

NOTICE
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2012 IL App (4th) 100866-U

Filed 4/13/12

NO. 4-10-0866

IN THE APPELLATE COURT

OF ILLINOIS

FOURTH DISTRICT

THE PEOPLE OF THE STATE OF ILLINOIS,)	Appeal from
Plaintiff-Appellee,)	Circuit Court of
v.)	Vermilion County
JOSHUA KRUGER,)	No. 99CF357
Defendant-Appellant.)	
)	Honorable
)	Michael D. Clary,
)	Judge Presiding.

JUSTICE COOK delivered the judgment of the court.
Presiding Justice Turner and Justice McCullough concurred in the judgment.

ORDER

¶ 1 *Held:* The Appellate Court (1) vacated defendant's conviction and sentence for residential burglary because defendant's conviction for first degree murder was predicated upon the lesser-included offense of residential burglary and (2) remanded for the second time with directions to correct the sentencing judgment to show defendant was convicted of "Type B" murder (count VI (720 ILCS 5/9-1(a)(3) (West 1998)), rather than "Type A" murder (count IV (720 ILCS 5/9-1(a)(1) (West 1998))).

¶ 2 Defendant, Joshua Kruger, appeals the trial court's April 8, 2010, dismissal of his October 13, 2009, postconviction petition. We affirm in part, vacate in part, and remand with directions.

¶ 3 I. BACKGROUND

¶ 4 In August 1999, defendant was indicted with seven counts of first degree murder (720 ILCS 5/9-1(a)(1), (a)(3) (West 1998)) (counts I to VII) for the death of Peter Godels, two counts of home invasion (720 ILCS 5/12-11(a)(2) (West 1998)) (counts VIII and IX), two counts

of residential burglary (720 ILCS 5/19-3(a) (West 1998)) (counts X and XI), and one count of attempt (robbery) (720 ILCS 5/8-4(a), 18-1(a) (West 1998)) (count XII). In February 2002, while an appeal was pending with this court regarding the trial court's grant of defendant's motion to exclude evidence (*People v. Kruger*, 327 Ill. App. 3d 839, 845, 764 N.E.2d 138, 142 (2002)), the State filed a new indictment that reinstated the charges from the original indictment and added four enhanced first degree murder counts based on the following: (1) the victim was 60 years of age or older (count XIII); (2) brutal or heinous behavior (count XIV); (3) section 9-1(b)(6) aggravating factor (murder committed during forcible felony) (720 ILCS 5/9-1(b)(6) (West 1998)) (count XV); and (4) section 9-1(b)(16) aggravating factor (the victim was over 60 and the acts were brutal or heinous) (720 ILCS 5/9-1(b)(16) (West 1998)) (count XVI).

¶ 5 During the June 2003 jury trial, the State submitted two theories of first degree murder. "Type A" theorized defendant personally or by accountability performed the acts that caused the death, and intended to kill or do great bodily harm, knew his acts would cause death, or knew his acts created a strong probability of death (counts I to IV). "Type B" theorized felony murder during the commission or attempted commission of home invasion (count V), residential burglary (count VI), or robbery (count VII). Defendant was convicted on general jury forms with no specification as to which counts of (1) first degree murder "Type B" (aggravating factors age, brutal or heinous behavior, and felony murder), (2) home invasion, (3) residential burglary, and (4) attempt (robbery).

¶ 6 At sentencing in August 2003, the State requested judgments on counts VI (first degree murder predicated on residential burglary), VIII (home invasion), and XII (attempt (robbery)). The trial court orally sentenced defendant to concurrent prison terms of natural life

for "Type B" first degree murder (apparently on count VI—although unspecified by the court), 30 years for home invasion (count VIII), 15 years for residential burglary (count X), and 5 years for attempt (robbery) (count XII). However, in the August 2003 written judgment order, the trial court entered judgment of conviction on count IV ("Type A" murder). In September 2003, defendant filed a motion to reconsider his sentence, which the court denied. Defendant appealed.

¶ 7 On direct appeal, defendant raised eight issues, including, in relevant part, that his sentence of natural life was based on a charge of which he was acquitted, *i.e.*, "Type A" murder. *People v. Kruger*, 363 Ill. App. 3d 1113, 1119, 845 N.E.2d 96, 101 (2006). In March 2006, this court affirmed defendant's convictions, but "remand[ed] with directions that the written judgment of sentence be corrected to show defendant was convicted of and sentenced for count VI, first degree murder, in that he without lawful justification performed the acts that caused the death of Godels while attempting to commit a forcible felony, residential burglary, in violation of section 9-1(a)(3) of the Criminal Code of 1961 (720 ILCS 5/9-1(a)(3) (West 1998))." *Id.* at 1124, 845 N.E.2d at 105.

¶ 8 In November 2006, defendant filed a *pro se* postconviction petition raising 12 grounds for relief. In April 2007, the trial court docketed the petition for stage-two review because the petition had not been acted upon within 90 days as required by statute (725 ILCS 5/122-2.1(a)(2) (West 2006)). The court appointed attorney Derek Griton to represent defendant and granted leave for Griton to file an amended postconviction petition. In September 2009, Griton filed an amended postconviction petition. The petition alleged ineffective assistance of trial counsel for a variety of reasons. Defendant petitioned the court to allow him to proceed *pro se*, asserting that (1) Griton failed to raise all issues defendant wanted in the petition and (2) the

petition did not contain statutorily required affidavits or citations to the record. Further, defendant stated he included these required affidavits with his earlier-filed *pro se* petition. The court granted defendant's request to proceed *pro se*, discharged Griton from any further representation, and gave defendant 30 days to file any amendments to the petition.

¶ 9 In October 2009, defendant filed an amended *pro se* postconviction petition, adding claims of ineffective assistance of appellate counsel. In January 2010, the State filed a motion to dismiss defendant's amended postconviction petition. On April 8, 2010, the trial court dismissed the petition in a written order. On April 26, 2010, defendant filed a "motion to reconsider order," which the court denied.

¶ 10 This appeal followed.

¶ 11 II. ANALYSIS

¶ 12 On appeal, defendant argues the trial court erred in dismissing his *pro se* postconviction petition because defendant made a substantial showing that his constitutional rights were violated when "trial and appellate counsel both failed to object to [defendant] being convicted and sentenced on multiple charges based on the same act, violating the 'one act, one crime' rule." Defendant requests this court to (1) reverse the dismissal of his postconviction petition, (2) modify the judgment order in accordance with this court's original decision in his direct appeal, thereby vacating defendant's conviction and sentence for residential burglary (count X), and (3) reaffirm our holding in his direct appeal and order that the judgment order be modified to reflect his conviction for "Type B" murder (count VI), rather than "Type A" murder (count IV).

¶ 13 The State concedes that appellate counsel was ineffective for failing to raise the

one-act, one-crime rule on appeal, because a defendant may not be convicted of both felony murder and the underlying felony. See *People v. Smith*, 183 Ill. 2d 425, 431-32, 701 N.E.2d 1097, 1100 (1998) (vacating the defendant's armed-robbery conviction because it was a lesser-included offense of defendant's felony-murder conviction). The State contends, however, that the proper remedy is for this court to (1) reverse the trial court's dismissal of defendant's postconviction petition, (2) modify the judgment to show a conviction for first degree murder based on attempt (robbery) (count VII), and (3) vacate defendant's conviction for attempt (robbery) (count XII), rather than residential burglary (count X).

¶ 14 "The Post-Conviction Hearing Act (725 ILCS 5/122-1 *et seq.* (West 2000)) provides a means by which a defendant may challenge his conviction or sentence for violations of federal or state constitutional rights. [Citation.] To be entitled to postconviction relief, a defendant must show that he has suffered a substantial deprivation of his federal or state constitutional rights in the proceedings that produced the conviction or sentence being challenged." *People v. Pendleton*, 223 Ill. 2d 458, 471, 861 N.E.2d 999, 1007 (2006) (citing *People v. Whitfield*, 217 Ill. 2d 177, 183, 840 N.E.2d 658, 663 (2005)). We review *de novo* the dismissal of a postconviction petition at the second stage. *Whitfield*, 217 Ill. 2d at 182, 840 N.E.2d at 661. In reviewing a circuit court's decision to grant the State's motion to dismiss at the second stage of the postconviction process, all allegations in the postconviction petition are taken as true and liberally construed in favor of the petitioner. *People v. Coleman*, 183 Ill. 2d 366, 380, 701 N.E.2d 1063, 1071 (1998). A circuit court may grant the State's motion to dismiss only where the allegations in the petition fail to make "a substantial showing of a violation of constitutional rights." *Id.* at 381, 701 N.E.2d at 1072.

¶ 15 The double jeopardy clauses of the United States and Illinois constitutions protect persons from multiple convictions and punishments for the same offense. U.S. Const., amends. V, XIV; Ill. Const. 1970, art. I, § 10; *Benton v. Maryland*, 395 U.S. 784, 787 (1969). "[M]ultiple convictions are improper if they are based on lesser[-]included offenses." *Smith*, 183 Ill. 2d at 431, 701 N.E.2d at 1100; *People v. King*, 66 Ill. 2d 551, 566, 363 N.E.2d 838, 844 (1977). "Whether a charged offense encompasses another as a lesser[-]included offense is a question of law, which this court reviews *de novo*." *People v. Echols*, 382 Ill. App. 3d 309, 314, 887 N.E.2d 793, 798 (2008). "[I]n the case of felony murder, the underlying felony is a lesser[-]included offense because the felony is established by proof of the same or less than all of the facts required to establish the offense of the felony murder." *People v. Washington*, 272 Ill. App. 3d 913, 919, 651 N.E.2d 625, 630 (1995).

¶ 16 We accept the State's concession that appellate counsel was ineffective for failing to raise a patently meritorious issue regarding multiple convictions based on the same offense. Although appellate counsel is not required to raise every conceivable error on appeal, it is ineffective assistance of counsel to fail to raise a patently meritorious issue which likely would have resulted in relief to the defendant. See, e.g., *People v. Moore*, 177 Ill. 2d 421, 437, 686 N.E.2d 587, 596 (1997) (appellate counsel ineffective for failing to raise a sentencing issue on appeal). Thus, the trial court erred in dismissing defendant's postconviction petition because defendant made a substantial showing that his constitutional rights were violated. Therefore, we must determine only which underlying offense—residential burglary or attempt (robbery)—predicates defendant's first degree murder conviction.

¶ 17 The State correctly asserts that it is entitled to exercise its discretion when

determining the statute under which to prosecute a defendant. See *People v. Price*, 221 Ill. 2d 182, 192, 850 N.E.2d 199, 204 (2006); *People v. Bogan*, 185 Ill. App. 3d 129, 133, 540 N.E.2d 1135, 1137 (1989). It is also true that "when a defendant's act has been in violation of more than one statute, and each statute requires different proof for conviction (though there may be some overlapping), or provides for different defenses, the defendant may be prosecuted under the statute which provides for the greater penalty." *People v. Gordon*, 64 Ill. 2d 166, 170, 355 N.E.2d 3, 6 (1976). However, in this case, the defendant has already been prosecuted, convicted, and sentenced on the felony murder charge.

¶ 18 At sentencing, the State requested judgments on counts VI ("Type B" murder predicated on residential burglary), VIII (home invasion), and XII (attempt (robbery)). On the written judgment order, the trial court erroneously entered a judgment of conviction on count IV ("Type A" murder). It also entered judgments of conviction on counts VIII (home invasion), X (residential burglary), and XII (attempt (robbery)). On direct appeal, the State asserted "[t]he mittimus should thus be amended to reflect entry of judgment and sentence on [c]ount VI as requested by the State's attorney." This court ordered that the sentencing judgement be corrected to reflect a conviction and sentence on count VI (felony murder predicated on the underlying offense of residential burglary) as originally requested at sentencing and by the State on appeal. The State cannot now—more than eight years after defendant was convicted and sentenced—decide that it should have asked for a felony murder conviction predicated on attempt (robbery) (count VII) , rather than residential burglary (count VI). As the State originally requested and received a judgment of conviction for "Type B" murder predicated on residential burglary (despite the clerical error made on the written judgment order) (count VI), our decision

on direct appeal stands. Therefore, we vacate defendant's conviction and sentence for residential burglary (count X).

¶ 19 Last, our review of the record indicates that no amended sentencing judgment was issued following our decision on direct appeal. Thus, we remand for the second time with directions to issue an amended sentencing judgment to reflect defendant's conviction for "Type B" murder (count VI), rather than "Type A" murder (count IV), consistent with our original decision on defendant's direct appeal. See *Kruger*, 363 Ill. App. 3d at 1124, 845 N.E.2d at 105.

¶ 20 III. CONCLUSION

¶ 21 For the foregoing reasons, we vacate defendant's conviction and sentence for residential burglary (count X) and correct defendant's murder conviction to show conviction for first degree murder predicated on residential burglary (count VI), and we remand with directions to issue an amended sentencing judgment so reflecting. We otherwise affirm the dismissal of defendant's amended postconviction petition.

¶ 22 Affirmed in part, vacated in part, and cause remanded with directions.