IN THE COURT OF CRIMINAL APPEALS OF TENNESSEE

AT NASHVILLE

JANUARY 1996 SESSION

FILED

November 27, 1996

Cecil W. Crowson
Appellate Court Clerk

STATE OF TENNESSEE,	)	
	)	
Appellee,	)	No. 01C01-9506-CC-00178
	)	
	)	Bedford County
v.	)	
	)	Hon. Charles Lee, Judge
	)	
ANTONIO ERASMO ALVARADO,	)	(Attempted Felony Murder,
	)	Aggravated Assault, Aggravated
Appellant.	)	Rape, Aggravated Burglary)

CONCURRING OPINION

I concur fully with the majority opinion, given the present state of the law. However, I would hope that our supreme court would revisit its holding in State v. Kimbrough, 924 S.W.2d 888 (Tenn. 1996), relative to there being no crime of attempt to commit felony murder. In it, our supreme court notes that an attempt to commit a crime necessarily involves an intended act or result. 924 S.W.2d at 890. It also notes that felony murder, at the time of the offense, required that the killing be committed recklessly. It then reasons that "it is logically and legally impossible to attempt to perpetrate an unintentional killing," stating, as well, "that one cannot intend to accomplish the unintended." Id. at 892. By this path, the court concludes that "the offense of attempted felony-murder does not exist in Tennessee." Id.

However, our criminal code expressly provides that the culpable mental state reflected by an "intentional" act legally suffices to establish the culpable mental states of criminal negligence and recklessness, as well. That is, T.C.A. § 39-11-301(a)(2) states:

> When the law provides that criminal negligence suffices to establish an element of an offense, that element is also established if a person acts intentionally, knowingly or

> recklessly. When recklessness suffices to establish an element, that element is also established if a person acts intentionally or knowingly. When acting knowingly suffices to establish an element, that element is also established if a person acts intentionally.

As the Sentencing Commission Comments explain, the lesser levels of culpability are included by law in the greater so that "a person who acts 'intentionally' also acts knowingly, recklessly and with criminal negligence."

In other words, although a felony murder required only a reckless killing, a conviction may be obtained even though the proof showed that the killing was intended. It would make no sense to conclude that the presence of a more culpable mental state would have any legal bearing on the chances for conviction. Similarly, the fact that an attempt to commit a crime requires an intent to commit that crime, which may only need a "reckless" mental state, should not be viewed to bar a conviction for attempt -- although the attempt necessarily limits convictions to cases where the defendant's intention is proven. The fact that the crime is not completed should not make any difference.

The potential reach of Kimbrough is fairly wide in that its reasoning would apply to an attempt to commit any offense having a reckless, criminally negligent, or even no culpable mental state as an element. Such a result should not occur. I am authorized to state that Judge Wade concurs in this opinion, as well.

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Joseph M. Tipton, Judge