

STATE OF MINNESOTA
IN COURT OF APPEALS

FILED

November 3, 2017

**OFFICE OF
APPELLATE COURTS**

State of Minnesota,

Appellant,

vs.

Annette Marie Klapstein,

Respondent (A17-1649),

Emily Nesbitt Johnston,

Respondent (A17-1650),

Steven Robert Liptay,

Respondent (A17-1651),

Benjamin Gary Joldersma,

Respondent (A17-1652).

ORDER

#A17-1649

#A17-1650

#A17-1651

#A17-1652

BASED ON THE FILE, RECORD, AND PROCEEDINGS, AND BECAUSE:

1. The state filed these pretrial appeals on October 19, 2017, seeking review of an order filed on October 11, 2017, granting respondents' motions to present necessity defenses at trial. Because the district court administrator did not serve notice of entry of the order on the prosecutor until October 15, 2017, the appeals are timely. *See* Minn. R. Crim. P. 28.04, subd. 2(8), 34.01. The state has filed a response opposing the motion to dismiss.

2. The appeals, which involve charges of criminal damage to property and trespass on a critical public service facility, utility, or pipeline at the Enbridge site, were consolidated by this court in an October 20, 2017 order. Respondents are represented by the same attorney.

3. Transcripts were delivered to the parties on October 25, 2017, and the state's brief is currently due on November 9, 2017. *See* Minn. R. Crim. P. 28.04, subd. 2(3) (providing prosecuting attorney must file appellant's brief within 15 days of transcript delivery).

4. On October 30, 2017, respondents' attorney filed a motion to dismiss the consolidated appeals on the grounds that the state has not demonstrated that the district court's order permitting respondents to present evidence on the necessity defense will have a critical impact on the outcome of the trial. Respondents' attorney supports the motion with a memorandum of law, an affidavit, a copy of the district court's order, an unpublished opinion addressing critical impact as a threshold question in considering the merits of the appeal, and jury instructions from a Wisconsin case.

5. In order for the state to prevail in a pretrial appeal, the state must show (1) "clearly and unequivocally" that the district court's order will have "critical impact" on the state's ability to successfully prosecute the defendant and (2) that the district court's order constituted error. *State v. Zanter*, 535 N.W.2d 624, 630 (Minn. 1995). The state is required to make a critical-impact showing in its statement of the case. Minn. R. Crim. P. 28.04, subd. 2(2)(b). In its statement of the case, the state argues that the district court's order

critically impacts the prosecution because it permits the respondents to shift the focus of the trials from their criminal activity to the issue of climate change.

6. Respondents gave notice of their intent to rely on the necessity defense at trial, and provided a lengthy list of potential witnesses who would testify about the effect burning fossil fuels has on climate change and the environment to explain the respondents' motives to engage in civil disobedience. The state objected, and a contested omnibus hearing was held. The district court's October 11, 2017 order grants respondents' "request to present evidence on the defense of necessity at trial." The order also states that the defense of necessity must "be focused, direct, and presented in a non-cumulative manner," and that the state will be afforded an opportunity to object at trial "on other lawful grounds." But the order does not address whether the court will instruct the jury on the necessity defense. *See State v. Brodie*, 532 N.W.2d 557, 557 (Minn. 1995) (stating, in order opinion, that instruction on affirmative defense of necessity is not given unless the defendant meets burden of making "prima facie showing of justification by necessity"); *see also State v. Rein*, 477 N.W.2d 716, 717-18 (Minn. App. 1991) (concluding district court's orders limiting defense evidence of necessity at trial and refusing to instruct jury on necessity defense were not erroneous), *review denied* (Minn. Jan. 30, 1992).

7. Although critical impact is a threshold inquiry, this court is not required to make a decision on critical impact before the appeal has been fully briefed. *See In re Estate v. Magnus*, 436 N.W.2d 821, 822-23 (Minn. App. 1989) (stating a motion filed prior to briefing on the merits that "seeks the same relief as the appeal itself" is not appropriate and will be denied). Appellate decisions often address critical impact as a threshold question

in a decision on the merits. *See, e.g., State v. McLeod*, 705 N.W.2d 776, 784-88 (Minn. 2005) (concluding, as a threshold question, that excluding *Spreigl* evidence would significantly reduce the state's chances of a successful prosecution before concluding that the district court erred in excluding that evidence); *State v. Skapyak*, 702 N.W.2d 331, 334 (Minn. App. 2005) (addressing critical impact before determining district court erred in permitting defendant to raise mistake-of-age defense to controlled-substance sale crime), *review denied* (Minn. Oct. 18, 2005).

8. Because the critical-impact inquiry is better left to full briefing, respondents' motion to dismiss will be denied at this time. A motion does not stay the state's time to file its brief on the merits. *See* Minn. R. Civ. App. P. 127. But given the time to process respondents' motion, the state will be given additional time to file its brief addressing (1) whether the district court's order permitting respondents to present evidence on the necessity defense will have a critical impact on the prosecution, and (2) whether that ruling was erroneous. *See State v. Keith*, 325 N.W.2d 641 (Minn. 1982) (allowing for special circumstances to extend time to file state's brief in pretrial state appeal).

IT IS HEREBY ORDERED:

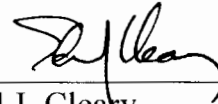
1. Respondents' motion to dismiss the state's consolidated pretrial appeals is denied.
2. Appellant's brief shall be served and filed on or before November 20, 2017.
3. Respondents' brief shall be served and filed within eight days of service of appellant's brief. Minn. R. Crim. P. 28.04, subd. 2(3).

4. Upon completion of briefing this matter will be scheduled for oral argument as requested in appellant's statement of the case. Counsel are reminded to provide the clerk of the appellate courts with dates they are unavailable for argument.

5. The clerk of the appellate courts shall provide copies of this order to the Honorable Robert D. Tiffany, to counsel of record, and to the district court administrator.

Dated: November 3, 2017

BY THE COURT



Edward J. Cleary
Chief Judge