No. A21-0201

State of Minnesota

In Supreme Court

State of Minnesota,

Respondent,

vs.

Derek Michael Chauvin,

Petitioner.

PETITION FOR REVIEW OF

DECISION OF COURT OF APPEALS

Date of Filing of Court of Appeals Decision: March 5, 2021.

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TO THE SUPREME COURT OF THE STATE OF MINNESOTA:

Petitioner Derek Michael Chauvin petitions this Court for an order granting review of the Minnesota Court of Appeals' published decision in *State v. Chauvin*, No. A21-0201, —N.W.2d— (Minn. App. Mar. 5, 2021):

Statement of Legal Issue

Is a published "precedential" opinion of the Minnesota Court of Appeals *immediately* precedential and binding in factually similar cases before the time for petitioning this Court for further review has expired, or this Court has denied review, or this Court has reviewed and issued a final ruling on the matter?

The district court concluded that the court of appeals' decision in *State v. Noor*, No. A19-1089, —N.W.2d—, 2021 WL 317740 (Minn. App. 2021) was not yet precedential when it denied the State's motion to amend its complaint. The court of appeals held that its published "precedential" opinions are immediately precedential and binding and reversed the district court.

Statement of Facts[1] and Procedural History

On May 25, 2020, Minneapolis Police Department ("MPD") Officers Thomas Lane and J. Alexander Kueng responded to a 911 call from a business located at the intersection of Chicago Avenue and 38th Street in Minneapolis. (Defendant Derek Michael Chauvin's Memorandum of Law in Support of Motion to Dismiss for Lack of Probable Cause

[1] A more complete version of the facts of this case can be found in Petitioner's "Memorandum of Law in Support of Motion to Dismiss for Lack of Probable Cause," filed in the district court on August 28, 2020, and incorporated herein by reference.

("M.D."), filed Aug. 28, 2020, at 1). The caller alleged that a man had passed a counterfeit $20 bill and appeared under the influence of a substance. (M.D. at 1). When officers arrived, store personnel directed them to a vehicle parked across from the store and indicated that the suspect was inside the vehicle. Officers approached the vehicle, where the man, later identified as George Floyd, was sitting in the driver's seat. (*Id.* at 2).

Officers Lane and Kueng observed Mr. Floyd moving furtively. The officers ordered Mr. Floyd to place his hands on the vehicle's steering wheel, which he repeatedly refused to do until Officer Lane drew his sidearm. When Mr. Floyd finally placed his hands on the steering wheel, Officer Lane immediately holstered his weapon and ordered Mr. Floyd to exit the vehicle. Mr. Floyd physically resisted exiting the car until the officers forcibly removed him. Mr. Floyd spoke quickly, occasionally incoherently, and was generally nonresponsive to officers' questions and commands. (*Id.*).

Outside the vehicle, Mr. Floyd continued to struggle and actively resisted the officers as they attempted to handcuff him. Officers noted that he was acting erratically and repeatedly inquired whether Mr. Floyd was drunk or "on something." (*Id.*). They also noted foam coming from Mr. Floyd's mouth. (*Id.* at 3). In the struggle that ensued prior to Petitioner's arrival, Mr. Floyd claimed that he could not breathe, that he was claustrophobic and could not get into the back seat of the squad vehicle, and called out for "Mama." (*See* M.D. at 4-5).

Mr. Floyd continued to actively and passively resist officers' attempts to effect his arrest as they walked him across the street to their squad car. Upon arriving at the squad, Mr. Floyd increased his active resistance. A struggle ensued when Officers Lane and

Kueng attempted to place Mr. Floyd, who was well over six feet tall, muscular, and weighed over two hundred pounds, into the back seat of their squad. (M.D. at 4).

It was during this struggle that MPD Officers Tou Thao and Derek Chauvin, the Petitioner herein, arrived on scene as backup for Officers Lane and Kueng and to assist with effecting the arrest of Mr. Floyd. Even with the assistance of Officers Thao and Chauvin, Mr. Floyd was able to resist, kicking and forcing himself out of the squad whenever officers managed to get him into the back seat. After much resistance, Officers Chauvin and Kueng were ultimately able to place Mr. Floyd in a prone position on the street next to the squad. This resulted in Officer Chauvin being positioned closest to Mr. Floyd's shoulders and Officer Kueng near Mr. Floyd's waist, while Officer Lane attempted to control Mr. Floyd's legs. (*Id.* at 4-5).

Mr. Floyd continued to struggle on the ground. Officer Chauvin restrained his shoulder and neck area using a knee and one of Mr. Floyd's hands with his own. Officer Kueng restrained Mr. Floyd's arms, and Officer Lane restrained Mr. Floyd's legs, effecting the first stage of MPD's Maximal Restraint Technique ("MRT"). (*Id.* at 5).

Officer Chauvin asked if Officers Lane and Kueng had called EMS, and Officer Lane responded that EMS was "on their way." (*Id.*). Several seconds later, Officer Thao asked Officer Lane if they had requested a "code 3" (*i.e.*, lights and sirens activated) response from EMS. (*Id.*). When Lane responded in the negative, Officer Thao immediately upgraded the EMS response to "code 3." The officers continued to restrain Mr. Floyd until EMS arrived. The responding ambulance arrived at 8:27 p.m. Emergency

personnel placed Mr. Floyd on a stretcher and transported him to Hennepin County Medical Center, where he was later pronounced dead. (M.D. at 5-6).

Mr. Chauvin was subsequently charged, on May 29, 2020, with one count of third-degree murder, in violation of Minn. Stat. § 609.195(a), and one count of second-degree manslaughter, in violation of Minn. Stat. § 609.205, subdivision 1. (*Id.*).

In a June 1, 2020, interview at the Attorney General's Office, in the presence of Assistant Attorney General Frank, Hennepin County Medical Examiner Dr. Andrew Baker informally shared the findings of his May 26, 2020, autopsy of George Floyd. (M.D. at 6). In spite of the Medical Examiner's findings, the State filed an Amended Complaint on June 3, 2020, adding one count of second-degree, felony murder, in violation of Minn. Stat. § 609.19, subdivision 2(1).

The Medical Examiner's report released on June 4, 2020, noted that Mr. Floyd had cannabinoids in his system at the time of death, in addition to fentanyl and methamphetamine ("Fentanyl at 11 ng/ml—this is higher than chronic pain patients. If [Mr. Floyd] were found dead at home alone and no other apparent causes, this could be acceptable to call an OD. Deaths have been certified [with] levels of 3[ng/ml]…."). (M.D. at 6-7). The autopsy further revealed that Mr. Floyd had arteriosclerotic and hypertensive heart disease, hypertension, and sickle cell trait. According to the report, the cause of Mr. Floyd's death was "cardiopulmonary arrest complicating law enforcement subdual, restraint, and neck compression." (M.D. at 7).

On August 28, 2020, Mr. Chauvin moved the district court to dismiss all three counts of the Complaint for lack of probable cause. On October 21, 2020, the district court

filed a 107-page memorandum opinion and order upholding the second-degree murder and manslaughter charges but dismissing the third-degree murder charge against Mr. Chauvin. (*See* Memorandum Opinion, 10-21-2020, at 52-67). At the time it issued its order, the district court explicitly stayed dismissal of the third-degree murder charge "for five days to allow the State to consider a pretrial appeal." (Order, 10-21-2020, at 2). The State did not file a pretrial appeal at that time, nor did the State file a motion to reconsider the district court's order dismissing the third-degree murder charge within the five days during which the dismissal was stayed.

On February 4, 2021, the State filed a document styled "Motion to Reinstate Third-Degree Murder Charge or, in the Alternative, to Amend the Complaint." The State advised that the district court "could also construe this as a motion for reconsideration of the Court's order dismissing the third-degree murder charge." (State's Mtn., 2-4-2021, at 7 n.1). The State's purported impetus for its motion was the court of appeals' decision in *State v. Noor,* No. A19-1089, —N.W.2d—, 2021 WL 317740 (Minn. App. 2021), issued on February 1, 2021, and written by the Honorable Michelle Larkin. *Noor,* in a divided panel, addressed the propriety of a third-degree murder charge in the context of a Minneapolis police officer's shooting of an unarmed citizen. The State contended that *Noor* was "precedential," and the district court was, therefore, bound to reconsider its order dismissing the third-degree murder charge more than three months prior. (State's Mtn., 2-4-2021, at 7). The district court, on February 11, 2021, denied the State's motion, concluding, among other things, that *Noor* was not yet binding precedent. (Order and Memo., 2-11-21, at 5).

On February 12, 2021,[2] the State filed its second pretrial appeal of a district court order in the George Floyd matter in the course of approximately two weeks. In its most recent pretrial filing, the State appealed the district court's order denying its "Motion to Reinstate Third-Degree Murder Charge or, in the Alternative, to Amend the Complaint"/motion to reconsider. On February 16, 2021, Mr. Chauvin moved the court of appeals to dismiss the State's appeal as untimely and otherwise improper.

The court of appeals denied Petitioner's motion and found that the State had met its pretrial appeal burden of demonstrating "critical impact," allowing this appeal to move forward. On February 25, 2021, counsel for Mohammed Noor filed a Petition for Further Review of the court of appeals' decision in the *Noor* case. (*See* No. A19-1089 docket). Mr. Chauvin submitted his brief on February 26, 2021. On March 1, 2021, the court of appeals heard oral arguments, centered largely on the issue of whether its decision in *Noor* was precedential from the time it was issued. Later the same day, this Court granted the petition for further review in *Noor.* Based on this Court's grant of review, on March 1, 2021, Mr. Chauvin moved the court of appeals to dismiss the State's appeal, which was denied as moot in an order.

On March 5, 2021, the court of appeals released its opinion, also written by Judge Larkin, reversing the district's order denying the State's motion on the ground that *Noor*

[2] On the same day, the court of appeals dismissed two prior pretrial appeals in the same matters. *See State v. Chauvin*, No. A21-0133 (Minn. App. Feb. 12, 2021); *State v. Kueng, et al.*, No. A21-0135 (Minn. App. Feb. 12, 2021). In those consolidated cases, the State had appealed pretrial orders denying the State's motion for a continuance and amending the district court's previous order joining all four defendants for trial.

was precedential authority. It remanded the matter to the district court for "reconsideration of the state's motion." *State v. Chauvin,* no. A21-0201, —N.W.2d—, slip op. at 18 (Minn. App. Mar. 5, 2021). The court of appeals further directed that, "[o]n remand, the district court has discretion to consider any additional arguments Chauvin might raise in opposition to the state's motion. But the district court's decision must be consistent with this opinion." *Id.* This timely petition for further review follows.

Argument Supporting Review

I. WITH ITS DECISION IN THIS MATTER, THE COURT OF APPEALS RULED IN A MANNER INCONSISTENT WITH ITS PREVIOUS DECISIONS AND MINNESOTA COURT RULES.

The State's sole basis for moving the district court for leave to amend the complaint in this matter was its assertion that the court of appeals' *Noor* decision was "precedential and now provides [the district court] with clear guidance regarding the elements of third-degree murder." (State's Mtn., Feb. 4, 2021, at 2). The court of appeals decision in *Noor,* a case that is procedurally and factually far different from the present matter, relied heavily on this Court's decision in *State v. Mytych,* 194 N.W.2d 276, 282 (Minn. 1972). This Court subsequently cautioned that *Mytych* was not a "typical application of [third-degree murder]." *State v. Leinweber,* 228 N.W.2d 120, at 123 n.3 (Minn. 1975); *State v. Wahlberg,* 296 N.W.2d 408, 417 (Minn. 1980). The dissent in *Noor* noted as much. Slip op. at C/D-

7. In *Noor,* the court of appeals also distinguished five decades of this Court's binding third-degree murder jurisprudence to reach its decision.[3]

In declining to follow *Noor,* the district court relied on the court of appeals' opinion in *State v. Collins,* 580 N.W.2d 36, 43 (Minn. App. 1998), *review denied* (Minn. App. 1998), which states that court of appeals "decisions ***do not have precedential effect until the deadline for granting review has expired***." (citing *Hoyt Inv. v. Bloomington Commerce & Trade Ctr. Assocs.*, 418 N.W.2d 173, 176 (Minn. 1988)) (emphasis added). The district court further concluded that "[a]lthough the *Noor* majority opinion is thorough, it is not persuasive in this Court's view because it departs from the Minnesota Supreme Court's long adherence to the no-particular-person requirement embedded in the depraved mind element of Minn. Stat. § 609.195(a)." (Order and Memo., Feb. 11, 2021, at 5).

On review, the court of appeals found that its unqualified statement in *Collins* was "obiter dictum and is therefore *not* binding precedent." *Chauvin,* slip. op. at 14 (emphasis in original), thus giving it license to disregard a long line of cases. The court of appeals concluded that "a precedential opinion of this court is binding authority for this court and district courts immediately upon its filing. Thus, the district court erred by refusing to

[3] "Third degree murder ***cannot occur when the defendant's actions were focused on a specific person.***" *State v. Zumberge,* 888 N.W.2d 688, 698 (Minn. 2017) (emphasis added); *accord State v. Hanson,* 176 N.W.2d 607, 614-15 (Minn. 1970); *State v. Stewart,* 276 N.W.2d 51 (Minn. 1979); *Wahlberg,* 296 N.W.2d at 417; *State v. Barnes,* 713 N.W.2d 325, 331 (Minn. 2006); *State v. Hall,* 931 N.W.2d 737, 743 n.9 (Minn. 2019) (stating the court's conclusion is "not inconsistent with" *Hanson,* which held that third-degree murder "excludes a situation where the animus of the defendant is directed toward one person") (citations omitted).

follow this court's precedential opinion in *Noor." Id.* at 18. *Chauvin* disrupts the fabric of existing appellate law concerning when the court of appeals' holdings become binding on another court.

A. The court of appeals' finding that its statement in *Collins* was not binding is inconsistent with its own applications of *Collins.*

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). Absent stipulation to the contrary, its orders do not become final until at least 30 days after the opinion has issued—the amount of time in which a party is granted to petition this Court for further review. Minn. R. Civ. App. Pro. 136.02. Although its opinion argues that Mr. Chauvin was conflating precedential authority with finality, Petitioner's basis for doing so was the court of appeals' own language in *Collins:* "decisions ***do not have precedential effect until the deadline for granting review has expired***." The court did not say that its decisions "do not become final." It clearly and unequivocally stated that they are not "precedential" until "the deadline for granting review has expired," *i.e.,* until the judgment has become final. This makes sense, because jurisdiction does not return to the trial court in a matter that has been appealed until 30 days after filing of the court of appeals decision—unless further review is granted by this Court. *See State v. Grose,* 396 N.W.2d 874, 875 (Minn. App. 1986) (stating that a trial court does "not have jurisdiction" over the matter appealed "and [can] not obtain it until 30 days from the filing of the court of appeals' decision"). If the originating court is not immediately bound by the court of appeals'

decision in the same case, the decision cannot be precedential for other courts until the matter is settled and judgment is entered.

Although the court of appeals now claims that this was merely dicta and not precedential, its own decisions belie this conclusion. For example, in conducting a plain error analysis in in *State v. Reek*, No. A11-185, 2011 WL 6141626 (Minn. App. Dec. 12, 2011), the court of appeals stated:

> "In order to demonstrate plain error, the law on the issue must be "clear or obvious." *State v. Jones,* 753 N.W.2d 677, 689 (Minn.2008). Moreover, "an error cannot be deemed plain[] in the absence of binding precedent." *Id.* While the syllabus of this court's decision in *Koppi* unambiguously invalidated the jury instruction given by the district court in this case, ***the case was not truly precedential authority due to the supreme court's grant of review***. *See Hoyt Inv. Co. v. Bloomington Commerce & Trade Ctr. Assocs.,* 418 N.W.2d 173, 176 (Minn.1988) (noting that published decisions of the court of appeals acquire legal force when the deadline for review has expired); *Sefkow v. Sefkow*, 427 N.W.2d 203, 213 (Minn.1988) (stating that a published decision of the court of appeals becomes binding when review is denied); *State v. Collins,* 580 N.W.2d 36, 43 (Minn.App.1998) (stating that this court's decisions are precedential unless the supreme court grants review and does not affirm), *review denied* (Minn. July 16, 1998). Accordingly, the error of the district court was neither plain nor obvious."

Reek, 2011 WL 6141626 at *4 (emphasis added). Thus, relying on the purported obiter dictum in *Collins,* the court of appeals held that its prior decision "was not truly precedential authority due to [this Court's] grant of review."

In *State ex rel. Ward v. Roy,* no. A15-1475, 2016 WL 3375989 (Minn. App. Aug. 23, 2016), *review denied* (Dec. 27, 2016), the court of appeals had "determined that supervised-release time must be served in the community after release from prison to count against the conditional-release period, where the offender was serving his term of

imprisonment on a concurrent sentence for an unrelated offense." *Id.* at *3 (citing *State ex rel. Pollard v. Roy*, 878 N.W.2d 341, 349–50 (Minn.App.2016)). However, the court went on to hold that it would not "rely on *Pollard* because [its] decisions are not binding until the deadline for granting review by the supreme court has expired." *Ward*, 2016 WL 3375989 at *3 (citing *Collins*, 580 N.W.2d at 43). Petitioner directed the court of appeals to these applications of *Collins*[4] in his second motion to dismiss the appeal, after this Court granted review in *Noor*, but, as noted, *supra*, the court appeals ignored this information and dismissed the motion as moot.

Although it has not always adhered to its statement in *Collins*, the court of appeals has cited to the above-quoted language in the case on numerous other occasions, and without ever referring to it as nonprecedential dictum.[5] The court of appeals has cited

[4] Somewhat ironically, at oral argument, the State urged the court not to follow *Collins* and relied heavily on the unpublished in *State v. Meger*, No. A15-1823, 2016 WL 3961841 (Minn. App. Jul. 25, 2016), for the proposition that the court of appeals "generally follow[s] a rule of law until the Minnesota Supreme Court announces a different rule of law." *Id.* at *4. This Court subsequently overturned *Meger*. *See State v. Meger*, 901 N.W.2d 418 (Minn. 2017).

[5] *See Rochester City Lines Co. v. City of Rochester*, No. A17-1944, 2018 WL 3716379 at *3 (Minn. App. Aug. 6, 2018) (*"RCL II* was not then and would not become state law unless and until it was affirmed on review"); *State v. Taylor*, No. A14-0938, 2015 WL 1757874 at *2 (Minn. App. Apr. 20, 2015) (describing *Collins* as "explaining that an opinion of this court has precedential effect once the deadline for granting review has expired"); *State v. Kowalzyk*, No. A18-1397, 2019 WL 3545835 at *6 (Minn. App. Aug. 5, 2019) (citing *Collins* for the principle that the court of appeals' "decisions do not have precedential effect until the deadline for granting review has expired"); *Fishel v. Encompass Indemnity Company*, No. A16-1659, 2017 WL 1548630 at *2 (Minn. App. May 1, 2017) (quoting *Collins* for the principle that "decisions of the court of appeals 'do not have precedential effect until the deadline for granting review has expired'"); *see also State v. Lindsey*, No. A12-0109, 2013 WL 141633, at *4 (Minn. App. Jan. 14, 2013), *review granted* (Mar. 27, 2013); *Kelly v. State Farm Mut. Auto Ins. Co.*, No. C0-02-217, 2002 WL

Collins with approval on many occasions, even relying on it to decide cases analogous to this one, *Reek*, *e.g.*, without ever before dismissing it as dictum or characterizing it as an outlier—as this Court did with *Mytych*. The district court's reliance on *Collins* in concluding that *Noor* did not yet have precedential authority was not, therefore, clearly misplaced.

In fact, applying *Collins* and the court of appeals' own reasoning in *Reek* to the facts of this case, it would appear that, once this Court granted review of *Noor*, its decision in that case was "not truly precedential" and the district court should not be bound to follow it on remand. This is because once this Court "has granted the petition for further review,… the case is thus of minimal precedential value." *Fabio v. Bellomo*, 489 N.W.2d 241, 245 n.1 (Minn. App. 1992).

B. The laws of other jurisdictions undermine the court of appeals' holding.

In its *Chauvin* decision, the court of appeals faulted Petitioner for not identifying "*any* other jurisdiction that does not treat a precedential decision of an intermediate appellate court as binding authority while further review is possible or pending." Slip. op. at 17. Given the State's posture as appellant in the pretrial appeal, along with the lack of precedential Minnesota authority supporting its position, Petitioner did not believe he had to rely on authority outside this state's law, as established in *Collins*, and cited over and

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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); Eric J. Magnuson, David F. Herr, Erica A. Holzer, 3 *Minnesota Practice, Appellate Rules Annotated*, "Rule 117. Petition in Supreme Court for Review of Decisions of the Court of Appeals" (citing *Collins* for the principle that court of appeals decisions "do not have precedential effect until the deadline for granting review has expired").

over again by the court of appeals. While it cannot be ignored that this case has drawn worldwide interest, it is still a Minnesota case, bound by Minnesota law. In light of the *Chauvin* opinion, however, Petitioner would like to point out that the laws of other jurisdictions do, in fact, support his position.

In Kansas, for example, "[i]t requires no citation to authority to note that Court of Appeals decisions do not become law of [the] state until a petition for review, if filed, has been denied and a mandate has been issued." *State v. Oliver,* 46 P.3d 36, 38 (Kan. App. 2002); *see* Rules of the Supreme Ct. of Kans. 8.03(k). In California, a grant of review deprives an intermediate appellate opinion of any precedential authority. Cal. Rules of Court 8.1115(e)(1) (when review of a published opinion is pending, "unless otherwise ordered by the Supreme Court, a published opinion of the court of the Appeal in the matter has no binding or precedential effect, and may be cited for potentially persuasive value only"). In Colorado, horizontal *stare decisis* does not apply among the different divisions of the state's court of appeals. *See In re Estate of Becker,* 32 P.3d 557, 563 (Colo. App.2000) (one division of the court of appeals is not bound by the decision of another division); *People v. Wolfe,* 213 P.3d 1035, 1036 (Colo. App. 2009).

The notion that a decision of this state's court of appeals may not be binding on a lower court—or even on the court of appeals—until it is final, or especially, when review of this Court is pending, is not so "radical" as the State and the *Chauvin* panel would seem to believe. In fact, the court of appeals' own opinions indicate otherwise. What is clear, however, is that this Court's wisdom is needed in order to settle the court of appeals' inconsistent application of its own precedent.

CONCLUSION

For the for the foregoing reasons, Petitioner respectfully requests that this Court grant his petition for review.

Respectfully submitted,

HALBERG CRIMINAL DEFENSE

Dated: March 8, 2021

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CERTIFICATE OF DOCUMENT LENGTH

I hereby certify that this brief conforms to the document length requirements as set forth by Minnesota Rule of Criminal Procedure 29.04, subdivision 3. Specifically, this petition for further review does not exceed 4,000 words in length, exclusive of the caption, signature block, and addendum. This brief was written using Word for Microsoft Office 365 and, pursuant to Rule 29.04, the application reports that the length of this brief is 3,991 words.

Respectfully submitted,

HALBERG CRIMINAL DEFENSE

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