

IN THE DISTRICT COURT OF APPEAL
FIRST DISTRICT, STATE OF FLORIDA

ISAAC ROGERS,

Petitioner,

v.

STATE OF FLORIDA,

Respondent.

NOT FINAL UNTIL TIME EXPIRES TO
FILE MOTION FOR REHEARING AND
DISPOSITION THEREOF IF FILED.

CASE NO. 1D06-1455

Opinion filed August 15, 2006.

Petition Alleging Ineffective Assistance of Appellate Counsel -- Original Jurisdiction.

Isaac Rogers, pro se, Petitioner.

Charlie Crist, Attorney General, and Elizabeth Duffy, Assistant Attorney General,
Tallahassee, for Respondent.

PER CURIAM.

Isaac Rogers presents a timely claim of ineffective assistance of appellate
counsel. We agree that petitioner's appellate counsel was ineffective for failing to

raise an issue of fundamental error in the jury instructions, and therefore grant the petition.

Among other offenses, Rogers was charged with armed kidnapping. Kidnapping is defined in section 787.01(1)(a), Florida Statutes (2003), as follows:

The term kidnapping means forcibly, secretly, or by threat confining, abducting, or imprisoning another person against her or his will and without lawful authority, with intent to:

1. Hold for ransom or reward or as a shield or hostage.
2. Commit or facilitate commission of any felony.
3. Inflict bodily harm upon or to terrorize the victim or another person.
4. Interfere with the performance of any governmental or political function.

The amended information alleged that Rogers committed the kidnapping offense with the intent to commit robbery and/or carjacking, but the jury was instructed on all four of the alternate intent elements set forth in the statute, and thereafter returned a general verdict finding Rogers guilty of armed kidnapping. By instructing the jury on alternate intent elements that were not alleged in the amended information, the trial court committed fundamental error. See, e.g., Debose v. State, 920 So. 2d 169 (Fla. 1st DCA 2006); Eaton v. State, 908 So. 2d 1164 (Fla. 1st DCA

2005); Braggs v. State, 789 So. 2d 1151 (Fla. 3d DCA 2001). Despite the absence of an objection at trial, petitioner's appellate counsel was ineffective for failing to raise this issue on appeal. See Hodges v. State, 878 So. 2d 401 (Fla. 4th DCA 2004).

Accordingly, we grant the petition alleging ineffective assistance of appellate counsel, vacate petitioner's armed kidnapping conviction, and remand for a new trial on that count. We further direct the trial court to consider on remand whether the outcome of the kidnapping charge necessitates resentencing on the other offense for which petitioner was convicted, and if so, to resentence petitioner accordingly.

KAHN, C.J., BARFIELD and ALLEN, JJ., CONCUR.