

No. 1-10-0579

**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).

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IN THE  
APPELLATE COURT OF ILLINOIS  
FIRST JUDICIAL DISTRICT

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THE PEOPLE OF THE STATE OF ILLINOIS,	)	Appeal from the
	)	Circuit Court of
Plaintiff-Appellee,	)	Cook County.
	)	
v.	)	No. 01 CR 8571
	)	
JERMAINE SMITH,	)	Honorable
	)	Joseph M. Claps,
Defendant-Appellant.	)	Judge Presiding.

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JUSTICE FITZGERALD SMITH delivered the judgment of the court.  
Presiding Justice Lavin and Justice Pucinski concurred in the judgment.

**ORDER**

¶ 1 *Held:* The trial court's order dismissing defendant's petition for post-conviction relief was not a void partial summary dismissal. The \$200 DNA analysis fee is vacated; the fines, fees, and costs order is modified to reflect a \$5-per-day presentence custody credit against the imposed fines.

¶ 2 Defendant Jermaine Smith appeals from the summary dismissal of his *pro se* petition for relief under the Post-Conviction Hearing Act (Act). 725 ILCS 5/122-1 *et seq.* (West 2008). On appeal, he contends that the trial court failed to review two of the four issues he raised in his petition and that therefore, the trial court's order is a void partial summary dismissal. Defendant

further contends that he is entitled to a \$5-per-day presentence custody credit against the fines imposed by the trial court. Finally, in his reply brief, defendant contends for the first time that we should vacate the trial court's assessment of a \$200 DNA analysis fee as part of his sentence. For the reasons that follow, we affirm the dismissal of defendant's petition, vacate the DNA analysis fee, and order modification of the fines, fees, and costs order.

¶ 3 Following a jury trial, defendant was convicted of attempted first degree murder of a police officer and sentenced to 60 years in prison. The underlying facts of the case are set forth in this court's order on direct appeal and need not be repeated here. On direct appeal, defendant contended that the trial court erred in granting the State's motion to join his murder and attempted murder charges, that trial counsel was ineffective, that the evidence was insufficient to sustain a conviction, and that his sentence was excessive. We affirmed. *People v. Smith*, No. 1-06-2404 (2008) (unpublished order under Supreme Court Rule 23).

¶ 4 In 2009, defendant filed a *pro se* petition for post-conviction relief. In the petition, defendant raised four issues: (1) the police entered his apartment without a warrant, in violation of the Fourth Amendment; (2) the evidence was insufficient to convict; (3) joinder of the charged counts was improper; and (4) trial counsel was ineffective for "jump[ing] all around the case" and leading defendant "to believe the warrant issue was taken care of."

¶ 5 The trial court summarily dismissed the petition based on a finding that the issues raised were frivolous and patently without merit. In its written order, the trial court listed defendant's post-conviction claims as follows: "(1) he was not proven guilty beyond a reasonable doubt of [attempted murder of] a police officer because he did not know they were officers and they entered his apartment illegally; and (2) he received ineffective assistance of trial counsel." The trial court determined that these claims had been raised on direct appeal and were barred by the

doctrine of *res judicata*. At the conclusion of its written order, the trial court directed that the petition was dismissed.

¶ 6 On appeal, defendant contends that because the trial court did not expressly address all four of his post-conviction claims in its written dismissal order, the order amounts to a partial summary dismissal. Relying upon *People v. Rivera*, 198 Ill. 2d 364, 374 (2001), defendant asserts that as a partial summary dismissal, the trial court's dismissal order is void. As relief, he seeks to have his petition remanded for appointment of counsel and further proceedings.

¶ 7 In *Rivera*, the defendant filed a *pro se* post-conviction petition alleging six violations of his constitutional rights. *Rivera*, 198 Ill. 2d at 366. The trial court dismissed four of the defendant's claims as frivolous or patently without merit, but found that two of the claims stated the gist of constitutional violations and advanced them for second-stage proceedings with the assistance of an appointed attorney. *Rivera*, 198 Ill. 2d at 366. On review, our supreme court held that the Act does not allow for partial summary dismissals. *Rivera*, 198 Ill. 2d at 372.

¶ 8 In contrast to *Rivera*, the trial court in the instant case did not summarily dismiss some of defendant's claims, allow other claims to proceed, and appoint counsel. Rather, the trial court dismissed defendant's entire post-conviction petition. Thus, the trial court did not enter an improper partial summary dismissal. *People v. Terry*, 2012 IL App (4th) 100205, ¶ 43. *Rivera* does not mandate reversal where a trial court fails to give reasons for dismissing part of a post-conviction petition. *People v. Lee*, 344 Ill. App. 3d 851, 854-55 (2003). Defendant's contention that the dismissal order is void fails.

¶ 9 In his reply brief, defendant contends that the trial court's assessment of a \$200 DNA analysis charge against him is void and must be vacated. Generally, arguments raised for the first time in a reply brief are waived. Ill. S. Ct. R. 341(h)(7) (eff. July 1, 2008). However, a void order is not subject to forfeiture and may be corrected at any time. *People v. Marshall*, 242 Ill.

2d 285, 302 (2011); see also *People v. Roberson*, 212 Ill. 2d 430, 440 (2004) (where the defendant's sentence was in conflict with a statutory guideline, it was void and could be challenged in the reply brief).

¶ 10 Section 5-4-3 of the Unified Code of Corrections (730 ILCS 5/5-4-3 (West 2008)) authorizes a trial court to order the taking, analysis, and indexing of a qualifying offender's DNA, and corresponding payment of the analysis fee, only once where the defendant is not currently registered in the DNA database. *Marshall*, 242 Ill. 2d at 303. An order imposing a duplicative DNA analysis fee is void and must be vacated, as it exceeds statutory authority. *Marshall*, 242 Ill. 2d at 302; *People v. Anthony*, 2011 IL App (1st) 091528-B, ¶ 23.

¶ 11 In the instant case, the records, of which we may take judicial notice (*People v. Jimerson*, 404 Ill. App. 3d 621, 634 (2010)), reflect that defendant was convicted of and sentenced on a prior felony in July 1998. Therefore, we can presume that defendant is already registered in the DNA database. *People v. Leach*, 2011 IL App (1st) 090339, ¶ 38 (holding that in order to vacate a DNA charge under *Marshall*, a defendant need only show that he was convicted of a felony after the DNA requirement went into effect on January 1, 1998). Accordingly, we agree with defendant that the \$200 DNA analysis fee is duplicative and must be vacated.

¶ 12 Defendant's final contention on appeal is that pursuant to section 110-14 of the Code of Criminal Procedure (725 ILCS 5/110-14 (West 2008)), he is entitled to a \$5-per-day presentence custody credit against the fines imposed by the trial court. The parties agree that defendant is entitled to a credit of \$19 against his "Criminal/Traffic Conviction Surcharge," "Mental Health Court," and "Youth Diversion/Peer Court" fines. We accept the State's concession.

¶ 13 For the reasons explained above, we affirm the summary dismissal of defendant's post-conviction petition. We vacate that portion of the trial court's order requiring defendant to pay

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the \$200 DNA analysis fee, and order the clerk of the circuit court to enter a modified fines, fees, and costs order to reflect \$19 presentence custody credit toward defendant's fines.

¶ 14 Affirmed in part; vacated in part; order modified.