

FIRST DIVISION
September 30, 2014

No. 1-13-0037

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
)	Cook County.
Plaintiff-Appellee,)	
)	
v.)	No. 95 CR 3173
)	
)	
DAMEN PRICE,)	Honorable Stuart E. Palmer
)	and Steven J. Goebel,
Defendant-Appellant.)	Judges Presiding.

PRESIDING JUSTICE DELORT delivered the judgment of the court.
Justices Connors and Harris concurred in the judgment.

ORDER

¶ 1 **Held:** The post-conviction court erred in denying defendant's 2-1401 petition, because the trial court did not provide separate jury verdict forms for the different theories of murder charged. The new rule requiring separate jury verdict forms is a substantive rule and must be retroactively applied to cases on collateral review. Accordingly, defendant's sentence was void and the case must be remanded for resentencing. Defendant's mittimus should also be corrected to reflect 740 days of presentence custody credit.

¶ 2 In this case, we address the ramifications of two relatively recent Illinois Supreme Court decisions regarding the proper verdict forms given to a jury when a defendant is charged with murder under multiple theories. The defendant, Damen Price, was sentenced to life in prison.

He appeals from an order of the circuit court of Cook County denying his petition for relief from judgment brought under section 2-1401 of the Code of Civil Procedure (735 ILCS 5/2-1401 (West 2012)). He first contends that the trial court's denial of his request for separate jury verdict forms renders his natural life sentence void under *People v. Smith*, 223 Ill. 2d 1 (2009), and *People v. Bailey*, 2013 IL 113690. He also claims that he is entitled to presentence custody credit of 740 days. We reverse the trial court's dismissal of defendant's section 2-1401 petition and remand this case with directions to vacate defendant's aggravated arson conviction and sentence, resentence defendant for felony murder (predicated upon aggravated arson), and correct defendant's mittimus.

¶ 3

BACKGROUND

¶ 4 This court has detailed the underlying facts of this case in an earlier decision. See *People v. Price*, No. 1-97-3195 (unpublished order under Rule 23) (April 5, 1999). Therefore, we will summarize only those facts pertinent the particular issues now before us.

¶ 5 The State charged Damen Price with multiple counts of first degree murder and aggravated arson. The first degree murder counts alleged various theories, including intentional, knowing, and felony murder predicated upon aggravated arson. The evidence adduced at trial established that on October 9, 1994, four-year-old Curtis Jones, Jr., was killed in an arson fire at 743 West 103rd Street in Chicago. LaShawn Means, the victim's cousin and the intended victim, was a member of the "Gangster Disciples" street gang, whereas defendant was a member of the rival "Mickey Cobras" street gang. At around 2:16 a.m., defendant and others were in the alley behind Means's house and threw at least two Molotov cocktails through the kitchen window. When the fire broke out, defendant and the individuals fled, laughing and shouting, "G.D.K." (*i.e.*, Gangster Disciple killer).

¶ 6 The trial court denied defendant's request for separate jury verdict forms which would have divided out the various theories of murder charged. The jury returned a general verdict of guilty as to first degree murder, and it also found defendant guilty of aggravated arson.

¶ 7 At the death penalty eligibility hearing, the jury found defendant eligible for the death penalty under section 9-1(b)(6) of the Criminal Code of 1961 (Criminal Code) (720 ILCS 5/9-1(b)(6) (West 1994)). In this phase, the jury returned a verdict form indicating that it unanimously found defendant eligible for the death penalty because defendant was at least 18 years old at the time of the murder and the following statutory "factor" existed:

"The murdered person was killed in the course of another
felony if

the murdered person was actually killed by the defendant;

or

the murdered person received physical injuries personally
inflicted by the defendant substantially contemporaneously with
physical injuries caused by one or more persons for whose conduct
the defendant was legally responsible and the physical injuries
inflicted by either the defendant or other persons for whose
conduct he is legally responsible caused the death of the murdered
person; and

in performing the acts which caused the death of the
murdered person, the defendant acted with the intent to kill the
murdered person or with the knowledge that his acts created a

strong probability of death or great bodily harm to the murdered person or another; and

the other felony was aggravated arson.”

¶ 8 In the next phase, however, the jury declined to impose the death penalty. Relying upon section 5-8-1(a)(1)(b) of the Unified Code of Corrections (Corrections Code) (730 ILCS 5/5-8-1(a)(1)(b) (West 1994)) and the jury’s finding under section 9-1(b)(6) of the Criminal Code (720 ILCS 5/9-1(b)(6) (West 1994)), the trial court sentenced defendant to consecutive terms of natural life and 30 years’ imprisonment for the murder and aggravated arson convictions, respectively. The trial court did not address defendant’s presentence custody credit.

¶ 9 On direct appeal, petitioner raised numerous contentions but did not challenge the trial court’s denial of his request for separate verdict forms. This court rejected his contentions and affirmed his convictions and sentences. *People v. Price*, No. 1-97-3195, 303 Ill. App. 3d 1101 (1999) (table), *appeal denied*, 187 Ill. 2d 587 (2000). In *People v. Price*, No. 1-00-2838 (2002) (unpublished order under Rule 23), *appeal denied*, 202 Ill. 2d 649 (2002), defendant filed a petition for postconviction relief, alleging ineffective assistance of counsel based upon various grounds, but he again made no claim regarding the denial of his request for separate verdicts. The trial court summarily dismissed the petition, and we affirmed. *Id.* Defendant then filed a successive postconviction petition and a section 2-1401 petition, neither of which raised an issue regarding the verdict forms. Defendant did not appeal the trial court’s denials of those petitions.¹

¶ 10 On February 21, 2012, defendant filed a second 2-1401 petition *pro se*, which is the subject of the present appeal. Relying upon our supreme court’s decision in *People v. Smith*, 233

¹ Petitioner also sought federal habeas corpus relief upon multiple unrelated grounds, which the federal district court denied. See *U.S. ex rel. Price v. McAdory*, No. 03 C 6485 (N.D. Ill. Oct. 19, 2004).

Ill. 2d 1 (2009), defendant claimed that his sentence of natural life (for his murder conviction) and consecutive 30-year sentence (for his aggravated arson conviction) were void because the trial court erred in refusing his request for separate verdict forms at trial. The trial court granted the State's motion to dismiss the petition in a written order. This appeal followed.

¶ 11

ANALYSIS

¶ 12

Defendant's 2-1401 Petition

¶ 13 On appeal, defendant first contends that the trial court erred in dismissing his 2-1401 petition. Specifically, he argues that, under *Smith*, the trial court erred in refusing his request for separate verdict forms for intentional, knowing, and felony murder (based upon aggravated arson), and as a result, the jury's general verdict finding him guilty of murder must be viewed as a guilty finding as to felony murder only and an acquittal of intentional and knowing murder. Defendant further reasons that, pursuant to *Smith*, he was not eligible for the death penalty under section 9-1(b)(6) of the Criminal Code. Defendant then concludes that, since his natural life sentence of imprisonment was based solely upon the jury's finding that an aggravating factor existed as enumerated under section 9-1(b)(6), he was not eligible for the natural life sentence actually imposed, either. Defendant asks that, in accordance with the decisions in *Smith* and *People v. Bailey*, 2013 IL 113690, this court (i) remand this cause for resentencing on the felony murder conviction only and (ii) vacate the underlying aggravated arson conviction. The State responds that (i) defendant's claim is time-barred, (ii) defendant's sentence is voidable only and not void (and thus not subject to collateral attack), and (iii) the *Smith* and *Bailey* decisions are distinguishable, and in any event, they do not retroactively apply to cases on collateral review.

¶ 14 Section 2-1401 of the Code of Civil Procedure establishes a comprehensive, statutory procedure to vacate a final judgment older than 30 days. 735 ILCS 5/2-1401 (West 2012);

People v. Vincent, 226 Ill. 2d 1, 7 (2007). Although a section 2-1401 petition is usually characterized as a civil remedy, its remedial powers extend to criminal cases. *People v. Haynes*, 192 Ill. 2d 437, 460-61 (2000). Relief under this section requires proof, by a preponderance of evidence, of a defense or claim that would have precluded entry of the judgment in the original action and diligence in both discovering the defense or claim and presenting the petition. *Vincent*, 226 Ill. 2d at 7-8. Notably, however, where, as here, a petitioner claims that the underlying judgment is void, the need to allege both a meritorious defense and also due diligence is obviated. 735 ILCS 5/2-1401(f) (West 2012); *Vincent*, 226 Ill. 2d at 7 n.2 (citing *Sarkissian v. Chicago Board of Education*, 201 Ill. 2d 95, 104 (2002)). A trial court's judgment on the pleadings or dismissal in a section 2-1401 proceeding is reviewed *de novo*. *Id.* at 18. While this case concerns the trial court's determination of jury instructions, which is generally within a trial court's sound discretion, we must determine instead whether the court exercised its discretion within the bounds of the law, which is a question of law subject to *de novo* review. *Smith*, 233 Ill. 2d at 15.

¶ 15 Initially, the State claims that defendant's claim is time-barred because his petition was filed well beyond the two-year limitations period for section 2-1401 petitions. Defendant, in turn, claims that his sentence of natural life imprisonment was not authorized by statute and is therefore void. When a defendant challenges a void judgment, the two-year time limitation does not apply. See *People v. Sims*, 378 Ill. App. 3d 643, 646 (2007) (citing *People v. Gosier*, 205 Ill. 2d 198, 206 (2001)).

¶ 16 Relatedly, the State further argues that defendant's allegedly erroneous sentence is merely voidable and not void, and therefore the sentence is not subject to collateral attack. In support, the State relies upon *People v. Coady*, 156 Ill. 2d 531 (1993). The State's reliance upon

Coady, however, is misplaced. *Coady* was not a sentencing case; rather, it concerned the forfeiture of a challenge to a lesser-included offense because of the defendant's failure to raise the issue in his motions to withdraw his guilty plea. *Id.* at 535. Here, the issue concerns defendant's unauthorized sentence, which was imposed following a trial. *Coady* is therefore unavailing, and the State's argument is without merit. It is well established that a sentence entered without statutory authorization is void and may be attacked at any time, even on collateral review. *People v. Donelson*, 2013 IL 113603, ¶ 15 (citing *People v. Thompson*, 209 Ill. 2d 19, 23 (2004)). We therefore turn to the merits of defendant's claim.

¶ 17 The issue presented concerns the trial court's denial of defendant's request for separate verdict forms for the different theories of first degree murder under which the State charged defendant. In *Smith*, our supreme court held that denying the 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. That kind of error is not harmless unless the jury's findings may be ascertained from the general verdicts entered, and all parts of the record may be searched and interpreted together to determine the meaning of the jury's general verdict. *Id.* at 25-26. The *Smith* court determined that a general verdict cannot be presumed to be a finding of intentional murder when the trial court has refused a request for separate verdict forms that would have clarified the basis for the jury's verdict. *Id.* at 28. Under those circumstances, the *Smith* court held that the appropriate remedy is to interpret the general verdict as a finding on felony murder. *Id.* As a result, the supreme court vacated the *Smith* defendant's conviction and sentence for the underlying felony. *Id.* at 29.

¶ 18 In *People v. Bailey*, 2013 IL 113690, ¶ 1, the defendant was charged with intentional, knowing, and felony murder predicated upon home invasion and robbery of an individual 60 years of age or older. The State filed its notice of intent to seek the death penalty, and the defendant elected to have the trial court determine eligibility for a death sentence. *Id.* The trial court denied the defendant's request for separate verdict forms for murder, and the jury found him guilty. *Id.* Although the trial court found the defendant eligible for a death sentence, it sentenced him to natural life instead. *Id.*

¶ 19 The supreme court reaffirmed the rule in *Smith* that the trial court erred in refusing the defendant's request for individual verdict forms for the various theories of murder where the sentencing consequences would differ. *Id.* ¶ 57. Having found error under *Smith* and observing that *Smith* (when read in conjunction with *Beck v. Alabama*, 447 U.S. 625 (1980), and *Bullington v. Missouri*, 451 U.S. 430 (1981)) requires that the verdict be interpreted not only as a conviction of felony murder, but also as an acquittal of intentional or knowing murder, the *Bailey* court held that the State was barred from seeking a finding of death penalty eligibility under section 9-1(b)(6) of the Criminal Code. *Id.* ¶ 64. The court then held that, since the defendant was not properly found eligible for the death penalty, he was not eligible for a sentence of natural life without parole under section 5-8-1(a)(1)(b) of the Corrections Code, which the trial court may impose when it elects not to impose the death penalty on an otherwise death-eligible defendant. *Id.* ¶ 65. The court clarified, however, that the *Smith* rule is applicable only where (1) the defendant has requested separate verdict forms, (2) the trial court denies the request, (3) and the lack of separate verdict forms could have adverse sentencing consequences. *Id.* ¶ 69.

¶ 20 Here, as in *Smith*, defendant requested separate verdict forms for the separate theories of murder, but the court denied the request. Since the sentencing consequences differ depending on

the theory proven, the general verdict form did not provide the specificity necessary for the trial court to sentence defendant properly. In light of *Smith* and *Bailey*, we must interpret the general verdict as a finding of guilty only on felony murder and an acquittal of intentional and knowing murder unless our review of the record reveals the meaning of the jury's general verdict. The State maintains that the jury's finding of death eligibility under section 9-1(b)(6) provides the support for the trial court's imposition of a natural life sentence based upon its presumption of a guilty verdict for intentional or knowing murder. We disagree.

¶ 21 Here, the jury's verdict form (which mirrored the trial court's instruction) did not delineate whether it found defendant eligible for a death sentence based upon intentional or knowing murder. The various theories of murder were listed disjunctively and, in pertinent part, the verdict form read that defendant would be eligible for a death sentence if he was least 18 years old at the time of the victim's murder and the victim "was killed in the course of another felony if the [victim] was actually killed by defendant; *or* the [victim] received *** injuries inflicted by defendant [at the same time as those inflicted by those for whom defendant was accountable] and the physical injuries *** caused the death of the [victim]; and in performing the acts which caused the death of the [victim], the defendant acted with the intent to kill the [victim] or with the knowledge that his acts created a strong probability of death or great bodily harm to the [victim] or another; and the other felony was aggravated arson." (Emphasis added.) As defendant points out, the jury could simply have found defendant eligible based upon the conditions leading up to the first "or" in the verdict form: the victim being "actually" killed by the defendant in the course of another felony. See *Smith*, 233 Ill. 2d at 27. Since we cannot ascertain the jury's findings from the general verdicts, we must interpret the general verdict as a

finding of guilty only on felony murder and an acquittal of intentional and knowing murder, and the error is not harmless. *Id.* at 27-28.

¶ 22 Finally, although the State agrees with defendant that the rules announced in *Smith* and *Bailey* were new rules, it claims that the rules are merely procedural in nature, not substantive, and they do not meet any relevant exceptions. As a result, according to the State, neither *Smith* nor *Bailey* should be given retroactive effect on collateral review.

¶ 23 We agree with the parties that the rules in *Smith* and *Bailey* are new rules. A new rule is one that breaks new ground or imposes a new obligation on the states or federal government, so that the result of the case “must not be ‘dictated by precedent existing at the time the defendant’s conviction became final.’ ” (Emphasis in original.) *People v. Sanders*, 238 Ill. 2d 391, 400-01 (2010) (quoting *Teague v. Lane*, 489 U.S. 288, 301 (1989)). Here, the outcomes in *Smith* and *Bailey* were not “dictated” by prior precedent—indeed, prior precedent held that a general verdict of guilty typically supported a conviction on the most culpable form of the charged offense, regardless of the sentencing consequences. See, e.g., *People v. Thompkins*, 121 Ill. 2d 401, 456 (1988) (upholding the defendant’s death sentence imposed after the trial court’s finding of eligibility from the jury’s general verdict of guilty as to first degree murder on various theories, including intentional, knowing, and felony murder) (citing *People v. Lymore*, 25 Ill. 2d 305, 308 (1962); *People v. Garcia*, 97 Ill. 2d 58, 83-85 (1983)). Therefore, the rules announced in *Smith* and *Bailey* were new rules, and we now must determine whether the new rules were substantive (and thus retroactively applied on collateral review) or procedural (and therefore not applied retroactively on collateral review unless they fall within an exception to this bar).

¶ 24 New constitutional rules of criminal procedure generally do not apply retroactively on collateral review because of the State’s legitimate interest in the finality of criminal convictions,

without which “the criminal law is deprived of much of its deterrent effect.” *People v. Flowers*, 138 Ill. 2d 218, 239 (1990) (quoting *Teague*, 489 U.S. at 309). In *Schriro v. Summerlin*, 542 U.S. 348, 351-52 (2004), however, the United States Supreme Court explicitly stated that substantive rules generally apply retroactively on collateral review because such rules “necessarily carry a significant risk that a defendant *** faces a punishment that the law cannot impose upon him.” (Internal quotation marks omitted.) Rules of this type are not properly characterized as an exception to *Teague*’s bar on retroactivity; rather, “they are more accurately characterized as substantive rules not subject to the bar.” *Id.* at 352 n.4.

¶ 25 The *Smith* rule essentially requires a general verdict of murder to be interpreted as a finding on felony murder where the separate verdict form would have different sentencing consequences and the record does not clarify the jury’s findings. *Smith*, 233 Ill. 2d at 23, 26-28. The *Bailey* court then held that a *Smith* error should be viewed as an acquittal of intentional and knowing murder counts, which thus renders a defendant ineligible for either the death penalty or a life sentence. *Bailey*, 2013 IL 113690, ¶¶ 64-67. In other words, the rules in *Smith* and *Bailey* resulted in defendant facing “a punishment the law cannot impose upon him.” (Internal quotation marks omitted.) *Schriro*, 542 U.S. at 351-52. Although neither *Smith* nor *Bailey* altered the elements of first degree murder, they nonetheless resulted in the prohibition of some types of punishment. As such, we hold that these rules were substantive and not procedural. Accord *Welch v. United States*, 604 F.3d 408, 415 (7th Cir. 2010) (holding that a decision by the United States Supreme Court that “narrowed substantially” the defendant’s exposure to an enhanced sentence of imprisonment was substantive and retroactively applicable on collateral review), *cert. denied*, ___ U.S. ___, 131 S. Ct. 3019 (2011). Accordingly, the rules announced in *Smith* and *Bailey* apply retroactively on collateral review.

¶ 26 In this case, the trial court should not have refused defendant's request for separate jury verdict forms for intentional, knowing, and felony murder, because the jury's acquittal on intentional and knowing murder would have had different sentencing consequences. *Smith*, 233 Ill. 2d at 23. Under *Bailey*, the jury's general verdict of guilty must be construed as a verdict of guilty as to felony murder (predicated upon aggravated arson) and an acquittal of intentional and knowing murder, and the jury's subsequent finding of death eligibility under section 9-1(b)(6) cannot stand, "despite the evidence that might have supported such a finding." *Bailey*, 2013 IL 113690, ¶ 64. Since defendant was not properly found eligible for a death sentence under section 9-1(b)(6), he was similarly ineligible for a natural life sentence under section 5-8-1(a)(1)(b), which the trial court may impose if there exists an aggravating factor (here, the factor found in section 9-1(b)(6)). Instead, the proper sentencing range for a defendant convicted of felony murder only is 20 to 60 years' imprisonment. 730 ILCS 5/5-8-1(a)(1)(a) (West 1994); see also *Bailey*, 2013 IL 113690, ¶ 65.

¶ 27 Therefore, in accordance with *Smith* and *Bailey*, defendant's section 2-1401 petition stated a valid claim. Since the petition raised only issues of law which are apparent from the record, we find that his sentence of natural life must be vacated and this cause must be remanded for resentencing under section 5-8-1(a)(1)(a) (730 ILCS 5/5-8-1(a)(1)(a) (West 1994)). Finally, since a defendant convicted of felony murder may not be convicted of the underlying felony (*Smith*, 233 Ill.2d at 17 (citing *People v. King*, 66 Ill. 2d 551, 566 (1977))), defendant's conviction and sentence for aggravated arson must also be vacated.

¶ 28 Defendant's Mitimus

¶ 29 Defendant also contends, and the State concedes, that he is entitled to presentence custody credit of 740 days. We agree with the parties. Defendant was arrested on December 28,

1994, and remained in custody until his sentencing on January 6, 1997, a total of 740 days. Therefore, pursuant to Supreme Court Rule 615(b)(1) (Ill. S. Ct. R. 615(b)(1) (eff. Jan. 1, 1967)), we direct the clerk of the circuit court of Cook County to correct defendant's mittimus to reflect a credit of 740 days for time actually served in custody prior to sentencing. See also *People v. McCray*, 273 Ill. App. 3d 396, 403 (1995) (holding that remand is unnecessary because the court may directly order the clerk to correct the mittimus).

¶ 30

CONCLUSION

¶ 31 We reverse the trial court's denial of defendant's 2-1401 petition and remand this cause with directions to grant the section 2-1401 petition, vacate defendant's conviction and sentence for aggravated arson, and to resentence defendant on felony murder predicated upon aggravated arson. We further order the mittimus to be corrected as noted above.

¶ 32 Reversed and remanded with directions.