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**IN THE
COURT OF APPEALS OF INDIANA**

BRIAN BAXTER,

Appellant-Petitioner,

vs.

STATE OF INDIANA,

Appellee-Respondent.

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No. 49A02-0702-PC-128

APPEAL FROM THE MARION SUPERIOR COURT
The Honorable Tanya Walton Pratt, Judge
The Honorable Heather Welch, Commissioner
Cause No. 49G01-0110-PC-197915

November 20, 2007

MEMORANDUM DECISION - NOT FOR PUBLICATION

CRONE, Judge

Case Summary

Brian Baxter appeals from the denial of his petition for post-conviction relief. We affirm.

Issue

Was Baxter's trial counsel ineffective in failing to tender a lesser included offense instruction on reckless homicide?

Facts and Procedural History

Another panel of this Court set forth the following relevant facts in Baxter's direct appeal:

On October 5, 2001, Baxter, Terrance Thomas, and Larry Mitchell, armed with a gun, went to Edward Green's apartment to rob him. Green was at his apartment with Antonio McGregor and Anthony Ashmore. During the robbery, Baxter shot and injured Green and fled from the apartment. While Baxter was waiting for Thomas and Mitchell in the car, Edward Gilbert entered the apartment. Thomas then shot and killed Green, Gilbert, and McGregor, and injured Ashmore.

....

On October 10, 2001, the State charged Baxter with three counts of murder [of Green, McGregor, and Gilbert], three counts of felony murder [of Green, McGregor, and Gilbert], one count of attempted murder [of Ashmore], one count of Class A felony conspiracy to commit robbery [of Green], one count of Class A felony robbery [of Green], one count of Class A misdemeanor carrying a handgun without a license, one count of Class A misdemeanor resisting law enforcement, and one count of Class D felony residential entry, that count was eventually dismissed.

On June 9, 2003, Baxter filed a motion to suppress, which the trial court denied. That same day a jury trial began. The jury [which had been instructed on accomplice liability¹] found Baxter guilty as charged. The trial court sentenced Baxter to sixty years on each of the three felony murder charges,^[2]

¹ See Ind. Code § 35-41-2-4 ("A person who knowingly or intentionally aids, induces, or causes another person to commit an offense commits that offense, even if the other person: (1) has not been prosecuted for the offense; (2) has not been convicted of the offense; or (3) has been acquitted of the offense.").

² The trial court did not sentence Baxter on the three murder counts.

forty years on the attempted murder charge, twenty years each on the conspiracy to commit robbery charge and the robbery charges, and one year on the carrying a handgun without a license and resisting law enforcement charges. The trial court ordered two of the felony murder sentences and conspiracy to commit robbery sentence to run consecutively with the remaining sentences to run concurrently for a total executed sentence of one hundred and forty years.

Baxter v. State, 49A04-0309-CR-444, slip op. at 2-4 (Ind. Ct. App. June 4, 2004) (“*Baxter I*”), *trans. denied*.

On appeal, Baxter raised three issues: (1) whether the trial court erred in denying his motion to suppress; (2) whether sufficient evidence supported his attempted murder conviction; and (3) whether the trial court improperly failed to consider certain mitigators at sentencing. The *Baxter I* court held that the trial court did not err in denying Baxter’s motion to suppress; that the evidence was insufficient to support Baxter’s attempted murder conviction; and that the trial court did not abuse its discretion in sentencing Baxter. The *Baxter I* court then determined, sua sponte, that Baxter’s convictions for robbery and felony murder violated double jeopardy and that his convictions for class A felony conspiracy to commit robbery and felony murder violated double jeopardy. The *Baxter I* court reversed the attempted murder conviction, vacated the robbery conviction, and remanded with instructions to reduce the class A felony conspiracy conviction to a class B felony. Our supreme court denied Baxter’s petition for transfer.

On May 13, 2005, Baxter filed a pro se petition for post-conviction relief, which was later amended by counsel. Baxter’s amended petition alleges that his trial counsel was ineffective in failing

to tender an instruction for a lesser included offense of aiding reckless homicide to Counts I and II, felony murder and murder, where the state's evidence showed that Baxter's accomplice [Thomas] did not intend to kill Edward Green when he fired the fatal shot. Had counsel tendered the lesser included offense instruction, there is a reasonable probability the court would have given the option and the jury would have convicted Baxter of aiding in the lesser included offense. Reckless homicide was an inherently lesser included offense to murder and felony murder. There was a serious evidentiary dispute about whether Baxter's accomplice intended to kill Green where the surviving victim [Ashmore] testified that Green was shot by the accomplice when those two men struggled to gain control over the handgun. Moreover, Baxter maintained in his statements that the accomplice did not mean to kill the victim when he fired the fatal shot. A serious evidentiary dispute existed about whether the accomplice committed murder or reckless homicide and, if the jury had considered the option of reckless homicide, they could not have properly convicted Baxter of aiding in murder because conviction of an accomplice requires sufficient proof of the underlying crime.

Appellant's App. at 74-75 (citation omitted). After a hearing, the post-conviction court denied Baxter's petition. Baxter now appeals.

Discussion and Decision

Our applicable standards of review are well settled:

Post-conviction proceedings are civil proceedings, so a defendant must establish his claims by a preponderance of the evidence.

A petitioner who appeals the denial of post-conviction relief faces a rigorous standard of review. The reviewing court may consider only the evidence and the reasonable inferences supporting the judgment of the post-conviction court. Furthermore, while we do not defer to the post-conviction court's legal conclusions, we accept its factual findings unless they are clearly erroneous. To prevail on appeal, the petitioner must establish that the evidence is uncontradicted and leads unerringly and unmistakably to a decision opposite that reached by the post-conviction court.

....

We review claims of ineffective assistance of trial counsel under the two-prong test set forth in *Strickland v. Washington*, 466 U.S. 668 (1984). First, the petitioner must demonstrate that counsel's performance was deficient because it fell below an objective standard of reasonableness and denied the petitioner the right to counsel guaranteed by the Sixth Amendment to the United States Constitution. Second, the petitioner must demonstrate that he

was prejudiced by his counsel's deficient performance. To demonstrate prejudice, a petitioner must demonstrate a reasonable probability that the result of the proceeding would have been different if his counsel had not made the errors. A probability is reasonable if our confidence in the outcome has been undermined.

Kien v. State, 866 N.E.2d 377, 381 (Ind. Ct. App. 2007) (some citations omitted), *trans. denied*. “If it is easier to dispose of an ineffectiveness claim on the ground of lack of sufficient prejudice ... that course should be followed.” *Strickland*, 466 U.S. at 697.

Murder is the knowing or intentional killing of another human being. Ind. Code § 35-42-1-1(1). Reckless homicide is the reckless killing of another human being. Ind. Code § 35-42-1-5. Because the only distinction between murder and reckless homicide is the level of culpability, reckless homicide is an inherently included offense of murder. *Wright v. State*, 658 N.E.2d 563, 567 (Ind. 1995).

Felony murder, on the other hand, is the killing of another human being while committing or attempting to commit certain crimes, including robbery. Ind. Code § 35-42-1-1(2). “A felony murder conviction requires proof of intent to commit the underlying felony but not of intent to kill.” *Kelly v. State*, 813 N.E.2d 1179, 1183 (Ind. Ct. App. 2004), *trans. denied*. Thus, contrary to what Baxter alleged in his petition for post-conviction relief, “[r]eckless homicide is not a lesser included offense of felony murder.” *Burns v. State*, 722 N.E.2d 1243, 1246 n.2 (Ind. 2000). In fact, “there are no lesser-included homicides in a felony murder charge.” *McFarland v. State*, 579 N.E.2d 610, 611 (Ind. 1991). Rather, “the underlying felony is the lesser included offense of the felony murder.” *Griffin v. State*, 717 N.E.2d 73, 80 n.12 (Ind. 1999), *cert. denied* (2000).

Our supreme court has stated that “[i]f the evidence warrants it, a requested instruction on Reckless Homicide should always be given in a case in which Murder has been charged.” *Wright*, 658 N.E.2d at 567. Stated more generally, a trial court should give an instruction on a lesser included offense “[i]f there is a serious evidentiary dispute about the element or elements distinguishing the greater from the lesser offense[.]” *Id.* Baxter claims that a serious evidentiary dispute existed regarding whether Thomas knowingly or recklessly killed Green and that his trial counsel was therefore ineffective in failing to tender an instruction on reckless homicide as a lesser included offense of murder.

We disagree. Even assuming for argument’s sake that a serious evidentiary dispute existed regarding Thomas’s intent to kill Green, his felony murder conviction establishes that the State proved to the jury beyond a reasonable doubt that Baxter and his cohorts had intended to rob Green and that Green was killed during the commission of the robbery. In other words, Thomas’s intent in killing Green was ultimately irrelevant. As such, Baxter cannot demonstrate prejudice, i.e., a reasonable probability that the result of his trial would have been different had trial counsel tendered an instruction on a lesser culpability for Green’s killing.³ We therefore affirm the denial of Baxter’s petition for post-conviction relief.

Affirmed.

DARDEN, J., and MAY, J., concur

³ Baxter's ineffectiveness argument is largely premised on the result of Thomas's trial, which occurred before Baxter's and was attended by Baxter's trial counsel. Thomas's counsel requested and received an instruction on reckless homicide as a lesser included offense of murder, and the jury found Thomas not guilty of felony murder and guilty of reckless homicide and robbery. We can only speculate that the jury in Thomas's case either was confused by the instructions or found that Green had not been killed during the commission of the robbery. The jury did not make such a finding in Baxter's case.