STATE OF MINNESOTA
IN COURT OF APPEALS
A07-0723

State of Minnesota,
Appellant,

vs.

Derrick Lamont Baynes,
Respondent.

Filed June 24, 2008
Appeal dismissed
Johnson, Judge

Stearns County District Court
File No. K6-06-2521

Lori Swanson, Attorney General, 1800 Bremer Tower, 445 Minnesota Street, St. Paul, MN 55101-2134; and

Janelle P. Kendall, Stearns County Attorney, Sarah E. Hilleren, Assistant County Attorney, 448 Administration Center, 705 Courthouse Square, St. Cloud, MN 56303-4701 (for appellant)

Mary M. McMahon, McMahon & Associates Criminal Defense, Ltd., 670 Commerce Drive, Suite 110, Woodbury, MN 55125-9210 (for respondent)

Considered and decided by Willis, Presiding Judge; Johnson, Judge; and Muehlberg, Judge.*

* Retired judge of the district court, serving as judge of the Minnesota Court of Appeals by appointment pursuant to Minn. Const. art. VI, § 10.

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

JOHNSON, Judge

Lucretia Dixon died after being shot in the chest in the St. Joseph townhome she shared with her boyfriend, Derrick Lamont Baynes. A Stearns County jury found Baynes guilty of four offenses: (1) second-degree intentional murder, (2) second-degree unintentional murder, (3) first-degree manslaughter, and (4) second-degree manslaughter. In a post-trial motion, Baynes argued that the verdicts on the first three offenses were inconsistent. In response, the district court ordered that the charges on the first, third, and fourth offenses be dismissed at sentencing and that Baynes be sentenced only for the second offense, second-degree unintentional murder. Prior to sentencing, the state appealed. We conclude that the appeal is not permitted by any provision in the Minnesota Rules of Criminal Procedure and, thus, that we are obligated to dismiss the appeal.

FACTS

On the morning of May 20, 2006, law-enforcement officers responded to a 911 call from Baynes, who said that he had shot his girlfriend while arguing with her. The victim was identified as Dixon, who was pronounced dead approximately an hour after the incident. Baynes was taken into custody and charged with homicide.

At the conclusion of the January 2007 trial, the district court instructed the jury on four separate offenses: second-degree intentional murder, second-degree unintentional felony murder, first-degree heat-of-passion manslaughter, and second-degree culpable-

negligence manslaughter. *See* Minn. Stat. §§ 609.19, subds. 1(1), 2(1), 609.20(1), 609.205(1) (2006). The jury found Baynes guilty of each offense.

In February 2007, Baynes brought several post-trial motions, including one in which he argued that the district court should sentence him only on the least-serious charge, second-degree manslaughter, because the verdicts were legally inconsistent. Baynes also argued, in the alternative, that the district court should sentence him only on the first-degree manslaughter charge because the jury's finding that he acted in the heat of passion mitigated the murder convictions.

The district court rejected Baynes's primary argument based on the allegedly inconsistent verdicts. But the district court adopted Baynes's argument regarding heat of passion. The district court concluded that the jury's implicit finding that Baynes acted in the heat of passion "cancelled out" the finding of guilt on the charge of second-degree intentional murder. Thus, the district court ordered that the second-degree intentional murder charge and the two manslaughter charges be dismissed at sentencing and further ordered that Baynes be sentenced only on the remaining charges of second-degree unintentional murder and possession of a firearm by an ineligible person (a charge to which Baynes had pleaded guilty before trial).

The state appeals, prior to sentencing, arguing that the jury's guilty verdict on the first-degree manslaughter charge does not require dismissal of the second-degree intentional-murder charge. In the alternative, the state argues that the appropriate remedy is a new trial on all counts.

D E C I S I O N

It is "'axiomatic' that the state's right to appeal in criminal proceedings is contrary to common law and must be expressly conferred by statute or must arise by necessary implication." *State v. Barrett*, 694 N.W.2d 783, 787 (Minn. 2005) (quoting *In re Welfare of C.W.S.*, 267 N.W.2d 496, 498 (Minn. 1978)). This principle predates the promulgation of the rules of criminal procedure. *See City of St. Paul v. Stamm*, 106 Minn. 81, 82-83, 118 N.W. 154, 155 (1908) ("it has long been settled in this state that, in the absence of legislative authority, no appeal can be taken by the state in any criminal case"). Today the Minnesota Supreme Court has authority to "regulate the pleadings, practice, procedure, and the forms thereof in criminal actions in all courts of this state, by rules promulgated by it from time to time." Minn. Stat. § 480.059, subd. 1 (2006). The supreme court assumed the role of promulgating rules of criminal procedure in 1975. *See* 1974 Minn. Laws ch. 390, § 2; *In re Proposed Rules of Criminal Procedure*, No. 45517 (Minn. Feb. 26, 1975) (order). The enabling act provides that, with the exception of certain enumerated statutes, the court's rules shall supersede all statutes concerning the same subject matter. Minn. Stat. § 480.057, subd. 7.

The state's right to appeal in a criminal case is defined by Minnesota Rule of Criminal Procedure 28.04, subdivision 1, which provides that the state may appeal "as of right to the Court of Appeals" in the following situations:

> (1) in any case, from any pretrial order of the trial court, including probable cause dismissal orders based on questions of law. However, an order is not appealable (a) if it is based solely on a factual determination dismissing a complaint for lack of probable cause to believe the defendant

> has committed an offense or (b) if it is an order dismissing a complaint pursuant to Minnesota Statutes, section 631.21; and
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> (2) in felony cases from any sentence imposed or stayed by the trial court; and
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> (3) in any case, from an order granting postconviction relief under Minnesota Statutes chapter 590; and
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> (4) in any case, from an order staying adjudication of an offense for which the defendant pleaded guilty or was found guilty at a trial. An order for a stay of adjudication to which the prosecuting attorney did not object is not appealable; and
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> (5) in any case, from a judgment of acquittal by the trial court entered after the jury returns a verdict of guilty under Rule 26.03, subd. 17(2) or (3); and
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> (6) in any case, from an order of the trial court vacating judgment and dismissing the case made after the jury returns a verdict of guilty under Rule 26.04, subd. 2; and
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> (7) in any case, from an order for a new trial granted under Rule 26.04, subd. 1, after a verdict or judgment of guilty, if the trial court expressly states therein, or in a memorandum attached thereto, that the order is based exclusively upon a question of law which in the opinion of the trial court is so important or doubtful as to require a decision by the appellate courts. However, an order for a new trial is not appealable if it is based on the interests of justice.

Minn. R. Crim. P. 28.04, subd. 1. Rule 28.04 should be "strictly construed." *Barrett*, 694 N.W.2d at 787; *see also State v. Gilmartin*, 550 N.W.2d 294, 296 (Minn. App. 1996); *City of Albert Lea v. Harrer*, 381 N.W.2d 499, 501 (Minn. App. 1986) (citing *Arizona v. Manypenny*, 451 U.S. 232, 245, 101 S. Ct. 1657, 1666 (1981) ("the Government may take an appeal from an adverse decision in a criminal case only if expressly authorized by statute to do so")).

The state contends that its appeal is proper under subdivision 1(6) of rule 28.04. That subdivision has two requirements: (1) the jury returned a verdict of guilty and (2) the district court vacated the judgment and dismissed the case under rule 26.04, subdivision 2. The first requirement is present; the jury returned a guilty verdict. The second requirement, however, is not present; the district court did not dismiss "the case . . . under Rule 26.04, subd. 2." The district court ordered only that certain charges be dismissed in the future. Furthermore, the reason for the dismissals makes subdivision 1(6) inapplicable. Rule 26.04, subdivision 2, which is referred to in subdivision 1(6), states:

> The court on motion of a defendant shall vacate judgment, if entered, and dismiss the case *if the indictment, complaint or tab charge does not charge an offense or if the court was without jurisdiction of the offense charged*. The motion shall be made within 15 days after verdict or finding of guilty or after plea of guilty, or within such time as the court may fix during the 15-day period. If the motion is granted, the court shall make written findings specifying its reasons for vacating the judgment and dismissing the case.

Minn. R. Crim. P. 26.04, subd. 2 (emphasis added). The district court's order providing that three counts be dismissed at sentencing was not based on the ground that the complaint does not charge an offense or the ground that the district court is without jurisdiction. Thus, the district court's order was not a dismissal "under Rule 26.04, subd. 2," which means that subdivision 1(6) of rule 28.04 does not provide a basis for the state's appeal.

In his responsive brief, Baynes takes the position that the state's appeal is permitted by subdivision 1(7) of rule 28.04. That subdivision plainly does not apply here

because it applies only in cases in which the district court has ordered a new trial. It appears, however, that Baynes is relying on subdivision 1(5), which permits the state to appeal "in any case, from a judgment of acquittal by the trial court entered after the jury returns a verdict of guilty under rule 26.03, subd. 17(2) or (3)." Minn. R. Crim. P. 28.04, subd. 1(5). The applicability of this subdivision depends on whether the district court issued a "judgment of acquittal" after the jury returns a guilty verdict under either subdivision 17(2) or subdivision 17(3) of rule 26.03. Subdivisions 17(2) and 17(3) relate to subdivision 17(1), which permits a motion for judgment of acquittal and describes its purpose:

> *Motions Before Submission to Jury*. Motions for directed verdict are abolished and motions for judgment of acquittal shall be used in their place. After the evidence on either side is closed, the court on motion of a defendant or on its initiative shall order the entry of a judgment of acquittal of one or more offenses charged in the tab charge, indictment or complaint *if the evidence is insufficient to sustain a conviction of such offense or offenses*. . . .

Minn. R. Crim. P. 26.03, subd. 17(1) (emphasis added). Subdivision 17(1) does not apply in this situation because, as the plain language demonstrates, a motion for judgment of acquittal is a motion challenging the sufficiency of the evidence to sustain the conviction. *See, e.g., State v. Simion*, 745 N.W.2d 830, 841 (Minn. 2008) ("A motion for judgment of acquittal is properly denied where the evidence, viewed in the light most favorable to the State, is sufficient to sustain a conviction."); *State v. Slaughter*, 691 N.W.2d 70, 74-75 (Minn. 2005) (stating that motion for judgment of acquittal is "procedurally equivalent to a motion for a directed verdict" and should be denied when

"the evidence is sufficient to present a fact question for the jury's determination, after viewing the evidence and all resulting inferences in favor of the state"). Because the motion regarding heat of passion did not challenge the sufficiency of the evidence, subdivision 17(2) and subdivision 17(3) do not apply. Consequently, subdivision 1(5) of rule 28.04 does not apply because, although the jury returned verdicts of guilty, there has not been a judgment of acquittal on any of the counts.

In sum, neither provision of the rules cited by the parties permits the state to appeal at this time. We have reviewed the remaining subparts in rule 28.04, subdivision 1, and we have concluded that none of them apply or even arguably apply. The state's right to appeal must be strictly construed. *Barrett*, 694 N.W.2d at 787; *In re Welfare of C.W.S.*, 267 N.W.2d at 498; *Gilmartin*, 550 N.W.2d at 296; *Harrer*, 381 N.W.2d at 501. Thus, we must dismiss the state's appeal without reaching the merits of the issues raised.

Appeal dismissed.