STATE OF MINNESOTA
IN COURT OF APPEALS
A11-1927

State of Minnesota,
Appellant,

vs.

Rachel Catherine Butler,
Respondent.

Filed March 19, 2012
Reversed and remanded
Johnson, Chief Judge
Dissenting, Cleary, Judge

Hennepin County District Court
File No. 27-CR-11-8243

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

Susan L. Segal, Minneapolis City Attorney, Paula J. Kruchowski, Assistant City Attorney, Minneapolis, Minnesota (for appellant)

Paul W. Rogosheske, Rogosheske, Sieben, Atkins & Pugh, LLC, South St. Paul, Minnesota (for respondent)

Considered and decided by Johnson, Chief Judge; Cleary, Judge; and Collins, 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, Chief Judge

Rachel Catherine Butler is charged with gross misdemeanor driving while impaired. In the district court, she moved to suppress evidence of her impairment on the ground that a state trooper unreasonably seized her at her home. The district court granted Butler's motion. The state appeals, arguing that the district court erred by determining that the trooper seized Butler by gesturing to her while she was looking out the window of her second-story apartment, thereby causing her to come to the front door of her secure apartment building. We conclude that Butler was not seized when she was inside her apartment and, therefore, reverse and remand.

FACTS

The relevant facts occurred in the early morning hours of January 29, 2011. At approximately 4:00 a.m., Trooper Benjamin Uzlik was conducting a traffic stop on the shoulder of the southbound lanes of interstate highway 35W in south Minneapolis, near 46th Street. As Trooper Uzlik was conducting the stop, he saw another vehicle approaching in the right lane. All other southbound lanes were open at the time, but the oncoming vehicle did not change lanes and passed within five feet of Trooper Uzlik. As the vehicle was passing by, Trooper Uzlik shined his flashlight into the vehicle and saw that the driver, the vehicle's sole occupant, was a white, blonde-haired female. He also made note of the vehicle's type and license-plate number.

After completing the traffic stop, Trooper Uzlik ran a check on the license-plate number of the vehicle that had passed him. He observed that the registered owner of the

vehicle, Butler, lived less than two miles from his current location. He also ran Butler's driving record and noticed that her photograph resembled the person driving the vehicle when it passed him. Trooper Uzlik believed that the driver of the vehicle had committed a petty misdemeanor violation of the Ted Foss Move Over Law, Minn. Stat. § 169.18, subd. 11 (2010), and wanted to gather additional information to confirm that Butler was the person who committed the violation.

Trooper Uzlik drove to Butler's address, where he found a small apartment building. Trooper Uzlik saw Butler's vehicle, a green Saab, parked on the street in front of the apartment building and noted its license-plate number. He felt the hood of Butler's vehicle and noticed that it was warm, which indicated to him that it had been driven recently. He parked his squad car on the street in the area of the apartment building. He later testified that he does not believe that he activated his red and blue flashing lights. He also testified that if his squad car was blocking traffic, he would have activated the squad car's yellow arrow lights, which are intended to divert vehicles approaching from the rear of the squad car.

Trooper Uzlik inferred from Butler's address that she probably lived on the second story of the apartment building. While standing on the front sidewalk or in the front yard, he shined his flashlight into the windows of the second-story apartment. A woman came to the window. Trooper Uzlik gestured with his arm for her to come down.

Butler came to the entrance of the apartment building and opened the front door. Trooper Uzlik asked Butler whether she recognized him, and she said that she did not. He asked her whether she remembered passing a state trooper on the freeway, and she

responded by saying, "I'm sorry, I should have moved over." As they spoke, Butler was standing either in the doorway or on the front step, and Trooper Uzlik was standing outside the apartment building, on the front step. Trooper Uzlik noticed that Butler's eyes appeared watery and glassy, and he detected an odor of alcohol. Trooper Uzlik asked Butler to perform field-sobriety tests and a preliminary breath test, which she failed. A subsequent blood test revealed an alcohol concentration of .23.

In March 2011, the state charged Butler with two counts of second-degree driving while impaired (DWI), violations of Minn. Stat. §§ 169A.20, subd. 1(5), 169A.25, subd. 1(a) (2010). In April 2011, Butler moved to suppress the evidence obtained by Trooper Uzlik on the ground that the trooper's investigation violated the Fourth Amendment to the United States Constitution and article 1, section 10, of the Minnesota Constitution. In September 2011, the district court held an evidentiary hearing at which only Trooper Uzlik testified. In a post-hearing letter brief, Butler argued that Trooper Uzlik engaged in an unlawful search of her home and an unlawful seizure of her person. In October 2011, the district court issued an order granting Butler's motion on the ground that Trooper Uzlik unlawfully seized Butler when he gestured for her to come to the front door of the apartment building. Accordingly, the district court suppressed the evidence obtained by Trooper Uzlik. The state appeals.

D E C I S I O N

The state argues that the district court erred by granting Butler's motion to suppress evidence. Specifically, the state argues that Trooper Uzlik did not seize Butler when he gestured for her to come to the front door while she was inside her second-story

apartment.[1] We apply a *de novo* standard of review to a district court's determination whether a law enforcement officer seized a person. *State v. Harris*, 590 N.W.2d 90, 98 (Minn. 1999).

Butler's argument is based on both the United States Constitution and the Minnesota Constitution. The Fourth Amendment to the United States Constitution guarantees the "right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures." U.S. Const. amend. IV. A similar right is contained in the Minnesota Constitution. *See* Minn. Const. art. I, § 10. As a general rule, a law enforcement officer may not seize a person without probable cause. *State v. Flowers*, 734 N.W.2d 239, 248 (Minn. 2007). But a law enforcement officer may conduct a brief investigatory stop of a person if the officer has a reasonable, articulable suspicion that the person might be engaged in criminal activity. *See State v. Houston*, 654 N.W.2d 727, 731-34 (Minn. App. 2003), *review denied* (Minn. Mar. 26, 2003); *see also Terry v. Ohio*, 392 U.S. 1, 21-22, 88 S. Ct. 1868, 1880 (1968).

In both the district court and this court, the parties contested a single issue: whether Trooper Uzlik seized Butler when he gestured for her to come to the front door of the apartment building. Neither party has raised the issue whether, if Butler was seized at that point in time, the seizure was justified. *See In re Welfare of E.D.J.*, 502

[1]If the state appeals from a pretrial order, the state "must clearly and unequivocally show . . . that the trial court's order will have a critical impact on the state's ability to prosecute the defendant successfully." *State v. Barrett*, 694 N.W.2d 783, 787 (Minn. 2005) (quotations omitted). In this case, Butler does not argue that the district court's order suppressing evidence does not have a critical impact on the prosecution. Because the parties do not disagree on this point, we need not analyze the issue of critical impact.

N.W.2d 779, 783 (Minn. 1993) (stating that if seizure has occurred, "the question becomes whether the police articulated a sufficient basis" for seizure). Accordingly, we confine our analysis to the question whether Trooper Uzlik seized Butler when she was inside her apartment.

"Not all encounters between the police and citizens constitute seizures." *Harris*, 590 N.W.2d at 98. For example, a law-enforcement officer does not necessarily conduct a seizure merely by approaching a person who is standing on a public street and asking the person a few questions. *E.D.J.*, 502 N.W.2d at 782; *Houston*, 654 N.W.2d at 731-32. As another example, law-enforcement officers do not necessarily conduct a seizure by boarding a passenger bus and announcing their intent to search for drugs or by approaching one of the passengers and asking questions. *Harris*, 590 N.W.2d at 98-102. Rather, under Minnesota law, a person is seized only if, given the totality of the circumstances, "a reasonable person would have believed that he or she was neither free to disregard the police questions nor free to terminate the encounter." *State v. Cripps*, 533 N.W.2d 388, 391 (Minn. 1995). The key question is whether "the conduct of the police would communicate to a reasonable person in the defendant's physical circumstances an attempt by the police to capture or seize or otherwise to significantly intrude on the person's freedom of movement." *State v. Hanson*, 504 N.W.2d 219, 220 (Minn. 1993). Even though all circumstances must be considered, the supreme court has identified a few specific factors that are most pertinent to the question whether a seizure occurred:

> Examples of circumstances that might indicate a seizure, even where the person did not attempt to leave, would be [1] the threatening presence of several officers, [2] the display of a weapon by an officer, [3] some physical touching of the person of the citizen, or [4] the use of language or tone of voice indicating that compliance with the officer's request might be compelled.

E.D.J., 502 N.W.2d at 781 (quoting *United States v. Mendenhall*, 446 U.S. 544, 554-55, 100 S. Ct. 1870, 1877 (1980)).[2] In the absence of some affirmative display of authority, "otherwise inoffensive contact between a member of the public and the police cannot, as a matter of law, amount to a seizure of that person." *Id.* (quoting *Mendenhall*, 446 U.S. at 554-55, 100 S. Ct. at 1877).

In this case, the totality of the circumstances indicates that a reasonable person in Butler's position would have felt free to disregard Trooper Uzlik's gesture and terminate the encounter. First, Trooper Uzlik was the only law-enforcement officer present, which made the situation less threatening than if several officers had been present. Second, there is no evidence in the record that Trooper Uzlik displayed a weapon. Third, Trooper Uzlik did not engage in any physical touching of Butler. Indeed, he was prevented from doing so by the distance and the building structure between him and Butler. And fourth, there is no evidence that Trooper Uzlik used language or a tone of voice indicating that compliance with the officer's request might be compelled. Rather, it appears that Butler

[2]The United States Supreme Court may have modified the *Mendenhall* test in *California v. Hodari D.*, 499 U.S. 621, 111 S. Ct. 1547 (1991), in which it held that a seizure occurs "only when police use physical force to restrain a person or, absent that, when a person physically submits to a show of authority by the police." *E.D.J.*, 502 N.W.2d at 780; *see also Hodari D.*, 499 U.S. at 626-29, 111 S. Ct. at 1550-52. The Minnesota Supreme Court has held that *Hodari D.* does not apply to article I, section 10, of the Minnesota Constitution. *E.D.J.*, 502 N.W.2d at 781-83.

was induced to go to the front door of the apartment building merely by a physical gesture. Thus, none of the special circumstances identified in *E.D.J.* are present in this case. *See* 502 N.W.2d at 781. Furthermore, Butler was within her apartment inside a secure apartment building and easily could have moved away from the window, closed the curtains or shades, and ignored the trooper entirely.

In most cases in which a question arises as to whether a person was seized, the person was in a public place. It appears that only one Minnesota case has considered whether a person was seized while inside a private residence. In *State v. Riley*, 568 N.W.2d 518 (Minn. 1997), the supreme court concluded that a seizure occurred, but the facts of that case are easily distinguishable. Riley was wanted in connection with a murder when law-enforcement officers learned that he was inside another person's home. *Id.* at 522. Approximately 40 to 45 officers of the Emergency Response Unit of the Minneapolis Police Department (referred to as the "SWAT team") surrounded the home for five hours. *Id.* The supreme court reasoned that these circumstances "[c]ertainly . . . would communicate to any reasonable person inside the house that the police were restricting that person's movement." *Id.* at 524. The facts of this case are a far cry from those of *Riley*.

Butler contends that Trooper Uzlik's gesture was essentially a "command" that Butler come to the front door of her apartment building. This contention is based on Trooper Uzlik's testimony at the suppression hearing. Butler's attorney cross-examined Trooper Uzlik as to whether his gesture toward Butler could be considered a "command," to which Trooper Uzlik answered, "I guess it could be construed as a command."

Trooper Uzlik's endorsement of Butler's attorney's characterization of his gesture is not meaningful, let alone dispositive, because the question whether a person has been seized is an objective determination based on an officer's outward conduct; the subjective intent of either the officer or the person who may have been seized is irrelevant. *See Michigan v. Chesternut*, 486 U.S. 567, 575 n.7, 108 S. Ct. 1975, 1980 n.7 (1988).

Butler also contends that a seizure is indicated by the "flashing" lights on Trooper Uzlik's squad car. But there is no evidence in the record that Trooper Uzlik used his squad car's flashing red light. Trooper Uzlik testified only that he may have activated the squad car's yellow arrow lights, which are directed backward toward vehicles approaching the squad car from the rear. There is no evidence in the record as to whether the yellow arrow lights were visible to Butler when she was in her apartment. Furthermore, the caselaw indicates that flashing lights are not necessarily indicative of a seizure because they often are used by law-enforcement officers to warn oncoming motorists to be careful. *See Hanson*, 504 N.W.2d at 220. Similarly, an officer's use of a flashlight generally does not give rise to a seizure, so long as the officer is in a lawful vantage point. *See State v. Alesso*, 328 N.W.2d 685, 687 (Minn. 1982); *State v. Vohnoutka*, 292 N.W.2d 756, 757 (Minn. 1980); *State v. Krech*, 381 N.W.2d 898, 899 (Minn. App. 1986). Here, Trooper Uzlik was in a lawful vantage point outside the apartment building when he used the flashlight.

The district court's order cited caselaw concerning the reasonableness of a warrantless search as well as caselaw concerning the reasonableness of a seizure. In light of the district court's conclusion that Butler was unlawfully seized, only the latter type of

caselaw is applicable. Nonetheless, it is worth noting that our conclusion is in harmony with two Minnesota Supreme Court opinions holding that a law-enforcement officer does not engage in a search by knocking on the front door of a single-unit residence and talking with the person who answers the door. *See, e.g.*, *State v. Alayon*, 459 N.W.2d 325, 328 (Minn. 1990); *State v. Patricelli*, 324 N.W.2d 351, 353-54 (Minn. 1982). If the Fourth Amendment does not prohibit a law-enforcement officer from knocking on the front door of a single-unit residence to elicit a face-to-face conversation with a resident, there is no apparent reason why a law-enforcement officer could not accomplish the same result by making a physical gesture from the front sidewalk or front yard of a multi-unit apartment building.

In sum, we conclude that Trooper Uzlik did not seize Butler when he gestured from the ground below to her second-story apartment window, which caused her to come to the front door of her secure apartment building. Thus, the district court erred by granting Butler's motion to suppress evidence. Accordingly, we remand the case to the district court for further proceedings.

Reversed and remanded.

CLEARY, Judge (dissenting)

I respectfully dissent from this decision. I would affirm the district court's order suppressing the evidence and dismissing the case against respondent.

A seizure "occurs only 'when the officer, by means of physical force or show of authority, has in some way restrained the liberty of a citizen.'" *In re Welfare of E.D.J.*, 502 N.W.2d 779, 781 (Minn. 1993) (quoting *Terry v. Ohio*, 392 U.S. 1, 19 n.16, 88 S. Ct. 1868, 1879 n.16 (1968)). "[A] person has been seized if in view of all of the circumstances surrounding the incident, a reasonable person would have believed that he or she was neither free to disregard the police questions nor free to terminate the encounter." *State v. Cripps*, 533 N.W.2d 388, 391 (Minn. 1995).

In my opinion, a reasonable person in respondent's situation would not have believed that he or she was free to ignore Trooper Uzlik. The trooper's actions by standing in front of respondent's residence in uniform at approximately 4:30 in the morning with his squad car's warning light activated, shining his flashlight into respondent's second-story windows, motioning for her to come down when she appeared at the window, and apparently directing her to step out of the house when she came down, amounted to a show of authority that an objectively reasonable person would feel required to obey. The shining of the flashlight into the windows of respondent's residence in the middle of the night was an invasion that distinguishes this case from police officers merely approaching a person in a public place or knocking on a person's door to have a conversation. The cases that have held that an officer's use of a flashlight

is permissible involve motor vehicles that are stopped on the road and have been lawfully approached, not a personal residence in the middle of the night.

A reasonable person would feel that what occurred in this situation was a police command and believe that she was compelled to go to the front door to speak with the trooper. Trooper Uzlik himself admitted that his actions that night could be considered a command:

> Q: When you say you had them come out of the building, that's your standard practice to get people to come out of the house so you don't have problems, is that a fair statement?
> A: Yes, sir. It also avoids any warrantless entry questions if I don't go in the house. I don't go in the house. They came out on their own accord.
> Q: So would you say that's more of a command or an order on your part to please step outside the house?
> A: I guess it could be construed as a command.

It should also be noted that the incident that Trooper Uzlik was investigating was a suspected petty misdemeanor traffic offense. He observed a white skinned and blonde haired female when she drove past him, and he ran her driving record to confirm that the picture of the registered owner of the vehicle matched his observation. The trooper could have simply mailed respondent a citation rather than confronting her at her home in the middle of the night.

Based on the totality of the circumstances as viewed by a reasonable person, respondent was unlawfully seized by Trooper Uzlik and the evidence resulting from this unlawful seizure was properly suppressed by the district court.