

DISTRICT COURT OF APPEAL OF THE STATE OF FLORIDA
FOURTH DISTRICT
July Term 2012

RUDOLPH A. BURKE,
Appellant,

v.

STATE OF FLORIDA,
Appellee.

No. 4D11-3391

[August 8, 2012]

PER CURIAM.

We affirm the denial of appellant's motion for postconviction relief. Appellant raises two claims regarding his conviction for attempted first degree murder of his ex-wife. First, he claims that counsel was ineffective, having failed to move pre-trial to attack the information, which failed to include the word "premeditation." Trial counsel made the challenge, and appellate counsel raised the issue on appeal. We considered the merits of the claim and affirmed. *Burke v. State*, 989 So. 2d 648 (Fla. 4th DCA 2008). Thus, this point serves as no ground for postconviction relief.

Second, appellant claims that his counsel was ineffective for failing to request a "heat of passion" jury instruction. "In order for the defense of crime of passion to be available there must be adequate provocation . . . as might obscure the reason or dominate the volition of an ordinary reasonable man." *Douglas v. State*, 652 So. 2d 887, 891 (Fla. 4th DCA), *rev. denied*, 661 So. 2d 823 (Fla. 1995) (internal quotations and citation omitted). We have reviewed the facts of this case and conclude that the jury instruction was not supported by the evidence.

Affirmed.

WARNER, GROSS and LEVINE, JJ., concur.

* * *

Appeal of order denying rule 3.850 motion from the Circuit Court for

the Fifteenth Judicial Circuit, Palm Beach County; Stephen A. Rapp, Judge; L.T. Case No. 2005CF013625AXX.

Rudolph A. Burke, Mayo, pro se.

No appearance required for appellee.

Not final until disposition of timely filed motion for rehearing.