IN THE COURT OF CRIMINAL APPEALS OF TENNESSEE AT KNOXVILLE

Assigned on Briefs August 26, 2008

IRA ISHMAEL MUHAMMAD v. STATE OF TENNESSEE

Direct Appeal from the Criminal Court for Hamilton County
No. 252341 Rebecca Stern, Judge

No. E2007-00748-CCA-R3-PC - Filed February 18, 2009

The petitioner, Ira Ishmael Muhammad, appeals the Hamilton County Criminal Court's denial of his petition for post-conviction relief. The petitioner was convicted of attempted second degree murder, attempted voluntary manslaughter, and two counts of aggravated assault. Based upon the imposition of consecutive sentencing, he received an effective sentence of twenty-eight years in the Department of Correction. On appeal, the petitioner argues that: (1) the trial court erred in imposing an excessive sentence based upon application of enhancement factors absent a finding by the jury and in imposing a consecutive sentence; (2) he was denied his Sixth Amendment right to the effective assistance of counsel based upon trial counsel's failure to request recusal of the trial judge and district attorney and appellate counsel's failure to pursue two issues on direct appeal; and (3) he should not have been convicted of attempted voluntary manslaughter as the crime is an impossibility under the law. Following review of the record, we affirm the denial of post-conviction relief.

Tenn. R. App. P. 3 Appeal as of Right; Judgment of the Criminal Court Affirmed

JOHN EVERETT WILLIAMS, J., delivered the opinion of the court, in which ROBERT W. WEDEMEYER and J.C. MCLIN, JJ., joined.

John G. McDougal, Chattanooga, Tennessee, for the appellant, Ira Ishmael Muhammad.

Robert E. Cooper, Jr., Attorney General and Reporter; Jennifer L. Bledsoe, Assistant Attorney General; William H. Cox, III, District Attorney General; and Jason Thomas, Assistant District Attorney General, for the appellee, State of Tennessee.

OPINION

Factual Background and Procedural History

The relevant underlying facts of the petitioner's convictions, as established on direct appeal, are as follows:

> The [petitioner's] convictions stemmed from a shooting incident that occurred on October 26, 2001, outside his then wife's place of business, Kimberly's Hair

Salon and Boutique, in Chattanooga. He shot his wife, Kimberly Muhammad, multiple times and endangered their infant son before being apprehended by police officers near Thankful Baptist Church where he was shot once.

. . . .

Officer George Forbes of the Chattanooga Police Department testified that he responded to a call of "unknown trouble" in the 2200 block of Glass Street where Ms. Muhammad's salon was located. He saw the [petitioner], who matched the description he had been provided, driving a red Mitsubishi Eclipse. Forbes, along with Officers Lockhart and Rogers, who were in separate patrol cars, pursued the [petitioner]. The [petitioner] subsequently lost control of his vehicle and crashed into the parking lot of Thankful Baptist Church. As the officers approached the church, Officer Rogers radioed that the [petitioner] was armed and was fleeing through the parking lot. Forbes drew his weapon and ordered the [petitioner], whom he called by name, to drop his. However, the [petitioner] ignored Forbes's commands, instead raising his gun toward the other officers. Believing that the [petitioner's] gun was loaded, Forbes then fired three rounds at the [petitioner], striking him on the back side of his shoulder. The [petitioner] then turned toward Forbes and pointed his pistol at him before dropping it and falling to the grounds. The [petitioner] told the officers, "You motherfuckers shot me. I hope all of you sons of bitches motherfuckers die of anthrax. You've suppressed my people." . . .

. . . .

Officer Ernest Craw testified that he also responded to the scene at Thankful Baptist Church. . . . The [petitioner] began making "outburst statements," saying, "There is no other person going to raise . . . my MF child." Craw then turned on his tape recorder and began recoding the [petitioner]'s statements. This audiotape and a transcript of it were entered into evidence, and the tape was playing for the jury.

Kimberly Muhammad testified that she married the [petitioner] in November 1998 when she was thirty-seven years old and the [petitioner] was nineteen. They separated on January 17, 2001, when the [petitioner] ordered her to leave their home. At the time of their separation, she was five and one-half months pregnant with their child. A month later, in February 2001, the [petitioner] began threatening her by telephone and in person at her salon. The [petitioner] told her to "plan [her] death" and that she "need[ed] to be burned up." He also threatened their unborn child, saying, "Why are you having it, . . . you know that we both need to die, why do you want that baby[?]" She gave birth to their son, Jabril Muhammad, in March 2001 and filed for divorce in May 2001. She said the [petitioner]'s threats continued until she was shot in October 2001. Ms. Muhammad tape-recorded various telephone threats made by the [petitioner] in August and September 2001, and this tape was admitted

> into evidence and played for the jury. Referencing one of the taped conversations, Ms. Muhammad said that DNA paternity testing was performed during the course of the divorce proceeding which established the [petitioner] as the father of her son. During another conversation, the [petitioner] asked her, "Did you not see what happened in California?" Ms. Muhammad said the [petitioner] was referring to an incident in California "where the guy went on a rampage and . . . killed his wife, and I think she was pregnant and with children, and the in-laws too."
>
> As to the events of October 26, 2001, Ms. Muhammad said that she had taken seven-month-old Jabril to work with her and had stepped outside to put a note on her door when she heard a loud noise. She turned around and saw the [petitioner] jump out of his red Mitsubishi with a gun. The [petitioner] "snatched" Jabril from her, opened the door to her shop, and let Jabril slide down his leg. The [petitioner] then shot at Jabril, and Ms. Muhammad saw Jabril's legs "extend[] forward and g[e]t real stiff and straight" and believed he had been killed. The [petitioner] then said, "I told you it was going to be like this, now get in here, it's your turn." She refused to go inside, and she and the [petitioner] ended up on the far side of Glass Street across from her business. The [petitioner] told her, "You're not going to divorce me" and started shooting "like a crazy person." After one bullet struck her breast, Ms. Muhammad fell to the ground. The [petitioner] stood over her and continued shooting, and she crisscrossed her legs in an effort to protect herself. After the [petitioner] stopped shooting and she realized no one was coming to her aid, Ms. Muhammad got up and ran toward the traffic light at the four-way intersection. Bleeding and hysterical, she beat on a motorist's car and pleaded with the motorist to take her to a nearby fire station. There, a fireman whom she knew rendered first-aid to her and summoned medical personnel. One of the medics informed her that they had checked on Jabril and that he was alive. Ms. Muhammad said she was struck by five bullets, her primary injuries were to her wrist, arm, and breast, and she was hospitalized for three or four days as a result. She acknowledged that Jabril had not been injured during the incident.

State v. Ira Ishmael Muhammed, No. E2003-01629-CCA-R3-CD (Tenn. Crim. App., at Knoxville, May 10, 2004). Following a jury trial, the petitioner was convicted of attempted second degree murder, attempted voluntary manslaughter, and two counts of aggravated assault. *Id*. He was subsequently sentenced to twelve years for the attempted second degree murder, four years for the attempted voluntary manslaughter, and six years for each aggravated assault. *Id*. All sentences were ordered to be served consecutively for an effective sentence of twenty-eight years in the Department of Correction. *Id*. The petitioner filed a direct appeal during which he challenged the admission of two audiotapes, the application of consecutive sentencing in his case, and the constitutionality of consecutive sentencing. Following review, a panel of this court affirmed the convictions and sentences as imposed. *Id*. No permission to appeal was filed with the Tennessee Supreme Court.

The petitioner later filed a *pro se* petition for post-conviction relief, alleging that he was denied his Sixth Amendment right to the effective assistance of counsel and that there was newly discovered evidence in the case. Counsel was appointed, and two subsequent amended petitions were filed. At a March 2006 hearing, proof was presented on all issues, including whether the petitioner had been denied his right to petition for an appeal to our supreme court.

At the post-conviction hearing, testimony was given by trial counsel, appellate counsel, and the petitioner. Trial counsel testified that they pursued a theory of defense at trial that the State had "overcharged" the petitioner in an attempt to get a conviction for a lesser included offense, which was successful based upon the conviction for attempted second degree murder. Trial counsel also testified that he filed a motion for change of venue in the case because of the pretrial publicity generated because the victim was a daughter of a county commissioner. The trial court denied the motion, and trial counsel testified that he did not feel that prejudice resulted. Moreover, trial counsel testified that the issue of a motion for recusal was not discussed, and he further stated that he felt that there was no basis for such motion as he was not aware of any contact between the victim's mother and the trial court or the district attorney general.

Trial counsel further testified that the petitioner discussed with him on multiple occasions the issue of a defective indictment. However, trial counsel stated that, after research, he could find no error in the indictment. During trial, counsel invoked the rule of sequestration. According to trial counsel, the rule was violated by allowing the victim to remain in the courtroom. However, when he raised the issue with the trial court, the court held that the victim had a constitutional right to remain in the courtroom. With regard to sentencing, trial counsel indicated that the petitioner was sentenced pursuant to the sentencing law in effect prior to the 2005 amendments.

Next, appellate counsel also testified and stated that he had taken the case following trial and that he was responsible for the petitioner's motion for new trial and his direct appeal. Several issues were raised and argued in the motion for new trial. However, after the denial of the motion for new trial, the petitioner and appellate counsel discussed which of the issues would be most "profitable" to raise on direct appeal. Following their discussion, it was decided that four issues would be raised. Appellate counsel stated that he did not believe the issue of a change of venue would be beneficial to the petitioner's appeal. He specifically testified that it was a tactical decision to raise only the four issues.

Next, the petitioner testified, and his testimony with regard to the issues raised on direct appeal contradicted that of appellate counsel. Specifically, the petitioner stated that he did not agree that only the four issues should be raised. With regard to the trial counsel, the petitioner testified that he felt that trial counsel should have objected to the victim's presence in the courtroom and that he had asked trial counsel to file both a motion for change of venue and a motion for recusal of the trial court and the district attorney. He testified that he felt his case was prejudiced by the fact that the victim was the daughter of a county commissioner and that, because of that relationship, the case was often in the news. However, he did acknowledge that the potential jurors had been questioned

regarding their knowledge of the case. He further acknowledged that, of those jurors who had heard of the case, all indicated that they could be fair.

The petitioner also testified that he felt he should have received concurrent sentences because all of his prior convictions were misdemeanors. He felt that his entire sentence should have been eight to twelve years.

Following the proof, the post-conviction court determined that the petitioner had, in fact, been denied his right of appeal, and the court granted a delayed appeal for that purpose. The post-conviction court stayed the remaining post-conviction issues pending the outcome of the delayed appeal. On March 12, 2007, our supreme court denied the petitioner's application for permission to appeal. On March 27, 2007, the post-conviction court, by written order, denied the remaining issues in the post-conviction petition. The petitioner now appeals that denial.

Analysis

On appeal, the petitioner has raised three issues for our review. First, he contends that the trial court erred by imposing consecutive sentencing and by enhancing his sentence length absent a jury finding of the enhancement factors. As part of the challenge to his sentence, he also challenges the constitutionality of consecutive sentencing. Next, he contends that trial counsel was ineffective for failing to request recusal of the trial court and district attorney general and that appellate counsel was ineffective based upon his failure to raise two issues on direct appeal. Finally, he contends that he should not have been convicted of attempted voluntary manslaughter as the crime is an impossibility under the law.

I. Sentencing

The petitioner first challenges the trial court's enhancement of his sentence absent findings of fact by the jury in violation of *Cunningham v. California*, 549 U.S. 270, 127 S. Ct. 856 (2007) and *State v. Gomez*, 239 S.W.3d 733 (Tenn. 2007) ("*Gomez II*"). In the alternative, he argues that the application of consecutive sentencing is unconstitutional following the decision in *Blakely v. Washington*, 542 U.S. 296, 124 S. Ct. 2531 (2004). According to the petitioner, the trial court "sentenced the [petitioner] as a Range I offender and sentenced him at the top of the guideline range without any enhancements per [Tennessee Code Annotated section] 40-35-115." Thus, we glean that the petitioner is arguing that his sentences are illegal because they exceed the statutory minimum as defined in *Blakely* and because the trial court improperly imposed consecutive sentences.

Review of the record reveals that the petitioner's argument does not entitle him to relief. We agree with the petitioner that in *Gomez II,* it was held that the trial court's enhancement of a defendant's sentence based on factors that had not been found by a jury beyond a reasonable doubt violated a defendant's Sixth Amendment right to a jury trial. *Gomez II*, 239 S.W.3d at 740. Here, however, the petitioner has failed to put forth any evidence that this occurred in his case. There is nothing in the record to indicate that the trial court relied upon additional enhancement factors in

setting the sentence length at the maximum within the range. In his brief, the petitioner refers only to the fact that the trial court used two prior misdemeanor charges to enhance the sentence, which is not a violation of the law pursuant to *Gomez II*.

Regardless, even if the record did, in fact, establish a *Gomez II* violation, the petitioner is raising this argument for the first time on collateral review. Our court has repeatedly held that *Blakely*, *Cunningham*, and *Gomez II* did not establish a new rule of constitutional law which was entitled to retroactive application on collateral review as it was only a clarification of the rule announced in *Apprendi v. New Jersey*, 530 U.S. 466, 120 S. Ct. 2348 (2000). *Gomez v. State*, 163 S.W.3d 632, 648-51 (Tenn. 2005) ("*Gomez I*"); *see also Ortega Wiltz v. State*, No. M2006-02740-CCA-R3-CD (Tenn. Crim. App., at Nashville, Apr. 25, 2008); *Timothy R. Bowles v. State*, No. M2006-01685-CCA-R3-HC (Tenn. Crim. App., at Nashville, May 1, 2007). We reject the petitioner's argument in his reply brief that, "based upon the pipeline approach which says that if the case were before the Court when there was a decision, then it would not be a retroactive decision" and, thus, he is not barred from raising the claim on collateral review. His argument is based upon the fact that his post-conviction case was pending at the time *Gomez II* was released, which fails to acknowledge that the rule existed previously pursuant to *Apprendi*.

We also must reject the petitioner's challenge to the constitutionality and imposition of consecutive sentencing, as both issues were raised and decided on direct appeal and are, thus, previously determined. *See State v. Ira Ishmael Muhammed*, No. E2003-01629-CCA-R3-CD. A panel of this court affirmed the trial court's imposition of consecutive sentencing, finding that the court properly found both that the petitioner was a dangerous offender and that he was on probation for a prior assault when these offenses were committed. *Id*. Moreover, the court also rejected the petitioner's challenge to the constitutionality of consecutive sentencing. As here, the petitioner argued that only a jury should make the findings required to impose consecutive sentencing and that to allow the court to do so violated his constitutional rights in violation of *Apprendi*. *Id*. Grounds for relief which have been waived or previously determined are not cognizable in a post-conviction proceeding. T.C.A. § 40-30-106(f) (2006).

II. Ineffective Assistance of Counsel

Next, the petitioner contends that he was denied his Sixth Amendment right to the effective assistance of counsel by both trial and appellate counsel. To succeed on a challenge of ineffective assistance of counsel, the petitioner bears the burden of establishing the allegations set forth in his petition by clear and convincing evidence. T.C.A. § 40-30-110(f) (2006). The petitioner must demonstrate that counsel's representation fell below the range of competence demanded of attorneys in criminal cases. *Baxter v. Rose*, 523 S.W.2d 930, 936 (Tenn. 1975). Under *Strickland v. Washington*, 466 U.S. 668, 687, 104 S. Ct. 2052 (1984), the petitioner must establish: (1) deficient performance and (2) prejudice resulting from the deficiency. The petitioner is not entitled to the benefit of hindsight; may not second-guess a reasonably based trial strategy; and cannot criticize a sound, but unsuccessful, tactical decision made during the course of the proceedings. *Adkins v. State*, 911 S.W.2d 334, 347 (Tenn. Crim. App. 1994). This deference to the tactical decisions of trial

counsel is dependent upon a showing that the decisions were made after adequate preparation. *Cooper v. State*, 847 S.W.2d 521, 528 (Tenn. Crim. App. 1992).

It is unnecessary for a court to address deficiency and prejudice in any particular order or even to address both if the petitioner makes an insufficient showing on either. *Strickland*, 466 U.S. at 697, 104 S. Ct. at 2069. In order to establish prejudice, the petitioner must establish a "reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different. A reasonable probability is a probability sufficient to undermine confidence in the outcome." *State v. Burns*, 6 S.W.3d 453, 463 (Tenn. 1999) (quoting *Strickland*, 466 U.S. at 694, 104 S. Ct. at 2068).

The issues of deficient performance by counsel and possible prejudice to the defense are mixed questions of law and fact. *Id.* at 461. "[A] trial court's findings of fact underlying a claim of ineffective assistance of counsel are reviewed on appeal under a *de novo* standard, accompanied with a presumption that those findings are correct unless the preponderance of the evidence is otherwise." *Fields v. State*, 40 S.W.3d 450, 458 (Tenn. 2001) (citing Tenn. R. App. P. 13(d); *Henley v. State*, 960 S.W.2d 572, 578 (Tenn. 1997)). However, conclusions of law are reviewed under a purely *de novo* standard with no presumption.

a. Trial Counsel

The petitioner argues that trial counsel was ineffective in that he failed to request that the trial court and the district attorney general recuse themselves because the victim in the case was the daughter of a county commissioner. Trial counsel acknowledged that no such motion was made, but he further testified that he felt it was not warranted as he was not aware of any improper conduct between the victim's mother and the court or district attorney general's office.

"A judge shall disqualify himself . . . in a proceeding in which the judge's impartiality might reasonably be questioned." Tenn. Sup. Ct. R. 10, Canon 3E(1). "[A] trial judge should grant a recusal whenever the judge has any doubts about his or her ability to preside impartially." *Alley v. State*, 882 S.W.2d 810, 820 (Tenn. Crim. App. 1994). However, recusal also is necessary "when a person of ordinary prudence in the judge's position, knowing all of the facts known to the judge, would find a reasonable basis for questioning the judge's impartiality." *Id.*

The petitioner has simply failed to put forth any evidence to support this bare allegation. While it was testified to that the victim in the case was the daughter of a county commissioner, there was no evidence presented that the victim's mother had any inappropriate contact with, or undue influence on, either the trial court or the district attorney general's office which would render them impartial in any way. As the petitioner has failed to show that such a motion would have been granted, we cannot conclude that trial counsel was ineffective in failing to file such a motion.

b. Appellate Counsel

Next, the petitioner contends that appellate counsel was ineffective for failing to raise two issues on direct appeal, those being: (1) whether the petitioner's constitutional rights were violated by allowing the victim to remain in the courtroom during testimony despite invoking the rule of sequestration; and (2) whether the trial court properly denied the petitioner's motion for change of venue. If a claim of ineffective assistance of counsel is based on the failure of counsel to raise a particular issue on appeal, then the reviewing court must determine the merits of the omitted issue. *Carpenter v. State*, 126 S.W.3d 879, 887 (Tenn. 2004) (citing *Kimmelman v. Morrison*, 477 U.S. 365, 375, 106 S. Ct. 2574 (1986)). If the omitted issue has no merit or is weak, then appellate counsel's performance will not be deficient if counsel failed to raise it on appeal. *Id*. Likewise, if the issue has no merit, then the petitioner suffered no prejudice from the failure to raise the issue on direct appeal. *Id*.

First, we must consider whether appellate counsel's failure to raise issues represents deficient performance. "[T]he determination of which issues to present on appeal is a matter of counsel's discretion." *State v. Swanson*, 680 S.W.2d 487, 491 (Tenn. Crim. App. 1984). Further, "the failure of counsel for a criminal defendant to argue every single issue that a case may present or to present every issue in an appeal that a client may request is not *per se* ineffective assistance of counsel." *See id*. at 491. This court should evaluate the questionable conduct from counsel's perspective at the time of his conduct with "a strong presumption that his conduct falls within the wide range of reasonable professional assistance." *Burns*, 6 S.W.3d at 462. Counsel should not be deemed to have been ineffective merely because a different procedure or strategy might have produced a different result. *Williams v. State*, 599 S.W.2d 276, 279-80 (Tenn. Crim. App. 1980). Moreover, this court has held that "[c]ounsel is not constitutionally required to argue every issue on appeal, or to present issues chosen by his client." *Swanson*, 680 S.W.2d at 491. "Ineffectiveness is rarely found in cases where a defendant asserts that appellate counsel failed to raise an issue on direct appeal, primarily because the decision of what issues to raise is one of the most important strategic decisions to be made by appellate counsel." *Kenneth Henderson v. State*, No. W2003-01545-CCA-R3-CD (Tenn. Crim. App., at Jackson, June 28, 2005).

Second, the petitioner is required to demonstrate prejudice due to appellate counsel's error. In order to establish prejudice, the petitioner must show that, had appellate counsel raised the issue or issues asserted, there is a reasonable probability that his conviction would have been reversed. Thus, we are required to examine the merits of the issues which were not raised by appellate counsel on appeal. *Carpenter*, 126 S.W.3d at 887.

As noted, the petitioner asserts that appellate counsel should have raised two additional issues on direct appeal, those being that the petitioner was denied his right to a fair trial by allowing the victim to be present in the courtroom during testimony after the rule was invoked and that the trial court erred in denying the petitioner's motion for change of venue. With regard to the victim's presence in the courtroom, trial counsel testified that he made an objection during trial, which the trial court overruled based upon the law which allows a victim to be present during testimony. Our supreme court, in *State v. Elkins*, 83 S.W.3d 703, 713 (Tenn. 2006), held that the State may designate a victim as the person to remain in the courtroom following the defendant's invocation of the rule

of sequestration. The petitioner acknowledges this rule but argues that it violates his due process right to a fair trial. We disagree. Moreover, as a lower court, we are bound by the rulings of our supreme court, and the law permits the presence of a designated victim. As such, the petitioner has failed to establish that the issue would have had merit on appeal. Thus, appellate counsel cannot be found deficient for not raising the issue.

With regard to the change of venue, the petitioner argues that appellate counsel was ineffective for failing to raise the issue because his right to a fair trial was denied based upon the victim's relationship to a local politician and, as a result, the case received attention in the local media. A change of venue may be granted if it appears that "due to undue excitement against the defendant in the county where the offense was committed or any other cause, a fair trial probably could not be had." Tenn. R. Crim. P. 21(a). A motion for change of venue is left to the sound discretion of the trial court and the court's ruling will be reversed on appeal only upon a clear showing of an abuse of that discretion. *State v. Howell*, 868 S.W.2d 238, 249 (Tenn. 1993); *State v. Hoover*, 594 S.W.2d 743, 746 (Tenn. Crim. App. 1979). The mere fact that jurors have been exposed to pretrial publicity will not warrant a change of venue. *State v. Mann*, 959 S.W.2d 503, 531-32 (Tenn. 1997). Similarly, prejudice will not be presumed on the mere showing of extensive pretrial publicity. *State v. Stapleton*, 638 S.W.2d 850, 856 (Tenn. Crim. App. 1982). In fact, jurors may possess knowledge of the facts of the case and may still be qualified to serve on the panel. *State v. Bates*, 804 S.W.2d 868, 877 (Tenn. 1991). The test is whether the jurors who actually sat on the panel and rendered the verdict and sentence were prejudiced by the pretrial publicity. *State v. Crenshaw*, 64 S.W.3d 374, 386 (Tenn. Crim. App. 2001); *State v. Kyger*, 787 S.W.2d 13, 18-19 (Tenn. Crim. App. 1989). Furthermore, the scope and extent of voir dire are also left to the sound discretion of the trial court. *State v. Smith*, 993 S.W.2d 6, 28 (Tenn. 1999). Jurors who have been exposed to pretrial publicity may sit on the panel if they can demonstrate to the trial court that they can put aside what they have heard and decide the case on the evidence presented at trial. *State v. Gray*, 960 S.W.2d 598, 608 (Tenn. Crim. App. 1997).

On the record before us, we are unable to conclude that the issue would have been meritorious if raised on appeal. Trial counsel gave testimony regarding the motion and stated that he did not feel that the petitioner suffered prejudice as a result of the court's failure to grant the motion. He specifically testified that he was unaware of any specific contact between the victim's mother and either the trial court or the district attorney. Additionally, while acknowledging some pretrial publicity, no specifics regarding the coverage of the case were stated. Moreover, the petitioner himself testified that the selected jury panel was questioned regarding the parties and their awareness of the case, and all indicated that they could be fair and impartial. Other than his own assertion, the petitioner presented no evidence that any prejudice resulted from the denial.

Finally, we note that appellate counsel testified that he and the petitioner specifically discussed which issues should be raised on appeal and that the petitioner agreed with appellate counsel's assessment. Appellate counsel testified that he felt it would not be beneficial to the petitioner's appeal to raise any additional issues as he wanted to concentrate on the issues which he felt were most meritorious. This was obviously a tactical decision made by appellate counsel. This

court has repeatedly held that we cannot second-guess a tactical and strategic choice made by counsel unless those choices were uninformed due to inadequate preparation. *Hellard v. State,* 629 S.W.2d 4, 9 (Tenn. 1982); *Alley v. State,* 958 S.W.2d 138, 149 (Tenn. Crim. App. 1997).

III. Attempted Voluntary Manslaughter Conviction

The petitioner's entire argument with regard to this issue is as follows:

> That the Petitioner should not have been convicted of attempted voluntary manslaughter. Said crime is an impossibility under the law. *See State v. Kimbrough*, 924 S.W.2d 888 (Tenn. 1996) and *State v. Skidmore*.

In *State v. Howard Martin Adams*, No. 03C01-9403-CR-00123 (Tenn. Crim. App., at Knoxville, Jan. 11, 1995), a panel of this court rejected a defendant's argument that it was impossible to commit an attempted voluntary manslaughter because "a state of passion produced by adequate provocation prevents an individual from acting in an intentional manner as required by the attempt statute." The court held that the crime of attempted voluntary manslaughter was an offense in Tennessee and stated that:

> [v]oluntary manslaughter requires an intentional or knowing killing done in the heat of passion with adequate provocation. The core elements of attempted voluntary manslaughter are that the defendant acts intentionally to complete a course of action that would constitute an intentional or knowing killing of another in the heat of passion with adequate provocation which is a substantial step towards the commission of voluntary manslaughter. The fact that an act is committed in the heat of passion with adequate provocation in no way prevents the act from being intentional or knowing.

State v. Howard Martin Adams, No. 03C01-9403-CR-00123.

The petitioner's reliance upon *Kimbrough* and *Skidmore* is misplaced. In *Kimbrough*, our supreme court addressed the crime of attempted felony murder and found the crime did not exist in Tennessee as it was impossible to attempt an unintentional killing. *State v. Kimbrough*, 924 S.E.2d 888, 892 (Tenn. 1996). No mention was made in the case regarding the crime of attempted voluntary manslaughter. In *State v. Cecil Skidmore*, No. 03C01-9502-CR-00039 (Tenn. Crim. App., at Knoxville, Apr. 26, 1997), the defendant asserted on direct appeal that the trial court had erred in failing to charge attempted voluntary manslaughter to the jury. In a footnote, a panel of this court noted that the holding in *Kimbrough* "seemingly casts doubt" upon the holding in *State v. Howard Martin Adams* that attempted voluntary manslaughter was a crime. *State v. Cecil Skidmore*, No. 03C01-9502-CR-00039. However, the court did not hold that the crime did not exist and proceeded to address the issue of whether there was sufficient proof to warrant a jury instruction on the offense. *Id*.

Despite language in *Kimbrough* and *Skidmore*, the decision in *State v. Howard Martin Adams* remains as the law of Tennessee as no case had found that the crime of attempted voluntary manslaughter does not exist. Indeed, in cases subsequent to both *Kimbrough* and *Skidmore*, the offense has been recognized. *State v. Jim Corbett Corder*, No. M2005-02860-CCA-R3-CD (Tenn. Crim. App., at Nashville, Feb. 26, 2007), *perm. app. denied* (Tenn. June 25, 2007) (finding evidence sufficient for attempted voluntary manslaughter); *State v. William Binkley*, No. M2001-00404-CCA-R3-CD (Tenn. Crim. App., at Nashville, Apr. 5, 2002), *perm. app. denied* (Tenn. Nov. 4, 2002) (noting in a footnote that attempted voluntary manslaughter is an offense). Thus, the petitioner is not entitled to relief on this issue.

CONCLUSION

Based upon the foregoing, the Hamilton County Criminal Court's denial of the petition for post-conviction relief is affirmed.

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JOHN EVERETT WILLIAMS, JUDGE