

OFFICE OF
APPELLATE COURTS

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FILED

A05-1782

STATE OF MINNESOTA
IN SUPREME COURT

STATE OF MINNESOTA

Petitioner,

vs.

JOHN JOSEPH BUSSMANN,

Appellant.

STATE'S PETITION FOR REHEARINGLORI SWANSON
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TO: THE SUPREME COURT OF THE STATE OF MINNESOTA

The State of Minnesota submits this Petition for Rehearing pursuant to Minnesota Rules of Civil Appellate Procedure 140.01 and 117.

FACTS

The facts underlying this case are largely set forth in this Court's opinion filed November 1, 2007. The following facts are relevant to this petition.

Following the Court of Appeals affirmance in this matter, Appellant petitioned this Court for review. Appellant identified three issues on which he sought review. The issues were, (1) "Whether Petitioner was entitled to a new trial"; (2) "Whether Minn. Stat. § 609.344(1)(1)(ii) is unconstitutional"; and (3) "Whether there [was] sufficient evidence to support petitioner's conviction." See Petition for Review at 1. As to the first issue, Appellant argued the evidentiary issue as: "the district court erroneously allowed Fr. Kevin McDonough and Phyllis Willerscheidt to testify." See *Id.* at 3. As to the second issue, Appellant argued that the relevant statute was void for vagueness and was facially invalid because it excessively entangled religious doctrine with state law. See *Id.* at 6-7.¹

On 12/12/2006, this Court granted limited review. The review was limited to the constitutional questions Appellant raised. This Court did not grant review of the evidentiary issues which the Court of Appeals found had been waived by Appellant's failure to object to them at trial. Nonetheless, this Court reversed the Court of Appeals and granted a new trial, not on an issue for which review was

¹ These are the issues the Court addressed in parts I and IIA and IIB of its opinion.

granted, but on the evidentiary issue. This Court's opinion cited as the basis for its reversal what it called "religious expert testimony." *State v. Bussmann*, A05-1782 at 18 (Nov. 1 2007). The Court said the testimony of Fr. Kevin McDonough and Phyllis Willerscheidt "lacked foundation to connect it to any secular standard, was irrelevant to any secular standard, was inadmissible hearsay evidence, and was highly prejudicial." *Id.* at 18.²

This Court neither noted nor addressed the Court of Appeals finding on the evidentiary issue that "because [defendant] did not object at trial, this argument should be deemed waived." *State v. Bussmann*, 2006 WL 2673294 (Minn. App. 2006).³ This Court did not mention the plain error doctrine or the fact that evidentiary rulings of trial courts are ordinarily reviewed on an abuse of discretion standard.

² The dissent notes that "(1) the trial court provided limiting instructions to the jury, (2) the state and defense counsel made clear in closing argument that the jury's duty was to apply Minnesota law and not church law, and (3) the sole issue in dispute was the existence of an ongoing clergy-counselee relationship, in light of defense counsel's concessions in opening remarks that 'Mr. Bussmann was a priest' and that he 'had sexual relations with parishioners.'" *Id.* at 32.

³ The Court of Appeals also found admission of the testimony did not amount to plain error. *State v. Bussmann*, 2006 WL 2673294. This Court made no mention of the plain error doctrine in part III of its opinion.

ARGUMENT

In *State v. Lefthand*, 488 N.W.2d 799, 802 (Minn. 1992), this Court admonished prosecutors that “Justice is a process, not simply a result.” This Court should take its own admonition to heart. In this case, although reasonable minds could certainly differ over the constitutional issue on which the court granted review (indeed this Court split 3-3), reversing on the basis of evidence which the Court of Appeals found was unobjected to and on which this Court did not grant review, fails to provide the just process to which both the litigants who appear before this Court and the citizens of Minnesota are entitled.

Over the years, this Court both, through its rules of appellate procedure and through its own rulings, has adopted a number of principles designed to effectuate the fair and efficient administration of justice in the courts of the state. Not so long ago, those rules, and this Court’s application of them, actually created an incentive for defense counsel to raise an objection to evidence sought to be introduced or to arguments of opposing counsel that were improper. See, e.g., Minn. R. Crim. P. 10.01 (providing that all trial defenses, objections, and requests determinable without trial shall be asserted by motion to dismiss or grant appropriate relief); Minn. R. Crim. P. 10.03 (providing that defendant waives defenses by failing to include them in pretrial motion); Minn. R. Evid. 103(a)(1) (error may not be predicated upon a ruling that admits or excludes evidence unless a substantial right of the party is affected and a timely objection or motion to strike

stating the specific ground therefore is made); *State v. Washington*, 521 N.W.2d 35, 40 (Minn. 1996) citing *State v. Brown*, 348 N.W.2d 743, 747 (1984); *State v. Kline*, 306 N.W.2d 132 (1981).

The basis for the rules was to preserve the integrity of trials by requiring counsel to raise objections and make arguments at the earliest possible stage. In so requiring, trial court judges would have the opportunity to rule on the parties' contentions – to “get it right” or, at the least, to offer curative instructions that could preserve the fundamental fairness of a trial. The rules also prevented defense counsel from making the understandable tactical decision to remain silent about what counsel might believe is error, secure in the knowledge that if the jury did not acquit, the appellate courts would stand ready to offer up a new trial anyway.

This Court has, quite unfortunately, been moving away from such rules, rooted as they were in an adversarial system of justice with the trial court as the initial decisionmaker. For example, on questions of prosecutorial error, this Court has quite intentionally created a body of law with incentives for defense counsel to remain silent about perceived trial error so as to obtain a more favorable standard of appellate review. See *State v. Ramey*, 721 N.W.2d 294 (Minn. 2006). More broadly, a simple Westlaw search reveals that in the 1984-85, approximately 37 percent of appellate cases were reviewed for plain error. In the 1994-95, approximately 50 percent of appellate cases were reviewed for plain error. More recently, from January 2004 to October 2005, approximately 92 percent of the

cases in which the defense sought review on a claim of error that went unobjected to at trial were reviewed for plain error. The sad reality is that this Court's decisions, intentionally or otherwise, have effectively removed the requirement that defendant's object to errors at trial in order to preserve the issue for appeal.

This case provides yet another unfortunate example. The Court in this case treats an evidentiary issue as if it were a pure question of law, subject to de novo review. The Court nowhere acknowledges the deference historically accorded trial judges in evidentiary rulings. The Court does not discuss plain error. Only the dissent even acknowledges the actual context of the evidence in trial, pointing out that the trial court provided limiting instructions to the jury and that counsel made clear in closing that the jury's duty was to apply Minnesota law and not church law.

Importantly, as a result of this Court's de novo approach to the evidentiary issues does more harm than simply ignoring the adversarial nature of trial proceedings, the Court's opinion inevitably leaves trial courts and counsel with more questions than answers. For example, in its opinion, this Court said the disputed evidence lacked foundation and was inadmissible hearsay. Yet, without any record as to the parties' contentions as to what the foundation was, how it might have been lacking, and some district court ruling, the opinion is of diminished value to a practitioner wondering what the appropriate foundation would be.

Similarly, as to the court's hearsay finding, expert testimony is nearly always based on hearsay. Minnesota Rules of Evidence 702 and 703 contemplate as much. Admitting Fr. McDougouh's testimony was surely not improper because it was given in the form of an opinion or rested upon facts or data not otherwise admissible. The point is this Court's de novo review, occurring without reference to the particular objection to the evidence and an actual trial court ruling, makes it more difficult to understand and apply in future cases.

More troubling, however, is the Court's apparent failure to follow its own review process. This Court did not grant review of the Court of Appeals affirmance of the trial court's evidentiary rulings. Had it done so the issue would have received the full attention and treatment that justice requires. Examining the issue from the perspective of this Court providing the appearance of justice, briefing and argument is important because, at a minimum, it provides the public with some assurance the Court has actually provided parties with the most fundamental elements of a fair process -- notice and an opportunity to be heard. It also provides some assurance that the ideas upon which the Court's opinions rest have been tested in the crucible of the adversary process and are, at some level, tied to the contested facts and legal rulings in a case.

More practically, however, this Court may actually wish to consider what the State has to say. The appellate section of the Hennepin County Attorneys Office has seven full time attorneys and one part-time attorney. They spend nearly all of their time handling criminal appellate matters in this Court and in the Court

of Appeals. Together they represent a combined 110 years of experience, averaging more than 14.5 years of criminal appellate experience per lawyer. Westlaw searches reveal nearly 2000 Minnesota appellate opinions listing one of the current members of the appellate team as the lawyer for the state. The lawyers in the Hennepin County Attorney's Office appellate section are, without doubt, among the most experienced appellate lawyers in the state.

Moreover, as this Court has recognized, albeit in a different context, the prosecutors appearing before it have duties in addition to the duty of zealous advocacy that applies to other lawyers who appear before the Court. See, e.g., *State v. Ramey*, 721 N.W.2d 294, 300 (Minn. 2006) (“a prosecutor ‘is a minister of justice whose obligation is to guard the rights of the accused as well as to enforce the rights of the public.’”). The prosecutors who appear before the courts of Minnesota take very seriously this unique obligation to pursue justice, not just convictions.

In light of their experience, unique role, and demonstrated commitment to justice, it is difficult to understand why this Court would ignore its own rules to the end of depriving itself of the views of the appellate lawyers that practice in Hennepin County. Recent cases of this Court sadly demonstrate that justice would have been well served by a considered response from the State. For example, in *State v. Gomez*, 704 N.W.2d 499 (Minn. 2006) this Court initially reversed two first degree murder convictions on a ground neither briefed nor argued by the parties. The Court eventually withdrew its opinion and affirmed the convictions

after receiving such briefing revealing a transcription error. *State v. Gomez*, 721 N.W.2d 871 (Minn. 2006). In *Leake v. State*, this Court issued an opinion remanding a premeditated first degree murder conviction to the trial court, curtly noting that the State never filed a brief. *Leake v. State*, 737 N.W.2d 531 (Minn. 2007). The reason the State never filed a brief was because the pro se defendant never served his brief on the State and misled this Court about having done so. This Court, despite extensive experience with difficulties in the timely filing and service of briefs by pro se litigants, never bothered to inquire of the State why it had no responsive brief on file. This Court apparently felt comfortable remanding a premeditated first degree murder conviction on the basis of sketchy and confused arguments of a pro se defendant who had been less than candid with the Court. This Court later issued an Order directing that its ruling not be considered the law of the case in any appeal from the remand. *State v. Leake*, 739 N.W.2d 714 (Minn. 2007).

In this case, the State understood that this Court did not wish to review the evidentiary rulings on which Appellant sought review and which the Court of Appeals noted had been waived by failing to object at trial. As it turns out, the State was sadly mistaken. As some of the most frequent and experienced practitioners in front of this Court, the appellate lawyers in the Hennepin County Attorneys Office remain committed to assisting this Court in an effort to focus on those issues it considers important to a case. Along these lines, if in handling a case, the Court identifies an issue as important, we stand ready to provide any

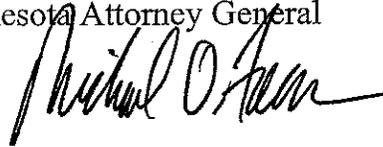
additional briefing and argument the Court may request. See, e.g., *State v. Shattuck*, 704 N.W.2d 131 (Minn. 2005)(Court requested additional briefing and argument); *State v. Dorsey*, 701 N.W.2d 238 (Minn. 2005)(same). Absent such a request or clear guidance on the issues the Court wishes to review, the appellate advocates attempt to focus on those issues most important to the Court (and ultimately to a just resolution of a case) becomes very difficult. The work of this Court, and the cause of justice, suffers.

CONCLUSION

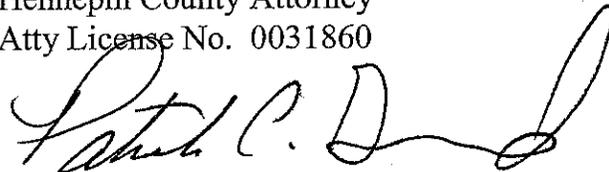
This Court should grant rehearing and order full briefing and argument on the evidentiary issues involved in this case.

DATED: November 13, 2007

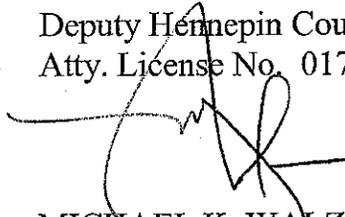
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