No. 10-104520-S

IN THE
SUPREME COURT OF THE
STATE OF KANSAS

STATE OF KANSAS
Plaintiff-Appellee

vs.

SCOTT P. ROEDER
Defendant-Appellant

APPLICATION FOR PERMISSION TO FILE PRO SE SUPPLEMENTAL BRIEF

Appeal from the District Court of Sedgwick County, Kansas
Honorable Warren Wilbert, Judge
District Court Case No. 09 CR 1462

Scott P. Roeder, Appellant
KDOC#0065192
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P.O. Box 2
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I, Scott Roeder, pro se for purposes of this application, request the Court's permission to submit a pro se supplemental brief to supplement and clarify the excellent brief filed by my Appellate Defender, pursuant to rule 5.01.

The areas I would like to explore further are:

1. My appellate defender argued on p. 12 of her brief that the "imminence" element of the "voluntary manslaughter" defense is satisfied if my belief that harm is imminent is merely subjective, contrary to the trial judge's ruling. I would like to develop the point that if she is wrong, then the objective fact of imminence is especially for the Triers of Fact to evaluate, guided by appropriate jury instructions. This is especially critical in the absence of any statute that defines how soon "imminence" is. I would also like to argue that the record supports the existence of imminent harm not merely as my subjective belief, but as objective fact.

2. I would like to survey the legal and logical novelty of Judge Wilbert's ruling that a witness can be too credible to be allowed to testify.[1]

I want to argue that it was reversible error when Judge Wilbert ruled that former Attorney General Phill Kline's testimony would have persuaded the jury that my belief (that Tiller's abortions were "unlawful force") was not only "honest" (the subjective standard for the Voluntary Manslaughter defense) but "reasonable", (the objective standard for the Defense of Others), and made that his reason for *not* allowing Kline to testify for me.

3. My appellate defender established that "There can be no doubt that the common and legal understanding of the term 'imminent' includes an element of both immediacy and

1. (Trial volume 12, page 39.)

certainty."[2] I would like to strengthen that point by explaining why certainty is not merely an additional element to be proved in addition to "immediacy", but that certainty is the essence of "imminence", and is the only reason to measure "immediacy". I would like to address Judge Wilbert's assertion to the contrary.[3] Even "immediacy" has relevance only to the extent it can show there was no time to pursue alternatives, without which the harm I prevented was a certainty. This logic will clarify the importance of the difference between other cases cited in the record,[4] where there was time to pursue alternatives, and my case, where there was not.

4. I would like to underline that not only did Tilson refrain from ruling on the availability of the Necessity Defense in Kansas, as my Appellate Defender explained under "Issue 5", but any perception that Tilson so implied should be tempered by noting Tilson's confusing comparison of the Necessity Defense with the Defense of Others, in which the former was left in doubt while the latter was unquestioned, at the same time that no distinction was made between the two.

5. I would like to explain how Judge Wilbert confused the existence of a law with the existence of a fact, alleging that because abortion is legal, the danger to the human lives I saved was not "imminent". Judge Wilbert has the authority to rule on the legality of abortion, but he should have deferred to the Triers of Fact to rule on whether the danger I averted was, in fact, imminent.

6. I would like to clarify a possible misunderstanding of the statement on p. 22 of my appellate defender's brief that I "honestly, though unreasonably, believed Dr. Tiller was

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2 p. 16, Appellate Defender's brief

3 Volume 12, page 214, line 11: (Wilbert:) They [White] cite the California case with approval that the fear of future harm, no matter how great the fear and no matter how great the likelihood of the harm, will not suffice.

4 p. 21, Appellate Defender's brief

unlawfully harming children by performing unlawful abortions." I do not acknowledge that my belief was unreasonable; to do so would be to abandon my reliance on the Defense of Others. I also dissent from that same statement made by my trial attorneys continually throughout the trial.

Their statements should not be taken as a stipulation or concession, but merely as verbiage reflecting the elements of the defense in Kansas law. This is the only explanation of the fact that my attorney, on page 21 of her brief, says my belief was unreasonable, and later argues that I should have been allowed the Defense of Others! And even the statements of my trial attorneys should be understood as partly humoring, or deferring to, the trial judge who had ruled against the Defense of Others.

Perhaps this is the interpretation you would adopt anyway, without my clarification, but the statement that my beliefs were unreasonable were so persistent and dogged that I would like the opportunity to make my dissent clear.

During trial, the judge and my public defender even treated the alleged unreasonableness of my belief as a positive element which must be positively proved.[5] I would like the opportunity to argue that that statute cannot mean "unreasonable(ness)" most be positively proved, since the "failure" to prove my beliefs were unreasonable would simply qualify me for the Defense of Others defense. My position is that my thinking was reasonable. Had the jury been allowed to decide whether it was, and had they agreed, then (assuming the other elements of the defense

5 Volume 12, page 36, line 6: [Rudy] Do you think that the behavior of Scott Roeder, if the allegations prove to be true, were justified in killing Dr. Tiller? [Kline] No. Q. Do you think they were in fact unreasonable? A. Yes. Q. Thank you for your proffer.
Volume 12, page 39, line11: [Rudy] He also testified obviously as to the unreasonableness of the defendant's action. We have already had some testimony as in fact that was unreasonable. But certainly, Judge, that is an element of our proposed, ultimately our proposed request for an instruction on voluntary manslaughter.
Volume 12, page 213, line18: THE COURT: My reading of the White decision would in fact lead me to the conclusion that while the Ordway decision -- you have to read the sentence before that. "The defendant's belief must be sincerely held, and it must be unreasonable."

were satisfied), they would have acquitted me under Defense of Others. Had they disagreed, they would have convicted me under Voluntary Manslaughter.

It is "honest" that must be positively proved to meet the requirements of the Voluntary Manslaughter defense. Not even as a backup defense do I argue that I was unreasonable. Rather, my "backup defense" is that at least you will have to admit I was honest. It is interesting that the honesty of my beliefs was never challenged throughout the trial.

7. I would like to explain how the trial judge's ruling denying a jury instruction on imminence was based on his misperception of what I was claiming. He said because abortion is lawful, I have no rational claim that I was preventing unlawful abortions. My defense was never that my ending Tiller's abortions per se satisfied the element that I stopped unlawful abortions. My defense was always that among all Tiller's abortions, a significant number were unlawful, which was not merely my personal unschooled opinion, but was the public position of the former Attorney General of Kansas.

That same kind of substitution of my legitimate claim with an illegitimate claim never made by me, in order to rule against me, is called a "straw man" argument in logic. I would like the opportunity to fully analyze this error, because the same kind of error was the very pillar of *City of Wichita v. Tilson,* 253 Kan. 285, 855 P.2d 911 (1993) which Judge Wilbert cited to deny me both the Necessity and Voluntary Manslaughter defenses.[6]

A lesser reason I am concerned about the influence of this kind of error over my case is that it was repeated throughout the ACLU/National Abortion Federation amicus brief which was

6 *"To allow voluntary manslaughter at this point in time would be nothing more than to reinsert the necessity defense in this case under the guise of voluntary manslaughter. And I return to the City of Wichita versus Tilson.... 'to allow the personal, ethical, moral or religious beliefs of a person, no matter how sincere or well intended, as a justification for criminal activity aimed at preventing a law-abiding citizen from exercising his or her legal and Constitutional rights would...only lead to chaos....'" Volume 12, page 219, line 15 thru page 220, line 23.*

received into the record by Judge Wilbert during my trial. Perhaps that is unimportant and deserves no response, since Wilbert ostensibly ruled against what it was asking,[7] as he expressed doubt that any rules even permitted its admission.[8]

But Wilbert's rulings later that day, which reverse his rulings made on the day before the ACLU/NAF brief was admitted,[9] suggest the influence of that ACLU/NAF reasoning. And after all, the brief nevertheless is there in the record, and the high respect of the Court for ACLU/NAF lawyers is suggested by the fact that the Supreme Court has invited a second ACLU/NAF brief into the record while rejecting all seven other amicus applications. But of course the primary reason to analyze this error is that it is found in Judge Wilbert's ruling denying me a Voluntary Manslaughter instruction, and in Tilson which Wilbert cited to deny me the Necessity and Voluntary Manslaughter Defenses.

Conclusion

For the foregoing reasons, this Court should permit me to submit a brief supplementary to that submitted by my Appellate Defender, to enable me to present a defense which is fully my own.

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7 *"...the Court is not going to make any rulings based upon that or do anything any differently or change any rulings or positions that I have taken at this point in time based upon that filing." Volume 12: page 4, line 15*

8 *"I'm not quite sure there is a procedure to file it at the district court level." Volume 12, 3:21-22*

9 *"And would I rethink what I said yesterday? Probably. Again, that was a pretty heated exchange yesterday afternoon, I will be very candid about it. And everybody's minds were racing and I just offered an example..." Volume 12, page 54, line 9*

Respectfully submitted,

(Signed)_____
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Certificate of Service

The undersigned hereby certifies that service of the above and foregoing brief was made by delivering 4 copies to the jailer for delivery, one each, to:

David Lowden, Chief Attorney, Appeals Div., 1900 East Morris, Wichita, KS 67211;
Derek Schmidt, Attorney General, Kansas Judicial Center, Topeka, KS 66612;
Rachel Pickering, #21747, Kansas Appellate Defender Office Jayhawk Tower, 700 Jackson, Suite 900 Topeka, Kansas 66603; and to the
Kansas Supreme Court, 301 SW 10th St, Kansas Judicial Center, Topeka KS 66612
on the ___ day of November, 2011.

Signed _____
Scott P. Roeder