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 REPLY BRIEF AND ARGUMENT

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CERTIFICATE OF SERVICE

On April 28, 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.

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Given that Iowa Code § 321.276 (2017) sets forth both permissible and impermissible uses of cell phones while driving, did the officers' 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

Iowa Code § 321.276 (2017)

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

U.S. v. Paniagua-Garcia, 813 F.3d 1013, 1013-14 (7th Cir. 2016)

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State v. Tague, 676 N.W.2d 197, 205 (Iowa 2004)

STATEMENT OF THE CASE

COMES NOW the defendant-appellant, pursuant to Iowa R. App. P. 6.903(4), and hereby submits the following argument in reply to the State's brief filed on or about March 24, 2020. While the defendant's brief adequately addresses the issues presented for review, a short reply is necessary to address certain contentions raised by the State.

ARGUMENT

Given that § 321.276 (2017) sets forth both permissible and impermissible uses of cell phones while driving, the observation that Struve was "manipulating" his cell phone while driving did not give rise to reasonable suspicion of a § 321.276 violation, as necessary to authorize the traffic stop.

The crucial feature shared in common between the Iowa statute and those involved in the North Dakota and Seventh Circuit cases cited by Struve is that, under each such statute, certain hands-on manipulations of the device while driving are allowed while other hands-on manipulations of the device are prohibited - in contrast with *hands-free statutes* prohibiting *any* hands-on manipulation of the device while driving. See

Iowa Code § 321.276; North Dakota v. Morsette, 924 N.W.2d 434, 436 (N.D. 2019); U.S. v. Paniagua-Garcia, 813 F.3d 1013, 1013-14 (7th Cir. 2016). As recognized by both Morsette and Paniagua-Garcia, where a statute provides for both permissible and impermissible hands-on manipulations of the device while driving, reasonable suspicion requires not only an objectively reasonable basis for believing the driver is manipulating the device while driving, but also an objectively reasonable basis for believing the driver's manipulation of the device is for a *purpose proscribed* rather than permitted under the statute. Morsette, 924 N.W.2d at 436-440; Paniagua-Garcia, 813 F.3d at 1014.

The Oregon Court of Appeals cases cited by the State are factually distinguishable and should be deemed analytically unpersuasive of the State's position. See (State's Br.26). The Oregon statute involved in those cases prohibited *any and all* communication (whether by text *or voice*) via an electronic communication device while driving. In State v. Rabanales-Ramos, 359 P.3d 250, 253-56 (Or. Ct. App. 2015), the stop

was found invalid in that the officers couldn't say from their observations (a) that the device at issue was even a *communication device* (e.g., a cell phone or other device capable of communication, as distinct from a GPS-only or music-only device that can't be used for voice or text communication), much less (b) that the driver was actively "using" that device *to communicate* with someone at the time.

In State v. Nguyen Ngoc Pham, 433 P.3d 745, 747 (Or. Ct. App. 2018), on the other hand, the officer (a) *was* able to clearly observe that the device wielded by the driver was a *cell phone* (as distinct from some electronic device incapable of communication). The question in Pham thus came down to whether the circumstances observed by the officers provided an adequate basis for the officers to conclude the cell phone (b) was being used *for communication* (either by text or voice). The Pham majority concluded there was, and upheld the stop. In doing so, it noted the officers *not only (1)* observed the driver looking at the phone and pressing buttons while driving (potentially analogous to Struve's 'manipulation' of the phone

by tapping or swiping herein), *but also (2)* observed that "[o]nce defendant realized that police officers were driving in a car next to his, defendant immediately put his phone down, [suggesting] that defendant believed that his use of his cell phone was unlawful". Pham, 433 P.3d at 747. It was under this *totality of the circumstances* (including defendant's furtive movements suggesting consciousness of guilt) that the majority concluded it was "reasonable for the officers to infer… defendant was unlawfully 'using [his phone] to receive and transmit voice or text communication'" in violation of the Oregon statute. Id.

Not only is (1) this latter factor of the driver's furtive behavior (suggestive of knowingly unlawful use) notably absent in Struve's case, but also (2) the hands-on use of cell phones *to place phone calls* (a very common use to which such devices are put, and one which commonly involves punching buttons on the phone) was *prohibited* under the Oregon statute but is *permitted* under the Iowa statute.

Even under the differing facts and law involved in Pham, however, the better position is that expressed by the dissenting judge, who would have concluded that (even with the driver's furtive movements) a mere observation of the driver "pushing… buttons on a lit-up screen" would not suggest "he was [engaging in the prohibited conduct of] talking or texting… rather than engaging in any of the other very common cell-phone activities" which (though possibly unwise) were not prohibited by the Oregon statute. Pham, 433 P.3d at 748 (Shorr, J., dissenting).

The State emphasizes the potential danger of distracted driving posed by the use of electronic devices while driving. See (State's Br.17-18, 25-26). But it is nevertheless quite clear the Iowa Statute does not prohibit all use of electronic devices while driving. Under the current iteration of the statute, the legislature has apparently decided that any potential risk of distracted driving is outweighed by the benefit (to safety and/or convenience for daily functioning) of allowing drivers to engage in hands-on operation of certain cell phone

functions while driving – including GPS navigation, phone calls, and safety or weather related alerts:

- The statute specifies that a driver does not violate the provision "by using a global positioning system or navigation system". Iowa Code § 321.276(2)(a) (2017). And the statute's authorized uses of GPS or navigation systems appears not to be limited, extending to any "use[]" of such systems – such as inputting addresses, scrolling back and forth on navigation maps, zooming in or out on such maps, or reading (not just listening to) listed turn by turn directions.
- The statute also specifies that a driver does not violate the provision where "the person selects or enters a telephone number or name" into their cell phone to engage in a phone call. Iowa Code § 321.276(2)(a) (2017). The statutorily "permitted activity of entering a telephone number" would certainly "involve finger-to-phone tapping" or manipulation as observed by the officers. Morsette, 924 N.W.2d at 438. The State

suggests that, because Struve never placed the phone up to his ear, the officers were warranted in concluding his manipulation of the phone was not for the lawful purpose of placing a phone call. But the observed facts do not support such an inference. Rather, the observed conduct would be wholly consistent with (a) a person dialing a phone number and then engaging the cell phone's speakerphone function to communicate during the call, or (b) a person dialing a phone number but then either not hitting the "call" button or hitting the "end" button when the officers initiated the stop of the vehicle.

- The statute also specifies a driver does not violate the statute where he or she is "receiving safety-related information including emergency, traffic, or weather alerts." Iowa Code § 321.276(2)(b)(3) (2017). The State argues no traffic or weather-related issues are apparent on the video. But even assuming the State is correct that "traffic was sparse and the weather was

clear" (State's Br.20) at the precise location visible on the video, that certainly wouldn't mean there were not: traffic alerts concerning other roadways in the immediate vicinity, weather alerts owing to anticipated changes in weather conditions, or traffic or weather alerts along the larger route the vehicle would be traveling. The State, which has the burden of establishing facts supportive of reasonable suspicion, failed to solicit any officer testimony indicating traffic or weather alerts were unlikely.

Proper and lawful use of a cell phone in connection with the above statutorily authorized purposes would include a driver's conduct of: using the type pad to manually input an address for GPS or navigation, scrolling forward or back on a GPS mapped route (as one might do to get a sense of how far they are from the next turn, view the cross-streets or intersections preceding an upcoming turn, or view potential traffic/construction/weather slow-down alerts depicted on the GPS mapped route), resizing a GPS map up or down (to zoom

in on a portion of the map or to zoom out for a view of the entire planned route), scrolling up or down to read through listed turn by turn directions, and using the type pad to manually type in a telephone number or name to place a phone call. And these lawful uses of cell phones while driving would involve the driver's holding an illuminated cell phone screen in front of one's face as well as the act of tapping, swiping, or otherwise manipulating the screen – the conduct observed by the officers here. See e.g., See Morsette, 924 N.W.2d at 438-440; Paniagua-Garcia, 813 F.3d at 1014.

The State appears to suggest the mere observation of a driver manipulating a cell phone while driving would give rise to reasonable suspicion. See (State's Br.12). But the mere use of a cell phone while driving is *not unlawful* in Iowa. Iowa Code § 321.276 (2017). The State is correct that absolute certainty is not required under the reasonable suspicion standard. See (State's Br.13). But neither does the mere possibility that a person could be engaging in illegal activity suffice. While less demanding than a probable cause

standard, the reasonable suspicion standard is neither toothless nor satisfied by bare suspicion or law enforcement's hunch. See e.g., State v. Salcedo, 935 N.W.2d 572, 579 (Iowa 2019) (No reasonable suspicion of criminal activity beyond traffic stop where: vehicle was out-of-state rental, car rental agreement had been signed by non-present third party, the vehicle contained lots of luggage and three cell phones but only two passengers, and officer believed motorist's travel plans seemed odd in that he'd flown to California but was driving back). Officers must both have an *articulable* basis for their suspicion of criminal activity, and that articulable basis must be objectively *reasonable.* Id.; State v. Heminover, 619 N.W.2d 353, 361 (Iowa 2000) (abrogated on other grounds by State v. Turner, 630 N.W.2d 601, 606 n. 2 (Iowa 2001)). It is not enough for the State here to reason that officers observed cell phone use by a driver, and that *some* cell phone use is unlawful. Because the Iowa Statute prohibits some uses of cell phones by drivers but authorizes others, there must be reasonable suspicion not only of the driver's *cell phone use* but

of the driver's *unlawful* cell phone use. That is, the State must point to a reasonable articulable basis for concluding the driver's manipulation or use of the cell phone in the present case was for a purpose prohibited (rather than allowed) by § 321.276.

The State appears to point to two facts in support of its claim of reasonable suspicion the phone was being used for a purpose violative of the statute – the purported duration of the phone's manipulation by Struve, and the purported bouncing around of the vehicle in its lane. Neither of these purported facts are supported by the factual record and, even if they were, neither supports a finding of reasonable suspicion.

The State seeks to argue that reasonable suspicion for a violation of the statute was supported by the observation of Struve's vehicle "bouncing" within its own lane, which the State argues was suggestive of "distracted driving". (State's Br.18). First, as a factual matter, Struve disputes that the officers observed any "bouncing" of a nature that would support a reasonable suspicion of distracted or dangerous

driving. No such finding was made by the district court. See (Suppr.Ruling) (App.20-27). And even if such a finding had been made, it would not bind this Court's de novo review of the record. Salcedo, 935 N.W.2d at 579. Officer Blake testified the vehicle was "bouncing back and forth within its own lane", but that it was "maintaining his lane", and that any such bouncing was "[n]ot, necessarily, any type of violation…." (Suppr.Tr.30:6-9). Officer Schumacher, on the other hand, did not reference any such bouncing by the vehicle at all, and to the contrary testified the vehicle "was not swerving" either "in its lane" nor "across the line of traffic." (Suppr.Tr.13:20-22). The video itself doesn't demonstrate any significant bouncing around of the vehicle, or concern in the manner of the vehicle's travel. See (Exhibit 3 at 00:00-00:30) (capturing the 30 seconds before police vehicle initiated its lights).

Even Officer Blake's testimony concerning minor bouncing of the vehicle back and forth within its own lane, however, would not give rise to a reasonable suspicion of either distracted driving nor of a violation of § 321.276. See

e.g., State v. Tague, 676 N.W.2d 197, 205 (Iowa 2004) (concluding that momentarily crossing the edge line or failing to follow perfect vector along the roadway does not give rise to reasonable suspicion of intoxication or fatigue).

And indeed, even if the record could support a finding of 'bouncing' to a degree that might indicate the driver was somewhat distracted – such fact still would not give rise to a reasonable suspicion of a § 321.276 violation. That Statute does not prohibit distracted driving – it prohibits only certain uses of cell phones by drivers, while authorizing certain other uses of cell phones while driving. See Iowa Code § 321.276 (2017); See also Rabanales-Ramos, 359 P.3d at 255-56 (noting Oregon statute did not "prohibit *all* distractions" while driving but only "a specific type of distraction… – talking and texting on a mobile communication device.") (emphasis in original). Even the statutorily permissible uses of cell phones while driving authorized under § 321.276 could result in a driver's temporary distraction – a split in the driver's attention between the road and his or her cell phone. See e.g., Tague,

676 N.W.2d at 205 ("Drivers talking on their cell phone, looking at a map, adjusting the radio, adjusting the heater, defroster or air conditioner, or checking on a child restrained in the back seat can lead a driver to momentarily cross an edge line, without giving rise to a reasonable suspicion of intoxication or fatigue."). But our legislature has determined that, despite the potential for distraction, the permissible uses set forth in the statute should be allowed. Thus a minor degree of distraction, as is inherent in the act of driving (safely) while accessing some function on one's cell phone, does not give rise to a reasonable suspicion to believe such cell phone use is in violation of the Iowa statute setting forth both permitted and prohibited uses of cell phones while driving.

The State also appears to point to the duration of the observed conduct to support a reasonable suspicion of a § 321.276 violation – namely the claim that Struve "held a lit phone in front of his face for at least 10 seconds while he moved his thumb across the screen." (State's Br.16, 20, 29). First, if the State suggests Struve was observed actively

tapping or swiping the phone screen for 10 seconds, Struve notes the record would not support such a conclusion. The officers indicated the lit phone was held up in front of the driver's face for 10 seconds, but did not testify the tapping or swiping of his finger on the screen had itself lasted for 10 seconds. (Suppr.Tr.21:6-24, 25:19-26:7, 27:4-30:23). And the squad video appears to indicate Struve's tapping or swiping of the screen lasted about 5 seconds, not 10. 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).

However, even assuming a 10-second duration of Struve's tapping or swiping on the phone screen, this duration still would not establish a reasonable articulable basis to believe the cell phone use was for a purpose prohibited rather than allowed under the statute. In particular, the process of using GPS or Navigation functions on the phone (including entering an address, scrolling forward or back on a mapped route, zooming in and out on a mapped route, and/or reading

through displayed turn by turn directions), or the process of entering in a telephone number (especially if the number was being entered from memory or while being recited or read off by a passenger, or if the driver was exercising care to enter the number while also safely maintaining an eye on the road) could well explain a 10-second duration of observed tapping or swiping on the phone. See e.g. Paniagua-Garcia, 813 F.3d at 1014 ("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.").

The State appears to suggest that a comparison of the scope of cell phone use prohibited with that permitted under § 321.276 gives rise to an inference that *any* driver observed to be using his or her cell phone while driving is engaging in a prohibited rather than permissible use, so as to authorize an investigative stop of that person. (State's Br.27-29). But such unlawfulness of the use cannot assumed, given the statute's

authorization of common and widespread uses to which cell phones are routinely put while driving – including for GPS driving directions or navigation, placing calls, and accessing traffic or safety alerts. Iowa Code § 321.276 (2017). Compare Rabanales-Ramos, 359 P.3d at 250 (Oregon statute prohibiting not only hands-on texting, but also hands-on *calling*). The State's position might be somewhat stronger if the only permissible purposes for which cell phones could be used under the statute were uncommon or niche uses. But that is not the case under the Iowa statute.

The officers here could point to no articulable fact which would support an objectively reasonable belief that the driver's cell phone use was in violation of § 321.276, rather than a use consistent with that statute. The officers did not observe what was on the screen, couldn't tell from the movement of the driver's thumb over the screen what functions he was performing, didn't hear anything (as through an open window) indicating the use the phone was being put to, did not know the driver to have a history of improper cell phone use while

driving, gave no indication of their historical success in distinguishing unlawful from lawful cell phone use under similar circumstances, and gave no indication even of information indicating that most drivers' cell phone use in Iowa is for a prohibited rather than a permissible purpose. (Suppr.Tr.2:15-4:19, 8:23-12:13, 13:4-10, 15:9-19, 21:4-22:1, 25:19-28:23). Under these circumstances, the officers certainly had reasonable suspicion of *cell phone use* but not of *unlawful* cell phone use in violation of Iowa Code § 321.276. See Morsette, 924 N.W.2d at 438-440; Paniagua-Garcia, 813 F.3d at 1014. The vehicle stop was unlawful, and all evidence seized from the stop should have been suppressed.

CONCLUSION

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

ATTORNEY'S COST CERTIFICATE

I, the undersigned, hereby certify that the true cost of producing the necessary copies of the foregoing Reply Brief and Argument was $ 0 , and that amount has been paid in full by the State Appellate Defender.

VIDHYA K. REDDY
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CERTIFICATE OF COMPLIANCE WITH TYPE-VOLUME LIMITATIONS, TYPEFACE REQUIREMENTS AND TYPE-STYLE REQUIREMENTS

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: *4/28/20*

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