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OFFICE OF
APPELLATE COURTS

STATE OF MINNESOTA

IN COURT OF APPEALS

State of Minnesota,

Appellant,

vs.

Derek Michael Chauvin,

Respondent (A21-0133),

J. Alexander Kueng,

Respondent (A21-0135),

Thomas Kiernan Lane,

Respondent (A21-0135),

Tou Thao,

Respondent (A21-0135).

O R D E R

#A21-0133
#A21-0135

Considered and decided by Smith, Tracy M., Presiding Judge; Jesson, Judge; and Bratvold, Judge.

BASED ON THE FILE, RECORD, AND PROCEEDINGS, AND FOR THE FOLLOWING REASONS:

On January 28, 2021, the state filed these pretrial appeals under Minn. R. Crim. P. 28.04, subd. 1(1). The state seeks review of (a) a January 11, 2021 order denying the state's request to continue the then-joint trial scheduled for March 8, 2021, and severing

respondent Derek Michael Chauvin's trial from the trial of respondent-codefendants J. Alexander Kueng, Thomas Kiernan Lane, and Tou Thao, and (b) a January 21, 2021 order denying the state's motion for reconsideration. The clerk of the appellate courts assigned case number A21-0133 to the state's appeal in respondent Chauvin's case and case number A21-0135 to the state's appeal in respondent-codefendants' cases. On January 29, 2021, the state filed its brief on the merits.

All four respondents moved to dismiss these appeals as untimely. Respondent-codefendants also moved to dismiss because the state failed to show that the district court's orders would have a critical impact on its ability to prosecute these matters. The state moved to consolidate and expedite both appeals. In a February 3, 2021 order, this court consolidated these appeals and stayed the respondents' briefing deadline. That order also indicated that respondents' motions to dismiss and the state's motion to expedite would be addressed by a separate order after consideration by a special-term panel.

Timeliness of appeals

We first consider respondents' motions to dismiss for untimeliness. On appeal of a pretrial order, the prosecutor has five days to perfect an appeal following notice of entry of the challenged pretrial order. Minn. R. Crim. P. 28.04, subd. 2(2), (8). The time requirements for filing a notice of appeal are jurisdictional. *Ford v. State*, 690 N.W.2d 706, 709 (Minn. 2005). "This court is barred from extending the time to file an appeal except as provided in the rules." *State v. Dorcy*, 778 N.W.2d 374, 376 (Minn. App. 2010) (citing Minn. R. Crim. P. 28.01, subd. 3). There is no rule that permits this court to extend the time for filing a prosecution pretrial appeal. *Id.*

All respondents argue that these appeals are "untimely and improper" because they were filed 17 calendar days after entry of the district court's January 11, 2021 order. Respondents also assert that the state's motion for reconsideration was not filed within five days of the January 11, 2021 order and did not extend the time for appeal. Respondents misinterpret the applicable criminal rules governing the calculation of the state's appeal deadline.

"To the extent applicable, the Minnesota Rules of Civil Appellate Procedure govern appellate procedure, unless [the rules of criminal procedure] direct otherwise." Minn. R. Crim. P. 28.01, subd. 2. In criminal cases, Minn. R. Crim. P. 34.01 governs the method for computing time: "When a period of time prescribed or allowed is seven or fewer days, intermediate Saturdays, Sundays, and legal holidays must be excluded in the computation." The deadline to file a prosecution pretrial appeal is only five days; thus, rule 34.01 directs that intermediate Saturdays, Sundays, and legal holidays must be excluded. *See State v. Hugger*, 640 N.W.2d 619, 625 (Minn. 2002) (holding that, when calculating five-day appeal period under rule 28.04, subdivision 2(8), intermediate Saturdays, Sundays, and legal holidays are excluded in accordance with rule 34.01).

Counting five days from January 11, 2021, and excluding the intermediate Saturday, Sunday, and Martin Luther King Jr. legal holiday on Monday, January 18, 2021, the last day of the state's appeal period was Tuesday, January 19, 2021. Instead of a notice of appeal, the state filed a motion for reconsideration on January 19, 2021, and that motion was denied on January 21, 2021. A motion for reconsideration filed within the time for filing a prosecution pretrial appeal extends the appeal time. *State v. Wollan*, 303 N.W.2d

253, 255 (Minn. 1981). After such a motion, the time for the state to appeal "beg[ins] to run upon the entry of the order denying clarification." *Id.* Excluding the intermediate Saturday and Sunday, as rule 34.01 requires, these appeals were timely filed on January 28, 2021, which is five days after January 21, 2021. The motions to dismiss these appeals as untimely are denied.

Critical impact on prosecution under rule 28.04

Respondent-codefendants argue for dismissal because "the State makes no attempt to satisfy the requirement for a showing of a critical impact on the outcome of the trial." In a pretrial appeal, the state is required to file a statement of the case that includes "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). The state can show critical impact when the district court's ruling "significantly reduces the likelihood of a successful prosecution." *State v. McLeod*, 705 N.W.2d 776, 784 (Minn. 2005). The state is not required to show that a conviction is impossible, "only that the prosecution's likelihood of success is seriously jeopardized." *State v. Underdahl*, 767 N.W.2d 677, 683 (Minn. 2009).

We have held that the state can appeal an order denying a request for a continuance if critical impact on the outcome of the trial is shown. *State v. Stroud*, 459 N.W.2d 332, 335 (Minn. App. 1990) (concluding that denial of continuance, which precluded the state from obtaining DNA test results, would have a critical impact on trial).[1] Critical impact is

[1] The state has not identified any cases involving prosecution pretrial appeals from orders denying joinder or severing offenses or defendants, but presumably such pretrial appeals

a threshold question that is generally decided by a panel before reaching the merits. *See State v. Jones*, 518 N.W.2d 67, 69 (Minn. App. 1994), *review denied* (Minn. July 27, 1994). But in some cases, when critical impact on the outcome of the trial is not "apparent," this court may require "a preliminary showing of critical impact" and determine whether to dismiss the appeal. *Id.*

In its statement of the case, response to the motions to dismiss, and brief on the merits, the state's argument focuses primarily on public-health concerns. The state relies on expert opinions that it submitted to the district court addressing the risks of COVID-19 transmission related to holding a jury trial of great public interest in March 2021. While the state in passing suggests that its ability to prosecute the case might be adversely affected if participants in the trial contract COVID-19 during the trial and a mistrial results, in general, it asserts that the "critical impact" of the district court's orders relates not to the state's ability to prosecute but rather to public-health risks.

We conclude that the state has not shown that proceeding with respondent Chauvin's trial in March 2021 would "significantly reduce[]" or "seriously jeopardize[]" the likelihood of a successful prosecution of any of the defendants. *Underdahl*, 767 N.W.2d at 683. Because "[c]ritical impact is a threshold issue," when it is lacking, an appellate court generally "will not review a pretrial order." *McLeod*, 705 N.W.2d at 784 (quotation omitted).

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would be permissible under Minn. R. Crim. P. 28.04, subd. 1(1), provided the state showed critical impact under subdivision 2(2)(b).

Inherent authority

The state argues that, in the absence of critical impact on the outcome of the trial, this court should exercise "inherent authority" to accept jurisdiction of these appeals in the interests of justice. The supreme court has recognized that there are some pretrial rulings that are not "readily subject to analysis under the critical-impact rule" and has sometimes chosen to consider pretrial appeals by the state "under [its] inherent authority to accept an appeal in the interests of justice." *State v. Lessley*, 779 N.W.2d 825, 832 (Minn. 2010).

We are not persuaded that this court can or should exercise inherent authority to accept jurisdiction over these pretrial appeals for several reasons. First, the state has not cited, and we are not aware of, any Minnesota authority holding that the court of appeals has inherent authority to accept jurisdiction over an appeal when doing so would be contrary to the supreme court's express rules governing prosecution pretrial appeals. In the specific context of rule 28.04, the supreme court has repudiated a court of appeals decision exempting certain pretrial appeals from the critical-impact requirement. *See Underdahl*, 767 N.W.2d at 682 (holding that rule 28.04 requires the state to show critical impact in *all* pretrial appeals, repudiating *State v. Renneke*, 563 N.W.2d 335 (Minn. App. 1997), which had exempted discovery orders from the critical-impact requirement).

Second, even if the court of appeals has such inherent authority, the state has not shown that the issues in these appeals warrant suspending the critical-impact requirement. The cases in which the supreme court has exercised inherent authority to accept a prosecution pretrial appeal without a showing of critical impact have involved exceptional legal issues that required the supreme court's immediate action. *See State v. Obeta*, 796

N.W.2d 282, 287-88 (Minn. 2011) (exercising "supervisory power to ensure the fair administration of justice" because supreme court precedent was being "misapplied in a large number of cases on an important issue of statewide concern"); *Lessley*, 779 N.W.2d at 832 (invoking inherent authority because the issue "raises a critical constitutional issue" involving jury-trial waiver "that is capable of repetition yet evading review in the future"); *State v. Kromah*, 657 N.W.2d 564, 566 (Minn. 2003) (exercising inherent authority to accept prosecution pretrial appeal in consolidated cases from a district court order suppressing DNA evidence when the issue involving PCR-STR methodology was identical to an issue already under consideration); *see also In re Welfare of J.R., Jr.*, 655 N.W.2d 1, 4 (Minn. 2003) (explaining that, "[w]hen the [supreme] court has deviated from the rules or statutes and instead relied on [its] inherent authority to allow an untimely appeal to go forward, it has been on the basis of peculiar facts, such as recent changes in the law or interpretation issues").

Here, the propriety of the district court's rulings on a continuance and on severance depends on the circumstances surrounding these cases and not on novel legal issues having statewide impact. Whether to proceed with trial in a particular case is unlikely to have the type of statewide impact that might support the exercise of inherent authority. The state points to the public-health risks from conducting the trials in these particular cases. As important as these concerns are, the judicial branch has implemented significant, tested safeguards and conditions on court operations and the conduct of jury trials during the pandemic. The state also cites the potential for COVID-19 spread that might arise from activities outside the courtroom relating to these cases. While we do not dismiss those

concerns, we are not persuaded that the concerns establish a rationale for appellate jurisdiction.

Third, this court has previously required the state to show critical impact to obtain pretrial appellate review of an order denying a continuance. *See Stroud*, 459 N.W.2d at 334. In addition, the supreme court has stressed that "rules governing appeals by the State in criminal cases" are strictly construed "because such appeals are not favored." *State v. Rourke*, 773 N.W.2d 913, 923 (Minn. 2009). And the supreme court has stressed that the purpose of the critical-impact requirement is to limit the state's right to pretrial appellate review. *See Underdahl*, 767 N.W.2d at 682. In light of this caselaw, the state has not established a compelling reason for allowing it to circumvent the clear requirement of showing critical impact on the outcome of the trial as a prerequisite to a pretrial appeal.

In sum, we are not persuaded that this court may exercise inherent authority to accept these appeals when they do not meet the requirements of Minn. R. Crim. P. 28.04, subd. 2(2)(b). Because the state has not shown critical impact on the outcome of the trial, and there is no basis for this court to exercise inherent authority to review the pretrial rulings challenged by the state, these appeals must be dismissed.

Writ of prohibition

Finally, the state asks this court to construe its appeal as a petition for a writ of prohibition. The supreme court has held that the court of appeals has authority "to suspend the technical requirements of the rules and treat [a defendant's] notice of appeal as a petition for writ of prohibition." *State v. Pflepsen*, 590 N.W.2d 759, 764 (Minn. 1999); *see* Minn. R. Crim. P. 28.01, subd. 3. The supreme court has followed *Pflepsen* and construed

a state appeal from a gross-misdemeanor sentence, which is not an appeal authorized by law, as a petition for a writ of mandamus. *State v. Hoelzel*, 639 N.W.2d 605, 609 (Minn. 2002); Minn. R. Crim. P. 28.04, subd. 1(2) (providing that the state may appeal from any sentence imposed or stayed in felony cases). But *Hoelzel* was not a pretrial appeal subject to a showing of critical impact. And, even if this court could construe the state's purported appeal of right as a petition for an extraordinary writ, we are not persuaded that we should do so.

In a procedurally similar case also involving a prosecution pretrial appeal, the supreme court declined to consider the state's challenge to the denial of a pretrial motion to remove the assigned judge because the state failed to "follow the proper procedure" by seeking a writ of prohibition and, instead, "simply filed a pretrial appeal." *Lessley*, 779 N.W.2d at 831. Likewise, here, because the state filed only a pretrial appeal and failed to make the required showing of critical impact, we decline to recast the state's appeal as a petition for a writ of prohibition.

We do not mean to imply that, but for the state's failure to seek a writ, prohibition would be appropriate here. A writ of prohibition is an extreme remedy, and the appellate courts have limited its availability "to those cases where the lower court has exceeded its jurisdiction and no other adequate remedy exists." *State v. Turner*, 550 N.W.2d 622, 626 (Minn. 1996). A district court's ruling on a request for a continuance is discretionary. *State v. Rainer*, 411 N.W.2d 490, 495 (Minn. 1987). The district court's decision on severance is also discretionary. Minn. R. Crim. P. 17.03, subd. 2 ("When two or more defendants are charged with the same offense, they may be tried separately or jointly at the court's

discretion."). We are not persuaded that these discretionary rulings present the type of legal issues that should be reviewed by way of a petition for a writ of prohibition, especially in light of the supreme court's guidance about prosecution pretrial appeals being disfavored and a showing of critical impact being required to obtain appellate review. Moreover, the state has not identified any case establishing that a petition for a writ of prohibition is the "proper procedure" for challenging a pretrial order denying a continuance or severing defendants for separate trials. *Cf. Lessley*, 779 N.W.2d at 831. We observe that a pretrial appeal would be available to the state if it made the requisite showing of critical impact. The state's inability to make this threshold showing does not, by itself, render the ordinary remedy of a direct appeal inadequate.

In sum, the state has not established a basis for our review of the district court's pretrial orders. Because we conclude that these appeals must be dismissed, we express no opinion on the merits of the district court's rulings. In addition, it is unnecessary to consider the state's motion for expedited consideration.

IT IS HEREBY ORDERED: These appeals are dismissed.

Dated: February 12, 2021

BY THE COURT

Tracy M. Smith
Presiding Judge