

*This opinion will be unpublished and
may not be cited except as provided by
Minn. Stat. § 480A.08, subd. 3 (2016).*

**STATE OF MINNESOTA
IN COURT OF APPEALS
A16-0949**

Troy Kenneth Scheffler,
Appellant,

vs.

Mark Joseph McDonough,
Respondent

**Filed May 1, 2017
Affirmed
Worke, Judge**

Anoka County District Court
File No. 02-CV-15-5963

Peter J. Nickitas, Minneapolis, Minnesota (for appellant)

Ryan M. Zipf, League of Minnesota Cities, St. Paul, Minnesota (for respondent)

Considered and decided by Worke, Presiding Judge; Jesson, Judge; and Smith, John,
Judge.*

UNPUBLISHED OPINION

WORKE, Judge

Appellant argues that the district court abused its discretion by denying his petition
for a harassment restraining order (HRO) against respondent, a retired police officer,

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

because the HRO statute has no exception for police officers, the underlying criminal charges against appellant were dismissed and expunged, and appellant's physical injuries precluded denial of the petition. We affirm.

FACTS

On December 17, 2015, appellant Troy Kenneth Scheffler petitioned for a HRO against respondent Mark Joseph McDonough, a now-retired police officer, alleging that on July 10, 2014, McDonough assaulted him.¹

At the hearing on the petition, Officer McDonough testified that in the early morning hours of July 10, 2014, he was on duty as a police officer when he and several other officers were dispatched to a disturbance call. Officers were informed that there might have been an altercation inside a car dealership or a possible prowler. As officers investigated the interior of the dealership, Officer McDonough watched the perimeter from inside his patrol car. Officer McDonough testified that Scheffler approached his patrol car and startled him. Shortly before approaching Officer McDonough's patrol car, Scheffler had called 911 and complained that a police officer followed him and he wanted the officer to leave. The 911 operator told Scheffler to approach the officer and say, "Hi, why are you here," if that was what he was wondering. Scheffler's 911 call was connected when he approached Officer McDonough and the following conversation was recorded.²

SCHEFFLER:	Why are you here?
MCDONOUGH:	What are you doing?
SCHEFFLER:	Excuse me?

¹ Scheffler alleged several instances of harassing conduct in his petition, but on appeal he challenges only the district court's conclusion regarding the July 10, 2014 incident.

² This recitation is from a recording that is inaudible at times.

MCDONOUGH: What are you doing?
 SCHEFFLER: Going home or minding my own business.
 MCDONOUGH: You came up to me. What do you want? Do you have an ID on you?
 SCHEFFLER: Doesn't matter.
 MCDONOUGH: Okay, listen, there's one or two ways this is going to go. Which way do you want it to go? Let me see your ID.
 SCHEFFLER: Excuse me?
 MCDONOUGH: Let me see your ID. Do you have an ID on you?
 SCHEFFLER: Am I breaking the law?
 MCDONOUGH: You came up to me, didn't you?
 SCHEFFLER: I asked why you are here and following me.
 MCDONOUGH: I'm not following you anywhere.
 SCHEFFLER: Why did you ask for my ID then?
 MCDONOUGH: You came up to me.
 SCHEFFLER: Who are you?
 MCDONOUGH: I'm the police.
 SCHEFFLER: I didn't say that. What's your name?
 MCDONOUGH: What's your name?
 SCHEFFLER: I don't have to respond to that.
 MCDONOUGH: Well, then get the f-ck out of here then.
 SCHEFFLER: Can I have a supervisor come out please?
 MCDONOUGH: Sure.
 SCHEFFLER: Okay. Please.
 MCDONOUGH: Sure.

Officer McDonough then attempted to handcuff Scheffler. During the recording, someone can be heard saying, "Ouch," and Officer McDonough can be heard saying, "Know your name yet?" Officer McDonough testified that another officer had to assist him with handcuffing Scheffler.

Officer McDonough testified that he told Scheffler to “get the f-ck out of here” because Scheffler was noncompliant and, in his experience, he had to use “colorful language” at times in order to get an individual’s attention. Officer McDonough testified that he did not know if Scheffler was involved in the disturbance call or if he had a weapon. Officer McDonough testified that he handcuffed Scheffler for his safety because Scheffler was intoxicated, belligerent, and possibly having a mental-health issue. Because Scheffler resisted the officers’ efforts to handcuff him, he was ticketed for obstructing legal process.³

Scheffler testified that on July 10, 2014, he went for a bike ride because he was unable to sleep despite taking a sleeping pill. He testified that he had also taken other medication that made him drowsy and slurred his speech. Scheffler testified that squad cars passed him and one shined a light in his eyes. He testified that he called 911 because the officers seemed interested in him.

Scheffler testified that he followed the 911 operator’s instructions when he approached Officer McDonough’s squad car and asked him what he was doing there. Scheffler testified that when he asked for McDonough’s supervisor, McDonough replied, “I’m going to put you in handcuffs, put you in back of my squad car.” Scheffler testified that Officer McDonough slammed him on the ground, said “[g]ive me your hand,” jumped on top of him, kneed him in the temple, dragged him on the ground, pushed him against the wheel well, and hit his head against the squad car while saying, “[R]emember your name?” Scheffler testified that another officer “cheer[ed]” McDonough on, saying, “Yeah,

³ The charges against Scheffler were later dismissed and a district court issued an order granting Scheffler an expungement.

yeah, you tell him your name. That's what you do to the police." Scheffler testified that he lost consciousness and woke up in the back of the officer's squad car.

Scheffler's medical records indicated erythema and swelling on his ears, ecchymosis on his torso, erythema on his wrists, and abrasions on his legs. Scheffler testified that his doctor told him that his reported symptoms were "concussion symptoms."

The district court denied Scheffler's HRO petition. After listening to the recording of the 911 call, the district court found that Scheffler sounded intoxicated and that a reasonable person could have concluded that he was impaired in some manner. The district court also found that Scheffler indicated that he did not have to cooperate with Officer McDonough's requests to leave or provide identification. Further, the district court found that although Scheffler received physical injuries, it was unclear whether they were caused by McDonough or Scheffler's efforts to resist arrest. The district court concluded that Scheffler failed to show that Officer McDonough was acting outside his capacity as a police officer, under Minn. Stat. § 609.06 (2016), and that McDonough's actions did not constitute harassment under the statute. This appeal followed.

D E C I S I O N

"[T]he harassment laws place carefully limited restraints on individuals whose conduct goes beyond an acceptable expression of outrage and civilized conduct, and instead causes a substantial adverse effect on another's safety, security or privacy." *Kush v. Mathison*, 683 N.W.2d 841, 846 (Minn. App. 2004), *review denied* (Minn. Sept. 29, 2004). This court reviews a district court's decision to deny a HRO petition for an abuse of discretion. *Peterson v. Johnson*, 755 N.W.2d 758, 761 (Minn. App. 2008). "A district

court's findings of fact will not be set aside unless clearly erroneous, and due regard is given to the district court's opportunity to judge the credibility of witnesses." *Kush*, 683 N.W.2d 843-44. In reviewing whether a district court abused its discretion, we may consider the broader context in which the alleged harassment took place. *See Witchell v. Witchell*, 606 N.W.2d 730, 732 (Minn. App. 2000). Whether the facts found by the district court satisfy the elements of harassment is a question of law that we review de novo. *Peterson*, 755 N.W.2d at 761.

A district court may grant a petition for a HRO if it finds that there are reasonable grounds to believe that a person has engaged in harassment. Minn. Stat. § 609.748, subd. 5(b)(3) (2016). "Harassment" includes:

a single incident of physical . . . assault, a single incident of stalking . . . or repeated incidents of intrusive or unwanted acts, words, or gestures that have a substantial adverse effect or are intended to have a substantial adverse effect on the safety, security, or privacy of another

Id., subd. 1(a)(1) (2016). To obtain a HRO, the petitioner must prove: (1) "objectively unreasonable conduct or intent on the part of the harasser," and (2) "an objectively reasonable belief on the part of the person subject to harassing conduct." *Dunham v. Roer*, 708 N.W.2d 552, 567 (Minn. App. 2006), *review denied* (Minn. Mar. 28, 2006).

Scheffler first argues that the district court abused its discretion by denying his request for a HRO because the HRO statute has no exception for police officers.

A police officer may use reasonable force "upon or toward the person of another without the other's consent when" effecting a lawful arrest or when the police officer reasonably believes that he is effecting a lawful arrest. Minn. Stat. § 609.06, subd. 1(1)(a).

At the hearing, Officer McDonough presented a defense that he did not assault Scheffler, but instead used reasonable force in his duties as a police officer.

The broader context in which the alleged harassment took place involves an impaired individual approaching an on-duty police officer investigating a disturbance call and asking him why he was there. *See Witchell*, 606 N.W.2d at 732. Scheffler startled Officer McDonough who was in his patrol car responding to a disturbance call. Officer McDonough did not know if Scheffler was involved in the disturbance call or if he had a weapon. Officer McDonough asked Scheffler what he was doing and for identification. When Scheffler refused to answer, Officer McDonough told him to leave the area. When Scheffler indicated that he was not going to leave or provide identification, Officer McDonough decided to handcuff Scheffler for his safety because Scheffler appeared to be intoxicated, was belligerent, and was possibly experiencing a mental-health issue. After Scheffler resisted the officers' efforts to handcuff him, he was arrested for obstructing legal process. The district court did not err in concluding that Scheffler failed to show that Officer McDonough was acting outside his capacity as a police officer, under Minn. Stat. § 609.06.

Scheffler next argues that the district court erred as a matter of law in denying the petition because the charges against him were dismissed and expunged with “no underlying judicial finding of probable cause.” Scheffler claims that the expungement “clear[ed] the slate as though the underlying offense never occurred,” in which case, Officer McDonough was not effecting a lawful arrest and was not authorized to use reasonable force.

First, Scheffler relies on the expungement order. But the language in the expungement order related to probable cause was deleted in an amended expungement order. It was appealed, and this court reversed and remanded because the district court failed to consider certain factors before granting the request to modify the order. It is unclear at this point as to whether the disputed language regarding probable cause will be included in the expungement order.

Additionally, the sequence of events shows that Officer McDonough reasonably believed that he was effecting a lawful arrest. *See* Minn. Stat. § 609.06, subd. 1(1)(a) (stating that a police officer is authorized to use reasonable force when the police officer reasonably believes that he is effecting a lawful arrest).

An officer does not seize an individual when he simply talks to that person standing in a public place. *State v. Vohnoutka*, 292 N.W.2d 756, 757 (Minn. 1980). In some situations, police officers need to ask questions to sort out a situation to determine if anyone should be arrested. *State v. Walsh*, 495 N.W.2d 602, 604-05 (Minn. 1993) (stating that “on-the-scene” questioning, in which an officer is simply trying to sort out a confusing situation, is not an in-custody situation). And briefly handcuffing or placing an individual in the back of a squad car while police sort out a scene and investigate does not per se constitute an arrest. *State v. Munson*, 594 N.W.2d 128, 137 (Minn. 1999); *Walsh*, 495 N.W.2d at 605 (stating that handcuffing, by itself, does not constitute an arrest). The intentional act of resisting handcuffs constitutes obstruction of legal process. Minn. Stat. § 609.50, subd. 1(2) (2016); *see State v. Occhino*, 572 N.W.2d 316, 321 (Minn. App. 1997)

(stating that defendant's intentional physical resistance to lawful police order qualified as obstruction of legal process), *review denied* (Minn. Jan. 28, 1998).

Officer McDonough was investigating a disturbance call when Scheffler approached him and startled him. Officer McDonough did not know if Scheffler was involved in the disturbance or if he had a weapon. Officer McDonough determined it necessary to question Scheffler to sort out the situation. Scheffler refused to tell Officer McDonough why he approached him, show his ID, or leave. Officer McDonough decided to handcuff Scheffler for his safety because Scheffler appeared intoxicated, was belligerent, and was possibly having a mental-health issue. Officer McDonough did not arrest Scheffler when he handcuffed him; Officer McDonough arrested Scheffler after Scheffler resisted the handcuffs, which is obstruction of legal process. *See* Minn. Stat. § 609.50, subd. 1(2).

Moreover, even if Scheffler's arrest was unlawful he had no right to resist because "Minnesota law does not recognize [a] defendant's asserted right to resist an unlawful arrest or search." *State v. Wick*, 331 N.W.2d 769, 771 (Minn. 1983); *State v. Ingram*, 570 N.W.2d 173, 178 (Minn. App. 1997) (stating that "[a] defendant may not resort to self-help to resolve disputes concerning unreasonable . . . seizures"), *review denied* (Minn. Dec. 22, 1997). Therefore, even if the expungement order includes language that there was "no underlying judicial finding of probable cause," Officer McDonough reasonably believed that he was effecting a lawful arrest and was authorized to use reasonable force.

Finally, Scheffler argues that McDonough inflicted a physical assault upon him that merits a HRO. But the statute does not mandate that a district court grant a HRO if it finds that there are reasonable grounds to believe that a person physically assaulted another. *See*

Minn. Stat. § 609.748, subds. 1(a)(1), 5(b)(3). The statutory language is permissive—a district court “may” grant a petition for a HRO if the prerequisites for a HRO are present. *Id.*, subd. 5(b).

Further, the district court found that Scheffler’s injuries may have resulted from his own actions in resisting arrest. Based on the record, the district court’s findings are not clearly erroneous. Therefore, the district court did not abuse its discretion by denying Scheffler’s petition for a HRO because Officer McDonough’s conduct did not go “beyond an acceptable expression of outrage and civilized conduct.” *See Kush*, 683 N.W.2d at 846.

Affirmed.