IN THE SUPREME COURT OF IOWA

STATE OF IOWA, Plaintiff-Appellee, v. STEVEN EDWARD STRUVE, Defendant-Appellant.	)))))))))	S.CT. NO. 19-1614

APPEAL FROM THE IOWA DISTRICT COURT
FOR CLINTON COUNTY
HON. MARLITA A. GREVE (MOTION TO SUPPRESS), HON. STUART WERLING (BENCH TRIAL ON THE MINUTES), & HON. JOHN D. TELLEEN (SENTENCING)

APPELLANT'S BRIEF AND ARGUMENT AND CONDITIONAL REQUEST FOR ORAL ARGUMENT

MARTHA J. LUCEY
State Appellate Defender

VIDHYA K. REDDY
Assistant Appellate Defender
vreddy@spd.state.ia.us
appellatedefender@spd.state.ia.us

STATE APPELLATE DEFENDER'S OFFICE
Fourth Floor Lucas Building
Des Moines, Iowa 50319
(515) 281-8841 / (515) 281-7281 FAX
ATTORNEY'S FOR DEFENDANT-APPELLANT

CERTIFICATE OF SERVICE

On April 27, 2020, the undersigned certifies that a true copy of the foregoing instrument was served upon Defendant-Appellant by placing one copy thereof in the United States mail, proper postage attached, addressed to Steven Struve, No. 1159110, Fort Dodge Correctional Facility, 1550 "L" Street, Fort Dodge, IA 50501-5767.

STATE APPELLATE DEFENDER

/s/ Vidhya K. Reddy

VIDHYA K. REDDY
Assistant Appellate Defender
Appellate Defender Office
Lucas Bldg., 4th Floor
321 E. 12th Street
Des Moines, IA 50319
(515) 281-8841
vreddy@spd.state.ia.us
appellatedefender@spd.state.ia.us

VKR/lr/1/20
VKR/lr/4/20

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STATEMENT OF THE ISSUE PRESENTED FOR REVIEW

Given that Iowa Code § 321.276 (2017) sets forth both permissible and impermissible uses of cell phones while driving, did the officers' mere observation of Struve "manipulating" a cell phone while driving fail to give rise to reasonable suspicion of a § 321.276 violation as necessary to authorize the traffic stop?

Authorities

State v. Countryman, 572 N.W.2d 553, 557 (Iowa 1997)

State v. Turner, 630 N.W.2d 601, 606 (Iowa 2001)

State v. Louwrens, 792 N.W.2d 649, 651 (Iowa 2010)

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Iowa Code § 321.276(1)(a) (2017)

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Iowa Code § 321.276(2)(a) (2017)

Iowa Code § 321.276(3)(b)(3) (2017)

North Dakota v. Morsette, 924 N.W.2d 434, 436 (N.D. 2019)

ROUTING STATEMENT

Struve argues that, because Iowa Code § 321.276 (2017) sets forth both permissible and impermissible uses of cell phones while driving, the mere observation of a driver "manipulating" a cell phone while driving does not give rise to reasonable suspicion of a § 321.276 violation as necessary to authorize a traffic stop. No Iowa appellate decision appears to have yet addressed this question, though caselaw from the North Dakota Supreme Court as well as the Seventh Circuit is supportive of Struve's position. See North Dakota v. Morsette, 924 N.W.2d 434, 436-440 (N.D. 2019); U.S. v. Paniagua-Garcia, 813 F.3d 1013, 1014 (7th Cir. 2016). Because the issue presented involves a substantial question of first impression in Iowa, retention is appropriate. Iowa R. App. P. 6.903(2)(d) and 6.1101(2)(c).

STATEMENT OF THE CASE

Nature of the Case: This is an appeal by Defendant-Appellant Steve Struve from his convictions and sentences following a bench trial on the minutes for: Possession of a

Controlled Substance (Methamphetamine) with Intent to Deliver, a Class C Felony in violation of Iowa Code § 124.401(1)(c)(6) (2017).

Course of Proceedings: On October 11, 2018, the State charged Struve with: Possession of a Controlled Substance (Methamphetamine) with Intent to Deliver, a Class B Felony in violation of Iowa Code § 124.401(1)(b)(7), as subject to a mandatory minimum set forth in § 124.413 (Count 1); and Failure to Affix Iowa Drug Tax Stamp, a Class D felony in violation of Iowa Code §§ 453B.3 and 453B.12, with the habitual offender enhancement provided for under §§ 902.8 and 902.9 (Count 2). (10/11/18 TI) (App. pp. 4-6).

On May 7, 2019, Struve filed a Motion to Suppress all evidence seized herein, arguing that (1) there was no probable cause for the traffic stop of Struve's vehicle, and (2) that the subsequent warrantless search of the vehicle was unauthorized. (5/7/19 Mot.Suppress) (App. p. 7). The State resisted, arguing (1) the traffic stop was supported by probable cause and reasonable suspicion that defendant was utilizing

his cell phone while driving in violation of Iowa Code section 321.276; and (2) that the officers thereafter observed drug paraphernalia in plain view in the back seat of the vehicle, triggering a probable cause search of the vehicle under the automobile exception to the warrant requirement. (6/3/19 Resist. With Attachment) (App. pp. 9-19).

A June 3, 2019 hearing was held on the suppression matter. At that time, the State introduced testimony from the two officers who initiated the traffic stop of Struve's vehicle (Officers Roger Schumacher and Curtis Blake), as well as each officer's body camera video and the squad car video capturing the stop and subsequent interaction with Struve (Exhibits 1-3). (Suppr.Tr.1:1-20, 8:3-17, 19:21-20:5, 27:4-26:7). At the conclusion of the hearing, the court took the matter under advisement. (Suppr.Tr.33:10-11). The court subsequently issued a written ruling concluding "the stop of Defendant's car was lawful" because the officers, who "observed [Defendant] manipulating the screen while driving", "had a reasonable suspicion and belief that Defendant was texting or improperly

operating his cell phone" while driving, in violation of Iowa Code section 321.276. (Suppr.Ruling p.5) (App. p. 24). The court recognized such statute sets forth both permissible and impermissible uses of cell phones while driving. (Suppr.Ruling pp.4-6) (App. pp. 23-25). However, the court concluded the officers here had a reasonable suspicion. Defendant's activity of "moving his thumb back and forth across the lighted cell phone screen was operating the cell phone in an illegal manner", rather than for a permissible purpose, under section 321.276. (Suppr.Ruling p.6) (App. p. 25). The court also agreed with the State that when, after the stop, the officers subsequently viewed illegal drug paraphernalia in plain view in the back seat of the automobile, the officers were authorized in searching the vehicle for drug-related contraband under the automobile exception to the warrant requirement. (Suppr.Ruling p.6) (App. p. 25). The court therefore denied Struve's motion to suppress in its entirety. (Suppr.Ruling p.7) (App. p. 26).

The parties thereafter notified the court of a plea agreement reached, which provided: Struve would plead guilty to Possession of Methamphetamine with Intent to Deliver, a Class C Felony in violation of Iowa Code § 124.401(c), a lesser-included offense on Count I; the State would not pursue the originally charged § 124.411 enhancement on that Count; and the State would dismiss Count 2 at sentencing with costs assessed to Struve. The plea agreement also provided that Struve would further plead guilty to a violation of probation in separately pending case number FECR073310. The plea agreement stated it was open as to the sentencing disposition, with the court not bound by the State's recommendation, though it noted: the State would recommend incarceration with consecutive sentencing, imposition of the minimum fine, surcharges, costs and attorney's fees ("if applicable"); Defendant would seek concurrent sentences or probation; and Defendant would be responsible for restitution resulting from all counts alleged in the trial information. (8/7/19 Calendar Entry of Plea Agreement) (App. p. 28).

On August 12, 2019, the State filed a motion to amend the trial information to a single reduced charge of Possession with Intent to Deliver, a Class C Felony. (8/12/19 Mot. Amend TI, with attachment) (App. p. 29). On the same date, the parties informed the court they wished to proceed in the manner of a bench trial on the minutes (rather than a guilty plea) on the reduced charge, so as to permit Struve to preserve his ability to challenge the earlier suppression ruling on appeal. It was agreed the plea agreement would be considered a nullity, though the trial on the minutes would still be on the reduced Count I charge (with dismissal of the Count II charge). (TrialTr.1:1-4:17); (8/12/19 Amended TI attached to Motion to Amend) (App. p. 29). The court accordingly memorialized the withdrawal of the plea agreement, and accepted the State's amendment to the trial information. (TrialTr.4:7-17); (8/12/19 Order Amending TI; Verdict p.1) (App. pp. 30-32).

The court then accepted Struve's waiver of his jury right, and proceeded to a bench trial on the minutes on the reduced charge. (TrialTr.4:18-6:4, 9:18-10:9, 11:17-23). For purposes

of the trial on the minutes, the State admitted before the court the Minutes and Additional Minutes (with all attachments) filed October 11, 2018 and April 2, 2019. (TrialTr.11:23-12:11). Upon the parties' agreement, the court specified it would file a written verdict without oral pronouncement of the verdict on the trial record. (TrialTr.12:12-21). On the same date, the court entered a written verdict of guilt. (8/12/19 Verdict) (App. pp. 32-35).

Thereafter, the Court dismissed Count 2 of the trial information upon the State's motion. (8/14/19 Mot.Dismiss; 8/14/19 Order Dismissing Ct.2) (App. pp. 36; 37-38).

A sentencing hearing was then held on September 26, 2019. (Sent.Tr.1:1-25). In the present case (FECR076297): the entered judgment against Struve for Possession of Methamphetamine with Intent to Deliver, a Class C Felony in violation of Iowa Code § 124.401(1)(c)(6) (2017); imposed an indeterminate term of incarceration not to exceed 10 years; suspended a $1,000 fine, imposed a $125 LEI surcharge, imposed a $10 DARE surcharge, ordered submission of a DNA

sample for profiling, and found him reasonably able to pay $352.61 in court costs but not able to pay reimbursement for legal assistance fees. (Sent.Tr.7:11-20, 8:9-9:12); (Sent.Order pp.1-3) (App. pp. 39-41). Further, as a result of the finding of guilt in the present case, the court also found Struve violated probation in separately pending case number FECR073310 (Possession with Intent to Deliver Methamphetamine), and imposed the 10-year sentence which had been previously suspended in that case. (Sent.Tr.3:7-25, 7:7-11). Finally, the court directed that the terms of incarceration in the two cases be served consecutively, for a total indeterminate term of incarceration not to exceed 20 years. (Sent.Tr. 6:15-7:6); (Sent.Order p.2) (App. p. 40).

Struve filed a notice of appeal herein on September 26, 2019. (NOA) (App. p. 44).

Facts:

Trial Evidence:

Struve submitted to a trial on a stipulated record consisting of the minutes of testimony and attachments thereto. The minutes set forth the following facts:

City of Clinton police officers Curtis Blake and Roger Schumacher conducted an October 2, 2018 traffic stop of a vehicle driven by and registered to Struve. (10/11/18 Min. p.1, and Attachment p.2) (Conf. App. p. 4, 8). The vehicle also contained a female seated in the front passenger seat. (10/11/18 Min: Attachment p.9) (Conf. App. p. 15).

Upon approaching the vehicle, law enforcement observed in plain view a "bubble" or "bong" device for smoking methamphetamine sticking out of a blue bag in the backseat. (10/11/18 Min: Attachment pp.2, 8-9) (Conf. App. pp. 8, 14-15). Upon making this observation, the officers ordered the occupants out, and searched the vehicle, seizing the smoking device. (10/11/18 Min: Attachment p.2) (Conf. App. p. 8). During the search, Officer Schumacher noticed the factory

screws were missing from the inner tray of the center console located between the driver and passenger seats. Upon lifting up that inner tray, he discovered two digital scales and a baggie of a crystalline substance which subsequent laboratory testing confirmed to be approximately 23 grams of methamphetamine. (10/11/18 Min: Attachment p.8; 4/2/19 Min: attached DCI Drug Chemistry Report) (Conf. App. pp. 14; 34). According to Officer Blake as well as the State's drug expert, the quantity of methamphetamine as well as the discovery of digital scales in close proximity to the drug, indicated the drug was held for distribution or resale rather than for personal use. (10/11/18 Min. p.1: Narrative of Officer Mike Adney; and Attachment p.10) (Conf. App. p. 4; 16).

Inside the blue bag containing the methamphetamine smoking device officers also found an x-box with accessories, as well as a notebook with Struve's email address written on the opened page. Upon inquiry by Officer Schumacher, Struve stated he and the passenger barely knew one another, and

confirmed that he had not given her his email address. Struve had also earlier stated he'd thrown his bag in the backseat (though he'd stated his bag was "camouflage" in color) and that his xbox was in the back as well. (10/11/18 Min: Attachment pp.2, 8-9) (Conf. App. pp. 8, 14-15). Concluding the methamphetamine, scales, and smoking device belonged to Struve, law enforcement arrested him and allowed his passenger to leave with her belongings. (10/11/18 Min: Attachment p.9) (Conf. App. p. 15). At the time of his arrest, Struve was found to have $419 in cash and three cell phones. (10/11/18 Min: Attachment pp.2, 9-10) (Conf. App. pp. 8, 15-16).

Upon submission to a trial on the minutes, the district court found that Struve had knowingly possessed the methamphetamine, and that he had possessed it with the intent to deliver. (Bench Verdict, pp.2-3) (App. pp. 33-34).

Suppression Hearing:

During the pretrial suppression hearing, the State introduced testimony from the two officers who initiated the

traffic stop of Struve's vehicle (Officers Roger Schumacher and Curtis Blake) and also placed in evidence each officer's body camera video as well as the dash cam video from their squad car. (Exhibits 1-3). (Suppr.Tr.1:1-20, 8:3-17, 19:21-20:5, 27:4-26:7). The evidence presented at the suppression hearing set forth the following facts:

Shortly before 9:00 p.m. on October 22, 2018, City of Clinton Police Officers Schumacher and Blake were driving in an unmarked squad vehicle on assignment with the "S.C.A.T.T. team." Officer Schumacher was driving, and Officer Blake was in the passenger seat. (Suppr.Tr.1:23-2:10, 8:23-25, 9:25-10:2, 12:21-13:1, 20:8-25, 21:9, 26:13-18). While the officers were driving on a three-lane portion of Camanche Avenue, they observed ahead of them a vehicle traveling in the same direction in the lane to the right of the squad car, which vehicle contained a driver and passenger. (Suppr.Tr.2:15-3:22).

Officer Schumacher testified that as the squad car began to pass the other vehicle, he observed the driver of the vehicle

(later identified as Struve) "manipulating his cell phone" which was "illuminated" and "was in his hand" as he drove. (Suppr.Tr.2:15-3:22). Officer Schumacher testified he saw the phone was held "in front of" the driver, and the driver "was manipulating it with his hand" "[l]ike with his finger across the screen." (Suppr.Tr.4:1-7, 10:18-11:7). However, Officer Schumacher acknowledged he "could not see what was on the screen", nor could he "tell if [the movement of the driver's finger on the screen] was an up-and-down motion or side-to-side motion… or… a typing motion as if you were texting" or "whether any of those actions were going on." (Suppr.Tr.11:6-15).

Officer Blake similarly testified that, as the squad car began to pass the vehicle, he noticed the vehicle's driver was holding a cell phone up by his face and "was manipulating the screen with his thumb as he was driving." (Suppr.Tr.21:4-22:1, 27:4-14, 27:22-28:3). As to how the phone was being "manipulated", Officer Blake testified he believed "it was in his left hand", the screen was emitting a bright light which was

noticeable as it was dark outside, and the officer could "see his thumb moving back and forth in front of" the screen. (Suppr.Tr.28:10-17). Officer Blake could not say if the movement of the driver's thumb was in "an up-and-down motion, side to side, or both", only that he could see his thumb "moving back and forth." (Suppr.Tr.28:18-23).

Officer Blake testified the fact that the driver was "manipulating the screen" of the cell phone while driving "was the basis of the traffic stop." (Suppr.Tr.21:4-22:1). Both officers acknowledged no other traffic violations or illegal activity was observed. The vehicle apparently had proper license plate and lighting, it was going the appropriate speed, it was not swerving either in its lane nor across the line of traffic, and Struve's insurance was current. (Suppr.Tr.11:16-12:1, 15:18-19, 27:19-21, 28:4-9). Neither officer was familiar with the vehicle from any prior incident. Officer Blake was familiar with Struve from prior contacts, but he was not aware Struve was in the vehicle until making contact with him after the stop. (Suppr.Tr.12:2-13, 27:15-18).

The officers initiated a traffic stop based on a violation of Iowa's "texting while driving" statute (Iowa Code section 321.276). (Suppr.Tr.4:9-19, 21:15-22:1). The vehicle immediately engaged its brakes and pulled over. (Suppr.Tr.4:9-10); (Exhibit 3 at 00:29-00:57). Officer Schumacher made contact with the driver (Struve), while Officer Blake made contact with the female passenger. (Suppr.Tr.4:12-13, 22:2-6, 29:15-30:2). Officer Schumacher testified that Struve "was still manipulating the cell phone in front of his person" at the time the officer made contact with him. (Suppr.Tr.4:11-14). Officer Schumacher "explained to [Struve] that we had stopped him for that reason and that it was illegal to be texting while he was driving down the road." In response, "Struve indicated he did not know it was illegal in Iowa and proceeded to say that he was going through his gallery and showing photographs to his passenger." (Suppr.Tr.4:15-22).

Struve did not seem nervous following the stop, he was cooperative, and nothing about his demeanor appeared out of

the ordinary. (Suppr.Tr.13:4-12). While Struve retrieved his insurance information on his cell phone to show Officer Schumacher, Officer Blake observed from the passenger side what appeared to him to be a methamphetamine pipe in plain view in the back seat, and alerted Officer Schumacher to this observation. (Suppr.Tr.4:24-5:3, 15:12-17, 22:7-12, 30:3-8). Officer Schumacher then looked in the backseat and observed the object which, from his vantage point, looked like the top of a bong. (Suppr.Tr.6:6-12). Struve and his passenger were both directed to exit the vehicle, and the officers conducted a "probable cause search of the vehicle" under the automobile exception to the warrant requirement. (Suppr.Tr.5:7-6:4, 6:13-22, 14:17-17:9, 22:12-15, 23:15-18, 30:9-32:2).

Officer Schumacher searched the front of the vehicle, while Officer Blake searched the back. (Suppr.Tr.6:23-25, 17:10-11, 24:6-8). Officer Blake seized the earlier-observed pipe from the bag in the backseat, and the device was determined to be a meth pipe attached to a bong. (Suppr.Tr.7:15-8:2, 23:25-25:3). When searching the center

console area between the driver and passenger seats, Officer Schumacher noticed the factory screws which would hold the inner compartment in place had all been removed. He lifted up that inner compartment or tray, and discovered underneath two digital scales and a plastic bag containing the methamphetamine that's the basis of the charge herein. (Suppr.Tr.7:1-12, 17:12-18:15, 23:18-24).

Officer Schumacher's body cam video was placed into evidence as Exhibit 1, Officer Blake's body cam video was placed into evidence as Exhibit 2, and the dash cam video from the officers' unmarked squad car was placed into evidence as Exhibit 3. (Suppr.Tr.8:3-17, 25:4-26:7). The dash cam video includes the 30 seconds prior to the officers' engaging their lights to effect the traffic stop, which Officer Blake testified "would include… observations of the defendant using his cell phone while driving." (Suppr.Tr.25:19-26:7). See e.g., (Exhibit 3 at 00:00-00:30) (capturing the 30 seconds before police vehicle initiated its lights); (Exhibit 3 at 00:05-00:10) (capturing driver's manipulation of cell phone).

Struve's cell phone was collected, but to the officers' knowledge the cell phone was never gone through to see whether any texts were sent or received from it just before the 8:52 p.m. traffic stop. (Suppr.Tr.12:14-13:3, 29:2-14).

Following the suppression hearing, the district court issued a written ruling concluding "the stop of Defendant's car was lawful" because the officers, who "observed [Defendant] manipulating the screen while driving", "had a reasonable suspicion and belief that Defendant was texting or improperly operating his cell phone" while driving, in violation of Iowa Code section 321.276. (Suppr.Ruling p.5) (App. p. 24).

Other pertinent facts will be discussed below.

ARGUMENT

Iowa Code § 321.276 (2017) sets forth both permissible and impermissible uses of a cell phone while driving. The mere observation that Struve was "manipulating" his cell phone while driving thus did not give rise to a reasonable suspicion of a § 321.276 violation. As such, the stop of Struve's vehicle was illegal, and the district court erred in declining to suppress the evidence seized therefrom.

A. Preservation of Error: Error was preserved by Struve's pretrial motion to suppress, and the court's ruling denying the same. (5/7/19 Mot.Suppress; Suppr.Ruling) (App. pp. 7; 20-27).

B. Standard of Review: Because a claim that the district court improperly denied a motion to suppress involves an alleged violation of constitutional rights, it is reviewed de novo. State v. Countryman, 572 N.W.2d 553, 557 (Iowa 1997). On de novo review, the appellate court makes an "independent evaluation of the totality of the circumstances as shown by the entire record." State v. Turner, 630 N.W.2d 601, 606 (Iowa 2001). The reviewing court may give deference to the trial court's findings regarding the credibility of the witnesses, but

is not bound by the district court's findings. Id; State v. Louwrens, 792 N.W.2d 649, 651 (Iowa 2010).

C. Discussion: The Fourth and Fourteenth Amendments to the United States Constitution and Article I, Section 8 of the Iowa Constitution protect individuals from unreasonable searches and seizures. State v. Hoskins, 711 N.W.2d 720, 725-26 (Iowa 2006). "When the police stop a car and temporarily detain an individual, the temporary detention is a 'seizure'" which is subject to the requirement of constitutional reasonableness. State v. Predka, 555 N.W.2d 202, 205 (Iowa 1996) (citing Whren v. United States, 517 U.S. 806, 810 (1996)).

Law enforcement may conduct a "Terry stop" of a vehicle for investigatory purposes, if they have "reasonable suspicion, supported by specific and articulable facts, that a criminal act has occurred or is occurring." State v. Kinkhead, 570 N.W.2d 97, 100 (Iowa 1997) (citing Terry v. Ohio, 392 U.S. 1, 21-22 (1968)). Whether reasonable suspicion supported the stop is judged in light of the totality of circumstances confronting the

officer at the time the decision to stop was made. Id. The burden is on the State to show by a preponderance of the evidence that the stopping officer at that time "had specific and articulable facts, which taken together with rational inferences from those facts, to reasonably believe criminal activity may have occurred." State v. Tague, 676 N.W.2d 197, 204 (Iowa 2004). Mere suspicion, curiosity, or hunch of criminal activity is not enough. Id.; State v. Kreps, 650 N.W.2d 636, 641 (Iowa 2002).

In the present case, the State argued and the district court concluded that the stop of Struve's vehicle was supported by reasonable suspicion that Struve was operating a cell phone while driving, in violation of Iowa Code section 321.276 (2017). This was based on the officers' observations of Struve "manipulating" his cell phone with his thumb moving back and forth across its lit screen, prior to the officers' initiation of the traffic stop. (6/3/19 Resist. ¶¶2, 6; Suppr.Ruling pp.2, 4-6) (App. pp. 9, 11; 21, 23-25). See also

(Suppr.Tr.2:15-18, 3:6-4:10, 10:18-11:15, 21:4-22:1, 27:4-14, 27:22-28:3, 28:10-23); (Exhibit 3 at 00:05-00:10).

But Iowa Code section 321.276 is not a "hands-free" law, as has been adopted in some states. U.S. v. Paniagua-Garcia, 813 F.3d 1013, 1015 (7th Cir. 2016). That is, the Iowa statute does not prohibit *all* manipulation of a cell phone while driving – it prohibits only manipulation of the phone *for certain purposes*. See Iowa Code § 321.276 (2017). As the officers herein could point to no "specific and articulable facts" observed prior to the initiation of the stop which would support a reasonable belief the phone was being used for a prohibited (rather than a non-prohibited) purpose under section 321.276, they lacked reasonable suspicion for the stop. See e.g., State v. Tague, 676 N.W.2d 197, 204-206 (Iowa 2004) (finding absence of articulable facts supporting reasonable suspicion of either traffic violation or of intoxicated/fatigued driver).

Under our Iowa statute, "Electronic message" includes any "images visible on the screen" of a "mobile telephone" or

other "hand-held electronic communication device". Iowa Code §§ 321.276(1)(a), (c) (2017). The statute generally provides that "A person shall not use a hand-held electronic communication device to write, send, or view an electronic message while driving a motor vehicle…." Iowa Code § 321.276(2) (2017). However, the statute also makes explicit that not all writing, sending, or viewing of electronic messages while driving is prohibited. For example, it is permissible under the statute to input an address for navigation, to input a telephone number or name for a phone call, to "activate[], deactivate[], or initiate[] a function" on a cell phone for the purpose of engaging in a call or for purposes of using a voice-operated or hands-free feature, or even to "receiv[e] safety-related information including emergency, traffic, or weather alerts" while driving. See Iowa Code §§ 321.276(1)(c), (2)(a), (3)(b)(3).

It appears no Iowa appellate case has yet spoken on the question of when reasonable suspicion of a section 321.276 violation may be said to exist, given the fact that the statute

provides for both permissible and prohibited use or manipulation of cell phones while driving. However, both the North Dakota Supreme Court and the Seventh Circuit have addressed the matter in a manner supportive of Struve's position.

In North Dakota v. Morsette, 924 N.W.2d 434, 436 (N.D. 2019), an officer had observed a driver manipulating his cell phone by tapping the illuminated screen of the phone approximately ten times. The North Dakota Supreme Court found such facts failed to give rise to reasonable suspicion of a violation of that state's statute prohibiting texting while driving, as necessary to initiate a traffic stop on the vehicle. Id. at 438–39. Like Iowa's statute, North Dakota's "statute provides several proscribed phone-related activities as well as several permitted phone-related activities" and "[b]oth the proscribed and permitted activities appear to encompass actions that may require finger-to-phone tapping…." Id. at 438. "…[F]or example, the proscribed activity of composing an electronic message could involve finger-to-phone tapping"

but so too "the permitted activity of entering a telephone number could involve finger-to-phone tapping." Id. The North Dakota Supreme Court concluded that "[a]lthough [the officer] testified to observing the screen's illumination and finger-to-phone tapping, there is absent a link between those observations and an objectively reasonable basis to suspect a violation" and he was therefore "unable to articulate why his suspicion was reasonable." Id. at 440.

A similar result was arrived at by the Seventh Circuit in U.S. v. Paniagua-Garcia, 813 F.3d 1013 (7th Cir. 2016) (also relied upon by the North Dakota Supreme Court in Morsette). The officer in that case, while passing a car, "saw that the driver was holding a cellphone in his right hand, that his head was bent toward the phone, and that he 'appeared to be texting.'" Paniagua-Garcia, 813 F.3d at 1014. The Seventh Circuit found the circumstances observed by the officer did not give rise to a reasonable suspicion of a violation of the Indiana-texting while driving statute where the officer never "explained what created the appearance of texting as distinct

from any one of the multiple other – lawful – uses of a cellphone by a driver." Id. The Seventh Circuit noted:

> Almost all the lawful uses we've listed would create the same appearance — cellphone held in hand, head of driver bending toward it because the text on a cellphone's screen is very small and therefore difficult to read from a distance, a finger or fingers touching an app on the cellphone's screen. No *fact* perceptible to a police officer glancing into a moving car and observing the driver using a cellphone would enable the officer to determine whether it was a permitted or a forbidden use.

Id. (emphasis in original; citation omitted).

A similar result must be reached in the present case. Iowa's texting while driving statute provides for both permissible and prohibited use or manipulation of cell phones while driving. Iowa Code § 321.276 (2017). The officers herein admitted they could not see what was on Struve's phone screen, could not say the movement of Struve's finger on the screen was indicative of texting (rather than some other activity), and could not tell what Struve was accessing on the phone prior to initiating the traffic stop. (Suppr.Tr.11:6-15, 28:16-23). The officers merely observed Struve "manipulating"

his cell phone while driving[1], but could point to no articulable fact to support an objectively reasonable belief Struve was using/manipulating the phone *for a prohibited purpose* rather than for a purpose lawful under the statute. See Morsette, 924 N.W.2d at 438-440; Paniagua-Garcia, 813 F.3d at 1014. See also Tague, 676 N.W.2d at 204-206 (finding absence of articulable facts supporting reasonable suspicion of either traffic violation or of intoxicated/fatigued driver). Because the officers lacked reasonable suspicion to stop Struve's vehicle, all evidence seized during the stop (including the various contraband) should have been suppressed. Tague, 676 N.W.2d at 206. The district court thus erred in denying Struve's motion to suppress.

D. Conclusion: Defendant-Appellant Struve respectfully requests this Court to reverse his conviction, and remand for suppression of all evidence flowing from the stop.

[1] See (Suppr.Tr.2:15-18, 3:6-4:10, 10:18-11:15, 21:4-22:1, 27:4-14, 27:22-28:3, 28:10-23); (Exhibit 3 at 00:05-00:10).

CONDITIONAL REQUEST FOR ORAL ARGUMENT

Counsel requests to be heard in oral argument, if argument may be of assistance to this Court.

ATTORNEY'S COST CERTIFICATE

The undersigned, hereby certifies that the true cost of producing the necessary copies of the foregoing Brief and Argument was $3.29, and that amount has been paid in full by the Office of the Appellate Defender.

CERTIFICATE OF COMPLIANCE WITH TYPEFACE REQUIREMENTS AND TYPE-VOLUME LIMITATION

This brief complies with the typeface requirements and type-volume limitation of Iowa Rs. App. P. 6.903(1)(d) and 6.903(1)(f)(1) because:

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/s/ Vidhya K. Reddy Dated: *4/27/20*

VIDHYA K. REDDY
Assistant Appellate Defender
Appellate Defender Office
Lucas Bldg., 4th Floor
321 E. 12th Street
Des Moines, IA 50319
(515) 281-8841
vreddy@spd.state.ia.us
appellatedefender@spd.state.ia.us