

2013 IL App (1st) 112376-U

SIXTH DIVISION  
December 20, 2013

No. 1-11-2376

**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 DISTRICT

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THE PEOPLE OF THE STATE OF ILLINOIS,	)	Appeal from the
	)	Circuit Court of
Plaintiff-Appellee,	)	Cook County.
	)	
v.	)	
	)	No. 06 CR 9098
NATHANIEL MCCRAY,	)	
	)	
Defendant-Appellant.	)	Honorable
	)	James B. Linn,
	)	Judge Presiding.

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JUSTICE HALL delivered the judgment of the court.

Presiding Justice Rochford and Justice Lampkin concurred in the judgment.

**ORDER**

¶ 1 **Held:** Summary dismissal of the defendant's postconviction petition was error where the defendant's claim of ineffective assistance of appellate counsel had an arguable basis in law and fact.

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¶ 2 Following a jury trial, defendant McCray was found guilty of first degree murder and aggravated kidnaping in connection with the abduction and death of Roger Hunz, Jr. (the victim).<sup>1</sup> The trial court sentenced him to 50 years' imprisonment for first degree murder and 25 years' imprisonment for aggravated kidnaping, the sentences to be served consecutively. On direct appeal, this court affirmed his convictions and sentences. See *People v. McCray*, No. 1-07-2640 (2010) (unpublished order under Supreme Court Rule 23).

¶ 3 Defendant McCray filed a *pro se* petition seeking postconviction relief. See 725 ILCS 5/122.1 *et seq.* (West 2010) (the Act). In his *pro se* petition, he alleged that his appellate counsel was ineffective for failing to raise as errors the trial court's refusal to give the jury separate verdict forms and allowing a piece of evidence to be sent to the jury room during deliberations. Defendant McCray's petition was summarily dismissed.

¶ 4 Defendant McCray appeals. On appeal, he contends that the summary dismissal of his postconviction petition was error because he stated the gist of a constitutional claim for the ineffective assistance of appellate counsel in his direct appeal. For the reasons explained below, we conclude that the summary dismissal of the postconviction petition was erroneous.

¶ 5 A detailed statement of facts is set forth in the Rule 23 disposition in this case. According to the evidence at trial, the motivation for the offenses in this case was defendant McCray's and Ms. Reeves' belief that the victim was in possession of some \$65,000 from the sale of his residence. Christina Noojin testified at defendant McCray's trial that she was present at the time

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<sup>1</sup>Defendant McCray's co-defendant, Jennifer Reeves, was tried separately and is not a party to this appeal.

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the offenses were committed. She provided the details of defendant McCray's involvement in the kidnaping, torture and murder of the victim. See *McCray*, order at 2-10.

¶ 6 During the conference on jury instructions, trial counsel argued that the use of the general verdict form could result in double enhancement. The trial court disagreed, and the jury received the general verdict form.

¶ 7 After the jury had retired to deliberate, the trial court addressed the assistant State's Attorney and trial counsel as follows:

"Let me know if there is any objection about exhibits going back. No police reports, protocol is not going back, also doctors' chart is not going back. The pictures and physical exhibits are available.

Let me know if you have any objections."

The parties raised no objections to any of the physical exhibits going back to the jury room.

¶ 8 The jury found the defendant guilty of first degree murder and aggravated kidnaping. After entering judgment on the verdict and discharging the jury, the trial court stated as follows:

"Back on the record. There were a few things that did come up. One thing was the Government asked that the piece of wood [the door jam exhibit] that had been received in evidence but not given to the jury during deliberations last night be given to the jury.

This was done over the objection of the defense.

The Court believed that they were entitled to see so the defense made a timely objection."

¶ 9 In his motion for a new trial, defendant McCray alleged error with respect to both the door

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jam exhibit being sent to the jury during deliberations and that it was packaged with a hazardous material label. He did not allege error with respect to the use of the general verdict form for murder rather than separate verdict forms. The trial court denied the motion for a new trial and sentenced defendant McCray to consecutive terms of 50 and 25 years' imprisonment for murder and aggravated kidnaping, respectively.

¶ 10 On direct appeal, defendant McCray argued that it was error for the jury to have the door jam exhibit during deliberations because the label on the bag suggested the presence of blood, a fact that had not been established. In affirming his convictions and sentences, this court held that any error relating to the door jam exhibit was forfeited because defendant McCray failed to cite authority to support his argument in violation of Illinois Supreme Court Rule 341(h)(7) (eff. July 1, 2008)). See *McCray*, order at 28-29.

¶ 11 Subsequently, defendant McCray filed a petition for postconviction relief, raising multiple claims. In claim one, he alleged he was denied due process by the trial court's denial of trial counsel's request for separate verdict forms for each theory of first degree murder with which he was charged. In claim six, defendant McCray alleged that he was denied effective assistance of trial counsel based on counsel's failure to object at trial to the lack of separate verdict forms and failure to raise the error in the motion for a new trial. In claim seven, defendant McCray alleged that he was denied effective assistance of appellate counsel by counsel's failure to raise the ineffectiveness of trial counsel in failing to preserve the error as to the separate verdict forms issue and counsel's failure to cite authority in support of the door jam exhibit issue resulting in the forfeiture of that issue.

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¶ 12 On July 1, 2011, the circuit court ruled on defendant McCray's petition. The court determined that defendant McCray was not prejudiced by the warning label on the door jam exhibit since the condition of the exhibit was explained at trial. Addressing the separate verdicts issue, the court stated as follows:

"[Defendant McCray] indicates that he is entitled to separate verdict forms for each theory of first degree murder, he not knowingly, intentionally or during the course of a force of a felony of aggravated [kidnaping] somehow would have impacted his sentencing. I'm not sure what he was talking about there.

He was found guilty of murder; he was also found guilty of aggravated [kidnaping]. Things that he was convicted of doing to the deceased were amply part of the court record and those were certainly factors for sentencing, but the theory under which the jury convicted him really wouldn't have mattered one way at all because the evidence was so clear and overwhelming that he was guilty of the murder and aggravated [kidnaping] with the manner of death as described in come detail by Dr. Cogan \*\*\*. Separate verdict forms would not have mattered in the sentencing. He still didn't get the maximum sentence he could have been sentenced to."

¶ 13 Defendant McCray's postconviction petition was summarily dismissed. He filed a timely notice of appeal.

¶ 14

## ANALYSIS

¶ 15

### I. Standard of Review

¶ 16 The summary dismissal of a postconviction petition is reviewed *de novo*. *People v.*

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*Hodges*, 234 Ill. 2d 1, 9 (2009).

¶ 17

## II. Discussion

¶ 18 In order to qualify for relief under the Act, the defendant must demonstrate the violation of a constitutional right. *People v. Cole*, 2012 IL App (1st) 102499, ¶ 8. A petition that is frivolous and patently without merit is subject to summary dismissal. *Cole*, 2012 IL App (1st) 102499, ¶ 8. In determining whether a postconviction petition is frivolous or patently without merit, the question before the court is whether the petition has no arguable basis in law or in fact, meaning whether it is based on "an indisputably meritless legal theory or a fanciful factual allegation." *Hodges*, 234 Ill. 2d at 17. "Essential to a postconviction claim of ineffectiveness of appellate counsel on direct appeal is proof of error of constitutional dimensions during the course of the trial, which counsel on direct appeal failed to raise." *Cole*, 2012 IL App (1st) 102499, ¶ 18. "Appellate counsel is only required to raise meritorious issues on appeal." *People v. McGhee*, 2012 IL App (1st) 093404, ¶ 12.

¶ 19 The *Strickland* standard governs claims of ineffective assistance of both trial and appellate counsel. *McGhee*, 2012 IL App (1st) 093404, ¶ 11; *Strickland v. Washington*, 466 U.S. 668 (1984). The defendant must show that (1) appellate counsel's performance was deficient, and (2) absent counsel's errors there was a reasonable probability the appeal would have been successful. *McGhee*, 2012 IL App (1st) 093404, ¶ 11. "The performance prong is satisfied if 'counsel's performance was objectively unreasonable under prevailing professional norms,' and the prejudice prong is satisfied if there is a 'reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different.' (Internal quotation

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marks omitted.)" *McGhee*, 2012 IL App (1st) 093404, ¶ 11 (quoting *People v. Petrenko*, 237 Ill. 2d 490, 496-97 (2010). Both prongs of the *Strickland* test must be satisfied, or the claim fails. *People v. Simms*, 192 Ill. 2d 348, 362 (2000).

¶ 20 In *People v. Smith*, 233 Ill. 2d 1 (2009), our supreme court held the denial of a defendant's request for separate verdict forms was an abuse of discretion "where \*\*\*specific findings by the jury with regard to the offenses charged could result in different sentencing consequences, favorable to the defendant." *Smith*, 233 Ill. 2d at 23. However, the trial court is not required to order, *sua sponte*, that separate verdict forms be used. *People v. Davis*, 233 Ill. 2d 244, 273 (2009). In *People v. Bailey*, 2013 IL 113690, our supreme court held that the rule in *Smith* is applicable only where (1) the defendant has requested separate verdict forms, (2) the lack of separate verdict forms could have adverse sentencing consequences, (3) and the trial court denies the request. *Bailey*, 2013 IL 113690, ¶ 69.

¶ 21 The parties disagree whether trial counsel requested separate verdict forms. In addition, the State points out that trial counsel's objection was based on the risk of double enhancement, not the possibility of adverse sentencing consequences, which distinguishes the present case from *Smith*. At the instructions conference, trial counsel objected to the IPI instructions defining and setting forth the issues applicable to first degree murder. See Illinois Pattern Jury Instructions, Criminal, Nos. 7.01, 7.02 (4th ed. 2000) (hereinafter IPI Criminal 4th Nos. 7.01, 7.02). Trial counsel stated as follows:

"We are objecting to 7.01 and 02, as defined by the other instructions in here, not so much as to [kidnaping], but as to aggravated [kidnaping], which is 8.04, 'a person who

kidnaps another commits the offense of aggravated [kidnaping] when he inflicts great bodily harm upon the victim,' because there is a risk with the general verdict forms, the state has submitted if the jurors find only on the felony murder, they will be finding the great bodily harm, which is the death of Roger Hunz.

Judge, as to the element of the aggravated [kidnaping] and the element of the murder, we believe that would be double enhancement.

THE COURT: I disagree. \*\*\* I intend to instruct them the jury has the right to, if they wish, to find him guilty of murder under three separate theories. One would be that he is responsible for this killing intentionally, or knowingly or during the course of an aggravated [kidnaping]. You can have an aggravated kidnaping which \*\*\*does not necessarily cause death.

In this case the jury may well feel that the aggravated [kidnaping] was in the course of, rather the murder occurred during the course of the [kidnaping]. That's why they will be allowed to make the finding \*\*\* if they find it appropriate.

But I don't see any issues in double enhancement. They could find him guilty of aggravated [kidnaping] and not murder, they could find him guilty of murder or find him guilty of both.

So your request for different verdict forms will be respectfully denied."

¶ 22 While trial counsel couched the objection in terms of double enhancement, counsel did argue against the use of the general verdict forms. The trial court discussed the various scenarios under which the jury could find the defendant guilty of murder and/or aggravated kidnaping.



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While not the model of clarity, there is sufficient support in the above-quoted exchange for defendant McCray's allegation that trial counsel requested separate verdict forms, and the trial court denied the request. The element of possible adverse sentencing consequences is satisfied since defendant McCray's convictions for both first degree murder and aggravated kidnaping required that he serve his 50- and 25-year sentences consecutively. See 730 ILCS 5/5-8-4(a)(i) (West 2006) ("one of the offenses for which the defendant was convicted was first degree murder or a Class X or Class 1 felony and the defendant inflicted severe bodily injury"). Separate verdict forms would have required the jury to specify on which theory of murder defendant McCray was convicted. Had the jury found him guilty of both felony murder and aggravated kidnaping, the finding of guilty of aggravated kidnaping would have been vacated, leaving only a sentence of 50 years, rather than 75 years.

¶ 23 The denial of defendant McCray's request for separate verdicts was an abuse of discretion. *Smith*, 233 Ill. 2d at 23. However, trial counsel failed to include the error in the posttrial motion. In order to preserve an error for appeal, the defendant must object at trial and include the error in the posttrial motion. *McGhee*, 2012 IL App (1st) 093404, ¶ 18. Where the error is not properly preserved, the claim of error is forfeited, and it may be reviewed only for plain error. *McGhee*, 2012 IL App (1st) 093404, ¶ 18. "An error is reversible under the plain error doctrine only when: '(1) a clear or obvious error occurred and the evidence is so closely balanced that the error alone threatened to tip the scales of justice against the defendant, regardless of the seriousness of the error, or (2) a clear or obvious error occurred and that error is so serious that it affected the fairness of the defendant's trial and challenged the integrity of the judicial process, regardless of

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the closeness of the evidence. [Citation.]" ' " *McGhee*, 2012 IL App (1st) 093404, ¶ 18 (quoting *People v. Thompson*, 238 Ill. 2d 598, 613 (2010)).

¶ 24 The first step in a plain error review is to determine if error occurred. *Thompson*, 238 Ill. 2d at 613. We have determined that the trial court erred in refusing the request for separate verdicts forms. Turning to the first prong of plain error doctrine, we find from our review of the record that the evidence against defendant McCray was not closely balanced. The trial evidence established that defendant McCray kidnaped the victim. He then tortured the victim to force him to disclose the location of the \$65,000. According to the medical examiner's report, there were 223 separate injuries on the victim's body. The victim's jaw was fractured, there was evidence of strangulation, and the victim's right ear was almost severed. The amount and severity of the injuries suffered by the victim went beyond what could be considered torture inflicted to make the victim disclose where the money was, and overwhelmingly supported separate convictions for aggravated kidnaping and murder.

¶ 25 Under the second prong of the plain error doctrine, "[p]rejudice to the defendant is presumed because of the importance of the right involved, regardless of the strength of the evidence.' (Internal quotation marks omitted.) (Emphasis omitted.)" *McGhee*, 2012 IL App (1st) 093404, ¶ 20 (quoting *Thompson*, 238 Ill. 2d at 613). "The supreme court has equated the second prong of the plain-error doctrine with structural error, which is 'a systemic error which serves to erode the integrity of the judicial process and undermine the fairness of the defendant's trial.' (Internal quotation marks omitted.)" *McGhee*, 2012 IL App (1st) 093404, ¶ 20 (quoting *Thompson*, 238 Ill. 2d at 613-14, quoting *People v. Glasper*, 234 Ill. 2d 173, 197-98 (2009)).

¶ 26 In *Glasper*, the defendant argued that the trial court's failure to conduct *voir dire* in accordance with *People v. Zehr*, 103 Ill. 2d 472 (1984) and Illinois Supreme Court Rule 431(b) (eff. Oct. 1, 1971)<sup>2</sup>, was reversible error, relying on *Smith*. In distinguishing *Smith*, the court explained that the error in *Smith* was not subject to a harmless error analysis because *Smith* "involved a basic, fundamental protection provided by the sixth amendment of the federal constitution - the right to have a jury, rather than a judge, determine an accused's guilt." *Glasper*, 234 Ill. 2d at 192. The court relied on the United States Supreme Court's determination in *Sullivan v. Louisiana*, 508 U.S. 275 (1993), that the deprivation of the right to a jury verdict qualified as a structural error. As the court in *Sullivan* explained,

" [t]here being no jury verdict of guilty-beyond-a-reasonable-doubt, the question whether the same verdict \*\*\*would have been rendered absent the constitutional error is utterly meaningless' \*\*\*" and "[t]he deprivation of the [right to trial by jury] with consequences that are necessarily unquantifiable and indeterminate, unquestionably qualifies as "structural error" ". " *Glasper*, 234 Ill. 2d at 192-93 (quoting *Sullivan*, 508 U.S. at 280, 281-82).

¶ 27 The trial court erred when it denied defendant McCray's request for separate verdict forms, and the error provided a meritorious issue for appeal. Even if forfeited, since the error fell under the second prong of the plain error doctrine, it would have been reviewed on appeal. Had appellate counsel raised plain error on direct appeal, there was a reasonable probability that the

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<sup>2</sup>The supreme court noted that Rule 431 had recently been amended, effective May 1, 1997. *Glasper*, 234 Ill. 2d at 187-88 n.2.

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appellate court would have vacated defendant McCray's conviction for aggravated kidnaping and his 25-year sentence for that offense.

¶ 28 We conclude that defendant McCray's postconviction petition had an arguable basis in both fact and law and was not subject to summary dismissal. The petition must be advanced to the second stage of postconviction proceedings. We do not address defendant McCray's ineffective assistance of appellate counsel claim with respect to the door jam exhibit. See *People v. Sparks*, 393 Ill. App. 3d 878, 887 (2009) (partial summary dismissals are not permitted at the first stage of postconviction proceedings).

¶ 29 CONCLUSION

¶ 30 The summary dismissal of the defendant's postconviction petition is reversed, and the cause is remanded to the circuit court for second stage postconviction proceedings.

¶ 31 Reversed and remanded.