State of Minnesota
In Supreme Court

A21-1228

Derek Michael Chauvin,
Petitioner/Appellant,

vs.

State of Minnesota,
Respondent.

PETITION FOR REVIEW

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May 17, 2023

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I. Statement of legal issues sought to be reviewed.

1. Whether the district court's failure to either transfer venue, delay the trial or sequester the jury deprived Petitioner of state rights and constitutional due process to a fair trial because (i) the district court failed to presume juror prejudice due to pervasive adverse publicity and violence in the community or (ii) the district court abused its discretion.

The appellate court held the district court did not abuse it's discretion in refusing to either transfer venue, delay trial or sequester the jury because of pervasive pretrial publicity and community violence and the pervasive pretrial publicity and community violence was insufficient to presume prejudice.

2. Whether (i) police officers acting to effect lawful arrests can be convicted of second-degree felony murder when the predicate felony required only intent to contact, with no subjective intent to use what is later adjudicated as objectively unreasonable force or (ii) Minnesota should abrogate felony murder where the predicate felony is assault.

The appellate court held police officers can be convicted of second-degree unintentional felony murder for causing the death of another when the officer uses unreasonable force constituting third-degree assault to effect a lawful arrest.

3. Whether the jury instruction on "reasonableness" police use-of-force was material error.

The appellate court held any error in jury instruction was harmless beyond a reasonable doubt.

4. Whether upward sentence departures are misapplied when defendant's conduct was without subjective intent.

The appellate court held the district court properly identified "particular cruelty" alone appropriately departed upward even disregarding the second aggravating factor "abuse of authority."

5. Whether denying a *Schwartz* hearing after defendant presented prima facie evidence of juror misconduct deprives defendants of the constitutional right to trial by impartial jury.

The appellate court affirmed the district court because petitioner had opportunity to question all the jurors and had unexhausted preemptory strikes.

II. Statement of criteria relied upon to support petition.

This case presents the Supreme Court with important questions on (i) developing and clarifying due process requirements to transfer venue when there is unprecedented pervasive pretrial publicity coupled with community violence directed at a criminal defendant, (ii) clarifying Minnesota's application of second-degree unintentional felony murder with no subjective intent to commit the predicate felony of assault, (iii) harmonizing jury instruction requirements, (iv) clarifying aggravating factor application for upward-departing sentences, and (v) determining when a *Schwartz* hearing must investigate alleged juror voir dire misconduct. Minn. Ct. R. App. P. 117, subd. 2 (a), (c), & (d).

First, the appellate court's opinion regarding two-tier change-of-venue review is inconsistent with U.S. Supreme Court precedent on presumed prejudice analysis and appears to be a matter of first impression for this Court. Second, the opinion removes individual *mens rea* for charging police officers with felony murder for third-degree assault, which requires only intent to physically contact, when police officers effect lawful arrests and later those contacts are adjudicated as unreasonable force. Third, the reasonable force jury instruction given materially deviates from precedent. Fourth,

petitioner's sentencing overlooks the purpose of upward departures. Finally, declining to investigate evidence of juror misconduct is constitutionally deficient.

These questions call for this Court to exercise its supervisory powers on matters that deal with the rights of all criminal defendants, would impact police officers statewide, and clarify the rules regarding juror misconduct. These questions may recur unless resolved.

III. Statement of case.

On May 25, 2020, Petitioner Derek Chauvin, a veteran Minneapolis Police Officer, arrived to assist the in-progress arrest of George Floyd. Chauvin used a Department-trained knee-restraint while effecting the arrest and Floyd died. Destructive anti-police riots immediately broke out in the Twin Cities resulting in nearly half a billion dollars of property damage.

Among other charges, Respondent charged Chauvin with second-degree unintentional felony murder under Minn. Stat. §609.19, subd. 2(1). Trial was held in Hennepin County where a jury found Chauvin guilty on all counts, necessarily finding Chauvin's use of force objectively unreasonable. Chauvin received a 270-month sentence, a 120-month upward departure from the presumptive sentence, based on aggravating factors of "particular cruelty" and "abuse of authority.

Prior to Chauvin's trial, held ten months after Floyd's death, media coverage in the Twin Cities was relentless, wholly negative and inflammatory toward Chauvin. More anti-police riots broke out during Chauvin's trial after Daunte Wright's death. The district

court denied Chauvin's repeated motions to transfer venue outside the Twin Cities to a locale which had not been subjected to such violence.

After trial, Chauvin learned that seated Juror 52 lacked candor during voir dire regarding his preexisting negative views of the police and his political activism. This included participation in a "Get Your Knees Off Our Necks" protest. The appellate court affirmed the district court's denial of Chauvin's motion for a *Schwartz* hearing to investigate whether Juror 52 committed misconduct depriving Chauvin of his right to trial by an impartial jury.

The appellate court affirmed the statutory application of third-degree assault as a predicate felony for the application of second-degree unintentional felony murder. The predicate felony could be applied to police officers without any subjective intent.

IV. Brief argument supporting petition.

Venue

The Sixth Amendment gives criminal defendants the right to trial by an impartial jury. *Skilling v. United States*, 561 U.S. 358 (2010). While the second tier of *Skilling*'s two-tier system looks for abuse of discretion and actual prejudice, the first tier presumed prejudice analysis demands *de novo* review of the totality of the circumstances, which are only fully available after trial. Presumed prejudice first tier analysis is to determine whether "the totality of the circumstances", such as publicity or violence, creates a presumption jurors will be unable to render a verdict based on the evidence. Thus, "a reviewing court is required to presume unfairness of constitutional magnitude." It appears first-tier presumed prejudice analysis is a matter of first impression for this Court.

The appellate court did not apply this two-tiered analysis for venue prejudice. Instead, it collapsed the district court's venue decisions for abuse of discretion, opining Chauvin's publicity failed to match previous "extraordinary cases." The court substituted *Skilling de novo* review and the "must" requirement for a "sufficient mitigation" approach. However, the mitigations cited amount only to traditional trial procedures. Further, despite repeated requests, the trial court neither delayed the trial to allow for a "cooling" period nor required any jury sequestration other than during the one day of jury deliberations despite a courthouse surrounded by razor-wire and military personnel.

"Mitigation" is insufficient to satisfy the right of defendants to change venue under circumstances with destructive, pervasive, adverse publicity prejudicing the likelihood of fair trial in the original venue. Denying Chauvin a venue change is contrary to existing Supreme Court precedent, *State v. Blom*, 682 N.W.2d 578 (Minn. 2004) and *State v. Fairbanks*, 842 N.W.2d 297 (Minn. 2014), that allowed a change in venue on far lesser circumstances than Chauvin experienced.

The law must be harmonized. Trial courts should not substitute constitutionally-accepted standards and reviewing courts must review *de novo* the totality of the circumstances, which here included the overwhelmingly hostile publicity, Minneapolis' $27,000,000 settlement announcement during trial, juror concerns for personal safety, and stake in the verdict for fear of violence in their home community, media courtroom infractions, National Guard troops presence prior to deliberation, and anti-police riots in Brooklyn Center during trial.

Second Degree Felony Murder and Jury Instruction

Chauvin was convicted of second degree felony-murder. Minn. Stat. §609.19. This issue presents the Court with the opportunity to revisit its rejection of the merger doctrine because the predicate felony was third degree assault, which is "[w]hoever assaults another and inflicts substantial bodily harm." Minn. Stat. §609.223, subd. 1. Assault is "the intentional infliction of or attempt to inflict bodily harm upon another." Minn. Stat. §609.02, subd. 10(2). Under *State* v. *Dorn*, 887 N.W.2d 826 (Minn. 2016), the intent element is to physically contact someone and not intent to harm. Police officers are authorized to effect lawful arrests and must "contact" suspects who resist arrest in ways that would otherwise be an assault.

The lower courts' decisions as-applied to police officers mean that whenever contact to effect arrest crosses the "reasonable" line and the one contacted dies related to that contact, the officer could be convicted of felony murder with no heightened *mens rea* than that with which must be used to effect the arrest. There is no requirement that an officer intend to act unreasonably, and it would not matter if she did. *Graham v. Connor*, 490 U.S. 386 (1989). Thus, while *Dorn* holds assault is not a strict liability offense for laypersons, the State has converted assault, and subsequently, second-degree felony murder, into a strict liability offense as-applied to arresting police officers when the arrest is later adjudicated objectively unreasonable. 887 N.W.2d at 83.

The trial court excluded Chauvin's requested jury instruction that "'reasonableness' of a particular use of force must be judged from the perspective of a reasonable officer on the scene, rather than with the 20/20 vision of hindsight." *Graham*,

480 U.S. at 396. Jury instruction errors are not harmless unless the error did not significantly impact the verdict beyond a reasonable doubt. *State v. Kuhnau*, 622 N.W.2d 552 (Minn. 2001). However, judgment from a reasonable officer's perspective at "the precise moment" is materially different from caution against adjudicating with "20/20 hindsight."

Thus, the State did not have to prove Chauvin's "intent" beyond the intent to "contact" which Chauvin was authorized and duty bound to do while effecting a lawful arrest. This is no subjective intent to commit assault, no greater culpability than the reasonable officer, and murder with no "guilty mind."

Upward Departure

The appellate court actually hesitated to affirm applying "abuse of authority" to police officers. Yet, it held that beyond a reasonable doubt "particular cruelty" alone was sufficient for Chauvin to receive ten addition years. With no heightened *mens rea* or subjective intent for the predicate felony, imposing an upward departure from the presumptive sentence based on finding the conduct was significantly more serious than the typical commission of the crime is injudicious. *See State v. Bartham*, 938 N.W.2d 257 (Minn. 2020).

Schwartz Hearing

Chauvin was denied a *Schwartz* hearing to investigate and establish a record of juror misconduct. *Schwartz v. Minneapolis Suburban Bus Co.*, 104 N.W.2d 301 (Minn. 1960). *Schwartz* hearings are to be granted liberally. *State v. Benedict*, 397 N.W.2d 337 (Minn. 1986). The requesting party need only supply evidence, which *standing alone and*

unchallenged, would support finding jury misconduct. *State v. Larson*, 281 N.W.2d 481 (Minn. 1979).

The appellate court affirmed the district court decision because Chauvin had voir dire opportunity to question jurors and had unused preemptory strikes. However, defendants frame voir dire questions based on honest juror responses to juror questionnaires. Chauvin presented evidence that just months prior to trial, Juror 52 traveled to Washington D.C. and participated in a "Get Your Knees Off Our Necks," protest to fight for policing and criminal justice that condemned Chauvin regarding Floyd's death. Yet, Juror 52 answered "No" to juror questionnaires asking "Have you… ever helped support or advocated in favor of or against police reform," "Have you… participated in protests about police use of force or police brutality," and "No" to "Is there anything else the judge and attorneys should know about you in relation to serving on this jury." *Juror Questionnaire 52* at 4, 6, 8, 14.

Chauvin highlighted the first and last of these questions when requesting a *Schwartz* hearing. Unexhausted preemptory strikes are irrelevant—had the truth been known—Juror 52 would have been struck for-cause. Chauvin presented what should be prima facie evidence for a *Schwartz* hearing to determine whether his constitutional right to trial by an impartial jury was violated.

V. Conclusion.

Chauvin requests this Court grant review of the Court of Appeals decision.

Dated: May 17, 2023.

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CERTIFICATE OF COMPLIANCE

WITH MINN. R. APP. P. 132.01, Subd. 3

The undersigned certifies that the Petition submitted herein contains 1,961 words and complies with the type/volume limitations of the Minnesota Rules of Appellate Procedure 117 and 132. This Petition was prepared using a proportional space font size of 13 pt. The word count is stated in reliance on Microsoft Word 2016, the word processing system used to prepare this Petition.

Dated: May 17, 2023.

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