

STATE OF MINNESOTA

DISTRICT COURT

COUNTY OF HENNEPIN

FOURTH JUDICIAL DISTRICT

Court File No. 27-CR-20-12953

State of Minnesota,

Plaintiff,

**NOTICE OF MOTION AND MOTION
TO DISMISS FOR LACK OF
PROBABLE CAUSE**

vs.

J. Alexander Kueng,

Defendant.

TO: The State of Minnesota, the Prosecuting Attorneys in the above-entitled case.

PLEASE TAKE NOTICE that on September 11, 2020 at 9:00 a.m. or as soon thereafter as counsel may be heard, before the Hon. Peter Cahill, Judge of District Court, the Defendant will move for an order as follows:

1. Mr. Kueng moves the Court for an order dismissing the charges against him because there is not probable cause to support the charges of aiding and abetting second degree murder and aiding and abetting second degree manslaughter.

FACTS

As alleged in the complaint¹, Kueng and Thomas Lane, a co-defendant, responded to a 911 caller at Cup Foods on Chicago Avenue in Minneapolis. The caller reported that a man bought merchandise with a counterfeit twenty dollar bill. After their meeting with the caller, Lane, a codefendant, went to the driver's side of the car which was still parked near the store. Kueng went to the passenger side of the car. Lane spoke to the driver,

¹ The facts are taken from the probable cause statement of the complaint. Kueng's challenge is that there is not probable cause for the charges based on the facts as alleged in the complaint.

George Floyd. Lane pulled his gun and pointed it at Floyd and directed him to show his hands. When Floyd put his hands on the wheel, Lane holstered his gun.

Lane ordered Floyd out of the car and handcuffed him. Lane walked Floyd to the sidewalk.² Lane talked to Floyd for under two minutes and asked for Floyd for his name and identification. During the conversation Lane asked Floyd if he was on anything and noted there was white foam on the edges of Floyd's mouth. Lane told Floyd he was being arrested for passing counterfeit currency.

The complaint notes that at 8:14 p.m. Lane and Kueng stood Floyd up and attempted to walk Floyd to their squad car. Floyd stiffened up as they tried to put him in the squad and Floyd fell to the ground. Even though Floyd said he was not resisting, he did not want to get into the backseat of the squad claiming he was claustrophobic.

Officer Chauvin and Officer Thao arrived on the scene. The officers tried to get Floyd into the squad car by pushing him from the driver's side. As they tried to get Floyd into the car, Floyd said he couldn't breathe. The officers struggled to get Floyd into the squad car. Floyd would not voluntarily sit in the back seat; he resisted.

Chauvin pulled Floyd out of the passenger side of the car at 8:18:38 and Floyd fell to the ground face down. Chauvin placed his left knee in the area of Floyd's head and neck. Kueng was at Floyd's back and Lane was at Floyd's feet. Floyd, who was still handcuffed, said he couldn't breathe, "Mama," "please," and "I'm about to die." One of the officers responded that he was talking fine.

² This is as stated in the complaint. BWC from Kueng and Lane show otherwise.

Lane suggested that they roll Floyd onto his side, but Chauvin told him “No, staying put where we got him.” The complaint alleges that Floyd stopped breathing and speaking at 8:25:31. Lane again suggested that they roll Floyd over onto his side. Kueng checked Floyd’s pulse and couldn’t find one. Chauvin removed his knee from the area of Floyd’s neck when the ambulance and emergency medical personnel arrived.

The Medical Examiner (ME) did not find physical findings supportive of mechanical asphyxia. The ME found that Floyd died from cardiopulmonary arrest while being restrained. The ME found that Floyd had arteriosclerotic and hypertensive heart disease. Toxicology screening found that Floyd had fentanyl present in his system and evidence of recent methamphetamine use. The ME opined that the effects of the officers’ restraint of Mr. Floyd, his underlying health conditions, and the presence of drugs contributed to his death.

THE CHARGES AGAINST KUENG MUST BE DISMISSED BECAUSE THE COMPLAINT DOES NOT ESTABLISH PROBABLE CAUSE

This Court should dismiss the complaint against Kueng because the complaint does not establish probable cause for aiding and abetting second degree murder and aiding and abetting second degree manslaughter. A probable cause motion requires a judge to determine whether it is more probable than not that a crime was committed, and that the defendant committed the crime. *State v. Florence*, 239 N.W.2d 892, 896 (Minn. 1976). To determine probable cause, the Court must consider whether there is “substantial evidence admissible at trial and adequate to bring the charge against the defendant within reasonable probability. ‘Substantial evidence’ means evidence adequate

to support denial of a motion for a directed verdict of acquittal.” *Id.* at 902. In determining questions of probable cause, the district court “must exercise an independent and concerned judgment addressed to this important question: Given the facts disclosed by the record, is it fair and reasonable ... to require the defendant to stand trial” *State v. Dunson*, 770 N.W.2d 546, 552–53 (Minn. Ct. App. 2009). The purpose of allowing a defendant to challenge probable cause at the omnibus hearing is, as stated in *Florence*, to “protect a defendant who is unjustly or improperly charged from being compelled to stand trial.” *State v. Rud*, 359 N.W.2d 573, 579 (Minn. 1984).

A. No Probable Cause for Aiding and Abetting Second Degree Murder

There is not probable cause to establish that Kueng aided and abetted second degree murder. As charged, unintentional felony murder requires the state to prove that Kueng aided and abetted others to cause the death of a human being without intent while committing a felony. *See* Minn. Stat. § 609.19, Subd. 2(1). The state is alleging the predicate felony is third degree assault, which requires the state to prove that someone assaulted Floyd and caused substantial bodily harm. *See* Minn. Stat. §§ 609.223, Subd. 1, 609.02, Subd. 7a.

Finally, a defendant is guilty of aiding and abetting if the defendant intentionally aids, advises, hires, counsels, or conspires with or otherwise procures another to commit a crime. *See* Minn. Stat. § 609.05, subd. 1. “[I]ntentionally aiding’ embodies two important and necessary principles: (1) that the defendant ‘knew that his alleged accomplices were going to commit a crime,’ and (2) that the defendant ‘intended his presence or actions to further the commission of that crime.’” *State v. Milton*, 821

N.W.2d 789, 805 (Minn. 2012). “Knowledge and intent are both necessary elements that the state must prove beyond a reasonable doubt.” *State v. Smith*, 901 N.W.2d 657, 663 (Minn. Ct. App. 2017).

The restraint used on Floyd by Chauvin was reasonable. As the complaint notes, officers are trained on how to use the neck restraint involved here. Moreover, the restraint has been found to be reasonable when the subject actively resists. “We must assess the actions of each officer from the perspective of a reasonable officer on the scene, including what the officer knew at the time, not with the 20/20 vision of hindsight.” *Lombardo v. City of St. Louis*, 956 F.3d 1009, 1013 (8th Cir. 2020). “This Court has previously held that the use of prone restraint is not objectively unreasonable when a detainee actively resists officer directives and efforts to subdue the detainee.” *Id.* In *Lombardo*, decided on April 20, 2020, one of the plaintiffs was in a neck restraint for fifteen minutes. *Id.* at 1014.

While the complaint does not use the conclusory term “resist” when describing Floyd’s conduct, his actions show he resisted. He stiffened up and fell to the ground when Lane and Kueng tried to pick him up off the sidewalk. Officers suspected Floyd was high, and they were right. Floyd claimed he was claustrophobic before even getting into the squad in an effort to avoid getting into the squad. Floyd would not voluntarily get into the squad. Multiple officers tried to get him into the squad, and when Floyd continued to resist, Chauvin pulled Floyd onto the ground. Floyd continued to resist by calling out while he was on the ground. Given Floyd’s resistance, the use of neck restraint was reasonable, especially given the decision in *Lombardo*.

The complaint does not establish criminal liability for aiding and abetting a procedure that the Eighth Circuit has found to be reasonable. Here, there is no evidence that Kueng knew Chauvin was going to commit a crime at the time and during the time Chauvin utilized the neck restraint. When asked by Lane if they should roll Floyd onto his stomach to avoid excited delirium, Chauvin said they should not, twice. This shows that Chauvin did not consider his use of force was unreasonable. Chauvin, based on his assessment at the time, believed he was using reasonable force against a suspect, who was high and had resisted arrest. Kueng could not intentionally aid and abet an act that he did not know was criminal.

While Chauvin continued the neck restraint after Floyd stopped moving, that does not show that Kueng intentionally aided and abetted an underlying assault. As noted in the complaint, Floyd did not die of asphyxiation. The ME found no physical findings supportive of mechanical asphyxia. The ME concluded that Floyd died of cardiopulmonary arrest. The ME noted there was complicating subdual restraint and neck compression among other contributing factors. Importantly, Chauvin declined to reposition Floyd. Chauvin was the senior officer and Kueng followed Chauvin's lead. Assuming without conceding that this constituted an assault, there was no way for Kueng to know that Floyd was going to die from the neck restraint or that he in fact did. The evidence does not show that he knew Chauvin was going to commit or was committing a third degree assault.

There is no evidence that Kueng intended his presence to further a crime. Kueng was at Floyd's back from the beginning of the neck restraint, which was reasonable. The

state cannot show that Kueng's continued presence was to aid in a crime. Kueng had a minimal role in the incident. Chauvin brought Floyd to the ground and reasonably initiated the neck restraint. Kueng was merely present at Floyd's back. The second degree murder charges must be dismissed. The facts here do not show the Kueng aid and abetted a third degree assault as the predicate offense of unintentional second degree murder.

B. Lack of Probable Cause for Manslaughter

The Court should dismiss the second degree manslaughter charge because there is not probable cause to support the charge. As charged, a person is guilty of second degree manslaughter if they cause the death of another "by the person's culpable negligence whereby the person creates an unreasonable risk, and consciously takes chances of causing death or great bodily harm to another." Minn. Stat. § 609.205(1). "This standard is satisfied by establishing (1) objective gross negligence on the part of the actor and (2) subjective recklessness in the form of an actual conscious disregard of the risk created by the conduct. The objective aspect is satisfied by demonstrating that the act was a gross deviation from the standard of care that a reasonable person would observe in the actor's situation." *State v. McCormick*, 835 N.W.2d 498, 507 (Minn. Ct. App. 2013)(internal citations and punctuation omitted). Importantly, had Floyd simply gotten into the squad car, like defendants do all over the city, state and country, there would not have been an issue.

Here Chauvin's actions were not objective gross negligence. He used a technique that he was trained to use, and that the Eighth circuit has been found to be reasonable.

Chauvin's conduct was not subjectively reckless. An officer's conduct, as noted, is assessed from the perspective of a reasonable officer at the scene. As the complaint alleges, Chauvin was faced with a scene where he had a suspect that had not complied, continued to not comply after being handcuffed, with an ambulance on the way. Chauvin was faced with an active and complicated crime scene. Chauvin's actions did not show actual disregard of the risk created by his conduct.

Kueng could not intentionally aid and abet Chauvin's conduct when the conduct was either reasonable or appeared reasonable at the time. The complaint does not establish that Kueng knew Chauvin was going to negligently commit a crime nor that he did. The evidence does not show that Kueng intended his presence to further the commission of a negligent act. The second degree manslaughter charge must be dismissed.

Respectfully submitted,

Date: August 27, 2020

/s/ Thomas C. Plunkett

Thomas C. Plunkett
Attorney No. 260162
Attorneys for Defendant
101 East Fifth Street
Suite 1500
St. Paul, MN 55101
Phone: (651) 222-4357