Filed in District Court
State of Minnesota
1/31/2022 4:10 PM

STATE OF MINNESOTA | DISTRICT COURT

COUNTY OF HENNEPIN | FOURTH JUDICIAL DISTRICT
D.C. File 27-CR-21-7460

State of Minnesota,

Plaintiff,

vs.

DEFENDANT'S RESPONSE TO STATE'S INTENT TO SEEK AN UPWARD DEPARTURE

Kimberly Ann Potter,

Defendant.

The State's request for more and more time is made in error. Two grounds are cited, neither persuasive.

The first is that Officer Potter's "conduct caused a greater-than-normal danger to the safety of other people, as she fired into a motor vehicle in which a passenger was present and two other officers were in proximity," and because of Officer Potter's conduct, Mr. Wright sped away "down the street and struck an occupied vehicle heading in the opposite direction." As if his immediate flight was her decision to make. As if she shouldn't have at least tried to restrain him.

The officers on the scene agreed with Officer Potter's attempt to stop Mr.

Filed in District Court
State of Minnesota
1/31/2022 4:10 PM

Wright. Officer Luckey testified that the use of a Taser was entirely appropriate. Sgt. Johnson told the jury he could have been killed, and Officer Potter was justified in using deadly force.

The State's citations offer no support. We welcome a comparison to State v. Fleming, 883 N.W.2d 790 (Minn. 2016). That case involved a pick up basketball game where Fleming and another player, "Doe," were caught up in "scuffle." Id. at 792. Doe "walked to the end of the basketball court, picked up a knife, walked toward Fleming, and stabbed Fleming in the left cheek." Id.

> . . . The standoff appeared to be ending, but then one of Fleming's friends retrieved a backpack and walked over to Fleming. Although the backpack belonged to the friend and not Fleming, Fleming knew that there was a handgun inside. Fleming withdrew the handgun from the backpack, brandished the handgun, advanced toward Doe, and deliberately fired the handgun six times in the direction of the quickly retreating Doe.
>
> Although Doe was not struck by any of the bullets, the shots were fired toward the street and in the direction of children and young people, placing them in danger . . .

Id.

Given his criminal history, Mr. Fleming was charged with felon-in-possession of a firearm, and initially received a dispositional departure to probation. His stayed sentence, however, had been enhanced due to "the large number of potential victims put in real and significant danger as a result of his

Filed in District Court
State of Minnesota
1/31/2022 4:10 PM

firing the hand gun six times in a public park, during the height of its use that day." Id. at 797. Mr. Fleming was later revoked, and sent to prison.

The Supreme Court affirmed the upward durational departure, finding that the crime of illegal possession was "continuing," i.e., Mr. Fleming had "continued to commit the possession offense when he fired the gun six times in a park filled with children." His conduct was far more "egregious than the typical" felon-in-possession case. Id. at 797.

The differences between Mr. Fleming's case and ours are obvious. Mr. Fleming couldn't possess a gun, but did anyway. With premeditation, he fired six shots, targeting his basketball mate "Doe," and in the process he, Fleming, could have hit innocent children who were playing at the park. Left unsaid in the opinion, but notable to practitioners, Mr. Fleming was initially given a stayed sentence from a presumptive commit; by violating the terms of his probation, he lost any chance of mercy the second time around.

Officer Potter's perceived Taser was aimed specifically at Mr. Wright, and could not have hit the passenger. Where Mr. Fleming's crime – felon in possession – was continuous, Officer Potter's conduct had ended with a single mistaken shot.

Officer Potter waived her right for a jury determination on the proposed

Filed in District Court
State of Minnesota
1/31/2022 4:10 PM

enhancements. See Blakely v. Washington, 542 U.S. 296, 310 (2004)(permitting the waiver). Presuming her innocence, this Court must use the "reasonable doubt standard." State v. Shattuck, 704 N.W.2d 131, 142 (Minn. 2005). No such proof has been offered. Her act having concluded, Officer Potter can't be held responsible for Mr. Wright's decisions. He was required by law to obey the officers' collective orders. They had the absolute right to arrest him. He alone did what he intended to do, driving into his own abyss that day. He caused the subsequent accident.

The State's second Blakely ground is that Officer Potter "abused her position of trust and authority, as she was a licensed police officer in full uniform who had seized Mr. Wright." The State cites State v. Lee, 494 N.W.2d 475 (Minn. 1992) and State v. Rourke, 681 N.W.2d 35 (Minn. Ct. App. 2004), both cases inapposite.

In Lee the defendant, a leader of the Hmong community and tutor at a local vo-tec (denoted in the opinion as TVI), was convicted of raping two of his students. The district court imposed an upward durational departure for reasons of abuse of trust. The rationale affirmed. "Here the defendant clearly abused his position of authority and TVI and his position as a leader in the Hmong community to maneuver the complainants into situations where he could sexually

Filed in District Court
State of Minnesota
1/31/2022 4:10 PM

assault them. Moreover, it appears that defendant's conduct has had a clearly foreseeable devastating impact on the lives of both complainants." Id. at 482 (emphasis added).

Note the germane phrasing: "to maneuver," "the victims," the defendant's conduct described as "clearly foreseeable."

There was no like cunning for Officer Potter. She had no intent to harm. She did not know she had a gun in her hand. Nor did she foresee the unfolding tragedy.

The second case the State cites, Rourke, involved chronic domestic abuse between the defendant and his girlfriend, the victim.

Rourke's facts:

> On January 28, 2003, Erica Boettcher picked up her boyfriend, appellant Chad Rourke, in her van, and Rourke forced Boettcher into the passenger seat and took over operating the vehicle. Boettcher had worked hard to make enough money to afford the van, and Rourke knew how proud she was of it. Rourke began driving recklessly while threatening to kill Boettcher and threatening that she would never see her children again. He sped through a stop sign at approximately 60 miles per hour in a 30-mile-per-hour zone and smashed into a pole. Beottcher shattered bones in her ankle, requiring placing of 17 screws and a metal plate in her leg. Her medical expenses exceeded $20,000.00.

Id. at 36-37.

Mr. Rourke was charged with assault in the first, second and third degrees,

Filed in District Court
State of Minnesota
1/31/2022 4:10 PM

among other offenses. The presentence investigation revealed a "five-year pattern of ongoing, escalating, violence by appellant toward Beottcher." Id. at 37. "The violence and control escalated to the point where appellant would not allow Boettcher to see other people, and appellant threatened that he would kill Boettcher if she reported the violence." Id. Mr. Rourke "had previously violated a domestic abuse order for protection." Id.

The upward departure was affirmed on a number of grounds, including "particular cruelty," "prior convictions involving the victim," and "abuse of a position of power." Id. at 39-40. For the latter, the High Court agreed with the State that

> there are many relationships fraught with power imbalances that may make it difficult for the victim to protect himself or herself – teacher-student, clergy-parishioner, employer-employee– to name a few. Here, given the long history of egregious domestic violence perpetrated by appellant against Boettcher, and specifically the power and control appellant achieved by years of terrorizing the victim, we are persuaded that the district court did not abuse its discretion by considering appellant's position of authority as an aggravating factor supporting the upward departure.

Id. at 41.

Again note the phrases supporting the upward departure: "Long history of domestic violence." "Years of terrorizing." A "power imbalance" within the "relationship." None describe our setting. Mr. Wright made sure he had no

Filed in District Court
State of Minnesota
1/31/2022 4:10 PM

relationship with any police officer, in this case and in all his other interactions, because his want was always to flee.

Other abuse of trust cases include State v. Carpenter, 459 N.W.2d 121, 128 (Minn. 1990) and State v. Cermak, 344 N.W.2d 833, 839 (Minn. 1984), both involving multiple sex offenses committed by, respectively, a youth church sponsor counseling the victim, and a trusted relative. Hardly our setting.

That Officer Potter wore a uniform is not listed as an aggravating factor. Compare the list set forth is Sec. 2.D.3(b), Minnesota Sentence Guidelines. The only other abuse of trust decision involving a police officer is State v. Chauvin, 27-CR-20-12646, filed June 25, 2021, where Judge Cahill found the placement of a knee on the back of George Floyd's neck to be "an egregious abuse of the authority to subdue and restrain because of the prolonged use . . ." Sentencing Order at p. 7. Officer Chavin "was in a position to dominate and control" Mr. Floyd. Id. Our facts feature a marked lack of restraint, domination; an absence of control.

* * * * * * * * * * * * * *

Blakely matters aside, the amended First Degree Manslaughter charge was designed only to double Officer Potter's prison exposure (86 months presumptive commit as opposed to 48 months for the lesser Manslaughter), without any indicia

Filed in District Court
State of Minnesota
1/31/2022 4:10 PM

she or society would benefit from a higher level conviction. Officer Potter will never recidivate, hence is not a danger to anyone. The facts were the same for each count.

The State's charging decision offers up an emptied out reflection. A sad image of unfairness.

We recommend Emily Bazelon's *Charges: The New Movement to Transform American Prosecution and End Mass Incarceration* Random House (2019). Ms. Bazelon's observations are apropo to the Attorney General's Blakely effort coupled with the inflated complaint counts.

Writes Ms. Bazelon, decisions to elevate the charges for the sake of doing so "show that American prosecutors have breathtaking power, leading to disastrous results for millions of people churning through the criminal justice system. Over the last forty-years, prosecutors have amassed more power than our system was designed for. And they have mostly used it to put more people in prison, contributing to the scourge of mass incarceration, especially if they are mostly black or brown, and long ago passed the level required for public safety." Id. at p. xxv. Ms. Bazelon observes that "when black defendants are punished more severely than white defendants for similar crimes, the choices of the prosecutors are largely to blame." Id.

Filed in District Court
State of Minnesota
1/31/2022 4:10 PM

Officer Potter's sentencing grid is an artificial construct, defined by the Attorney General. Whose constituency asks for higher time in this case? Whose voice is the Attorney General hearing? Is it the defunding movement, those who see the police as a pejorative inconvenience until needed? The movement that neglects to read the data, where a decrease in police investigation and presence has lead to an increase in crime. See generally Edward Glaeser and David Cutler, *Survival of the City* (Penguin Press 2021), at pp. 293-94. Take for example the experience of our sister city, the authors emphasizing that "in 2016, Chicago's murder clearance rate dropped to under 30 percent. Since 2017, Chicago has hired more detectives, the clearance rate has rose to about 50 percent, and the murder rate has come down." Id. at 294.

We are in an age that features contempt. "A moral conviction of our time, especially prevalent on the cultural left, is that the powerful are presumptively bad while the powerless are presumptively good. These categories aren't just political. They are also social, economic, ethnic and racial . . ." Bret Stephens, "An Antisemite's Dangerous Fantasy," New York Times, January 23, 2022. That was the presumption/conviction/abstract belief referenced at Mr. Wright's funeral, the eulogist describing Mr. Wright as the "prince of Brooklyn Center," while Officer Potter was assumed to have "thought he was some kid with an air freshener."

Filed in District Court
State of Minnesota
1/31/2022 4:10 PM

To those who wish to make an example out of Officer Potter, we can say this. Our justice system is imperfect and like every system in place improvements can always be made. But we do know this much. The State's requested prison term is not part and parcel of any solution.

And to address the disparate excessive prison time for black and brown defendants (which may not be disparate given the departure rates for almost 60% of the women defendants), the answer cannot be what the Attorney General suggests. If black and brown first time defendants are being incarcerated, as Ms. Bazelon's observes, beyond "the level required for public safety," the same can be said of the State's proposed term for Officer Potter.

Dated: January 31, 2022

Respectfully submitted,

/s/ Paul Engh

PAUL ENGH #134685
Suite 2860
150 South Fifth Street
Minneapolis, MN 55402
612.252.1100

Filed in District Court
State of Minnesota
1/31/2022 4:10 PM

EARL GRAY #37072
Suite 1600W
First National Bank Building
332 Minnesota Street
St. Paul, MN 55101
651.223.5175

Lawyers for Officer Potter