

STATE OF MINNESOTA**IN COURT OF APPEALS**

CASE NO. A21-0201

State of Minnesota,

Appellant,

v.

Derek Michael Chauvin,

Respondent.

**RESPONDENT'S
MOTION TO DISMISS
PRETRIAL APPEAL**

Respondent, Derek Michael Chauvin, by and through undersigned counsel, Eric J. Nelson, Halberg Criminal Defense, hereby moves this Court to dismiss Appellant's pretrial appeal as untimely and improper.

PROCEDURAL BACKGROUND

On May 29, 2020, the State charged Respondent Derek Chauvin with one count of third-degree murder, in violation of Minn. Stat. § 609.195(a), and one count of second-degree manslaughter, in violation of Minn. Stat. § 609.205, subd. 1, for his alleged role in the death of George Floyd. On June 3, 2020, the State amended the Complaint to add one count of second-degree felony murder, in violation of Minn. Stat. § 609.19, subd. 2(1), against Mr. Chauvin. On June 30, 2020, the district court issued a scheduling order, setting a trial date of March 8, 2021.

On August 28, 2020, Respondent moved the district court to dismiss all three counts of the Complaint for lack of probable cause. On October 21, 2020, the district court filed a

107-page memorandum opinion and order upholding the second-degree murder and manslaughter charges but dismissing the third-degree murder charge against Mr. Chauvin. (See Memorandum Opinion, 10-21-2020, at 52-67). At the time it issued its order, the district court explicitly stayed dismissal of the third-degree murder charge “for five days to allow the State to consider a pretrial appeal.” (Order, 10-21-2020, at 2). The State did not file a pretrial appeal at that time, nor did the State file a motion to reconsider the district court’s order dismissing the third-degree murder charge within the five days during which the dismissal was stayed.

On February 4, 2021, the State filed a document styled “Motion to Reinstate Third-Degree Murder Charge or, in the Alternative, to Amend the Complaint.” The State advised that the district court “could also construe this as a motion for reconsideration of the Court’s order dismissing the third-degree murder charge.” (State’s Mtn., 2-4-2021, at 7 n.1). The State’s purported impetus for its motion was this Court’s decision in *State v. Noor*, No. A19-1089, —N.W.2d—, 2021 WL 317740 (Minn. App. 2021). *Noor* addressed the propriety of a third-degree murder charge in the context of a Minneapolis police officer’s shooting of an unarmed citizen. The State contended that *Noor* was “precedential,” and the district court was, therefore, bound to reconsider its order dismissing the third-degree murder charge more than three months prior. (State’s Mtn., 2-4-2021, at 7). The district court, on February 11, 2021, denied the State’s motion, concluding, among other things, that *Noor* was not yet binding precedent. (Order and Memo., 2-11-21, at 5).

On February 12, 2021,¹ the State filed its third and fourth pretrial appeals of district court orders in the George Floyd matter in the course of approximately two weeks. In its most recent pretrial filing, the State appeals the district court's order denying its "Motion to Reinstate Third-Degree Murder Charge or, in the Alternative, to Amend the Complaint"/motion to reconsider. Because the State's appeal is untimely and otherwise improper, it must be dismissed.

ARGUMENT

I. THE STATE'S PRETRIAL APPEAL OF THE DISTRICT COURT'S DISMISSAL OF THE THIRD-DEGREE MURDER CHARGES AGAINST RESPONDENT IS UNTIMELY.

Rule 28.04 of the Minnesota Rules of Criminal Procedure governs appeals by the prosecutor, including appeals from pretrial orders. Appellant filed this appeal on February 12, 2021. Appellant's Notice of Appeal and Statement of the Case purport to appeal a pretrial order that was filed on February 11, 2021. However, the State, by its own admission,² is *actually* appealing the district court's October 21, 2020 order dismissing the third-degree murder charge against Mr. Chauvin. The State is simply trying to obfuscate its delay in filing an appeal with its motion for "reinstatement" of the charge or leave to amend the (already-amended) Complaint to add the already-dismissed charge. The State

¹ On the same day, this Court dismissed two prior pretrial appeals in the same matters. *See State v. Chauvin*, No. A21-0133 (Minn. App. Feb. 12, 2021); *State v. Kueng, et al.*, No. A21-0135 (Minn. App. Feb. 12, 2021). In those consolidated cases, the State had appealed pretrial orders denying the State's motion for a continuance and amending the district court's previous order joining all four defendants for trial.

² When it invited the district court to construe its motion for reinstatement as a motion for reconsideration, the State expressly acknowledged that it was asking the district court to reconsider its October 21, 2020, order dismissing the third-degree murder charge against Mr. Chauvin.

does not allege that the underlying facts have changed. Nor does it allege that new evidence has come to light creating probable cause for the charge. The facts and evidence are the same. The law is the same. If the State wished to appeal the district court's dismissal of the charge, it should have done so more than three months ago. Because it did not, this appeal is untimely.

The language of Rule 28.04 plainly states that appeal of a pretrial order "must be taken *within 5 days* after the defense, or the court administrator under Rule 33.03, serves notice of entry of the order to be appealed." Minn. R. Crim. P. 28.04, subd. 2(8) (emphasis added). The district court stayed its order dismissing the third-degree murder charge to give the State time to perfect a pretrial appeal on that issue. The State did not act. Now, on the eve of trial, and on the heels of a district court order denying a continuance, the State is once again before this Court with another frivolous pretrial appeal. It is becoming clear that the State, which did not complain about the trial date for six months or appeal any other pretrial orders, is wasting judicial resources in an attempt to delay the trial of Mr. Chauvin because its request for a continuance was not granted.

Although the State's appeal was filed one day after the district court's February 11, 2021, order, it was filed more than 90 days after the order dismissing the third-degree murder charge against Mr. Chauvin. Because the State's February 4, 2021, motion was a motion for reconsideration of the October 21, 2020, order, the State's appeal as to the February 11, 2021, order must be dismissed as untimely under Minn. R. Crim. P. 28.04.

While, in some cases, a *good-faith* motion for reconsideration may toll the time in which to appeal a pretrial order, the motion must be made within the time to take such appeal. *In re Welfare of S.M.E.*, 725 N.W.2d 740, 743 (Minn. 2007). *State v. Wollan*, 303

N.W.2d 253, 254-55 (Minn. 1981) (“The general rule is that if one files a motion for rehearing or a similar motion after the time limit for filing notice of appeal has expired, then the filing of the motion does not extend the time within which to appeal”). The State had five days from October 21, 2020, to appeal the district court’s order or to file a good-faith motion for reconsideration. While the State’s good faith in filing its February 4, 2021, motion is questionable, the motion, clearly, was not filed within five days of the district court’s October 21, 2020, order. The time for pretrial appeal of the district court’s dismissal of the third-degree murder charge has long since passed. The State’s appeal must, therefore, be dismissed as untimely.

II. BECAUSE THE DISTRICT COURT’S DISMISSAL OF THE THIRD-DEGREE MURDER CHARGE WAS ALREADY THE LAW OF THE CASE, THE COURT’S FEBRUARY 11, 2021, ORDER DID NOT HAVE A CRITICAL IMPACT ON THE STATE’S ABILITY TO PROSECUTE THE CASE.

In a pretrial appeal, the State must “prove clearly and unequivocally both that the trial court erred and that the error will have a critical impact on the trial.” *State v. Stroud*, 459 N.W.2d 332, 334 (Minn. App. 1990) (citing *State v. Kim*, 398 N.W.2d 544, 547 (Minn. 1987)). Rule 28.04 “requires the State to show critical impact *in all pretrial appeals*.” *State v. Underdahl*, 767 N.W.2d 677, 679 (Minn. 2009) (emphasis added). “Critical impact is a threshold showing that must be made in order for an appellate court to have jurisdiction.” *State v. Gradishar*, 765 N.W.2d 901, 902 (Minn. App. 2009). To show that a pretrial order had a critical impact on the trial, the State must prove “clearly and unequivocally” that the orders, if in error, will have a critical impact on the “outcome of the trial,” *State v. Jones*, 519 N.W.2d 67, 69 (Minn. App. 1994), *review denied* (Minn. Jul. 27, 1994), or on “*the state’s ability to prosecute the defendant successfully*.” *State v. Zanter*, 535 N.W.2d 624,

630-631 (Minn. 1995) (emphasis added). Here, the State claims that the district court's February 11, 2021, pretrial order will have a critical impact on its ability to successfully prosecute Respondent. However, the issue the State attempted to litigate in its motion giving rise to the order it is appealing was decided months earlier. Because the State did not file a pretrial appeal at that time, it, essentially, waived the issue of critical impact with respect to the third-degree murder charge.

When the district court dismissed the third-degree murder charge against Mr. Chauvin last October, and the State failed to file a timely pretrial appeal or motion for reconsideration, the court's order became the law of the case, thus precluding the State from attempting to relitigate the matter. The law-of-the-case doctrine "applies to issues decided in earlier stages of the same case." *State v. Miller*, 849 N.W.2d 94, 98 (Minn. App. 2014) (quoting *In re Welfare of M.D.O.*, 462 N.W.2d 370, 375 (Minn. 1990). "The doctrine provides that when a court decides upon a rule of law, that decision should continue to govern the *same issues* in subsequent stages in the *same case*." *Id.* (quoting *Arizona v. California*, 460 U.S. 605, 618 (1983) (emphasis in original). Here, the district court ruled that the State failed to present sufficient probable cause to sustain a third-degree murder charge. The State did not attempt to appeal or seek reconsideration of the district court's ruling. The district court's ruling became the law of the case, precluding the State from further litigating the issue.

Nevertheless, more than three months later, the State filed its motion seeking to reinstate the charge, asking the district court to construe its filing as a motion for reconsideration of the court's dismissal of the third-degree murder charges. It was an attempt to relitigate the *same issue* in subsequent stages of the *same case*. In its filing, the

State contended that its motion was warranted because of this Court’s decision in *State v. Noor*, No. A19-1089, —N.W.2d—, 2021 WL 317740 (Minn. App. 2021). In so asserting, the State claimed that *Noor* was “precedential” authority requiring the district court to reconsider its earlier order. However, the State brazenly ignored—or misstated—clearly established Minnesota law.

This Court is an “intermediate appellate court.” *State v. Gilmartin*, 535 N.W.2d 650, 653 (Minn. App. 1995), *review denied* (Minn. Sep. 20, 1995). Its orders do not become final until at least 30 days after the opinion has issued—the amount of time a party is granted to petition the Minnesota Supreme Court for further review. Minn. R. Civ. App. Pro. 136.02. If a party files a petition for further review, entry of this Court’s judgment is stayed until action is taken on the petition. *Id.* If the supreme court denies the petition, this Court’s judgment becomes final. *Id.*; *City of Waite Park v. Office of Administrative Hearings*, 758 N.W.2d 347, 353 (Minn. App. 2008) (court of appeals opinions become final when “further review is denied by the supreme court or the time to seek further review has passed”), *review denied* (Minn. Feb 25, 2009).

Similarly, decisions by the Minnesota Court of Appeals do not become precedential or binding on lower courts until the judgment in the case has become final. *See, e.g., Hoyt Inv. v. Bloomington Commerce & Trade Ctr. Assocs.*, 418 N.W.2d 173, 176 (Minn. 1988). Relying on *Hoyt*, this Court explicitly held that its “decisions ***do not have precedential effect until the deadline for granting review has expired.***” *State v. Collins*, 580 N.W.2d 36, 43 (Minn. App. 1998), *review denied* (Minn. Jul. 16, 1998) (emphasis added); *see Fishel v. Encompass Indemnity Co.*, No. A16-1659, 2017 WL 1548630 at *2 (Minn. App. 2017); *State v. Taylor*, No. A14-0938, 2015 WL 1757874 at *2 (Minn. App. Apr. 20, 2015),

review denied (Minn. Jun. 30, 2015); *State v. Lindsey*, No. A12-0109, 2013 WL 141633, at *4 (Minn. App. Jan. 14, 2013), *review granted* (Mar. 27, 2013), *stay granted* (Mar. 27, 2013), *stay vacated, review denied* (Nov. 12, 2013); *Kelly v. State Farm Mut. Auto Ins. Co.*, No. C0-02-217, 2002 WL 1837992, at *3 (Minn. App. Aug. 13, 2002); *Willette v. Smith*, No. CX-99-1668, 2000 WL 687631, at *1 (Minn. App. May 30, 2000).

The decision in *State v. Noor* was issued on February 1, 2021. If neither party petitions for further review, judgment will not be final—and the decision will not acquire precedential authority—until at least March 3, 2021. However, counsel for Mr. Noor has indicated his intent to file a petition for further review in the *Noor* matter. (Order, 2-11-2021, at 4). This means that the *Noor* decision may not become final and acquire precedential authority for several months. However, given that *Noor* was an extremely high-profile case, which garnered international attention, and that one member of the three-judge panel dissented, a fair likelihood exists that the Minnesota Supreme Court will grant review. Thus, depending on the outcome of the petition for review and a potential supreme court decision, this Court’s opinion in *Noor* may, in fact, ***never become precedential***.

The district court’s dismissal of the third-degree murder charges is the law of the case. No new facts, evidence or precedential authority have been offered that might change the law of the case. The State’s attempt to relitigate the matter was, therefore, improper. The district court’s order denying the State’s motion did not have a critical impact on the State’s ability to prosecute this case—rather, any critical impact on the State’s case derived from the district court’s October 21, 2020. But the State failed to appeal that order, thus waiving its critical impact argument. The district court’s order denying the State’s motion for reinstatement or reconsideration did not alter the State’s case at all. The matter of the

third-degree murder charge had already been litigated and become the law of the case. The State is, therefore, precluded from using the order denying its improper motion as a basis for an untimely pretrial appeal.

Based on the foregoing, Respondent respectfully requests that this Court dismiss Appellant's appeal.

Respectfully submitted,

Dated: February 16, 2021

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