

STATE OF MINNESOTA
COUNTY OF HENNEPIN

DISTRICT COURT
FOURTH JUDICIAL DISTRICT

STATE OF MINNESOTA,

PLAINTIFF,

V.

**MEMORANDUM IN SUPPORT
OF MOTION TO DISMISS**

TOU THAO,

DEFENDANT,

COURT FILE NO. 27-CR-20-12949

TO: THE HONORABLE PETER A. CAHILL, JUDGE OF DISTRICT COURT, AND
MR. MATTHEW G. FRANK, ASSISTANT ATTORNEY GENERAL

STATEMENT OF FACTS

On May 25, 2020 at approximately 8:08 p.m., Minneapolis Police Department (a.k.a. “MPD”) Officers Thomas Lane and J.A. Kueng (“Officer Lane” and “Officer Kueng” hereinafter) arrived at the Cup Foods located on 3759 Chicago Avenue in Minneapolis, Hennepin County, Minnesota to respond to a 911 call. The call stated that a man bought merchandise with counterfeit bills. Upon arrival, store personnel informed the two officers that the man was inside a parked car around the corner. Officer Lane and Officer Kueng approached the car and identified the man as George Floyd (“Mr. Floyd” hereinafter).

Officer Lane and Officer Kueng ordered Mr. Floyd out of the car. He refused to get out of the car and physically resisted being removed from the car until he was handcuffed. When the officers walked Mr. Floyd to the squad car to effect the lawful arrest, Mr. Floyd continued to resist both passively (by sitting on the ground) and actively (by stiffening up and refusing to enter the squad car). MPD Officer Tou Thao (“Officer Thao” hereinafter) and MPD Officer Derek Chauvin (“Officer Chauvin” hereinafter) arrived in their squad car as backup for Officer Lane and Officer

Kueng to assist with the arrest. Mr. Floyd continued to resist by pushing his body outside the squad car until he was forcibly placed inside. Mr. Floyd persisted to struggle inside the squad car and ultimately forced himself outside of the passenger side of the squad car using his legs.

Officer Chauvin then placed Mr. Floyd in a prone position and secured him using a neck restraint. Officer Lane and Officer Kueng assisted by placing themselves on top of Mr. Floyd's midsection and feet respectively. Mr. Floyd continued to resist by moving his legs, arms, and torso. At this point, Officer Thao went to the rear of the squad car and retrieved a hobble restraint and offered it to the other three officers as an alternative to their neck restraint. The officers refused the hobble restraint and stayed the course of keeping Mr. Floyd in a neck restraint in a prone position. Officer Thao then inquired about the status of the responding EMS ambulance and radioed police dispatch to hurry up the response to a "code 3" (lights and sirens).

Officer Thao then immediately turned his attention to crowd control. Officer Thao kept his back to Mr. Floyd and the three other officers for the majority of the remainder of the arrest. When Officer Thao turned his back to Mr. Floyd and the three other officers for the last time, Mr. Floyd was still alive and breathing.

At 8:27 p.m., emergency medical personnel arrived. Mr. Floyd was placed on a stretcher and taken to Hennepin County Medical Center where he was later pronounced dead.

On June 3, 2020, the State charged Officer Thao with two criminal counts via complaint. Count I alleges that Officer Thao committed the crime of aiding and abetting Second Degree Murder in violation of Minn. Stat. § 609.19.2(1) with reference to Minn. Stat. § 609.05.1. Count II alleges that Officer Thao committed the crime of aiding and abetting Second Degree Manslaughter in violation of Minn. Stat. § 609.205(1) with reference to Minn. Stat. § 609.05.1.

ARGUMENT

The State has failed to meet its burden of establishing probable cause to support Counts I and II in the Complaint. In order to establish probable cause, the State must present substantial evidence admissible under Minn. R. Crim. P. 18.05, subd.1, which would constitute evidence adequate to support denial of a motion for a directed verdict of acquittal. *State v. Florence*, 239 N.W.2d 982, 093 (Minn. 1976). The State is required to set forth all essential facts and elements which constitute the charged offenses in the complaint and supporting affidavits. *State v. Oman*, 121 N.W.2d 616, 619 (Minn. 1963). The facts must establish “probable cause to believe that an offense has been committed and the defendant committed it”. Minn. R. Crim. P. 2.01. Dismissal is not appropriate when the factual record established “a question for the jury determination on each element of the crime charged.” *State v. Lopez*, 778 N.W.2d 700, 703 (Minn. 2010).

The Minnesota Rules of Criminal Procedure require that the State must present facts establishing probable cause to believe that (1) “an offense has been committed” and (2) “the defendant committed it.” Minn. R. Crim. P. 2.01, subd. 1. Specifically, the State’s “facts establishing probable cause ‘must be set forth in writing in the complaint, and may be supplemented by supporting affidavits or by sworn testimony of witnesses taken before the issuing judge or judicial officer.’” *State v. Dunson*, 770 N.W.2d 546, (Minn. Ct. App. 2009)(citing Minn. R. Crim. P. 2.01, subd. 1). Here, the State has yet to specify what underlying facts show that a crime has been committed and how Officer Thao aided and abetted it. Therefore, the State has failed to meet their burden of establishing probable cause. As such, both Counts I and II must be dismissed.

I. COUNTS I AND II MUST BE DISMISSED ON THE GROUNDS THAT THE COMPLAIN FAILS TO ESTABLISH BY PROBABLE CAUSE THAT OFFICER THAO AIDED AND ABETTED IN THE DEATH OF MR. FLOYD.

The Sixth and Fourteenth Amendments require the State to inform Officer Thao “of the nature and cause of the accusation.” U.S. Const. amends VI, XIV. “This “nature and cause” requirement is satisfied if the charging instrument “contains such descriptions of the offense charged as will enable him to make his defense and to plead the judgment in bar of any further prosecution for the same crime.”” *State v. Chavin*, 723 N.W.2d 20, 29-30 (Minn. 2006)(quoting *State v. Becker*, 351 N.W.2d 923, 926 (Minn. 1984)(quoting *Rosen v United States*, 161 U.S. 29, 34, 16 S.Ct. 434, 40 L.Ed. 606 (1896)).

The Minnesota Constitution provides that “in all criminal prosecution the accused shall enjoy the right ... to be informed of the nature and cause of the accusation”. Minn. Const. Art. 1, § 6. “The purpose is plain. It is ‘that the accusation, whether by indictment or information, must be sufficiently specific fairly to apprise the accused of the nature of the charge against him, so that he may know what to answer, and be prepared to meet the exact charge against him, so that the record may show, as far as may be, for what he is put in jeopardy.’” *State v. Eich*, 282 N.W. 810, 814 (Minn. 1938)(citing to *State v. Nelson*, 77, N.W. 223 (Minn. 1898)); see also *State v. Wurdemann*, 120 N.W.2d 317, 318 (Minn. 1963).

The State failed to give sufficient facts to inform Officer Thao of what exactly he is alleged to have done to Aid and Abet the three other officers under Minn. Stat. § 609.05 subd. 1 in reference to § 609.19 subd. 2 (1) and § 609.205 subd. 1. As such, the State has failed to make a proper showing of probable cause as required under Minnesota law and thus Counts I and II must be dismissed.

- a. Counts I and II must be dismissed on the grounds that the Complaint fails to establish by probable cause that Officer Thao had the requisite mental state for Aiding and Abetting under Minn. Stat. § 609.05 subd. 1.**

The Minnesota Supreme Court has held that the *mens rea* for Aiding and Abetting under Minn. Stat. § 609.19 is intentional. *State v. Huber*, 877 N.W.2d 519 (Minn. 2016); *State v. Milton*, 821 N.W.2d 789 (Minn. 2012). To properly convict, the State must prove beyond a reasonable doubt that Officer Thao intentionally aided a principal in the commission of another crime. *See Huber*, 877 N.W.2d at 524. The mental state of intentionally must be properly defined for the jury. *Id*; *see also Milton* 821 N.W.2d at 806-808. Specifically, the State has the burden of showing – by probable cause – that Officer Thao(1) knew Officer Chauvin and others were going to commit a crime and (2) intended his presence to further the commission of that crime. *Huber*, 877 N.W.2d at 524 (citing *Milton*, 821 N.W.2d at 808).

While the State may use indirect evidence in their attempt to prove that Officer Thao intentionally aided a principal in the commission of a crime, the Minnesota Supreme Court has remanded cases where there was no direct evidence that a defendant knew the principal was going to commit a crime. *See Huber*, 877 N.W.2d 519, 526 (2016)(where the Minnesota Supreme Court reversed and remanded a defendant’s conviction for a new trial because the lower court failed to explain the meaning of “intentionally” aiding another and because there was not overwhelming evidence to show that defendant had intentionally aided the principal); *compare Kelly*, 855 N.W.2d 269 at 284 (where the Minnesota Supreme Court concluded that jury instructions that did not define the mens rea element did not have a substantial effect on the verdict because the defendant actively participated in the robbery by punching and kicking the victim); *compare Milton*, 821 N.W.2d 789 (where the Minnesota Supreme Court concluded that erroneous jury instructions did

not have a substantial effect on the verdict because defendant admitted to planning to rob the murder victim).

Here, the State has not offered any support in the Complaint that Officer Thao had the requisite *mens rea* to be charged with Aiding and Abetting under Minn. Stat. § 609.05 subd. 1. In fact, discovery provided by the State shows that Officer Thao did not intend to aid Officer Chauvin in the commission of any crimes. Officer Thao and the other three officers had been repeatedly trained to use neck restraints. When Officer Thao observed Mr. Floyd on the ground, the three other MPD officers were properly using force authorized by MPD policy. Officer Thao saw his partner, Officer Chauvin, using a MPD authorized neck restraint on Mr. Floyd. *See* Exhibit 3. The State has yet to provide any information to paint a scene other than Officer Thao observing his partner performing an arrest per Minneapolis Police Department policy. As there is no direct or circumstantial evidence to show that Officer Thao (1) **knew** Officer Chauvin and others were going to commit a crime and (2) **intended** his presence to further the commission of that crime as required by Minnesota law, thus Counts I and II must be dismissed.

b. Counts I and II must be dismissed on the grounds that the Complaint fails to establish by probable cause that Officer Thao furthered the commission of the underlying crime for Aiding and Abetting under Minn. Stat. § 609.05 subd. 1.

The State has failed to specify what actions Officer Thao allegedly did that would meet the elements of Counts I and II, thereby failing to meet their burden of probable cause. The State charged Officer Thao with two counts of aiding and abetting: “A person is criminally liable for a crime committed by another if the person intentionally aids, advises, hires, counsels, or conspires with or otherwise procures the other to commit the crime.” Minn. Stat. § 609.05 subd. 1. The State fails to put Officer Thao on notice as to what actions he did that would amount to aiding and abetting Officer Chauvin and others in the second degree murder or manslaughter of Mr. Floyd.

Instead, the State simply parrots the language of the statute without applying facts in both Count I and in Count II:

That on or about May 25, 2020, in Hennepin County, Minnesota, Tou Thao intentionally aided, advised, hired, counseled, or conspired with or otherwise procured the other to commit the crime, namely causing the death of a human being, George Floyd, without intent to effect the death of any person, while committing or attempting to commit a felony offense...

That on or about May 25, 2020, in Hennepin County, Tou Thao intentionally aided, advised, hired, counseled, or conspired with or otherwise procured the other to commit the crime, namely caused the death of another, George Floyd, by his culpable negligence, creating an unreasonable risk and consciously took the chances of causing death or great bodily harm to another, George Floyd.

See Complaint at 1 and 2. The State fails show by probable cause what Officer Thao exactly did to intentionally aid, advise, hire, counsel, or conspire another to cause the death of Mr. Floyd.

To convict Officer Thao of aiding and abetting another person in the commission of a crime, the State must show that Officer Thao actively played a role in the crime. *State v. Pendleton*, 759 N.W.2d 900 (Minn. 2009). Mere presence at the scene of a crime does not amount to aiding and abetting. *See State v. Huber*, 877 N.W.2d 519, 525 (Minn. 2016) (“[T]he instructions erroneously allowed the jury to convict Huber for his mere presence near the commission of the crime”). Mere presence at the crime scene alone is not sufficient to prove that a person aided or advised, because inaction, knowledge, or passive acquiescence does not rise to the level of criminal culpability. *State v. Ostrem*, 535 N.W.2d 916, 924 (Minn. 1995). However, “active participation in the overt act which constitutes the substantive offense is not

required, and a person's presence, companionship, and conduct before and after an offense are relevant circumstances from which a person's criminal intent may be inferred.” *Id.* The Minnesota Supreme Court has overturned a Hennepin County District Court Aiding and Abetting First Degree Murder under Minn. Stat. § 609.05 subd. 1 stating that “use of terms such as ‘aids,’ ‘advises,’ and ‘conspires’ requires something more of a person than mere inaction to impose liability ...” *State v. Ulvinen*, 313 N.W.2d 425 (Minn. 1981)(where the defendant was in the house while her son murdered his wife, watched his children while he dismembered her body, cleaned up some items, and corroborated her son’s story). The Minnesota Supreme Court held that while there was evidence the mother knew that her son was going to kill his wife and that she told him the murder would benefit the children, her actions did not amount to Aiding and Abetting under Minn. Stat. § 609.05 subd. 1 because she did not have any influence on the son’s decision to kill. *Id.* at 428.

In the case of *State v. Thao*, Officer Thao did not physically place his hands on Mr. Floyd at any point in time. His actions in no way furthered the commission of the alleged crime of assault. Instead, Officer Thao suggested alternative means to using a neck restraint on Mr. Floyd when he offered the hobble restraint. When the three officers decided it best to stay the course with the neck restraint, Officer Thao contacted the responding EMS and increased the urgency to a code 3 response. Officer Thao went to secure the scene to ensure the safety of the three other officers and Mr. Floyd. There is no legal precedent in Minnesota that an officer who is securing the scene and keeping victims, arrestees, officers, or civilians safe is in turn criminally liable for the actions of the officers on the scene. If so, all officers present at the

scene of Mr. Floyd's arrest (i.e. park police) would also be criminally liable for any alleged assaults under the State's theory of aiding and abetting.

The last time Officer Thao turned around to see what was happening, Mr. Floyd was alive and breathing. Officer Thao did nothing outside of the scope of his duties. Officer Thao spent the time during the arrest of Mr. Floyd focused on keeping the civilian bystanders out of the scene to allow the other three officers to effectuate the legal arrest and to turn Mr. Floyd over to responding medical personnel. Officer Thao did nothing to aid in the commission of a crime.

II. COUNTS I AND II MUST BE DISMISSED ON THE GROUNDS THAT THE COMPLAINT FAILS TO ESTABLISH PROBABLE CAUSE OF A CRIMINAL ACT IN LIGHT OF THE AUTHORIZATION SET FORTH IN MINN. STAT. § 609.06 subd. 1.

The arrest and death of Mr. Floyd are not crimes under current Minnesota Law. Because no underlying crime took place, Officer Thao cannot be charged with aiding and abetting under Minn. Stat. § 609.05 subd. 1.

The charge of aiding and abetting requires that the principal (in this case Officer Chauvin) have committed a crime. Minn. Stat. § 609.05 subd. 1 (stating "a person is criminally liable for a crime committed by another if the person intentionally aids, advises, hires, counsels, or conspires with or otherwise procures the other to commit the crime")(emphasis added). While it is necessary for there to be an underlying crime, it is not necessary for the principal to be found guilty of said crime for the agent (here Officer Thao) to be charged with aiding and abetting. Minn. Stat. § 609.05 subd. 4.

Minnesota law provides criminal immunity to police officers when they use reasonable force in effecting a lawful arrest. Specifically:

[R]easonable force may be used upon or toward the person of another without the other's consent when the following circumstances exist or the actor reasonable believes them to exist:

- 1) when used by a public officer or one assisting a public officer under the public officer's direction:
 - a. in effecting a lawful arrest; or
 - b. in the execution of legal process; or
 - c. in enforcing an order of the court; or
 - d. in executing any other duty imposed upon the public officer by law.

Minn. Stat. § 609.06 subd. 1. If a police officer is acting lawfully within Minn. Stat. § 609.06 subd.1, the underlying actions do not provide for criminal charges as they were, in fact, lawful.

Here, the officers involved in the arrest of Mr. Floyd were acting within the scope of force authorized under Minn. Stat. § 609.06 subd. 1. Officer Chauvin subdued Mr. Floyd during a lawful arrest by using a restraint that is lawful in Minnesota and a reasonable use of force under Minn. Stat. § 609.06.

The State claims that police officers are “trained that this type of restraint with a subject in a prone position is inherently dangerous”. Complaint at 4. However, discovery provided by the State directly contradicts that statement. Even if “inherently dangerous”, the restraint used by Officer Chauvin is still a reasonable use of force and thus authorized.

Minneapolis Police Officers are trained to use neck restraints. *See* Exhibit 2. Training materials used by the Minneapolis Police Department showing how to effectively administer neck restraints do not provided warnings that neck restraints are dangerous. *See* Exhibit 2.

The Use of Force Section of the Minneapolis Police Department Policy and Procedure Manual authorizes police officers to use neck restraints on subjects who are actively resisting. *See* Exhibit 3. (Stating that a neck restraint is “Defined as compressing one or both sides of a person's neck with an arm or leg, without applying direct pressure to the trachea or airway (front of the

neck). Only sworn employees who have received training from the MPD Training Unit are authorized to use neck restraints”).

The Minneapolis Police Department allows for two types of neck restraints: the “Conscious Neck Restraint” and the “Unconscious Neck Restraint”. Exhibit 3. The Conscious Neck Restraint is defined as “[t]he subject is placed in a neck restraint with intent to control, and not to render the subject unconscious, by only applying light to moderate pressure”. Exhibit 3 at §5-311. The Unconscious Neck Restraint is defined as “[t]he subject is placed in a neck restraint with the intention of rendering the person unconscious by applying adequate pressure”. *Id.* All authorized neck restraints are defined as a “non-deadly force option”. Exhibit 3 at § 5-311. The MPD defines “non-deadly force” as “[f]orce that does not have the reasonable likelihood of causing or creating a substantial risk of death or great bodily harm.” Exhibit 3 at § 5-302.

During his lawful arrest, Mr. Floyd became agitated and resisted in both active and passive manners. To subdue Mr. Floyd, Officer Chauvin utilized his training and experience to administer a non-deadly, MPD-approved neck restraint.

In addition to Minnesota statute, the Eighth Circuit has held that subduing an arrestee in a prone position is an authorized use of force. *Lombardo v. City of St. Louis*, 956 F.3d 1009 (8th. Ct. App. 2020). In *Lombardo*, the victim was arrested on suspicion of trespassing and for failing to appear in court for an outstanding traffic ticket. *Id.* Once arrested, the victim began resisting in his cell. *Id.* Multiple officers responded and placed the victim in a prone position on the floor while they held down his limbs and torso. *Id.* During the fifteen minutes he was in the prone position, the victim told the officers they were hurting him. *Id.* The victim stopped breathing while officers held him down. *Id.* He was transported to a hospital where he was later pronounced dead. *Id.* The Eighth Circuit Court of Appeals held that the officers’ actions did not amount to constitutionally

excessive force. *Id.* at 1013. Although *Lombardo* is not binding, it is persuasive. With similar facts, the federal appeals court held that the officers administered an authorized use of force and thus did not violate the victim's constitutional rights. *Id.* at 1015.

As a trained and licensed Minneapolis Police Officer, Officer Chauvin was acting within the scope of Minnesota Law by using the authorized use of force of a neck restraint on Mr. Floyd. Minnesota Law prohibits criminal liability of police officers when they use reasonable force during a lawful arrest. Minn. Stat. § 609.06 subd. 1. As such, there is no underlying crime of assault and thus there cannot legally be any aiding and abetting under Minn. Stat. § 609.05 subd. 1 for Officer Thao. In light of the foregoing Counts I and II must be dismissed.

CONCLUSION

Counts I and II are not supported by probable cause. The State has the burden of establishing by probable cause that Officer Thao (1) knew Officer Chauvin was going to commit a crime and that (2) he intended his presence or actions to further the commission of the crime. *State v. Huber*, 877 N.W.2d 519, 524 (Minn. 2016). The State has failed to prove either of those prongs because they offer no evidence that Officer Thao had the requisite mental state of intent nor do they show what actions of Officer Thao allegedly aided and abetted Officer Chauvin.

Furthermore, there is no underlying crime to the Aiding and Abetting charges thereby leaving Officer Thao with no criminal liability. Any underlying assault is shielded by Minnesota Law because the officers used authorized force when they held Mr. Floyd down in the prone position with a neck restraint. As Minn. Stat. § 609.06 subd. 1. removes any alleged underlying crime, there cannot be any agent liability stemming from it.

Counts I and II must be dismissed for lack of probable cause and in light of the authorization set forth by Minn. Stat. § 609.06 subd. 1.

Respectfully submitted,

Dated: This fifth day of August, 2020

/s/ Robert M. Paule

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