STATE OF MINNESOTA
IN COURT OF APPEALS
A17-1649
A17-1650
A17-1651
A17-1652

State of Minnesota,
Appellant,

vs.

Annette Marie Klapstein,
Respondent (A17-1649),

Emily Nesbitt Johnston,
Respondent (A17-1650),

Steven Robert Liptay,
Respondent (A17-1651),

Benjamin Gary Joldersma,
Respondent (A17-1652).

Filed April 23, 2018
Appeal dismissed
Halbrooks, Judge
Dissenting, Connolly, Judge

Clearwater County District Court
File No. 15-CR-16-413

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Considered and decided by Connolly, Presiding Judge; Halbrooks, Judge; and Reilly, Judge.

U N P U B L I S H E D O P I N I O N

HALBROOKS, Judge

In this pretrial appeal, appellant State of Minnesota challenges the order of the Clearwater County District Court permitting respondents to present evidence at trial on the defense of necessity. Because the state has not demonstrated that the district court's ruling will have a critical impact on the outcome of the trial, we dismiss the appeal.

FACTS

On October 11, 2016, respondents Annette Klapstein and Emily Johnston traveled to the rural town of Leonard with the intention of shutting down a petroleum pipeline at a valve station located nearby. Klapstein and Johnston used bolt-cutters to cut the chain securing the valve enclosure, entered, and then cut the chain securing the valve device itself. Respondent Benjamin Joldersma accompanied Klapstein and Johnston, and he contacted Enbridge—the company operating the pipeline—in order to inform it of what was occurring and to provide the company an opportunity to remotely shut down the

pipeline valve, which it ultimately did. Respondent Steven Liptay also accompanied the group for the purpose of documenting the events of the day in video recordings.

Klapstein, Johnston, and Liptay were each charged with felony criminal damage to property, aiding and abetting felony criminal damage to property, gross misdemeanor trespassing, and aiding and abetting gross misdemeanor trespassing. Joldersma was charged with conspiracy to commit felony criminal damage to property and aiding and abetting felony criminal damage to property.

Respondents gave notice of their intent to rely on the defense of necessity at trial. The state filed a memorandum opposing respondents' reliance on the necessity defense and requesting that the district court expressly preclude its use. Respondents filed a responsive memorandum asking the district court "to allow them to present evidence of . . . necessity to a jury of their peers." At a hearing to address the state's objection, respondents testified to their individual perceptions of the necessity of their actions in preventing environmental harm caused by the use of fossil fuels, particularly the tar sands oil carried by the pipeline with which they interfered.

After supplemental briefing, the district court issued an order and memorandum, stating:

> The Court GRANTS [respondents'] request to present evidence on the defense of necessity at trial. The Court's grant is not unlimited and the Court expects any evidence in support of the defense of necessity to be focused, direct, and presented in a non-cumulative manner. The State of Minnesota may object at trial on the above or other lawful grounds.

The state appeals from this order.

D E C I S I O N

The state may appeal from a pretrial order in a criminal case provided that it can establish "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). "To prevail, the state must clearly and unequivocally show both that the trial court's order will have a critical impact on the state's ability to prosecute the defendant successfully and that the order constituted error." *State v. Zanter*, 535 N.W.2d 624, 630 (Minn. 1995) (quotations omitted).

To establish critical impact, the state need not show that the pretrial ruling "completely destroys" the state's case, but it is sufficient that it "significantly reduces the likelihood of a successful prosecution." *State v. McLeod*, 705 N.W.2d 776, 784 (Minn. 2005) (quotations omitted). Nevertheless, the test for critical impact is intended to be a "demanding standard" and presents a threshold question that must be resolved prior to ruling on the merits of a pretrial order itself. *Id.* If this test is not satisfied, the correct remedy is dismissal of the appeal. *See State v. Jones*, 518 N.W.2d 67, 71 (Minn. App. 1994) (dismissing appeal for lack of critical impact), *review denied* (Minn. July 27, 1994).

The state argues that the district court's ruling will significantly reduce the likelihood of a successful prosecution because the necessity defense is inapplicable to respondents' cases, and therefore evidence concerning it "will unnecessarily confuse the jury and conflate the issue regarding the [r]espondents' culpability." The common-law defense of necessity has long been recognized in Minnesota and "applies only in emergency situations where the peril is instant, overwhelming, and leaves no alternative

but the conduct in question." *State v. Johnson*, 289 Minn. 196, 199, 183 N.W. 541, 543 (1971). Generally speaking, necessity is an effective defense to a criminal charge "if the harm that would have resulted from compliance with the law would have significantly exceeded the harm actually resulting from the defendant's breach of the law." *State v. Rein*, 477 N.W.2d 716, 717 (Minn. App. 1991) (quoting *United States v. Seward*, 687 F.2d 1270, 1275 (10th Cir. 1982)), *review denied* (Minn. Jan. 30, 1992).

In *State v. Jones*, this court held that the state's claim of critical impact in a pretrial appeal may not be predicated on future evidentiary rulings that have yet to occur. 518 N.W.2d 67, 70 (Minn. App. 1994). The defendant in *Jones* was indicted for the aggravated robbery of a casino together with four other individuals. *Id.* at 68. A fifth person—who had withdrawn from the conspiracy prior to the robbery taking place—was to be called as a witness on the state's behalf. *Id.* In anticipation of this, the state moved to preclude the defense from introducing evidence that this witness had participated in the robbery of a truck stop just days before the robbery of the casino. *Id.* The district court denied this motion, and the state filed a pretrial appeal. *Id.* at 69.

The state argued that permitting the defense to introduce unproven evidence of a witness's involvement in other criminal activity would have a critical impact on its case due to the fact that one of Jones's codefendants was acquitted after a trial in which this same evidence was introduced. *Id.* at 70. The state maintained that this evidence "divert[ed] the jury's attention from the charged offense." *Id.* In finding a deficient showing of critical impact, this court noted that the state's concern over the admission of this evidence "extends to a series of evidentiary rulings it expects the district court will

make." *Id.* We declined to assume that the district court in Jones's case would make the same decisions that were made in the trial of his co-defendant and noted that doing so would "amount to issuing an advisory opinion." *Id.* (citing *State v. Kvale*, 352 N.W.2d 137, 140 (Minn. App. 1984)). We concluded that the district court's finding on the relevance of Jones's evidence did not have a critical impact and that the state could not "premise critical impact on a series of evidentiary rulings that may or may not follow that ruling." *Id.*

The district court's ruling here presents an analogous circumstance. Similar to *Jones*, the district court's ruling does not have any immediate impact on the state's case in the absence of other yet-unmade rulings in trial. The district court's order only permits respondents to present evidence on necessity at trial; it makes no commitments as to the scope of the evidence that will be allowed, and it specifically authorizes the state to object again at trial on any lawful grounds. Any evaluation of the impact of this order on the state's case necessarily involves assumptions as to (1) what testimony and evidence will actually be presented at trial, (2) what objections to its admission the state will make, and (3) what those rulings will be.

Whether, for instance, the district court will instruct the jury on the allowable use of this evidence prior to its deliberation is a question that would bear heavily on assessment of critical impact, but yet is wholly unanswered by the district court's order. The district court may or may not so instruct the jury at the conclusion of the evidence. A finding of critical impact in this situation would therefore—just as in *Jones*—be tantamount to issuing an advisory opinion on the matter. *See Thompson v. State*, 284 Minn. 274, 277, 170

N.W.2d 101, 103 (1969) ("An appellate court will not consider abstract or unnecessarily general questions which might result in one answer to one set of circumstances but another answer to a different set of circumstances."). Considering that the effect of the district court's order in this matter is so conditioned by and dependent upon the resolution of issues and objections not yet before it belies the state's claim that it has met its "demanding" burden of "clearly and unequivocally" demonstrating a critical impact on its case.[1] *Zanter*, 535 N.W.2d at 630.

Appeal dismissed.

[1] Because the state has failed to make a satisfactory showing that the district court's pretrial order will have a critical impact on the trial's outcome, we do not reach the question of the applicability of the necessity defense in this matter.

CONNOLLY, Judge (dissenting)

I respectfully dissent. This case is about whether respondents have committed the crimes of damage to property and trespass. It is not about global warming.

I disagree with the majority's characterization of the district court's order as being tentative. That order specifically grants respondents' request to present evidence on the defense of necessity at trial. At oral argument, respondents stated they believe the district court's order would permit them to call four expert witnesses. These witnesses intend to testify at length about global warming and their belief that the federal government's response has been ineffective. To permit any such evidence would have a critical impact on the outcome of the trial. To establish critical impact, the state need not show that the pretrial ruling "completely destroys the state's case," but it is sufficient that it "significantly reduces the likelihood of a successful prosecution." *State v. McLeod*, 705 N.W.2d 776, 784 (Minn. 2005) (quoting *State v. Joon Kyu Kim*, 398 N.W.2d 544, 551 (Minn. 1987)). Here, the state argues that the district court's ruling will significantly reduce the likelihood of a successful prosecution because the necessity defense is inapplicable to this case, and therefore, such evidence will confuse the jury and conflate issues regarding culpability. I agree.

Moreover, the evidence the respondents wish to provide for their necessity defense is inadmissible because it does not relate to the defense of necessity as this defense has been interpreted under Minnesota law. Generally, our court reviews a district court's evidentiary ruling for an abuse of discretion. *State v. Loving*, 775 N.W.2d 872, 879 (Minn. 2009). However, even under this standard, appellate courts may reverse a district court's

ruling when that ruling is "based on an erroneous view of the law." *State v. Bustos*, 861 N.W.2d 655, 666 (quoting *Riley v. State*, 792 N.W.2d 831, 833 (Minn. 2011)). Here, the district court relied on an erroneous view of the law when it granted respondents permission to present evidence on the necessity defense at trial, and consequently, it abused its discretion.

In Minnesota, "[a] necessity defense defeats a criminal charge if the harm that would have resulted from compliance with the law would have significantly exceeded the harm actually resulting from the defendant's breach of the law." *State v. Rein*, 477 N.W.2d 716, 717 (Minn. App. 1991), *review denied* (Minn. Jan. 30, 1992) (quotations omitted). Additionally, the necessity defense exists only if "(1) there is no legal alternative to breaking the law, (2) the harm to be prevented is imminent, and (3) there is a direct, causal connection between breaking the law and preventing the harm." *Id.* The necessity defense "applies only in emergency situations where the peril is instant, overwhelming, and leaves no alternative but the conduct in question." *State v. Johnson*, 289 Minn. 196, 199, 183 N.W.2d 541, 543 (1971). Respondents cannot meet any of these elements.

First, respondents are unable to establish that there was no other legal alternative to breaking the law when they chose to trespass and sabotage the pipeline. In Minnesota, the necessity defense is not available to individuals who decide to disobey the law despite other available legal alternatives. *See Rein*, 477 N.W.2d at 718 (concluding that the defendant protestors were not able to use the necessity defense because they had access to the other alternatives such as the state legislature, courts, advocacy, etc.); *see also Cleveland v.*

Municipality of Anchorage, 631 P.2d 1073, 1078-80 (Alaska 1981) (rejecting necessity defense because harm could be protested through other noncriminal means).

Here, like in *Rein*, the respondents had the full disposal of the state and federal legislatures, state and federal regulatory agencies, and the courts. 477 N.W.2d at 718. Although respondents argue that their "legal efforts" for addressing fossil fuel consumption and climate change are "not sufficient to address the problem," the pertinent question for purposes of the necessity defense is not whether the defendants were successful in using various political and legal processes but whether there were *no* legal alternatives to preventing the harm. The answer in their case is that there were many other ways respondents could have tried to effectuate meaningful change in U.S. environmental policy. Instead, they elected to engage in criminal conduct, not as a last resort, but rather as their idea of a more effective resort. That was their choice, but the law of necessity does not shield them from criminal liability because there were other legal alternatives.

Second, because the respondents cannot show that the harm was imminent, the necessity defense does not apply. The harm the respondents cite as justification for their trespass and sabotage of the pipeline is catastrophic climate change. Although they argue that much of the world has recognized that climate change is an urgent and consequential problem, the pipeline respondents sabotaged was operating legally under both the laws of Minnesota and the United States. Our court does not recognize harm from a practice when that practice is specifically condoned by the law. *Rein*, 477 N.W.2d at 718; *see also United States v. Schoon*, 971 F.2d 193, 197-98 (9th Cir. 1991). This recognition is every bit as true when the practice is conducting legal abortions, as it is when the practice is the

transportation of tar-sands-derived crude oil. *See Rein*, 477 N.W.2d at 718 (concluding that there is no cognizable harm to be avoided in trying to stop legal abortions). Because the respondents are unable to establish harm—let alone imminent harm—their use of the necessity defense is inappropriate in this context.

Third, because there is no direct, causal connection between respondents' criminal trespass and the prevention of global warming, the necessity defense does not apply. The necessity defense requires "a direct, causal connection between breaking the law and preventing the harm." *Id.* at 717. This connection must have a close "nexus between the act undertaken and the result sought." *Schoon*, 971 F.2d at 198.

Here, like in many other civil-disobedience cases, the act alone does not suffice to stop the harm but rather requires—at the very least—one more step not controlled by the protestors. *See id.* (explaining that "Congress must change its mind"). Many courts over the years have held that attempts to change the law through means of civil disobedience cannot be directly or causally linked to preventing an imminent harm. *See, e.g.*, *United States v. Cassidy*, 616 F.2d 101, 102 (4th Cir. 1979) (stating that even if the defendants could show the United States illegally possessed nuclear weapons under international law, their demonstration could not invoke the necessity defense because throwing blood on the walls of the pentagon does not have a direct, causal relationship with nuclear weapons possession); *United States v. Simpson*, 460 F.2d 515, 518 (9th Cir. 1972) (stating that the defendant's assumption that destroying draft boards would have an impact on the country's war in Vietnam was unreasonable); *Rein*, 477 N.W.2d at 718 (stating that there was no evidence that any abortions were actually prevented by the trespass).

In the instant case, respondents could not have reasonably expected that their criminal act was "directly" or "causally" connected to the prevention of climate change. In fact, in their brief, respondents concede that they only had "anticipation of a direct causal connection" based on their action's potential ability to raise awareness in others of the harm of climate change. Although there is no doubt that their actions drew attention to the cause they sought to highlight, that in and of itself would not be effective in reversing a state's or country's climate laws or policies. Respondents' use of the necessity defense is inapplicable because their actions are far too removed from the continuing harm they sought to prevent.

I believe the undisputed facts of this case negate all three essential elements of the necessity defense. Consequently, it would be reversible error to allow respondents to present any of their evidence. By permitting it, the district court's error will have a critical impact on the outcome of the trial. Therefore, I would reverse the decision of the district court.