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No. 1-08-2313

IN THE
APPELLATE COURT OF ILLINOIS
FIRST JUDICIAL DISTRICT

THE PEOPLE OF THE STATE OF ILLINOIS,)	Appeal from the
)	Circuit Court of
Plaintiff-Appellee,)	Cook County.
)	
v.)	No. 04 C2 20201
)	
JAMES NOVAKOWSKI,)	Honorable
)	Garritt E. Howard,
Defendant-Appellant.)	Judge Presiding.

PRESIDING JUSTICE GALLAGHER delivered the judgment of the court.

Justices Neville and Salone concurred in the judgment.

O R D E R

Held: Pursuant to a supervisory order entered by the Illinois Supreme Court, we reconsidered our initial judgment remanding the matter for further proceedings in accordance with the Post-Conviction Hearing Act in light of *People v. Miller*, 238 Ill. 2d 161 (2010), and now conclude that remand is unnecessary because theft is not a lesser-included offense of residential burglary; the trial court's judgment was affirmed.

Defendant James Novakowski 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, defendant contends that his petition stated the gist of a constitutional claim of ineffective assistance of appellate counsel. Specifically, defendant maintains that appellate counsel was ineffective for failing to argue that his conviction for theft must be vacated because, as alleged in the charging instrument, theft was a lesser-included offense of residential burglary.

In a Rule 23 Order entered on August 12, 2010, we reversed and remanded the trial court's summary dismissal of defendant's *pro se* petition under the Act. In doing so, this court held that defendant demonstrated an arguable claim of ineffective assistance of counsel because a conflict existed in the appellate court on the lesser-included issue raised by defendant. Subsequently, the Illinois Supreme Court entered a supervisory order directing us to vacate that decision and reconsider it in light of *People v. Miller*, 238 Ill. 2d 161 (2010). We now affirm the trial court's judgment.

On March 12, 2004, defendant was arrested when police found him with a backpack containing stolen items. He was subsequently charged with, and ultimately convicted of, both residential

burglary and theft.

The evidence at trial revealed that Officer James Salas was investigating a residential burglary when he noticed defendant carrying a backpack. When defendant saw Salas, he dropped the backpack and walked toward Salas. Salas recognized defendant as a suspect in several neighborhood robberies, and when he asked defendant about the backpack, he "chuckled." A second officer arrived to secure defendant while Salas retrieved the backpack which contained a video camera, money, collectable coins, and jewelry. Defendant was arrested and eventually confessed to breaking a basement window of the victim's home and removing several items from the residence.

Defendant testified at trial that, on the day in question, he was released from a methadone clinic, went to his mother's house, and then went to a grocery store. After leaving the store, defendant was stopped by Officer Salas. Defendant denied carrying a backpack and making a statement. Following the bench trial, defendant was convicted of residential burglary and theft and sentenced to concurrent terms of 15 and 5 years' imprisonment, respectively.

We affirmed the trial court's judgment on direct appeal. *People v. Novakowski*, 368 Ill. App. 3d 637 (2006). In doing so,

we rejected defendant's contention that his motion to quash arrest and suppress evidence was erroneously denied. *Novakowski*, 368 Ill. App. 3d at 641-43.

On July 5, 2008, defendant filed a *pro se* post-conviction petition alleging, in pertinent part, that his appellate counsel was ineffective for failing to challenge his convictions of theft and burglary. Defendant specifically maintained that his theft conviction should be vacated because it was a lesser-included offense of residential burglary as charged. On July 22, 2008, the circuit court summarily dismissed the petition as frivolous and patently without merit.

In this appeal, defendant challenges the propriety of that dismissal, arguing that he alleged the gist of a constitutional claim of ineffective assistance of appellate counsel. Specifically, defendant maintains that because theft is a lesser-included offense of residential burglary as charged, he should not have been convicted of both offenses, and appellate counsel was ineffective for not raising this issue on appeal. Our review of the circuit court's dismissal of defendant's post-conviction petition is *de novo*. *People v. Hodges*, 234 Ill. 2d 1, 9 (2009).

The dismissal of a petition is appropriate at the first stage of post-conviction review where the circuit court finds

that it is frivolous and patently without merit (725 ILCS 5/122-2.1(a)(2) (West 2008)), *i.e.*, the petition has no arguable basis in either law or fact. *Hodges*, 234 Ill. 2d at 11-12. To have no arguable basis, the petition must be based on an "indisputably meritless legal theory or a fanciful factual allegation." *Hodges*, 234 Ill. 2d at 16. In order for a defendant to overcome dismissal at the first stage, he must allege the "gist" of a constitutional claim, which is a low threshold. *Hodges*, 234 Ill. 2d at 9-10.

To succeed on a post-conviction claim that appellate counsel was ineffective, the defendant must show that appellate counsel's failure to raise the specified issue was objectively unreasonable "and that, absent this failure, his conviction or sentence would have been reversed on direct appeal." *People v. Williams*, 209 Ill. 2d 227, 243 (2004). To survive the first stage of post-conviction proceedings, the defendant need only show that it is arguable that counsel's performance fell below an objective standard of reasonableness, and arguable that the defendant was prejudiced. *Hodges*, 234 Ill. 2d at 17.

As relevant to this appeal, the one-act, one-crime doctrine prohibits multiple convictions when one of the offenses is a lesser-included offense of the other. *Miller*, 238 Ill. 2d at

165; *People v. King*, 66 Ill. 2d 551, 566 (1977). A lesser-included offense is one that establishes "proof of the same or less than all of the facts or a less culpable mental state, *** than that which is required to establish the commission of the offense charged." 720 ILCS 5/2-9(a) (West 2004). In order to determine whether defendant's conviction for theft is a lesser-included offense of residential burglary, we employ the abstract elements approach. *Miller*, 238 Ill. 2d at 163. Defendant's arguments to this court employ the alternative "charging instrument" method because they were submitted before the supreme court decided *Miller*. Under the abstract elements approach, we must compare the statutory elements of the two offenses to determine if one is a lesser-included offense of the other. *Miller*, 238 Ill. 2d at 166.

A person commits residential burglary when he "knowingly and without authority enters or *** remains within the dwelling place of another *** with the intent to commit therein a felony or theft. 720 ILCS 5/19-3(a) (West 2004). In comparison, as relevant to this case, a person commits theft when he "obtains control over stolen property knowing the property to have been stolen or under such circumstances as would reasonably induce him to believe that the property was stolen." 720 ILCS 5/16-1(a) (4)

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(West 2004).

Our analysis of the elements of residential burglary and theft reveals that these crimes are not lesser-included offenses of each other. Each offense contains elements that are not included in the other. First, residential burglary requires a person to enter or remain within a dwelling place of another, whereas theft does not. Secondly, theft, in this case, required that a person obtain control over stolen property, whereas residential burglary does not. Finally, the requisite intents of each offense are different. Thus, it is possible to commit residential burglary without necessarily committing theft. Accordingly, we conclude that theft is not a lesser-included offense of residential burglary and, therefore, both of defendant's convictions stand under *King*. See *Miller*, 238 Ill. 2d at 176 (retail theft is not a lesser-included offense of burglary).

For the foregoing reasons, we affirm the judgment of the circuit court.

Affirmed.