STATE OF MINNESOTA
IN COURT OF APPEALS
A13-0555

State of Minnesota,
Respondent,

vs.

Yuliya Sergeyevna Fesenko,
Appellant.

Filed March 24, 2014
Affirmed
Rodenberg, Judge
Dissenting, Cleary, Chief Judge

Carver County District Court
File No. 10-CR-12-469

Lori Swanson, Attorney General, St. Paul, Minnesota; and

Mark Metz, Carver County Attorney, Mary E. Shimshak, Assistant County Attorney, Chaska, Minnesota (for respondent)

Cathryn Middlebrook, Appellate State Public Defender, Stephen L. Smith, Assistant Public Defender Minneapolis, Minnesota (for appellant)

Considered and decided by Cleary, Chief Judge; Johnson, Judge; and Rodenberg, Judge.

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

RODENBERG, Judge

Appellant Yuliya Sergeyevna Fesenko challenges her conviction of obstructing legal process in violation of Minn. Stat. § 609.50, subd. 1(2) (2010), arguing that the district court erred in declining to suppress evidence of her response to an officer's unjustified demand that she identify herself. We affirm.

FACTS

Just before midnight on April 19, 2012, near Mark Twain Drive and Hundertmark Road in Chaska, Officer Christopher George of the Chaska Police Department was on patrol when he noticed a person, later identified as appellant, standing next to a parked car on the north side of Hundertmark Road in an area that is not well lit. According to Officer George, in the weeks leading up to April 19, there had been several reported "break-ins" of vehicles in the neighborhood, including the entry into an unlocked car and theft of personal items just one and one-half weeks earlier and one and one-half blocks from where Officer George observed appellant. Officer George believed that appellant demonstrated suspicious behavior when he drove past her slowly and she did not look up. He also believed that appellant was looking into the car, preparing to steal items from it.

Appellant testified that she was standing outside, near her aunt's car, which she had borrowed for the night. She had driven the car to a friend's house, where it was parked when Officer George drove by. Appellant had just left the house, but realized when she got to the car that she had forgotten her keys inside the house. She used her cellular telephone to send a text message to a friend inside the house requesting that her

keys be brought outside. She did not look up from her phone until she had completed the message.[1]

Officer George drove slowly past appellant, turned around, and parked his squad car approximately two car lengths from appellant. Throughout this time, he believed that appellant never stopped looking into the back window of the car. Once parked, Officer George stepped out of his squad car, without activating any emergency lights or siren. The squad car headlights remained on and directed toward appellant as Officer George approached her on foot. Appellant testified that, as Officer George approached with the headlights behind him, she could not tell that he was a police officer. Even after she saw his uniform, she was still suspicious of his identity, owing to her having heard that people sometimes impersonate police officers. Officer George's approach, with no use of emergency lights, and with his squad car headlights behind him as he approached, doubtless contributed to appellant's suspicions. Appellant testified that Officer George immediately made a verbal demand to see identification when he approached.

Officer George did not immediately identify himself as a police officer. Instead, in what he described as a nonconfrontational manner and tone, he approached appellant and asked "Hey, what is going on tonight?" Appellant responded with what Officer George described as "a thousand-yard stare," without any verbal response. Officer George testified that, because of his police training, he became more suspicious of appellant because such a stare is often given by people prior to attacking, and therefore his suspicions of appellant increased. When he received no verbal response, Officer

[1] This testimony was given at trial and not at the motion hearing.

George asked again what was going on. According to Officer George, appellant then responded by saying, "I'm pissed off at somebody inside" in a tone that was "very short and angered." Officer George testified that her behavior indicated to him "that this was not a normal situation [that he] was dealing with, and that [he] needed to investigate further as to why she was mad at somebody inside." Officer George testified that, at this point, his suspicions increased to include the possibility that "somebody [inside the house] placed an order for protection against her" and that she was not lawfully on the premises. Appellant denied that this verbal exchange occurred.

Officer George testified that he requested identification from appellant, which she refused to provide. Officer George testified that he explained to appellant that he was asking for identification because of a recent string of thefts from motor vehicles. He articulated two reasons for requesting appellant's identification: (1) he wanted to know what appellant was doing there and whether the car belonged to her, and (2) he wanted to find out whether appellant was prohibited from having contact with anyone inside the home. Appellant responded by saying that people who dress like she was dressed do not break into cars.

When Officer George made a second request for identification, appellant became confrontational and refused to produce her driver's license. Officer George testified that at some point appellant said, "F-ck you, I'm not telling you who I am." She then began to walk toward the house. Appellant testified that, being only five-feet-three-inches tall, she was "not about to, you know, take any chances" and that she felt unsafe, given the circumstances. Officer George commanded her to stop with what he described as "some

authority" because he did not want her to get near the house. When appellant did not stop, Officer George grabbed her arm with what he described as "very little force." Appellant recoiled and said, "Get your hands off of me."

According to Officer George, when he grabbed appellant's arm again, she turned to face him with her clenched fist raised over her head. Officer George believed that appellant "was posturing as if she was going to strike [him]." Appellant was holding her cell phone, and testified that she was frantically trying to contact somebody inside due to the aggressiveness of Officer George's conduct. Officer George attempted to handcuff appellant, eventually taking her to the ground using an arm-bar takedown and called for backup. Appellant resisted the use of handcuffs by keeping her arms underneath her body. She stopped resisting and allowed herself to be handcuffed once a second police officer arrived. After Officer George checked appellant's identification and determined the ownership of the vehicle, he concluded that appellant had not been engaged in any criminal activity when he first approached. However, he issued appellant a citation for obstructing legal process in violation of Minn. Stat. § 609.50, subd. 1(2).

Appellant made a pretrial motion for dismissal. We interpret appellant's pretrial motion as one to suppress evidence resulting from an unconstitutional search or seizure, and a derivative motion to dismiss based on the exclusion of that evidence.[2] The district court denied appellant's motions. A jury later convicted appellant of obstructing legal

[2] Appellant's pretrial motion to the district court asked "(1) for an order suppressing the evidence obtained in an illegal search and seizure in violation of the [appellant's] Fourth Amendment rights" and "(2) for an order dismissing the charge of obstructing the legal process, Minn. Stat. § 609.50, subd. 1(2), for lack of evidence."

process. Appellant now challenges the conviction on the sole ground that Officer George did not have a reasonable and articulable suspicion of criminal activity justifying his request for identification and that "everything that flowed from [Officer George's] constitutionally infirm actions should have been suppressed and this case should have been dismissed."

D E C I S I O N

Appellant contends on appeal that, because the state did not demonstrate that Officer George had a reasonable and articulable suspicion that appellant was engaged in criminal activity, his request for identification was unlawful. Respondent argues that a seizure did not occur until appellant attempted to retreat to the house, at which point Officer George had a reasonable and articulable suspicion that appellant was violating an order for protection and, therefore, the seizure was legally justified. Both parties fail to address the dispositive issue: whether appellant was entitled to obstruct legal process if her initial declination to identify herself was lawful.

Both the United States and Minnesota Constitutions prohibit unreasonable searches and seizures. U.S. Const. amend. IV; Minn. Const. art. I, § 10. A valid investigative seizure requires the state to demonstrate the existence of "specific and articulable facts which, taken together with rational inferences from those facts, reasonably warrant [seizure]." *Terry v. Ohio*, 392 U.S. 1, 21, 88 S. Ct. 1868, 1880 (1968). A police officer's actions must have been taken on more than a hunch or mere "whim, caprice, or idle curiosity." *State v. Johnson*, 444 N.W.2d 824, 827 (Minn. 1989) (citation omitted).

Courts have seldom addressed whether physical force is permissible in the course of a *Terry* stop. *See* 4 Wayne R. LaFave, *Search and Seizure*, § 9.2(d), at 412-13 (5th ed. 2012) (noting that the absence of caselaw on this issue is "apparently because in the overwhelming majority of instances suspects comply with a verbal command to stop"). We have addressed the issue in one previous instance, where we reversed a grant of a motion to suppress evidence and dismiss a complaint despite an officer's use of minimal force to prevent a potentially armed suspect from leaving the officer's presence. *See State v. Balenger*, 667 N.W.2d 133, 140-41 (Minn. App. 2003), *review denied* (Minn. Oct. 21, 2003). However, we need not reach the constitutional issue in this case. The remedy for an unconstitutional search or seizure is the exclusion of the resulting evidence. *See, e.g.*, *Terry*, 392 U.S. at 12-14, 88 S. Ct. at 1875-76 (discussing the purposes of the exclusionary rule as a remedy for unconstitutional searches or seizures). Here, there was no evidence seized in the allegedly unconstitutional encounter between appellant and Officer George. Therefore, reversal of the conviction is not warranted based on the sole issue preserved for our review.

Appellant may have been constitutionally entitled to decline Officer George's initial demand for identification, but she did not have the legal right to resist his show of authority. We are informed by caselaw involving individuals' resistance to searches they believe to be unconstitutional. The seminal Minnesota case regarding this subject, *State v. Hoagland*, involved a charge of obstructing legal process. 270 N.W.2d 778, 779 (Minn. 1978). In *Hoagland*, two officers attempted to investigate a possible violation of hunting laws on private property, but they were forced off the land when the officers'

lives were threatened by several individuals. *Id.* at 779-80. In reviewing these individuals' convictions for obstructing legal process, the *Hoagland* court held that the officers' entry onto the land was constitutional. *Id.* at 780. But the analysis did not stop there.

Even if the entry had been unconstitutional, *Hoagland* held that resorting to violent self-help to resist the search would be unlawful, adopting the following rationale from *United States v. Ferrone*:

> Society has an interest in securing for its members the right to be free from unreasonable searches and seizures. Society also has an interest, however, in the orderly settlement of disputes between citizens and their government; it has an especially strong interest in minimizing the use of violent self-help in the resolution of those disputes. We think a proper accommodation of those interests requires that a person claiming to be aggrieved by a search conducted by a peace officer pursuant to an allegedly invalid warrant test that claim in a court of law and not forcibly resist the execution of the warrant at the place of search. The development of legal safeguards in the Fourth, Fifth, Sixth and Fourteenth Amendment fields in recent years has provided the victim of an unlawful search with realistic and orderly legal alternatives to physical resistance.

Id. at 780-81 (quoting 438 F.2d 381, 390 (3d Cir. 1970), *cert. denied*, 402 U.S. 1008, 91 S. Ct. 2188 (1971)). Our caselaw has consistently applied this principle. *See State v. Wick*, 331 N.W.2d 769, 771 (Minn. 1983) (stating that "Minnesota law does not recognize [an] asserted right to resist an unlawful arrest or search"); *State v. Kittleson*, 305 N.W.2d 787, 789 (Minn. 1981) (declining to suppress evidence of assault on officers when suspect believed that officers unconstitutionally entered a closed room to conduct a search); *In re Burns*, 284 N.W.2d 359, 360 (Minn. 1979) (declining to reach the issue of

the legality of a search when a suspect forcibly resisted the search because "Minnesota law does not recognize a defendant's right to resist a search which he feels is illegal"). In sum, "Minnesota law does not recognize [an] asserted right to resist a search" that an individual believes is unconstitutional. *Hoagland*, 270 N.W.2d at 780.

In *City of St. Louis Park v. Berg*, our supreme court considered whether an unconstitutional entry into a person's house to effectuate an arrest results in the "exclusion of evidence of defendant's resistance to the unlawful arrest." 433 N.W.2d 87, 89 (Minn. 1988). The *Berg* court held that evidence of resistance to an illegal arrest is not appropriately excluded in a prosecution for resisting arrest and assault on the arresting officers. *Id.* The supreme court went on: "The deterrence of unlawful police conduct, which is the basis for the exclusionary rule, must yield to countervailing concerns. To exclude evidence of a defendant's assaultive response to a Fourth Amendment violation would be a license for defendants to assault police officers, even to murder them." *Id.* at 90.

Here, the offense of which appellant was convicted did not involve weapons or an assault on a police officer. Some authorities suggest that a right to self-help may be available under certain circumstances where a suspect resists an unconstitutional seizure. *See Wick*, 331 N.W.2d at 771 (noting that "a defendant would have a right to resist an officer in order to defend himself or another against unjustified bodily attack"); *United States v. Russell*, 411 U.S. 423, 431-32, 93 S. Ct. 1637, 1643 (1973) (noting the possibility of "a situation in which the conduct of law enforcement agents is so outrageous that due process principles would absolutely bar the government from

invoking judicial processes to obtain a conviction"). Others question the efficacy of a rule disallowing the self-help remedy. *Cf.* 1 Wayne R. LaFave, *Search and Seizure*, § 1.13(a), at 554-55 (5th ed. 2012) ("If resistance to lawful arrest is punished, it would be to the advantage of police to arrest and search by force because even if unlawfully obtained evidence is excluded, the police might nonetheless obtain a valid conviction for the provoked resistance itself." (citation omitted)). But because this issue was neither presented to the district court nor briefed on appeal, we decline to address the issue. *See State v. Butcher*, 563 N.W.2d 776, 780 (Minn. App. 1997) (noting that issues not briefed on appeal are waived), *review denied* (Minn. Aug. 5, 1997).

Here, in a case involving sharp factual disagreements, the jury found appellant guilty of obstructing legal process. *See* Minn. Stat. § 609.50, subd. 1(2). On appeal, appellant does not argue that there was error in the jury instructions. Neither does she argue that the evidence was insufficient to support the verdict.[3] She argues only that the evidence of her unlawful conduct ought to have been suppressed and kept from the jury. Our supreme court has not applied the exclusionary rule in such a circumstance.

[3] The crime with which appellant was charged required the jury to find that appellant "*intentionally* . . . obstruct[ed], resist[ed], or interfere[d] with a peace officer while the officer [was] *engaged in the performance of his official duties*." Minn. Stat. § 609.50, subd. 1(2) (emphasis added). A challenge regarding whether the jury could have found all elements of the crime to have been proven on this record has not been preserved for our review. *See Butcher*, 563 N.W.2d at 780.

Appellant may have other avenues for relief.[4] But she has not preserved for appeal any issue on which she is entitled to appellate relief.

Affirmed.

[4] Concluding that the exclusionary rule does not apply in this case does not limit appellant's ability to seek relief for Officer George's alleged Fourth Amendment violation in other contexts. *See, e.g.*, *Stone v. Powell*, 428 U.S. 465, 485-86, 96 S. Ct. 3037, 3048 (1976) ("[T]he [exclusionary] rule is not a personal constitutional right. It is not calculated to redress the injury to the privacy of the victim of the search or seizure . . . ."). "Whether the exclusionary sanction is appropriately imposed in a particular case . . . is 'an issue separate from the question [of] whether the Fourth Amendment rights of the party seeking to invoke the rule were violated by police conduct.'" *United States v. Leon*, 468 U.S. 897, 906, 104 S. Ct. 3405, 3412 (1984) (quoting *Illinois v. Gates*, 462 U.S. 213, 223, 103 S. Ct. 2317, 2324 (1983)).

CLEARY, Chief Judge (dissenting)

I respectfully dissent from the majority's opinion. I believe that Officer George did not have the reasonable, articulable suspicion necessary to demand appellant's identification or to seize her and that, as a result of Officer George's outrageous conduct, escalating a peaceful situation into a violent confrontation, appellant was entitled to resist the seizure. The district court should have granted the motion to dismiss the citation for obstructing legal process, and I would reverse appellant's conviction.

A police officer may temporarily seize a suspect if the officer has reasonable, articulable suspicion of criminal activity. *State v. Diede*, 795 N.W.2d 836, 842 (Minn. 2011) (citing *Terry v. Ohio*, 392 U.S. 1, 88 S. Ct. 1868 (1968)). The reasonable suspicion standard is not high, but the officer must have an objective and particularized basis for suspecting that criminal activity is afoot. *State v. Timberlake*, 744 N.W.2d 390, 393 (Minn. 2008). A mere hunch will not justify a seizure. *State v. Harris*, 590 N.W.2d 90, 99 (Minn. 1999). In this case, it was not reasonable for Officer George to suspect that appellant was preparing to break into a vehicle merely because she was standing near a car, sending text messages, and looking into that car. Appellant had forgotten her keys and was texting her friend in the house at that address to bring her keys to the car. Officer George stated that he thought it suspicious that appellant did not look up when he drove past her. But courts have held that it may be considered suspicious if a suspect does make eye contact with an officer, *see, e.g.*, *State v. Johnson*, 444 N.W.2d 824, 825 (Minn. 1989), or if a suspect looks at an officer or squad car and then looks away. *See, e.g.*, *State v. Yang*, 774 N.W.2d 539, 552 (Minn. 2009). If it is suspicious when a suspect

fails to notice a passing squad car at all, then we have come full circle and law enforcement will be allowed to bootstrap *any* reaction or lack of reaction by a citizen to a passing squad car to the level of "suspicious" behavior. Under these circumstances, because the officer was acting only on a hunch, appellant had no obligation to produce identification when approached. *See Terry*, 392 U.S. at 21, 88 S. Ct. at 1880.

Further, it was not reasonable for Officer George to suspect that appellant was violating or was about to violate an order for protection based merely on appellant's statement that she was "pissed off at somebody" in the house. Because the officer did not have reasonable, articulable suspicion that appellant was about to engage in criminal activity, he had no basis for seizing her by commanding her to stop and grabbing her arm when she attempted to walk away. *Cf. In re Welfare of E.D.J.*, 502 N.W.2d 779, 783 (Minn. 1993) (holding that a seizure has occurred when a reasonable person in the defendant's shoes would conclude that he or she is not free to leave).

As the majority opinion notes, there is little guidance on the right of a citizen to a "self-help" remedy when forcibly resisting an unconstitutional seizure based on a claim of reasonable fear for personal safety. In my opinion, Officer George's conduct was so outrageous that appellant was justified in resisting, at least temporarily, the officer's attempts to restrain and arrest her. *See City of St. Louis Park v. Berg*, 433 N.W.2d 87, 91 (Minn. 1988) (stating that there may be a rare instance where the force used by the police in making an arrest is so outrageous that due process should bar the government from obtaining a conviction for the defendant's resistance); *State v. Wick*, 331 N.W.2d 769, 771 (Minn. 1983) (stating that "a defendant would have a right to resist an officer in

order to defend himself or another against unjustified bodily attack"). Officer George approached appellant in the middle of the night without identifying himself or showing a badge, and his squad car's siren or emergency lights were not activated. According to the record, he is a six-foot-tall man, while appellant is 5'3" and weighs 118 pounds. Appellant could not clearly see him or his uniform as he approached because the headlights of his squad car were shining in her eyes. At the time, appellant stated that she did not feel safe and believed that he might be an imposter because she had heard stories of people impersonating police officers. Given these circumstances, the officer should have allowed appellant to retreat to the house without interference, and appellant was justified in resisting when Officer George commanded her to stop, grabbed her arm, and then tackled her to the ground. Appellant allowed herself to be handcuffed when another police officer arrived on the scene and confirmed the involvement of law enforcement. Appellant should never have been charged with a criminal offense, and her conviction for obstructing legal process should be reversed.

Date: March 18, 2014

/s/
Chief Judge Edward J. Cleary