

20180076

IN THE SUPREME COURT
STATE OF NORTH DAKOTA

FILED
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CLERK OF SUPREME COURT

JUL 23 2018

Supreme Court No. 20180076
Burleigh County No. 08-2017-CR-03227

STATE OF NORTH DAKOTA

State of North Dakota,)
)
Plaintiff and Appellee,)
)
vs.)
)
Travis James Morsette,)
)
Defendant and Appellant.)

APPEAL FROM ORDER DENYING APPELLANT'S MOTION TO
SUPPRESS ENTERED ON FEBRUARY 15, 2018.

SOUTH CENTRAL JUDICIAL DISTRICT

HONORABLE JAMES HILL, PRESIDING

**BRIEF OF APPELLEE
STATE OF NORTH DAKOTA**

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ISSUE PRESENTED FOR REVIEW

[¶ 1] Whether Officer Bratsch had reasonable and articulable suspicion to stop Travis Morsette's vehicle.

STATEMENT OF THE CASE

[¶ 2] This case comes to this Court from an appeal brought after the district court denied Travis Morsette's Motion to Suppress on February 7, 2018. Appellant's Appendix at page 13 (hereinafter "App. 13"). Morsette appeals the district court's order denying his Motion to Suppress. App. 18.

[¶ 3] On October 11, 2017, Morsette was charged with Possession of Heroin (Class A Misdemeanor) and Possession of Paraphernalia (Class A Misdemeanor). App. 1-2. On December 7, 2017, Morsette filed a Motion to Suppress, alleging that Officer Bratsch of the Bismarck Police Department did not have reasonable and articulable suspicion to stop his vehicle. App. 4-8. On December 19, 2017, the State filed its Response to Defendant's Motion to Suppress, arguing that Officer Bratsch had reasonable and articulable suspicion to stop Morsette's vehicle. App. 9-12. On January 29, 2018, the district court held a motion hearing in which it denied Morsette's Motion to Suppress. App. 2. On February 7, 2018, the Court entered its Order Denying Morsette's Motion to Suppress. App. 2. On February 15, 2018, Morsette conditional plead guilty to the offenses. App. 2. On February 26, 2018, Morsette filed a Notice of Appeal. App. 2.

STATEMENT OF THE FACTS

[¶ 4] On September 8, 2017, at approximately 10:57 p.m., Officer Jacob Bratsch of the Bismarck Police Department was on patrol near the 600 block of South Washington Street in Bismarck, North Dakota. Transcript at page 5-6 (hereinafter Tr. at 5-6). Bratsch pulled up to a red traffic light and observed a vehicle in the right lane immediately next to his vehicle. Tr. at 5, 10. The vehicle was a smaller car, so Bratsch was able to look down into the vehicle. Tr. at 5-6. When Bratsch looked into the vehicle, he observed Travis Morsette manipulating his touchscreen cell phone for approximately two second. Tr. at 6,

8. During those two seconds, Bratsch observed Morsette tap approximately ten times on the screen of the cell phone. Tr. at 6. Bratsch could not observe if a message was open or if anything was being downloaded, but did notice light coming off of Morsette's phone. Tr. at 6, 14.

[¶ 5] After Bratsch observed Morsette manipulating his cell phone, Bratsch initiated a traffic stop. Tr. at 8. Bratsch did not notice any other traffic violations before initiating the traffic stop which occurred immediately after his observations. Tr. at 8-9. During the traffic stop, Bratsch had a conversation with Morsette. Tr. at 13. Morsette claimed to be changing the music on his phone. Tr. at 13. Bratsch stated that he did not believe that Morsette was changing his music. Tr. at 14. Following an investigation, Morsette was subsequently arrested for possession of heroin and possession of heroin paraphernalia. Tr. at 8.

[¶ 6] During the suppression hearing, Bratsch testified that he was familiar with the law regarding the use of cell phones when operating a motor vehicle. Tr. at 12-13. Specifically, Bratsch testified that "basically any access of the internet, whether it be sending or receiving data" is prohibited. Tr. at 12. Further, Bratsch agreed that sending and receiving text messages, emails, and/or instant messages is prohibited. Tr. at 13. Bratsch also acknowledged there are legal ways to use a cell phone while driving, such as making phone call and changing music on the radio. Tr. at 12-13.

LAW AND ARGUMENT

I. Standard of review

[¶ 7] The North Dakota Supreme Court reviews a district court’s decision on a motion to suppress as follows:

In reviewing a district court’s decision on a motion to suppress evidence, we defer to the district court’s findings of fact and resolve conflicts in testimony in favor of affirmance. We will affirm a district court’s decision on a motion to suppress if there is sufficient competent evidence fairly capable of supporting the trial court’s findings, and the decision is not contrary to the manifest weight of evidence. Our standard of review recognized the important of the district court’s opportunity to observe the witnesses and assess their credibility. Questions of law are fully reviewable on appeal, and whether a finding of fact meets a legal standard is a question of law.

State v. Hawkins, 2017 ND 172, ¶ 6, 898 N.W.2d 446 (internal citation and quotation omitted).

II. Officer Bratsch had reasonable and articulable suspicion to stop Morsette’s vehicle.

[¶ 8] The Fourth Amendment of the United States Constitution and Article I, Section 8 of the North Dakota Constitution protect “[t]he right of the people to be secure in their persons, houses, papers and effects, against unreasonable searches and seizures.” U.S. Const. am. IV; N.D. Const. art. I, § 8. “Investigatory traffic stops are valid when the officer conducting the stop has a reasonable and articulable suspicion the motorist has violated or is violating the law.” State v. Wolfer, 2010 ND 63, ¶ 6, 780 N.W.2d 650 (internal citation and quotation omitted).

[¶ 9] Whether an officer has reasonable and articulable suspicion is evaluated under an objective standard, taking into account the totality of the circumstances. Id. “The severity of the observed legal violation is not relevant, and even common and minor violations

constitute prohibited conduct which provide officers with requisite suspicion for conducting investigatory stops.” Id. (internal citation and quotation omitted).

Furthermore, “[w]hether the driver actually committed a traffic violation does not change whether the officer had reasonable suspicion necessary to justify a traffic stop.” State v. Hirschhorn, 2016 ND 117, ¶ 14, 881 N.W.2d 244. An officer’s objectively reasonable mistake, whether a mistake of fact or law, can provide the reasonable suspicion necessary to justify a traffic stop.” Id. (citing Heien v. North Carolina, 135 S.Ct. 530 (2014)).

[¶ 10] The relevant portions of N.D.C.C. § 39-08-23, use of a wireless communications device prohibited, states:

1. The operator of a motor vehicle that is part of traffic may not use a wireless communications device to compose, read, or send an electronic message.
2. Under this section:
 - a. “Electronic message” means a self-contained piece of digital communication that is designed or intended to be transmitted between physical devices. The term includes electronic mail, a text message, an instant message, a command or request to access a worldwide web page, or other data that uses a commonly recognized electronic communications protocol. The term does not include:
 - (1) Reading, selecting, or entering a telephone number, an extension number, or voice mail retrieval codes and commands into an electronic device for the purpose of initiating or receiving a telephone or cellular phone call or using voice commands to initiate or receive a telephone or cellular phone call;
 - (2) Inputting, selecting, or reading information on a global positioning system device or other navigation system device;
 - (3) Using a device capable of performing multiple functions, such as fleet management systems, dispatching devices, phones, citizen band radios, music players, or similar devices, for a purpose that is not otherwise prohibited;
 - (4) Voice or other data transmitted as a result of making a telephone or cellular phone call;
 - (5) Data transmitted automatically by a wireless communication device without direct initiation by an individual; or
 - (6) A wireless communications device used in a voice-activated, voice-operated, or any other hands-free manner.

N.D.C.C. § 39-08-23.

[¶ 11] This Court has not addressed stopping motorists for cell phone use; however, the standard of analysis for traffic stops remain the same: whether a law enforcement officer has reasonable and articulable suspicion that the motorist has committed a traffic offense. Wolfer, 2010 ND 63, ¶ 6.

[¶ 12] In this case, Bratsch had reasonable and articulable suspicion to stop Morsette's vehicle. Bratsch pulled up to a red light and observed Morsette, the driver of the vehicle, in the lane immediately next to his vehicle manipulating his phone. Bratsch's vehicle was higher than Morsette's vehicle, so Bratsch was able to look at a downward angle and view Morsette manipulating his phone. Morsette was observed manipulating his touchscreen cell phone for approximately two seconds. During this time, Morsette was observed to tap the screen of his phone approximately ten times. Bratsch correspondingly observed that there was light coming off of Morsette's phone. Bratsch, however, was not able to see for what purpose(s) Morsette was using his phone. After seeing Morsette's manipulation of his phone, Bratsch has reasonable and articulable suspicion that Morsette violation N.D.C.C. § 39-08-23.

[¶ 13] Morsette asks this Court to accept the reasoning of the 7th Circuit in United States v. Paniagua-Garcia, to determine this issue. 813 F.3d 1013 (7th Cir. 2016). In Paniagua-Garcia, the officer "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." Id. at 1014 (internal citation omitted). In that case, the officer "never explained what created the appearance of texting as distinct from any one of multiple other – lawful – uses of a cellphone by a driver[.]" Id. That Court held that "[t]he government failed to establish that the officer

had probable cause or a reasonable suspicion that Paniagua was violating the no-texting law.” Id. Further, “[t]he officer hadn’t seen any texting; what he had seen was consistent with any one of a number of lawful uses of cellphones.” Id.

[¶ 14] The Paniagua-Garcia case is distinguishable from this case because the no-texting law in that case is substantially different than the controlling law in North Dakota.

Indiana Code 9-21-8-59, texting while driving; confiscation, states:

- (a) A person may not use a telecommunication device to:
 - (1) type a text message or an electronic mail message;
 - (2) transmit a text message or an electronic mail message; or
 - (3) read a text message or an electronic mail message;while operating a moving vehicle unless the device is used in conjunction with hands free or voice operated technology, or unless the device is used to call 911 to report a bona fide emergency.

Ind. Code § 9-21-8-59.

[¶ 15] Indiana’s law specifically singles out text messages and electronic mail messages as the only prohibited uses of a cell phone while driving. Alternatively, in North Dakota, our statute states a cell phone may not be used for multiple purposes including: electronic mail, text messages, instant messages, commands or requests to access a worldwide web page, or other data that uses a commonly recognized electronic communications protocol. N.D.C.C. § 39-08-23. North Dakota’s statute goes on to specifically state acceptable uses for cell phones while driving including using global positioning systems, making phone calls, and changing music. N.D.C.C. § 39-08-23. In North Dakota, the few specifically allowed uses for cell phones while driving are outweighed by the numerous impermissible uses for cell phones; the exact opposite of Indiana’s regulation of cell phone usage.

[¶ 16] Additionally, in Paniagua-Garcia, the officer only saw the driver was holding a cellphone in his right hand, his head was bent toward the phone, and he appeared to be texting. 813 F.3d 1013, 2014 (7th Cir. 2016). That Court held that the government failed to establish that the officer had reasonable suspicion that the defendant was violating the “no-texting law.” Id. However, in this case, Bratsch observed more than the officer did in Paniagua-Garcia. Bratsch observed Morsette manipulating his cell phone by tapping on the screen approximately ten times within two seconds and saw light coming from the cell phone. Because of Bratsch’s specific observations and North Dakota’s specific statute, Bratsch had reasonable and articulable suspicion to stop Morsette’s vehicle.

[¶ 17] Other courts have also addressed similar issues and have found that there is reasonable and articulable suspicion to stop a motorist. See People v. Corrales, 213 Cal. App. Ct. 4th 696. In Corrales, the officers observed the defendant pull into traffic, looking down a few times as he was using his cell phone, and making movements with his hands as if he was texting. Id. at 700. The Court held that the “defendant was engaged in conduct an experienced police officer could reasonably believe involved texting while driving, a violation of Vehicle Code section 23123.5, subdivision (a).” Id. (referencing Cal. Veh. Code § 23123.5).

[¶ 18] Lastly, Morsette puts a major focus on the fact Bratsch’s actions cannot be excused as a mistake of fact or law. The State believes Morsette’s focus is misplaced. The State’s citing of State v. Hirschorn, was for the proposition that if Morsette testified that he was using his phone for a lawful reason, that it would not dispel the reasonable and articulable suspicion that Bratsch had to conduct the traffic stop. 2016 ND 117, 881 N.W.2d 244. The district court understood this argument by stating that “if it’s later

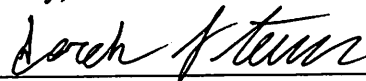
determined that it wasn't, I think that the statute still provides that as long as it was reasonable and articulable to stop at that point, a mistake of law or fact is not going to vitiate the reasonable and articulable suspicion that he had at that time." Tr. at 29-30. Therefore, because Bratsch only needed a reasonable and articulable suspicion that Morsette committed an offense to stop Morsette's vehicle, whether or not an offense actually occurred is irrelevant to the determination of the issue in this case.

CONCLUSION

[¶ 19] Overall, Bratsch had reasonable and articulable suspicion to stop Morsette's vehicle. Bratsch observed Morsette manipulating the screen on his phone for approximately two seconds. During this time, Morsette tapped on the screen of this phone approximately ten times. Bratsch also observed light coming off of Morsette's phone. For the above reasons, Bratsch had reasonable and articulable suspicion to stop Morsette's vehicle for violating N.D.C.C. § 39-08-23. Therefore, the State respectfully requests that this Court affirm the district court's order.

RESPECTFULLY SUBMITTED:

Dated this 23rd day of July, 2018.



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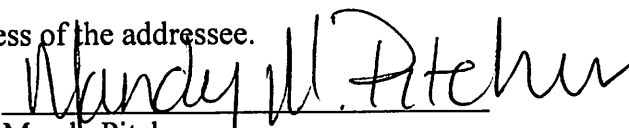
I, Mandy Pitcher, being first duly sworn, depose and say that I am a Legal Resident over 21 years old, and on the 23 day of July, 2018, I deposited in a sealed envelope a true copy of the attached:

1. Brief of Plaintiff-Appellee
2. Affidavit of Mailing

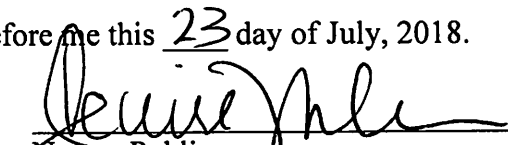
in the United States mail at Bismarck, North Dakota, postage prepaid, addressed to:

Christopher Redmann
Attorney at Law
Redmann Law, P.C.
400 E. Broadway Ave., Ste. 410
P.O. Box 7097
Bismarck, ND 58507

which address is the last known address of the addressee.


Mandy Pitcher

Subscribed and sworn to before me this 23 day of July, 2018.


Notary Public
Burleigh County, North Dakota

