

STATE OF MINNESOTA
COUNTY OF HENNEPIN

DISTRICT COURT
FOURTH JUDICIAL DISTRICT

Court File No. 27-CR-20-12646

State of Minnesota,
vs.
Derek Michael Chauvin,
Plaintiff,
Defendant.

**MEMORANDUM OF LAW
OPPOSING STATE’S MOTION
TO REINSTATE THIRD-
DEGREE MURDER CHARGES**

TO: **THE HONORABLE PETER CAHILL, JUDGE OF HENNEPIN COUNTY DISTRICT COURT; AND MATTHEW G. FRANK, ASSISTANT MINNESOTA ATTORNEY GENERAL.**

INTRODUCTION

On August 28, 2020, Defendant Derek Michael Chauvin, through his attorney Eric J. Nelson, Halberg Criminal Defense, moved this Court to dismiss all three counts of the Amended Complaint against him for lack of probable cause, pursuant to Minn. R. Crim. P. 11.04. On November 11, 2020, this Court filed an Order dismissing Count II of the Amended Complaint, which charged the Defendant with third-degree murder.

On February 1, 2021, the Minnesota Court of Appeals issued a published opinion in *State v. Noor*, No. A19-1089, —N.W.2d—, 2021 WL 317740 (Minn. App. 2021). *Noor* addressed third-degree murder in the context of a Minneapolis police officer’s shooting of an unarmed citizen. On February 4, 2021, relying on *Noor* and several unpublished cases from the court of appeals, the State filed a motion seeking to reinstate the original third-degree murder charge against the Defendant or, in the alternative, leave to amend the Complaint to add a count of third-degree murder. Mr. Chauvin strongly opposes the State’s motion for the following reasons.

ARGUMENT

I. *STATE V. NOOR* LACKS PRECEDENTIAL AUTHORITY.

In its motion and accompanying memorandum, the State asserts that “The Court of Appeals’ decision in *Noor* is precedential. (State’s Mtn. at 7). As a basis for this claim, the State cites to the court’s “Recent Opinions” web page, where *Noor* is included in the page’s “Precedential Opinions” section. (*Id.*). In so doing, however, the State has deliberately turned a blind eye to actual binding precedent which clearly establishes that *Noor* **is not**, in fact, precedential.

The Minnesota Court of Appeals is an “intermediate appellate court.” *State v. Gilmartin*, 535 N.W.2d 650, 653 (Minn. App. 1995), *review denied* (Minn. Sep. 20, 1995). Its orders do not become final until at least 30 days after the opinion has issued—the time a party is granted to petition the Minnesota Supreme Court for further review. Minn. R. Civ. App. Pro. 136.02. If a party files a petition for further review, entry of the Court of Appeals’ judgment is stayed until action is taken upon the petition. *Id.* If the supreme court denies the petition, the court of appeals’ judgment becomes final. *Id.*; *City of Waite Park v. Office of Administrative Hearings*, 758 N.W.2d 347, 353 (Minn. App. 2008) (court of appeals opinions become final when “further review is denied by the supreme court or the time to seek further review has passed”), *review denied* (Minn. Feb 25, 2009).

Similarly, decisions by the Minnesota Court of Appeals do not become precedential or binding on lower courts until the judgment in the case has become final. *See, e.g., Hoyt Inv. v. Bloomington Commerce & Trade Ctr. Assocs.*, 418 N.W.2d 173, 176 (Minn. 1988). Relying on *Hoyt*, the Minnesota Court of Appeals explicitly held that its “decisions ***do not have precedential effect until the deadline for granting review has expired.***” *State v. Collins*, 580 N.W.2d 36, 43

(Minn. App. 1998), *review denied* (Minn. Jul. 16, 1998); *see Fishel v. Encompass Indemnity Co.*, No. A16-1659, 2017 WL 1548630 at *2 (Minn. App. 2017); *State v. Taylor*, No. A14-0938, 2015 WL 1757874 at *2 (Minn. App. Apr. 20, 2015), *review denied* (Minn. Jun. 30, 2015); *State v. Lindsey*, No. A12-0109, 2013 WL 141633, at *4 (Minn. App. Jan. 14, 2013), *review granted* (Mar. 27, 2013), *stay granted* (Mar. 27, 2013), *stay vacated, review denied* (Nov. 12, 2013); *Kelly v. State Farm Mut. Auto Ins. Co.*, No. C0-02-217, 2002 WL 1837992, at *3 (Minn. App. Aug. 13, 2002); *Willette v. Smith*, No. CX-99-1668, 2000 WL 687631, at *1 (Minn. App. May 30, 2000).

The Minnesota Court of Appeals' decision in *State v. Noor* was issued on February 1, 2021. If neither party petitions for further review, judgment will not be final—and the decision will not acquire precedential authority—until at least March 3, 2021. At best, the State's motion is several weeks premature. However, counsel for Mr. Noor—who happens to be counsel for Mr. Chauvin's codefendant, J. Alexander Kueng—has indicated his intent to file a petition for further review in the *Noor* matter. This means that the court of appeals' decision may not become final and acquire precedential authority until May 2, 2021, which is the date by which the supreme court would have to grant or deny the petition. However, given that *Noor* was an extremely high-profile case, which garnered international attention, that one member of the three-judge court of appeals panel dissented, and that the *Noor* opinion muddied the law surrounding third-degree murder in Minnesota, a fair likelihood exists that the Minnesota Supreme Court will grant review. Thus, depending on the outcome of the petition for review and a potential supreme court decision, the court of appeals' opinion in *Noor* may, in fact, ***never become precedential***.

The State's reliance on *Noor* is misplaced or, at best, premature. Its motions to reinstate or amend the Complaint must, therefore, be denied.

II. STATE V. NOOR IS DISTINGUISHABLE FROM THE PRESENT CASE, IN WHICH THERE REMAINS INSUFFICIENT PROBABLE CAUSE TO SUSTAIN A THIRD-DEGREE MURDER CHARGE.

The facts underlying *State v. Noor* differ considerably from those in the present case. Applying the same law on which this Court relied to dismiss the third-degree murder charge against Mr. Chauvin, unlike this case, the facts underlying *Noor* were sufficient to sustain a charge of third-degree murder.

In Minnesota, every criminal complaint must set forth “the facts establishing probable cause to believe that the charged offense has been committed.” Minn. R. Crim. P. 2.01. Courts should dismiss any complaint that lacks such foundational facts. *See State v. Rud*, 359 N.W.2d 573, 579 (Minn. 1984) (“The purpose of allowing a defendant to challenge probable cause at the omnibus hearing is, as [the Court] stated in *Florence*, to ‘protect a defendant who is unjustly or improperly charged from being compelled to stand trial.’” (citing *State v. Florence*, 239 N.W.2d 892, 900 (1976))). On a defendant’s motion challenging probable cause, “[t]he court must determine whether probable cause exists to believe that an offense has been committed and that the defendant committed it.” Minn. R. Crim. P. 11.04, subd. 1(a).

In so doing, the Court applies a stricter legal standard of what constitutes sufficient probable cause than does a law enforcement officer who has made the decision to arrest a defendant — and the Court must do so without regard for the arresting officer’s probable cause determination. *See Florence*, 239 N.W.2d at 902 (“Even assuming the correctness of the decision that probable cause existed to warrant arrest, that decision does not of itself determine the proper resolution of a Rule [11.04] probable cause motion.”). The Court must examine the entire record, including evidence inadmissible at trial, such as police reports and hearsay, to make its determination. *Welfare*

of *E.Y.W.*, 496 N.W.2d 847, 850 (Minn. App. 1993), *review denied* (Minn. Apr. 20, 1993).

“The test of probable cause is whether the evidence worthy of consideration . . . brings the charge within a reasonable probability.” *State v. Wood*, 845 N.W.2d 239, 243 (Minn. App. 2014) (citing *Florence*, 239 N.W.2d at 896), *review denied* (Minn. Jun. 17, 2014). Thus, the question before the Court was: “Given the facts disclosed by the record, [was] it fair and reasonable, applying Rule [11.04] as here interpreted, to require the defendant to stand trial?” *Florence*, 239 N.W.2d at 902. The answer, in light of the facts alleged by the State, was no—it was not reasonable to require Mr. Chauvin to stand trial for third-degree murder.

Count II of the Amended Complaint charged Mr. Chauvin with Third Degree Murder—Perpetrating Eminently Dangerous Act and Evincing Depraved Mind, in violation of Minn. Stat. § 609.195(a). Under Minnesota law, however, “[d]epraved mind murder cannot occur where the defendant’s actions were focused on a specific person.” *State v. Barnes*, 713 N.W.2d 325, 331 (Minn. 2006) (citing *State v. Wahlberg*, 296 N.W.2d 408, 417 (Minn. 1980)); *see* 10 Minn. Prac., Jury Instr. Guides—Criminal, 11.38 (6th ed.) (“the defendant’s intentional act, which caused the death... *may not be directed at the particular person whose death occurred*”) (emphasis added).

As the Minnesota Supreme Court has explained, “We have made clear that the statute covers only acts committed without special regard to the effect on any particular person or persons.” *State v. Zumberge*, 888 N.W.2d 688, 698 (Minn. 2017). “[*T*]he act must be committed without a special design upon the particular person or persons with whose murder the accused is charged.” *Id.* (appellant’s claims that he shot “toward” not “at” the decedent precluded a third-degree murder instruction) (citation omitted). Third-degree murder is reserved to cover cases where the act was committed in a “reckless or wanton manner,” with the “knowledge that someone may be killed and with a heedless disregard of that happening”—such as firing a gun into a bus or

driving a vehicle into a crowd. 10 Minn. Prac., Jury Instr. Guides—Criminal, 11.38 (6th ed.); *Wahlberg*, 296 N.W.2d at 417. That is simply not the case here.

In its Amended Complaint, the State made no attempt to allege facts that Mr. Chauvin's actions were directed generally and not specifically toward George Floyd. The probable cause statement only alleged that "The defendant placed his left knee in the area of Mr. Floyd's head and neck" and remained in that position. As alleged by the State, Mr. Chauvin's acts were neither reckless nor wanton.

Moreover, there is no evidence that anyone else in the vicinity of the incident was concerned for their own safety, as demonstrated by the crowd gathered on the sidewalk and on the street. Mr. Chauvin was discharging his lawful duties as a licensed peace officer in the State of Minnesota. In light of the circumstances into which he entered—a large, muscular man actively resisting arrest—the force Mr. Chauvin used to restrain Mr. Floyd was authorized. Under these facts, Mr. Chauvin's actions were neither wanton nor reckless, evinced no knowledge that someone may have been killed, were directed toward no one but Mr. Floyd and could not have resulted in harm to any person other than George Floyd. *See State v. Stewart*, 276 N.W.2d 51 (Minn. 1979) (where victim was shot twice, and no bullets fired at anything or anyone else, and no other person in the vicinity was concerned for their own safety, trial court did not err by refusing to submit third degree murder to the jury). The State's facts simply did not sustain the charge of third-degree murder against Mr. Chauvin.

Conversely, in *Noor*, the defendant discharged his weapon inside a squad car, across the body of his partner, firing through the vehicle's lowered, driver-side window, and into the dark toward an unidentifiable and unidentified "silhouette." *Noor*, Slip. Op. at 4. The defendant's actions may have been focused on the "silhouette," but his act endangered his partner, the

silhouette, which may have been a child and was, in fact, an innocent, unarmed woman, and anyone else who may have been present in the darkened alley. Clearly discharging a firearm into the darkness strongly implies “knowledge that someone may be killed and... a heedless disregard of that happening.” The defendant’s actions in *Noor* were the type of wanton and reckless behavior, evincing a depraved indifference to human life, that the third-degree murder statute encompasses.

Here, it was clear from the Amended Complaint’s probable cause statement that Mr. Chauvin’s actions were directed toward no person other than “the particular person whose death occurred”—Mr. Floyd. Because the facts contained in the Complaint did not establish “probable cause to believe that the charged offense has been committed,” Count II was properly dismissed pursuant to *Florence, Rud*, and Minn. R. Crim. P. 2.01. Perhaps, more importantly, the authority that this Court relied upon in dismissing the third-degree murder charge was, and continues to be, *precedential*—unlike *State v. Noor*.

CONCLUSION

Because *Noor* is both nonprecedential and distinguishable from the present case, the State’s motions to reinstate third-degree murder charges or, in the alternative, amend the Complaint must be denied.

Respectfully submitted,

HALBERG CRIMINAL DEFENSE

Dated: February 8, 2021

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