

STATE OF MINNESOTA

IN SUPREME COURT

A22-0606

Court of Appeals

Gildea, C.J.

State of Minnesota,

Appellant,

vs.

Filed: March 22, 2023
Office of Appellate Courts

Donald Mark Gray,

Respondent.

Keith Ellison, Attorney General, Saint Paul, Minnesota; and

Mary F. Moriarty, Hennepin County Attorney, Jonathan P. Schmidt, Assistant County Attorney, Minneapolis, Minnesota, for appellant.

David J. Risk, Halberg Criminal Defense, Bloomington, Minnesota, for respondent.

S Y L L A B U S

1. When, as here, the district court's dismissal of a criminal complaint for lack of probable cause was not premised solely on a factual determination, the State can appeal that order under Minnesota Rule of Criminal Procedure 28.04, subdivision 1(1).

2. *State v. Dixon*, 981 N.W.2d 387 (Minn. 2022), which was decided after oral argument in this case, is relevant to whether the district court erroneously dismissed counts one and two for lack of probable cause.

Reversed and remanded.

OPINION

GILDEA, Chief Justice.

The question presented in this case is whether the district court properly granted respondent Donald Gray’s motion to dismiss second-degree criminal sexual conduct charges for lack of probable cause. The court of appeals did not reach the merits of the dismissal, holding instead that the State could not appeal the dismissal. Because the district court’s order dismissing the charges was not premised solely on a factual determination, we hold that the State can appeal the dismissal order under Minnesota Rule of Criminal Procedure 28.04, subdivision 1(1), and we remand to the court of appeals for a decision on the merits.

FACTS

This case arises from allegations that Gray sexually abused a young girl twice, the first time when she was 8 years old. On April 26, 2021, Gray reported to Hennepin County Child Protection Services (Child Protection) that on two occasions, he sexually abused the girl. Gray reported that the first instance occurred in the United Kingdom in June 2015 and that the second instance occurred between 6 months and a year later in Edina,

Minnesota. He said that he touched the girl's vagina the first time and her chest the second time.¹

On April 29, 2021, a detective in the Edina Police Department arranged a forensic interview of the girl. During the interview, the girl described an incident of Gray touching her while abroad in the United Kingdom. But she said that she did not remember inappropriate contact occurring in Edina. The girl thought that the incident Gray reported related to a time Gray was at her house in Edina and brushed her hair.

Separate from Gray's confession to Child Protection, he also confessed two other times to sexually abusing the girl. First, on April 30, 2021, Gray wrote a letter to the girl's father in which Gray apologized for what he had done, stating "[a]bove all, I hope [the girl] can get the help she needs to recover from these terrible mistakes I have made." Second, during an unrecorded May 12, 2021, phone call with the detective, Gray acknowledged that he inappropriately touched the girl twice. Gray said the second incident occurred in the fall of 2015 in Edina.

The State charged Gray with second-degree criminal sexual conduct, Minn. Stat. § 609.343, subd. 1(a), (g) (2020), for sexual contact with the girl. Counts one and two arise from the incident that occurred in Edina. The State later amended the complaint and added

¹ In Gray's brief, he moves to strike "any and all references, including citations and quotations, in Appellant's brief that are not contained in its Amended Complaint or in Respondent's recitation of facts in his February 22, 2022, memorandum of law." The State counters that "[a]ll factual citations in Appellant's brief were properly to (1) the district court's order, and (2) the amended complaint." We rely on the district court's order for our recitation of the facts and because that order is in the record, we deny the motion to strike.

counts three and four, which alleged that Gray committed second-degree criminal sexual conduct against the girl for the incident that occurred in the United Kingdom.

Gray filed a motion to dismiss. He asked the district court to dismiss counts one and two for lack of probable cause. Gray argued these counts lacked probable cause because the State did not have evidence corroborating his confessions to the Edina incident.

The district court granted Gray's motion and dismissed the complaint.² The district court explained that Gray's statements to the detective, Child Protection, and in the letter to the girl's father are all "considered confessions" and require corroboration under Minnesota Statutes section 634.03 (2022). As corroborating evidence, the State put forward Gray's confessions and the statements the girl gave during the forensic interview with police. The State also said that it would present testimony at trial from the girl's parents about the girl's changed behavior and the location of Gray at the time of the alleged incident. The district court held that the parent's testimony was "[g]eneral" and did not corroborate Gray's confessions. Moreover, the court determined that the girl's statements to police did not corroborate Gray's confession to the Edina incident because she did not report sexual abuse that occurred in Edina. The State relied on Gray's multiple confessions to corroborate the Edina incident, arguing that each separate confession could act as corroborating evidence of other confessions. The district court disagreed.

² Gray separately argued counts three and four should be dismissed for lack of subject matter jurisdiction. The district court agreed and dismissed counts three and four for lack of subject matter jurisdiction. These counts are not at issue in this appeal.

The district court found that subsequent confessions cannot corroborate prior confessions, stating that “multiple confessions from the same individual do not increase the reliability of the confession” and that confessions “cannot corroborate themselves.” The district court concluded that “[b]ecause the [S]tate failed to present evidence that could independently corroborate” the confessions underlying counts one and two, the State did “not establish[] probable cause” for these charges and dismissed them.

The State appealed. Gray filed a motion to dismiss the appeal, arguing that the district court’s order was not appealable under Minnesota Rule of Criminal Procedure 28.04. The court of appeals agreed, holding that the order dismissing counts one and two was not appealable because the probable cause dismissal was premised solely on a factual determination.

We granted the State’s petition for review.

ANALYSIS

On appeal, the State argues that the district court’s order is appealable and that a subsequent confession can corroborate a prior confession under Minnesota law. We turn first to the question of whether the dismissal order is appealable.

I.

The State’s ability to appeal a pretrial dismissal for lack of probable cause is limited. *See* Minn. R. Crim. P. 28.04, subd. 1(1). Under Minnesota Rule of Criminal Procedure 28.04, subd. 1(1), a “prosecutor may appeal as of right . . . in any case, from any pretrial order, including probable cause dismissal orders based on questions of law. But a pretrial order cannot be appealed if the court dismissed a complaint for lack of probable

cause premised solely on a factual determination”³ The parties in this case disagree about whether the district court’s dismissal of counts one and two was “premised solely on a factual determination.” The interpretation of procedural rules is a question of law that we review de novo. *State v. Hugger*, 640 N.W.2d 619, 621 (Minn. 2002).

We have not yet interpreted the phrase “premised solely on a factual determination” in Rule 28.04. But “[w]hen interpreting a rule, we look first to the plain language of the rule and its purpose.” *Walsh v. U.S. Bank, N.A.*, 851 N.W.2d 598, 601 (Minn. 2014). And “[w]here the language is plain and unambiguous, that plain language must be followed.” *State v. Dahlin*, 753 N.W.2d 300, 305 (Minn. 2008). We construe “[w]ords and phrases . . . according to rules of grammar and according to their common and approved usage.” *Welscher v. Myhre*, 42 N.W.2d 311, 314 (Minn. 1950).

Rule 28.04 has a common and approved usage. “[S]olely” is defined as “alone,” “singly,” “entirely,” and “exclusively.” *Solely*, *The American Heritage Dictionary of the*

³ When the rules of criminal procedure were first promulgated, the State could not appeal to the appellate court from “an order dismissing a complaint for lack of probable cause.” Minn. R. Crim P. 29.03 (1975). We interpreted that rule in several cases. *See, e.g., State v. Blom*, 358 N.W.2d 63, 64 (Minn. 1984) (holding that the district court wrongly interpreted a sex crime statute before holding that the district court’s probable cause dismissal was an unappealable order); *State v. Schroeder*, 300 N.W.2d 790, 791 (Minn. 1981) (stating that the district court erred in denying a request for a voice sample and in dismissing the complaint for lack of probable cause but that the remedy was filing a new complaint because the State could not appeal the dismissal for lack of probable cause); *State v. Shaw*, 264 N.W.2d 397, 398 (Minn. 1978) (clarifying that the evidence at issue could be used for limited purposes, before holding that the district court’s probable cause dismissal was an unappealable order). The location of the rule addressing the State’s ability to appeal to the appellate court was changed to Rule 28.04 in 1983. *See* Minn. R. Crim. P. 28.04 (1984) (including amendments received up to December 14, 1983). Language substantially similar to the current version of the rule was adopted in 1998. *See* Minn. R. Crim. P. 28.04 (1999) (including amendments received through December 15, 1998).

English Language 1666 (5th ed. 2018). Therefore, an unappealable order is one that is *exclusively* “premised” on a factual determination. See Minn. R. Crim. P. 28.04, subd. 1(1). “Premised” means to “provide a basis for.” *Premised, The American Heritage Dictionary of the English Language* 1390 (5th ed. 2018). So, if the basis for a district court’s probable cause dismissal is exclusively factual, then the probable cause dismissal is not appealable. But if the basis for the district court’s dismissal is a construction of facts that is based on a legal conclusion, then the dismissal is not “premised *solely* on a factual determination.” Minn. R. Crim. P. 28.04, subd. 1(1) (emphasis added).

A court of appeals case illustrates the proper application of the rule. In *State v. Dunson*, the court of appeals held that the State could appeal from pretrial probable cause dismissals “if the order is based on a legal determination.” 770 N.W.2d 546, 550 (Minn. App. 2009), *rev. denied* (Minn. Oct. 20, 2009). There, the district court determined that, as a matter of law, victims’ names must be spelled out in a complaint to establish probable cause. *Id.* at 549. Following that legal determination, the district court held that the complaints lacked facts to establish probable cause because the victims’ names were not spelled out. *Id.* The court of appeals explained that “[w]hile respondents are technically correct that the dismissals were based on the state’s failure to include certain factual information in the complaints[,] . . . the failure is material only because of the district court’s underlying legal conclusion.” *Id.* And because the “legal determination is the underlying basis for the district court’s order,” it provides a basis for the pretrial appeal. *Id.*

Similar to *Dunson*, the district court’s dismissal in this case was based on the court’s underlying legal conclusion regarding corroboration under Minnesota law. The court of appeals reasoned that “[b]y finding insufficient corroborative evidence in the record, the district court made a factual determination.” *State v. Gray*, No. A22-0606, Order at 3 (Minn. App. filed May 18, 2022). But the reason corroboration independent of a confession was required at all was because of the district court’s initial legal determination as to what corroboration Minnesota law required. Specifically, the district court interpreted Minnesota Statutes section 634.03, which provides that “[a] confession of the defendant shall not be sufficient to warrant conviction without evidence that the offense charged has been committed.” The district court concluded that the statute requires the State to corroborate Gray’s confessions with some evidence other than another confession. Because the State did not offer such independent corroborating evidence, the court held that there was not probable cause that Gray committed the charged offenses.

In sum, the probable cause dismissal was based, in part, on the district court’s underlying interpretation of section 634.03. Accordingly, the dismissal was not premised solely on a factual determination. We therefore hold that the district court’s order is appealable.⁴

⁴ In urging us to affirm, Gray argues that the State can refile charges if it comes forward with additional evidence, relying on *State v. Gerring*, 418 N.W.2d 517, 519–20 (Minn. App. 1988) (holding that dismissal was appealable where the district court held a statute unconstitutional because the district court’s “order would foreclose prosecution even if additional evidence were available”). But whether the State can refile charges is not at issue here. The question is whether the district court’s dismissal was “premiered solely on a factual determination.” Minn. R. Crim. P. 28.04, subd. 1(1).

II.

The court of appeals did not reach the merits of the district court's dismissal, and so we remand to the court of appeals. In *State v. Dixon*, we held that section 634.03 does not preclude a finding of probable cause based on an uncorroborated confession, even though the statute precludes that same uncorroborated confession from sustaining a conviction. 981 N.W.2d 387, 394 (Minn. 2022). *Dixon* was decided after oral argument in this case. The court of appeals should consider the State's appeal in light of *Dixon*.

CONCLUSION

For the foregoing reasons, we reverse the decision of the court of appeals and remand to the court of appeals for further proceedings consistent with this opinion.

Reversed and remanded.