

FILED

November 3, 2017

STATE OF MINNESOTA
IN COURT OF APPEALS

**OFFICE OF
APPELLATE COURTS**

State of Minnesota,
Appellant

vs.

**APPELLANT'S
MEMORANDUM IN
OPPOSITION TO
RESPONDENTS' MOTION
TO DISMISS**

Annette Marie Klapstein,
Respondent (A17-1649)

File Nos.: A17-1649

A17-1650

Emily Nesbit Johnston,
Respondent (A17-1650)

A17-1651

A17-1652

Steven Robert Liptay,
Respondent (A17-1651)

Benjamin Gary Joldersma,
Respondent (A17-1652)

TO: THE MINNESOTA COURT OF APPEALS; RESPONDENTS; AND THEIR
ATTORNEY, TIM M. PHILLIPS, JR WILLIAMS LAW 2836 LYNDALE
AVENUE SOUTH SUITE 160, MINNEAPOLIS, MN, 55408.

INTRODUCTION

Appellant, State of Minnesota, filed this consolidated pretrial appeal on October 19, 2017. Briefs have not yet been filed. On October 30, 2017, Respondents filed a motion to dismiss, arguing the Appellant has not met the “critical impact” standard. Respondents present three arguments explaining the Appellant’s failure to establish how the district court’s error would have a critical impact on the outcome of the trial. First, Respondents assert that the Appellant has not explained how the necessity defense will significantly

reduce the State's likelihood of success at trial. Respondents cite an example in Iowa where the district court allowed the necessity defense, but a jury still convicted the defendant. Second, Respondents argue that anticipating a series of evidentiary rulings does not show that a defense will significantly reduce the State's likelihood of successful prosecution. Finally, Respondents contend that the Appellant's inability to file a post-trial appeal does not show that the necessity defense will significantly reduce the likelihood of the State's success at trial.

ISSUES

- I. Has the Appellant's consolidated appeal demonstrated that the district court's order has a critical impact on the outcome of the trial?**
- II. Have the Respondents shown the Appellant's consolidated appeal should be dismissed for failure to demonstrate that the district court's order does not have a critical impact on the outcome of the trial?**

RULE

Critical impact is a threshold issue and in the absence of critical impact the reviewing court will not review a pretrial order, *see State v. McLeod*, 705 N.W.2d 776, 784 (Minn. 2005). Critical impact is a requirement under the Rules, "the prosecutor [must explain] how the district court's alleged error, unless reversed, will have a critical impact on the outcome of the trial." Minn. R. Crim P. 28.04, subd. 2(2)(b). The standard for demonstrating critical impact is demanding, but has flexibility. *State v. Underdahl*, 767 N.W.2d 677, 683 (Minn. 2009). To show critical impact, it is not necessary to demonstrate that the pretrial order has eliminated all possibility of a successful prosecution, nor that the State's case has all but collapsed. Instead, the State need only show that the pretrial order

“significantly reduces the likelihood of a successful prosecution.” State v. Kim, 398 N.W. 2d 544, 551 (Minn. 1987).

ARGUMENT

I. The Appellant met the critical impact standard

The State may appeal pretrial orders in felony cases pursuant to Minn. R. Crim. P. 28.04. To prevail on its appeal, the Appellant must clearly and unequivocally show two things: (1) the pretrial order will have a critical impact on the outcome of the trial and (2) the district court erred in its judgment. *Kim* at 547. This argument focuses on the first prong (the second prong is the nature of this appeal and will be addressed in the Appellant’s brief).

At this stage, this Court is not being asked to determine whether the Respondents should be allowed to present the necessity defense at trial; rather this Court is being asked to determine whether allowing (or not allowing) the Respondents to present that affirmative defense at trial will have a critical impact on the State’s case. This Court has ruled that a district court’s erroneous decision allowing a defendant to present an inapplicable affirmative defense constituted a critical impact. *See State v. Skapyak* 702 N.W.2d 331 (2005), *review denied* (Minn. Oct. 18, 2005). In *Skapyak*, the district court granted the defendant’s pretrial motion to assert an affirmative defense; the State then appealed that pretrial order. This Court reversed the district court’s pretrial order reasoning that “allowing the [defendant] to present the inapplicable defense would have a critical impact on the outcome of the trial.” *Id.* at 335. Regardless of whether an affirmative defense

should be presented at trial, the mere presentation of the necessity defense in this trial will have a critical impact on the State’s case. Therefore, Respondents’ motion to dismiss should be denied.

II. Have the Respondents shown the Appellant’s consolidated appeal should be dismissed for failure to demonstrate that the district court’s order does not have a critical impact on the outcome of the trial?

A. The pretrial order allowing the Respondents to raise the necessity defense will significantly reduce the State’s likelihood of a successful prosecution.

The Respondents claim that the Appellant has not explained how the necessity defense will significantly reduce the State’s likelihood of success at trial. To bolster this argument, the Respondents rely on an unpublished Court of Appeals case, State v. Gearin, No. A09-0467, 2009 WL 3078581 (attached to Respondent’s affidavit as exhibit 2). *Gearin*, however, besides being unbinding precedent, is distinguishable from the present case. *Gearin* involves a pretrial order suppressing the State’s evidence obtained from an illegal administrative warrant. *Id.* Moreover, before the district court ruled on the suppression motion, the State amended the complaint and eliminated the charges that were relevant to the evidence obtained by the warrant, *Id.* at *2 (“The state did not recharge respondent with ‘Certificate of Occupancy.’”), and at *3 (“the district court only suppressed evidence of building-code violations—evidence that is neither necessary nor relevant to the state's case. Because the suppressed evidence is entirely unrelated to the charges in the amended complaint, the suppression order does not significantly reduce the likelihood of a successful prosecution.”). Respondents further rely on *Gearin* to argue that critical impact is intended to be a “demanding standard,” *Id.* at *5 (*quoting* State v. Zanter,

535 N.W.2d 624, 631 (Minn. 1995)), but the Respondents leave out the second half of the quote, “critical impact is necessarily a demanding standard, but it is a fair and workable rule.” *Zanter*, at 630 (emphasis added).

Respondents also make reference to an Iowa case where their attorney, Mr. Phillips, represented an unrelated defendant at trial and presented a similar ‘justification defense’ in a pipeline protest case (the underlying nature of this case is pipeline protesting). In that case, the defendant was convicted by a jury. The Respondents argue since one defendant was unsuccessful at trial surely that means raising the justification defense (or necessity defense) cannot critically impact the State’s case. Besides the fact that anecdotal evidence should not be the standard for critical impact, this argument also flies in the face of logic. Why would the Respondents raise the necessity defense if not for their hope to critically impact the outcome of trial? Respondents have put themselves in a position where they must admit one of two realities; either, raising the necessity defense will *per se* have a critical impact on the outcome of the trial, or they are purposefully wasting the district court’s time in presenting such a defense because they know it will fail.

The district court’s order allowing the Respondents to present the necessity defense will significantly reduce the State’s likelihood of a successful prosecution in this particular case for the following reasons. First, allowing the Respondents to present an inapplicable defense will unnecessarily confuse the jury and conflate the issue regarding the Respondents’ culpability. Second, allowing the Respondents to present an inapplicable defense is a waste of judicial resources as it unduly adds a significant amount of time to the trial.

B. Because the district court's pretrial order allows the Respondents to present the necessity defense, the court's future evidentiary rulings on the defense are unrelated to the determination of a critical impact on the outcome of the trial.

Next, the Respondents assert that the Appellant did not satisfy the threshold issue of critical impact because anticipating a series of evidentiary rulings does not show that a defense will significantly reduce the State's likelihood of successful prosecution. Respondents argue that because the District Court, in its pre-trial order, issued a limitation on how much evidence in support of a necessity defense the Respondents can introduce at trial (and laid out the groundwork for the Appellant to object at trial), that the Appellant is now asking this Court to find critical impact on a series of evidentiary rulings that are sure to follow at trial. This argument is simply a red-herring. The Appellant's contention is that by permitting the Respondents to present the necessity defense at trial, the district court's pretrial order critically impacts the outcome of the trial. The Appellant is not arguing critical impact is demonstrated by permitting certain evidentiary rulings or limiting the amount of evidence in support of the necessity defense at trial.

C. The district court's pretrial order critically impacts the outcome of the trial because if the Respondents are allowed to present a necessity defense and the jury acquits, the Appellant has no post-trial recourse to appeal the district court's ruling.

Finally, the Respondents assert that the Appellant's inability to appeal post-trial does not show that the necessity defense will significantly reduce the likelihood of success at trial. Again, this flies in the face of logic. Why would the Respondents request to present the necessity defense if they were not hopeful in a successful trial outcome? This is a case where the Respondents have all but admitted their culpability, but in making their

admissions they wish to present evidence of the defense of necessity. The State cannot appeal an acquittal, no matter what the reasoning. As Justice Stras points out in his dissent in *Obeta* “an adverse effect on the State's ability to prosecute is *not* our test for critical impact. Rather, the State must demonstrate “clearly and unequivocally” that the impact on its case will be *critical*. State v. Obeta, 796 N.W.2d 282, 296 (Minn. 2011) (emphasis in original). If the Respondents are allowed to present the necessity defense at trial, there is a chance of misleading and confusing the jury, which could result in an acquittal and a foreclosure on the State’s ability to appeal the district court’s pretrial order.


CONCLUSION

Regardless of how this Court rules regarding the appropriateness of allowing the necessity defense at trial in this case, permitting the defense will have a critical impact on how the State presents its case. The Respondents’ motion to dismiss should be denied and the Appellant should be allowed to brief the merits of its appeal.

Respectfully submitted,

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