

2018 IL App (1st) 152414-U

No. 1-15-2414

Order filed May 11, 2018

Fifth Division

**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 DISTRICT

---

THE PEOPLE OF THE STATE OF ILLINOIS,	)	Appeal from the
	)	Circuit Court of
Plaintiff-Appellee,	)	Cook County.
	)	
v.	)	No. 10 CR 3600
	)	
LAPOLEON COLBERT,	)	Honorable
	)	Nicholas R. Ford,
Defendant-Appellant.	)	Judge, presiding.

---

JUSTICE HALL delivered the judgment of the court.  
Presiding Justice Reyes and Justice Rochford concurred in the judgment.

**ORDER**

¶ 1 *Held:* Summary dismissal of defendant's *pro se* postconviction petition affirmed over his contention that the circuit court's failure to address one of the claims raised in the petition in the written dismissal order rendered the dismissal a partial summary dismissal.

¶ 2 Defendant Lapoleon Colbert 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 2014)).

On appeal, defendant contends this cause must be remanded for further proceedings under the

Act because the circuit court erred by entering a partial summary dismissal of his *pro se* petition. Specifically, defendant contends that because the court failed to address one of the claims raised in the petition in its written dismissal order the cause must be remanded for further proceedings under the Act. We affirm.

¶ 3 Following a jury trial, defendant Lapoleon Colbert was found guilty of first degree felony murder based upon the predicate felony of mob action in connection with the beating death of the victim Derrion Albert. Eric Carson, Eugene Riley, and Silvonus Shannon were also charged in connection with the victim's death.<sup>1</sup>

¶ 4 The evidence at defendant's jury trial established that a fight broke out on the afternoon of September 24, 2009, between students attending Fenger Academy High School. The fight was documented by a nearby building's video surveillance system and by a cellular phone recording. These videos were admitted at trial and showed, in pertinent part, defendant kicking the victim in the head and stomping on the victim's torso when the victim was on the ground. After the State played one of the videos, Detective William Sullivan then identified photographs of, *inter alia*, Carson, Riley, and Shannon. The defense objected to the photograph of Carson and to the entry of the photographs into evidence. The trial court overruled the objections. The defense theory at trial was that although defendant kicked the victim in the head, defendant was not responsible for the blow that ultimately killed the victim and that defendant did not participate in the mob action. The jury found defendant guilty of first degree felony murder predicated on mob action. He was sentenced to 32 years in prison. Defendant's conviction and sentence were affirmed on direct appeal. See *People v. Colbert*, 2013 IL App (1st) 112935.

---

<sup>1</sup> Shannon and Riley's convictions for first degree murder were affirmed on appeal. See *People v. Shannon*, 2012 IL App (1st) 11433-U; *People v. Riley*, 2013 IL App (1st) 112464-U.

¶ 5 In November 2014, defendant filed the instant *pro se* postconviction petition alleging that because mob action was not defined as a “feloneous [*sic*] offense” under the felony murder statute, the trial court usurped the “legislative intent” when it permitted defendant to be prosecuted under that statute, and to be prosecuted for felony murder. The petition also alleged that the “mob action” statute was unconstitutional, and that defendant was denied the effective assistance of trial and appellate counsel when counsel failed to challenge the constitutionality of the mob action statute. The petition further alleged that trial counsel failed to file a “post-trial motion in arrest of judgment notwithstanding the verdict,” and that appellate counsel failed to raise that issue on appeal. The petition then listed two “supplemental issues.” First, defendant contended that the indictment failed to “state” that defendant knowingly, recklessly and intentionally engaged “in such conduct;” that defendant’s conviction was “void for vagueness”; and that defendant was denied the effective assistance of trial and appellate counsel for a failure to raise these issues. Second, he contended that he was denied the effective assistance of counsel when trial counsel “allowed” the State to introduce pictures of “co-defendants, [Carson, Riley, and Shannon] to prove” that defendant was part of a mob without an objection or preserving the issue in a post-trial motion, and when appellate counsel failed to challenge this conduct on appeal.

¶ 6 The circuit court summarily dismissed the petition in a 12-page written order. The court grouped defendant’s claims into three categories: (1) that mob action cannot serve as a predicate offense for felony murder as defined under that statute (see 720 ILCS 5/9-1(A)(3) (West 2008)); (2) that the indictment was defective in that it did not allege that defendant knowingly, recklessly and intentionally engaged in mob action; and (3) that defendant was denied the effective

assistance of both trial and appellate counsel. With regard to defendant's claims that he was deprived of the effective assistance of counsel, the circuit court addressed defendant's claims that he was denied the effective assistance of trial counsel when counsel failed to challenge the constitutionality of the mob action statute and failed to file a post-trial motion in arrest of judgment notwithstanding the verdict and that he was denied the effective assistance of appellate counsel when counsel failed to raise these issues on appeal. Ultimately, the court found "that the issues raised and presented by [defendant] are frivolous and patently without merit." Therefore, "the petition for post-conviction relief [was] hereby dismissed." Defendant filed a *pro se* motion for reconsideration, which the court denied. Defendant now appeals.

¶ 7 On appeal, defendant contends that the circuit court failed to rule on one of his postconviction claims, *i.e.*, that he was denied the effective assistance of trial and appellate counsel based upon the failure to argue that defendant was prejudiced at trial when the State showed pictures of Carson, Riley, and Shannon to the jury. Defendant therefore concludes that the circuit court improperly entered a partial summary dismissal, which is not permitted at this stage of proceedings under the Act, and, therefore, this cause must be remanded for further proceedings. The State responds that despite the fact that the circuit court did not address one claim contained in the instant petition, the court intended to dismiss the entire petition.

¶ 8 The Act provides a procedural mechanism through which a defendant may assert a substantial denial of his constitutional rights in the proceedings which resulted in his conviction. 725 ILCS 5/122-1 (West 2014). At the first stage of a postconviction proceeding, the circuit court independently reviews the petition, taking the allegations as true, and determines if it is frivolous or patently without merit. *People v. Hodges*, 234 Ill. 2d 1, 10 (2009). Partial summary

dismissals are not permitted by the Act, and if even one claim raised in a *pro se* postconviction petition is not frivolous or patently without merit, the entire petition must advance for further proceedings under the Act. *People v. Rivera*, 198 Ill. 2d 364, 370-71 (2001). Although partial summary dismissal is improper, the court's failure to address every claim in writing does not necessarily render a summary dismissal a partial dismissal. *People v. Lee*, 344 Ill. App. 3d 851, 855 (2003). Where an order may be construed as intending to dismiss the entire petition, it is treated as a summary dismissal of all claims. See *id.* This court reviews the summary dismissal of a postconviction petition *de novo*. *People v. Tate*, 2012 IL 112214, ¶ 10.

¶ 9 Here, defendant relies on *People v. Rivera*, 198 Ill. 2d 364 (2001), to argue that the failure to address one claim contained in the instant petition means that the petition, in its entirety, must advance to second stage proceedings.

¶ 10 In *Rivera*, the trial court summarily dismissed four of the six claims the defendant raised in his postconviction petition, and appointed counsel to assist the defendant with presentation of his two remaining claims. The court ultimately held an evidentiary hearing on one claim and denied defendant relief based on its findings of fact related to that single claim. Our supreme court, however, determined that “summary partial dismissals made during the first stage of a postconviction proceeding are not permitted under the Act.” *Id.* at 374. In other words, if any part of a petition merits further proceedings under the Act, the entire petition must advance. *Id.*

¶ 11 This is not a case, however, where the court determined that one of the claims raised in the instant petition must advance for further proceedings under the Act. Rather, this is a case where the court dismissed the petition as frivolous and patently without merit in a written order but did not address one of the claims raised in the petition in that dismissal order.

¶ 12 *People v. Lee*, 344 Ill. App. 3d 851 (2003), is instructive. In that case, the defendant raised two issues in his postconviction petition. In the order summarily dismissing the petition, the circuit court explained its reasons for rejecting one of the issues, but not the other. *Id.* at 852. On appeal, the defendant relied on *Rivera* to argue that the cause must be remanded for further proceedings because the court did not explain its reasons for dismissing the second issue in its written dismissal order. *Id.* at 854-55. That is, the court’s failure to address the second issue in writing constituted an improper partial summary dismissal.

¶ 13 The appellate court rejected the defendant’s argument that reversal was required because the circuit court’s written order did not address the second claim, finding that although the court did not expressly address one of the issues presented, it “plainly intended to dismiss the entire petition.” *Id.* at 855. In so doing, the court distinguished *Rivera*, noting that unlike *Rivera*, the circuit court in *Lee* did not advance any of the defendant’s claims for further proceedings. *Id.* The court therefore declined the defendant’s invitation to construe the court’s order as a partial summary dismissal and noted that a judgment must generally be construed to give effect to the court’s intention and to uphold its validity where supported by the wording of the judgment. *Id.* The court then determined that the fact that the circuit court gave no reason for dismissing one of the claims was not contrary to its plain intent to dismiss the entire petition. *Id.* In support of this conclusion, the court further noted that not only did the circuit court’s written order state that the petition was dismissed, but also that “the parties understood the order as a complete dismissal subject to immediate appellate review.” *Id.*

¶ 14 In the case at bar, the circuit court addressed the majority of defendant’s claims in a written order. Although the court did not expressly discuss defendant’s claim that he was denied

the effective assistance of trial and appellate counsel for a failure to challenge the fact that that State showed photographs of Carson, Riley, and Shannon to the jury, in its written order summarily dismissing the petition, the court concluded “that the issues raised and presented by [defendant] are frivolous and patently without merit.” The court further ordered that “the petition for post-conviction relief [was] hereby dismissed.” As in *Lee*, the dismissal order in this case showed that the circuit court intended to dismiss the entire petition. We find no appreciable difference in the written order in this case, and conclude as in *Lee*, that the obvious intent of the written order was to dismiss the petition in its entirety. See *id.*

¶ 15 We are unpersuaded by defendant’s argument that *Lee* was wrongly decided because it conflicts with our supreme court’s holding in *Rivera* that a *pro se* petition must either be summarily dismissed or advanced, in its entirety, at this stage of review under the Act. See *Rivera*, 198 Ill. 2d at 374. This is not a case where the court found that one claim in an otherwise frivolous petition was meritorious and advanced that claim for further review. Here, the court did not advance any claims, let alone defendant’s claim that trial and appellate counsel failed to challenge the admission of the photographs, for further proceedings under the Act.

¶ 16 We also note that defendant apparently understood the circuit court’s summary dismissal order was a final order subject to appellate review because he filed an appeal after the court denied his *pro se* motion to reconsider. See *Lee*, 344 Ill. App. 3d at 855 (noting that “the parties understood the [summary dismissal] order as a complete dismissal subject to immediate appellate review”). Accordingly, we must reject defendant’s characterization of the circuit court’s order summarily dismissing the instant *pro se* postconviction petition as a partial summary dismissal (see *id.*), and his contention on appeal must fail.

No. 1-15-2414

¶ 17 For the foregoing reasons, we affirm the judgment of the circuit court of Cook County.

¶ 18 Affirmed.