

STATE OF MINNESOTA
IN COURT OF APPEALS

FILED

October 30, 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).

**MEMORANDUM IN
SUPPORT OF
RESPONDENTS'
MOTION TO DISMISS**

A17-1649

A17-1650

A17-1651

A17-1652

INTRODUCTION

By Order and Memorandum dated October 11, 2017, Judge Robert D. Tiffany granted Respondents' request to present evidence on the defense of necessity at trial. The District Court's Order and Memorandum preemptively and explicitly limited the scope of the defense of necessity, requiring "any evidence in support of the defense of necessity to be focused, direct, and presented in a non-cumulative manner." *Exhibit 1 to Affidavit of Tim M. Phillips ("Phillips Aff."), p. 6*. In support of this limitation, the District Court's

Order and Memorandum further stated that Appellant “may object at trial on the above or other lawful grounds.” *Id.*

On October 19, 2017, Appellant filed its Notice of Appeal to this Court regarding the District Court’s Order dated October 11, 2017. For the reasons set forth below, Respondents respectfully request that this Court dismiss the consolidated appeals filed by Appellant on the grounds that Appellant has not demonstrated that the District Court’s Order will have a critical impact on the outcome of the trial.

ARGUMENT

I. APPELLANT HAS NOT MET THE CRITICAL IMPACT STANDARD

Minnesota courts “strictly construe the rules governing appeals by the State in criminal cases because such appeals are not favored.” *State v. Rourke*, 773 N.W.2d 913, 923 (Minn.2009) (citing *State v. Barrett*, 694 N.W.2d 783, 785–87 (Minn.2005)).

Subject to certain exceptions not relevant to the above-titled case, the State may appeal as of right “from any pretrial order.” Minn. R. Crim. P. 28.04, subd. 1(1). The rule, however, explicitly requires that the statement of the case made in support of a notice of appeal from a pretrial order “must also include a summary statement by the prosecutor explaining 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); *see also* Minn. R. Civ. App. P. 133.03.

Importantly, the plain language of the rule requires an affirmative showing of critical impact (*i.e.*, “will have a critical impact”), as opposed to a merely speculative or anticipatory prediction of possible critical impact. Minn. R. Crim. P. 28.04, subd.

2(2)(b). The Minnesota Supreme Court has long held that the showing of critical impact is a threshold issue that the prosecution must first satisfy before the appellate court will review the pretrial order. *State v. McLeod*, 705 N.W.2d 776, 784-87 (Minn.2005) (“We view ‘critical impact’ as a ‘threshold issue’ and will not review a pretrial order absent such a showing.”); *see also State v. Zanter*, 535 N.W.2d 624, 631 (Minn.1995) (holding that critical impact is a threshold issue that must be determined in advance of deciding whether a suppression order was made in error); *State v. Edrozo*, 578 N.W.2d 719, 722-23 (Minn.1998) (supporting *Zanter*’s clarification of the sequence in which critical impact and alleged error must be addressed). The Supreme Court has also held that the critical impact test is “necessarily a demanding standard” and “a fair and workable rule.” *Zanter, supra*, 535 N.W.2d at 630; *see also State v. Rambahal*, 751 N.W.2d 84, 89 (Minn.2008).

The Court further clarified in several cases that, although the State need not show that the pretrial order will completely foreclose prosecution, the State must show that the unreversed pretrial order “will significantly reduce the likelihood of a successful prosecution.” *State v. Kim*, 398 N.W.2d 544, 551 (Minn.1987); *see also McLeod, supra*, 705 N.W.2d at 784; *Rambahal, supra*, 751 N.W.2d at 89 (articulating the State’s burden under the critical impact test). In addition, the Court has held that whether particular evidence will have a critical impact on the outcome of the case “depends on the nature of the state’s evidence against the defendant.” *Zanter, supra*, 535 N.W.2d at 630. To further clarify the prosecution’s burden under the critical impact test, the Court has relied on the standard set forth in the A.B.A. Standards for Criminal Justice. *Kim, supra*, 398

N.W.2d at 551 (“The *Webber* critical impact rule as we have applied it is consistent with the standard proposed by the A.B.A. Standards for Criminal Justice.”); *see also In re Welfare L.E.P.*, 594 N.W.2d 163, 169 (citing to the more rigorous standard of “seriously jeopardized” in the A.B.A. Standards for Criminal Justice in its analysis of the critical impact test); *State v. Miller*, 586 N.W.2d 133, 137 (Minn. Ct. App. 1998), reversed on other grounds 600 N.W.2d 457 (1999) (relying upon the more rigorous “seriously impede” standard in *Kim*); IV A.B.A. Standards for Criminal Justice, Criminal Appeals 21-1.4(a)(iii) (2d ed.1980) (“Prosecution Appeals”).

The A.B.A. Standards for Criminal Justice¹ is a more rigorous standard. It states in pertinent part that the prosecution should be permitted to appeal “from pretrial orders . . . where the effect is to **seriously impede**, although not to completely foreclose, the continuation of the prosecution.” IV A.B.A. Standards for Criminal Justice, Criminal Appeals 21-1.4(a)(iii) (2d ed.1980) (“Prosecution Appeals”) (emphasis added). As discussed below, Appellant has not satisfied the threshold issue of critical impact.

A. APPELLANT DOES NOT EXPLAIN HOW THE DEFENSE OF NECESSITY WILL SIGNIFICANTLY REDUCE ITS LIKELIHOOD OF A SUCCESSFUL PROSECUTION

In *State v. Gearin*, the Minnesota Court of Appeals found no showing of a critical impact on the outcome of the trial because the prosecution suggested “that the mere fact of the suppression significantly reduces the likelihood of a successful prosecution.”

¹ A.B.A. Standards for Criminal Justice, https://www.americanbar.org/groups/criminal_justice/publications/criminal_justice_section_archive/crimjust_standards_crimappeals_blk.html#1.4 (last accessed October 29, 2017).

Exhibit 2 to Phillips Aff., No. A09–0467, 2009 WL 3078581, at *4 (2009) (unpublished opinion). To support its holding, the *Gearin* court found that “there is simply no authority to sustain the state’s position that the mere fact of suppression – in and of itself – is sufficient to constitute critical impact.” *Id.* The *Gearin* court also stated that “the mere fact of suppression reduces the likelihood of a successful prosecution **only in the sense that any ruling adverse to the state reduces the likelihood of a successful prosecution.**” *Id.* (emphasis added.) Finally, the *Gearin* court pointed to the “demanding standard” set forth by the Minnesota Supreme Court in *State v. Zanter*, when it stated that “to accept the state’s argument here would be to strip the critical-impact test of its heft and practical effect.” *Id.*, quoting *Zanter, supra*, 535 N.W.2d at 630.

Here, Appellant suggests that “[t]he District Court’s order critically impacts the State’s prosecution because it erroneously allows the Respondent to present the Defense of Necessity to the Jury.” *Appellant’s Statement of the Case*, ¶ 5. As in *Gearin*, Appellant rests upon the mere fact that the defense of necessity – in and of itself – will be asserted as being a sufficient explanation to establish a critical impact on the outcome of the case. Yet if merely presenting a defense against a criminal charge is a sufficient showing of a critical impact, the critical-impact test is not “a demanding standard.” *Zanter, supra*, 535 N.W.2d at 630.

The critical impact test functions as a procedural safeguard to ensure that when the prosecution appeals “from any pretrial order,” it must, as a threshold issue, *explain how* an unreversed pretrial order will critically impact the outcome of the case. Minn. R. Crim. P. 28.04, subd. 2(2)(b) (stating that the appeal “must also include a summary

statement by the prosecutor explaining how the district court’s alleged error, unless reversed, will have a critical impact on the outcome of the trial”); *see also McLeod, supra*, 705 N.W.2d at 784-87 (Minn.2005). It is not enough – particularly when criminal appeals from pretrial orders are disfavored and involve defendants who are awaiting trial, presumed innocent, and possibly confined – for Appellant to claim that the mere opportunity to affirmatively defend oneself against a criminal charge will significantly reduce the prosecution’s likelihood of success. *State v. Underdahl*, 767 N.W.2d 677, 683 (Minn.2009) (citing *State v. Barrett*, 694 N.W.2d 783, 787 (Minn.2005)). For this reason, Appellant failed to show an adequate critical impact to generate a right to appeal under Minn. R. Crim. P. 28.04.

In June 2017, Respondents’ counsel represented Kriss Wells at trial in the Iowa District Court for Boone County. *Phillips Aff.*, ¶¶ 1, 4. Mr. Wells had allegedly entered private property belonging to a contractor working on the Dakota Access Pipeline, and was charged with trespass. *Id.* at ¶ 5. The Court permitted Mr. Wells to call David Courard-Hauri, Professor of Environmental Science and Sustainability at Drake University, to testify regarding climate change; permitted Mr. Wells to introduce several graphs from Mr. Courard-Hauri’s Environmental Science textbook as exhibits; and instructed the jury that the State was required to prove beyond a reasonable doubt that Mr. Wells “remained on the property without justification,” without defining the word “justification” for the jury. *Id.* at ¶¶ 6-8. Regardless, the jury deliberated for only about 15 minutes before finding Mr. Wells guilty of trespass. *Id.* at 10.

As stated above, it is not enough to merely point to the routine nature of criminal proceedings as having a critical impact on the outcome of a case. Instead, as established under *Kim* and further clarified by subsequent Minnesota Supreme Court decisions, Appellant's burden under the critical impact test is to show that the unreversed pretrial order "will significantly reduce the likelihood of a successful prosecution." *Kim, supra*, 398 N.W.2d at 551; *see also McLeod, supra*, 705 N.W.2d at 784; *Rambahal, supra*, 751 N.W.2d at 89 (articulating the State's burden under the critical impact test). Appellant has not met the threshold issue of critical impact.

This appeal must therefore be dismissed as a matter of law. Minn. R. Crim. P. 28.04, subd. 2(2)(b); *see also McLeod, supra*, 705 N.W.2d at 784-87; *Zanter, supra*, 535 N.W.2d at 630.

B. APPELLANT DID NOT SATISFY 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 A SUCCESSFUL PROSECUTION

Appellant cannot premise its critical impact argument on evidentiary rulings that it anticipates the district court will make. In *State v. Jones*, the Minnesota Court of Appeals held that when a preliminary showing of critical impact is required, the State cannot base its contention of critical impact on a series of evidentiary rulings that it expects the district court may make by extension of the pretrial order. 518 N.W.2d 67, 70 (Minn. Ct. App. 1994). The critical impact test is *not* speculative or anticipatory but is, instead, built on the prosecution's explanation of what *will* have a critical impact on the outcome of the case. Minn. R. Crim. P. 28.04, subd. 2(2)(b).

Here, Appellant believes that “[t]he District Court’s ruling effectively shifts the trial from one of alleged criminal activity to a trial on whether or not climate change is happening.” *Appellant’s Statement of the Case*, ¶ 5. Appellant also cites to “both the substance and spirit” of Minnesota Rule of Evidence 403, quoting that “evidence may be excluded if its probative value is substantially outweighed by the danger of . . . confusion of the issues, or misleading the jury, or by considerations of undue delay, or waste of time . . .” *Id.* Even if the critical impact test allowed for speculation, which it does not, the district court already imposed certain evidentiary limitations in its the Order and Memorandum, stating that “any evidence in support of the defense of necessity to be focused, direct, and presented in a non-cumulative manner.” *Exhibit 1 to Phillips Aff.*, p. 6.

Moreover, in support of this limitation, the District Court’s Order and Memorandum further clarified that Appellant “may object at trial on the above or other lawful grounds.” *Id.* The district court’s limitation is preemptive. It serves as an additional evidentiary safeguard against, for example, the risk of shifting the focus from criminal activity to climate change. In addition, as further outlined in the Order, and under the Minnesota Rules of Evidence, Appellant will continue to have proper procedural opportunities at trial to object and to ensure that both the substance and spirit of Minn. R. Evid. 403 are preserved.

In *State v. Skapyak*, the trial court allowed for a mistake-of-age defense, which was found on appeal to have a critical impact because it would have required the State to satisfy an additional *mens rea* requirement. 702 N.W.2d 331, 335 (Minn. Ct. App. 2005).

Unlike in *Skapyak*, there is no additional burden of proof placed on Appellant as a result of the pretrial order allowing Respondents to present evidence on the defense of necessity.

As Appellant has not met the threshold issue of critical impact, this appeal must be dismissed as a matter of law.

C. APPELLANT INABILITY TO APPEAL POST-TRIAL DOES NOT SHOW THAT THE DEFENSE OF NECESSITY WILL SIGNIFICANTLY REDUCE ITS LIKELIHOOD OF A SUCCESSFUL PROSECUTION

As a showing of a critical impact on the outcome of the case, Appellant states that it “cannot appeal this issue after jeopardy attaches, or post-trial.” *Appellant’s Statement of the Case*, ¶ 5. If the State could show a critical impact every time it will be unable to appeal post-trial, that would no doubt be inconsistent with the “demanding standard” discussed above. More important, an inability to appeal the issue of whether evidence on the defense of necessity should have been allowed does not explain how the pretrial order at issue will have a critical impact on the prosecution’s likelihood of success at *trial*.

As Appellant has not met the threshold issue of critical impact, this appeal must be dismissed as a matter of law, and in accordance with the what is “necessarily a demanding standard.” Minn. R. Crim. P. 28.04, subd. 2(2)(b); *see also McLeod, supra*, 705 N.W.2d at 784-87; *Zanter, supra*, 535 N.W.2d at 630.

CONCLUSION

Respondents respectfully request that the State’s consolidated appeals be dismissed.

Dated: October 30, 2017

Respectfully submitted,

LAW OFFICE OF JOSHUA R. WILLIAMS

A handwritten signature in black ink, appearing to read "Tim M. Phillips". The signature is stylized with a large initial "T" and "M" and a long, sweeping flourish at the end.

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