aggravated battery. We affirmed on direct appeal. *People v. Brown*, No. 1-08-2132 (2010) (unpublished order under Supreme Court Rule 23). Defendant now appeals from the summary dismissal of his *pro se* post-conviction petition. He contends that he stated arguably meritorious claims that counsel rendered ineffective assistance by (1) not

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objecting or indicating to the trial court that jurors were sleeping during the trial, and (2) not arguing in the trial court or on direct appeal that his aggravated kidnaping convictions must be vacated as predicate felonies for his murder convictions. The State responds that the sleeping-juror claim is frivolous and patently without merit but concedes error on the predicate-felony-vacatur claim, arguing that we can vacate one of the aggravated kidnaping convictions and otherwise affirm the summary dismissal. However, for the reasons stated below, we vacate the summary dismissal and remand for further post-conviction proceedings.

¶ 3 Defendant and codefendant Dennis Taylor¹ were charged in relevant part with the first degree murder of Kathryn McMaster and Alen Kicic, the aggravated kidnaping of Janet Graniczny and Carlois Robinson, and the aggravated battery of Elizabeth Stevenson, all in the course of their attempted armed robbery of a Jewel store on September 6, 2005. The deaths of McMaster and Kicic were alleged to have occurred in a vehicle collision "at a high rate of speed" while defendant and codefendant knew that speed created a strong probability of death or great bodily harm, or were committing attempted armed robbery or aggravated kidnaping.

¶ 4 Following trial – summarized in our direct appeal order – and argument, the jury was instructed. On the aggravated kidnaping charges, the jury was also instructed regarding aggravated unlawful restraint. On the murder charges, the jury was instructed on felony murder alone (that is, it was not instructed on a strong-probability theory) based on attempted armed robbery, aggravated kidnaping, or aggravated unlawful restraint. The jury was instructed that an "attempted escape immediately after the commission of a crime is a part of the crime itself" and that it should determine "whether the defendant was attempting to escape." The jury convicted defendant of two counts of first degree murder, two counts of aggravated kidnaping, and one count each of aggravated battery and attempted armed robbery.

¹Codefendant was convicted in a separate jury trial, and we affirmed on direct appeal. *People v. Taylor*, No. 1-08-0454 (2011)(unpublished order under Supreme Court Rule 23).

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¶ 5 Following the denial of a post-trial motion that raised no issue of sleeping jurors nor an argument that any conviction should be vacated as redundant or predicate, the court sentenced defendant to prison terms of natural life for the murders and kidnappings, 15 years for attempted armed robbery, and 10 years for aggravated battery.

¶ 6 On direct appeal, we vacated the attempted armed robbery conviction as predicate to the felony-murder convictions, and we corrected the mittimus to clarify that all sentences were concurrent and to reflect the proper counts of the indictment. We otherwise affirmed defendant's convictions and sentences against contentions of insufficient evidence for the felony-murder convictions, that the court's examination of the venire did not comply with Rule 431(b) (eff. July 1, 2012), that the jury should not have been instructed on the felony murder escape rule, that counsel was ineffective for not tendering certain jury instructions, and that the State made improper closing argument. We noted that defendant did not contend on appeal "that his convictions and sentences for aggravated kidnaping should be vacated where they served as the predicate offenses for the felony murders" and held that he forfeited such a claim.

¶ 7 Defendant filed the instant *pro se* post-conviction petition in March 2011. It included a claim that trial counsel refused to object or point out to the court that "approximately five to six jurors were persistent in sleeping during pertinent testimony of the trial" over three days, when defendant pointed this out to counsel. It also included a claim that trial and appellate counsel were ineffective for not seeking vacatur of his aggravated kidnaping convictions as predicate to his felony-murder convictions. The petition was supported by defendant's affidavit, which was verified under section 1-109 of the Code of Civil Procedure (735 ILCS 5/1-109 (West 2010)) rather than notarized.

¶ 8 On June 10, 2011, the court summarily dismissed the petition. The same judge presided at defendant's trial and post-conviction proceeding, and he noted in relevant part that:

"when I do jury trials, as opposed to doing bench trials, I take a lot of notes at a bench trial, I don't take a lot of notes at a jury trial. I

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am constantly looking at the jury and what's happening around the surroundings in the courtroom, make sure there is no communication between any of the witnesses and the people out in the audience, there is nothing being said or done. I constantly look at the jurors to make sure that the jurors are paying attention to the evidence. I can tell you that if I ever saw a juror who I thought was sleeping, I would make a statement to the jury to pay attention and ask them whether or not they need to take a break at this time.

That did not happen in this case. "

The court made no express finding regarding the aggravated kidnaping claim. This appeal timely followed.

¶ 9 On appeal, defendant contends that the court erred in summarily dismissing his petition because it stated arguably meritorious claims that (1) trial counsel was ineffective for not objecting or noting for the court that jurors were sleeping during the trial and (2) trial and appellate counsel should have sought vacatur of his aggravated kidnaping convictions as predicates of his felony-murder convictions.

¶ 10 Under the Post Conviction Hearing Act (Act), 725 ILCS 5/122-1 *et seq.* (West 2010), a petition may be summarily dismissed within 90 days of its filing and docketing if "the court determines the petition is frivolous or is patently without merit." 725 ILCS 5/122-2.1(a)(2) (West 2010). Where a "petition is not dismissed pursuant to this Section, the court shall order the petition to be docketed for further consideration in accordance with Sections 122-4 through 122-6" of the Act. 725 ILCS 5/122-2.1(b) (West 2010).

¶ 11 Because section 122-2.1 refers to determining whether "the petition" is frivolous or patently without merit, and thereby either dismissed or docketed for further proceedings, partial summary dismissal of a post-conviction petition is improper. *People v. Rivera*, 198 Ill. 2d 364 (2001). This court has held that *Rivera's* "holding will essentially require second-stage

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post-conviction review of the *entire* petition and appointment of counsel, if petitioner is so entitled, whenever *any* allegation of a multiple-claim, first-stage post-conviction petition is not found to be frivolous or patently without merit." (Emphasis in original.) *People v. Montgomery*, 327 Ill. App. 3d 180, 189 (2001), citing *Rivera*, 198 Ill. 2d at 374. Similarly, this court has held that, "[w]here the gist of a meritorious claim has been made, all allegations of the postconviction petition advance as there is no provision in the Act for partial dismissals" and thus this court "need not consider" the defendant's other claims "as the entire petition advances." *People v. Munoz*, 406 Ill. App. 3d 844, 855 (2010).

¶ 12 Here, the State concedes that aggravated kidnaping is the predicate felony for one of his felony-murder convictions and must be vacated. We agree. While defendant was charged with two murders on a strong-probability as well as felony-murder theory, the jury was instructed only on felony murder. And while the felony-murder instructions were based on attempted armed robbery, aggravated kidnaping, and aggravated unlawful restraint, the jury convicted on two counts of aggravated kidnaping and did not convict defendant of aggravated unlawful restraint. Lastly, we vacated the attempted armed robbery conviction because it was predicate to his felony-murder convictions. Thus, one count of aggravated kidnaping must be serving as the predicate felony for one of his two murder convictions.

¶ 13 However, the State contends that we should vacate one of the aggravated kidnaping convictions and otherwise affirm the summary dismissal. Pursuant to *Rivera* and *Montgomery*, we cannot do so. Having found a claim of arguable merit in defendant's petition, we must vacate its summary dismissal and remand for further post-conviction proceedings.

¶ 14 Our consideration of defendant's other contention, regarding the sleeping-juror claim, would therefore be premature. We note that counsel appointed for the further proceedings on remand will have an opportunity to investigate this claim.

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¶ 15 Accordingly, we vacate the judgment of the circuit court and remand for further proceedings pursuant to sections 122-4 through 122-6 of the Act. 725 ILCS 5/122-4 to 122-6 (West 2010).

¶ 16 Vacated and remanded.