CRIMINAL LAW—SEARCH AND SEIZURE: DETERMINING PROBABLE CAUSE RELATING TO "HANDS-FREE" LAWS

State v. Morsette, 2019 ND 84, 924 N.W.2d 434

ABSTRACT

In *State v. Morsette*, the North Dakota Supreme Court *held* observing a driver looking at a phone and tapping its illuminated screen does not give law enforcement officers a reasonable suspicion to initiate a traffic stop. An officer observed Morsette using his cell phone while driving and saw him touch the phone's screen ten times in approximately two seconds. After stopping Morsette, who claimed he was only changing the music on the radio, the officer investigated the vehicle and arrested Morsette on drug possession charges. Morsette filed a motion to suppress, arguing that his stop was not based on reasonable suspicion and thus violated his Fourth Amendment protection against unlawful search and seizure. The district court denied Morsette's motion to suppress the evidence resulting from his allegedly unreasonable traffic stop. Morsette then entered a conditional plea agreement. On appeal, the North Dakota Supreme Court reversed, finding that under section 39-08-23 of the North Dakota Century Code, determining whether a driver is engaged in a prohibited activity rather than a permitted activity is arguably uneasily discernable at a distance. While it is possible drivers are using their devices in a prohibited manner, the court reasoned it is just as likely, if not more likely, that their use is allowed under the statute. Therefore, law enforcement officers must have more than a "mere hunch" the driver is violating the law. Officers may be required to witness a message being sent, or a download occurring. In addition, the court *held* that if an officer is unable to articulate *why* they believed a driver's conduct violated the statute, such mistake of fact is not reasonable. The officer must rely on factual evidence in initiating a stop, even if that evidence results in a mistake of fact. The court's holding in *Morsette* increases the level of culpable activity an officer must observe before effectuating a traffic stop, thus making section 39-08-23 difficult to enforce. This precedent is critical in protecting law abiding motorists and preventing broad and unnecessary traffic stops for the mere possibility of an infraction. An officer must observe a specific prohibited activity like transmitting a message or accessing a web page.

I. FACTS

Officer Jacob Bratsch of the Bismarck Police Department was on patrol on September 8, 2017, when he pulled up to a red light.[1] While waiting for the light to turn green, Bratsch noticed the driver next to him was on his cell phone.[2] Bratsch observed the driver of the car tapping the illuminated screen of his phone, touching it ten times in approximately two seconds.[3] Bratsch could not determine if the driver had a message open or if he was downloading anything.[4] Based on this activity, however, Bratsch pulled the vehicle over for a violation of North Dakota Century Code section 39-08-23, which prohibits the use of wireless communications devices for composing, reading, or sending electronic messages while driving.[5]

1. Brief of Appellant at ¶ 4, State v. Morsette, 2019 ND 84, 924 N.W.2d 434 (No. 20180076).
2. *Id.*
3. *Id.*
4. *Id.*
5. *Id.*; N.D. CENT. CODE § 39-08-23 (2019).

The driver of the car, Travis Morsette, explained to Bratsch he was only changing the music on his car's radio and denied having used his phone for texting, as the officer suspected.[6] Bratsch, unconvinced by Morsette, continued the stop and investigated Morsette's vehicle.[7] The investigation of the vehicle revealed heroin and drug paraphernalia.[8] Morsette was arrested for possession of heroin and possession of heroin paraphernalia.[9]

Before trial, Morsette moved to suppress the evidence discovered as a result of his traffic stop.[10] Morsette argued that because the arresting officer lacked reasonable suspicion to pull him over, the resulting evidence was inadmissible.[11] Bratsch testified he knew the law prohibited "basically any access of the internet, whether it be sending or receiving data."[12] Bratsch stated that the cell phone violation was the only reason for the traffic stop.[13] The district court found Bratsch had a reasonable and articulable suspicion to stop Morsette's vehicle and denied the motion to suppress.[14] Morsette conditionally pled guilty and appealed the district court's decision to the North Dakota Supreme Court.[15] The North Dakota Supreme Court reversed the district court's decision and remanded to allow Morsette to withdraw his guilty plea.[16]

II. LEGAL BACKGROUND

A. NORTH DAKOTA CENTURY CODE SECTION 39-08-23 PROHIBITING ELECTRONIC MESSAGING

The North Dakota Legislature initially adopted North Dakota Century Code Section 39-08-23 after the 2011 Legislative Assembly.[17] The statute states "[t]he operator of a motor vehicle that is part of traffic may not use a wireless communications device to compose, read, or send an electronic

6. Brief of Appellee at ¶ 5, State v. Morsette, 2019 ND 84, 924 N.W.2d 434 (No. 20180076).
7. *Id*.
8. *Id*.
9. *Id*.
10. State v. Morsette, 2019 ND 84, ¶ 3, 924 N.W.2d 434.
11. *Id*.
12. Brief of Appellee at ¶ 6, State v. Morsette, 2019 ND 84, 924 N.W.2d 434 (No. 20180076).
13. *Id*. at ¶ 5; *see also* Brief of Appellant at ¶ 4, State v. Morsette, 2019 ND 84, 924 N.W.2d 434 (No. 20180076).
14. *Morsette*, 2019 ND 84, ¶ 3, 924 N.W.2d 434.
15. *Id*. at ¶ 4.
16. *Id*. at ¶ 19.
17. H.B. 1195, 62nd Legis. Assemb., Reg. Sess. (N.D. 2011); N.D. CENT. CODE § 39-08-23 (2019).

message."[18] The statute specifies an electronic message includes electronic mail, text messages, instant messages, and web pages.[19] However, the term "electronic message" 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;
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> (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.[20]

Section 39-08-23 illustrates that the permitted uses for a device while driving far exceed the enumerated prohibited uses. The implications of such language use are further evidenced by the 2017 attempt of legislators to repeal and replace the language of section 39-08-23.[21] Rather than limiting the prohibited uses as the current statute does, legislators introduced a bill during the 2017 Legislative Assembly to amend section 39-08-23.[22] In its place, the proposed language prohibited "distracted driving," defined as "activity that requires the use of the operator's sight unless that activity involves using the whole motor vehicle or a built-in accessory."[23] Under this language, only four uses of a device were permitted while driving.[24] An operator could legally use:

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18. N.D. CENT. CODE § 39-08-23(1) (2019).
19. *Id.*
20. *Id.*
21. H.B. 1430, 65th Leg. Assemb., Reg. Sess. (N.D. 2017).
22. *Id.*
23. *Id.*
24. *Id.*

1. An electronic device that transmits data automatically and does not require direct initiation by the operator;

2. A voice-operated device;

3. A navigational system; or

4. An electronic device to obtain emergency assistance; report a crime; or report a traffic offense, hazard, or accident.[25]

These offered amendments were not supported by the Transportation Committee and were subsequently removed from the bill.[26] Section 39-08-23 remained relatively unchanged.

B. REASONABLE AND ARTICULABLE SUSPICION STANDARD

The standard used in *Morsette* was one of a reasonable and articulable suspicion.[27] The North Dakota Supreme Court cited several cases describing what constitutes a reasonable and articulable suspicion on the part of a law enforcement officer.[28] The standard requires an officer have "more than a mere hunch,"[29] but it is a less strict standard than probable cause.[30] The court evaluates the totality of the circumstances in determining whether the standard has been met for a reasonable and articulable suspicion.[31] Ultimately, it must be found that "a reasonable person in the officer's position would have been justified in stopping the vehicle because of some objective manifestation to suspect potential criminal activity."[32] An "objective standard of reasonable suspicion is not contingent upon an officer's actual motivation for stopping a vehicle."[33] This objective standard test continues into how the court reviews mistake on the part of the officer.

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25. *Id*.

26. N.D. CENT. CODE. § 39-08-23 (2019).

27. State v. Morsette, 2019 ND 84, ¶ 6, 924 N.W.2d 434.

28. *Id*. (citing State v. Wolfer, 2010 ND 63, ¶ 6, 780 N.W.2d 650; State v. James, 2016 ND 68, ¶ 7, 876 N.W.2d 720; U.S. v. Arvizu, 534 U.S. 266, 273 (2002)).

29. *Id*. (citing Gabel v. N.D. Dep't of Transp., 2006 ND 178, ¶ 20, 720 N.W.2d 433).

30. *Id*.

31. *Id*.

32. *Id*.; *see also* State v. Rahier, 2014 ND 153, ¶ 13, 849 N.W.2d 212 ("In assessing the reasonableness of an officer's traffic stop to investigate, this Court takes into account the inferences and deductions that an officer would make. An officer's inferences and deductions, drawn from experience and training, are considered when determining whether the circumstances create a reasonable suspicion of potential criminal activity.") (internal quotations and citations omitted).

33. State v. Hirschkorn, 2016 ND 117, ¶ 13, 881 N.W.2d 244.

C. MISTAKE OF LAW AND FACT UNDER *HEIEN*

Under the standard set forth in *Heien v. North Carolina*,[34] an objectively reasonable mistake on the part of an officer can provide the reasonable suspicion necessary to justify a traffic stop.[35] This standard allows searches and seizures to be permissible even in the event of a factual mistake or a mistake of law.[36] The standard in *Heien* follows the premise that the "Fourth Amendment requires government officials to act reasonably, not perfectly. . . ."[37]

In *Heien*, a sheriff stopped a vehicle after noticing that it had a faulty brake light.[38] Based on the behavior of the driver and his passenger, the officer requested consent to search the vehicle, and both men consented.[39] After searching the car, officers discovered a bag of cocaine and arrested Heien.[40]

North Carolina law, however, does not make it illegal to drive with only one working brake light.[41] Heien argued that because his vehicle was not in violation of the law, the officer's justification for the stop was unreasonable and violated his Fourth Amendment right to be free from unreasonable searches and seizures.[42]

The Supreme Court of the United States, in upholding Heien's conviction, noted that reasonable suspicion is "a particularized and objective basis for suspecting the particular person stopped" has broken the law.[43] Mistakes of fact had long been found reasonable for the purpose of searches and seizures.[44] The court held that mistakes of law should not be treated differently, stating, "[r]easonable suspicion arises from the combination of an officer's understanding of the facts and his understanding of the relevant law."[45] If it is reasonable for an officer to suspect a person's action is illegal, the court reasoned, there is no constitutional violation even if it turns out the officer was mistaken.[46] However, the mistake must be reasonable under an objective standard, not a subjective one.[47] The court "do[es] not examine the subjective

34. 574 U.S. 54 (2014).
35. *Heien*, 574 U.S. 54, 68 (2014).
36. *Id.*
37. *Id.* at 54.
38. *Id.* at 57.
39. *Id.* at 58.
40. *Id.*
41. *Id.* at 58-59.
42. *Id.* at 58.
43. *Id.* at 60.
44. *Id.* at 61.
45. *Id.*
46. *Id.*
47. *Id.* at 66.

understanding of the particular officer involved."[48] Thus, evidence such as "an incorrect memo or training program from the police department" or whether an officer is unaware of or untrained in the law is not considered by the court.[49]

III. COURT'S ANALYSIS

A. THE MAJORITY OPINION

The North Dakota Supreme Court, holding 4-1 in favor of the defendant, reasoned in *Morsette* that more than a "mere hunch" of illegal activity is necessary for law enforcement to conduct a traffic stop under section 39-08-23 of the North Dakota Century Code.[50] An officer must be able to connect what he observed to why he thought a violation had taken place.[51] The case, which was one of first impression under section 39-08-23, required the North Dakota Supreme Court to look to other states' interpretations of similar statutes to come to a decision.[52]

1. Perception of a Violation

First, the court found that an officer's perception of a violation must be both reasonable and articulable.[53] The court uses an objective standard to determine whether a reasonable person in the officer's position would believe an activity violates the law.[54] While an officer does not need to "see a motorist violating a traffic law" or rule out any possible legal behavior, there must be an objective manifestation to suspect criminal activity.[55]

The court performed an in-depth dissection of how several states interpreted the reasonable suspicion standard.[56] These included cell phone statutes from Indiana and California, as well as window tint statutes from North Dakota, California, and New Jersey.[57] In analyzing these cases, the court looked at activity that provided an officer with "a reasonable likelihood of unlawful conduct."[58] In Indiana, for example, reasonable suspicion did not exist unless

48. *Id*. at 66.
49. *Id*. at 69 (Kagan, J., concurring).
50. State v. Morsette, 2019 ND 84, ¶ 6, 924 N.W.2d 434.
51. *Id*. at ¶ 16.
52. *Id*. at ¶¶ 9-15.
53. *Id*. at ¶ 16.
54. *Heien*, 574 U.S. at 60; *see also Morsette*, 2019 ND 84, ¶ 6, 924 N.W.2d 434.
55. *Morsette*, 2019 ND 84, ¶ 6, 924 N.W.2d 434.
56. *Id*. at ¶¶ 9-15.
57. *Id*. at ¶¶ 9-12, 14-15.
58. *Id*. at ¶ 14.

a "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" the use was permitted or prohibited.[59] Similarly, the North Dakota Supreme Court previously found that reasonable suspicion existed where, "on the basis of his training and experience," an officer perceived window tint in excess of the allowable limit.[60] Other states held similarly in instances where tinting "prevent[ed] the officer from seeing the occupants of the front seats" or obstructed the driver's vision.[61]

In interpreting the California Court of Appeals' decision in *People v. Corrales*,[62] the North Dakota Supreme Court distinguished Morsette's situation because the officer had not observed Morsette actually texting, unlike in *Corrales*.[63] In *People v. Corrales*,[64] an officer who observed a driver texting behind the wheel prior to conducting a traffic stop was found to meet an objective reasonable suspicion standard.[65] Officer Bratsch testified he did not observe Morsette's use of the phone aside from seeing him touch an illuminated screen.[66] The officer in *Corrales*, on the other hand, had observed the defendant texting on the side of the road before he pulled into traffic and continued looking down "as though he was still using his cellular phone."[67] This gave the officer reasonable suspicion that Corrales was still texting in violation of the law.[68]

In *Morsette*, Officer Bratsch testified that, while he observed Morsette touching his phone ten times in approximately two seconds, he was unable to see the screen of Morsette's phone.[69] The officer testified that he knew what constituted a violation, but could not testify that he actually saw behavior in violation of section 39-08-23, such as texting or web surfing.[70] Unlike the court's previous holding, where based on his training and experience the officer "observed that [the defendant's] vehicle appeared to have excessive

59. *Id.* at ¶ 9 (quoting United States v. Paniagua-Garcia, 813 F.3d 1013, 1014 (7th Cir. 2016)) (emphasis omitted).

60. *Id.* at ¶ 14 (citing State v. $127,930 United States Currency, 2017 ND 282, ¶ 9, 904 N.W.2d 307).

61. *Id.* at ¶ 15 (quoting People v. Hanes, 72 Cal. Rptr. 2d 212, 214 (Cal. App. Dep't Super. Ct. 1997); State v. Cohen, 790 A.2d 202, 205 (N.J. Super. Ct. App. Div. 2002)).

62. 152 Cal. Rptr. 3d 667 (Cal. Ct. App. 2013).

63. *Morsette*, 2019 ND 84, ¶ 12, 924 N.W.2d 434.

64. 152 Cal. Rptr. 3d 667 (Cal. Ct. App. 2013).

65. *Id.* at 670.

66. *Morsette*, 2019 ND 84, ¶ 16, 924 N.W.2d 434.

67. *Id.* at ¶ 12 (citing People v. Corrales, 152 Cal. Rptr. 3d 667, 670 (Cal. Ct. App. 2013)).

68. *Id.*

69. *Id.* at ¶ 16.

70. *Id.*

tint when he drove next to it,"[71] Officer Bratsch did not testify about his success rate at identifying cell phone violations or his training on those violations.[72] The court held that without a link between what Bratsch saw and why he suspected those observations were of illegal activity, the reasonable and articulable suspicion standard had not been met.[73]

2. *Mistaken Belief by an Officer*

The court found even if a traffic violation has not occurred, a court may find reasonable suspicion if the officer's mistake of fact or law was reasonable.[74] An officer's mistake is objectively reasonable if a reasonable person would conclude that a traffic stop was justified.[75] A mistake may be found to be reasonable "[w]hether the facts turn out to be not what was thought, or the law turns out to be not what was thought."[76]

The North Dakota Supreme Court explained why mistake on the part of an officer could provide the "reasonable suspicion necessary to justify a traffic stop."[77] The Fourth Amendment tolerates objectively "reasonable mistakes," therefore an officer could still be found to have reasonable suspicion even though his understanding of the law or the facts was incorrect.[78] The court cited to *Heien v. North Carolina*, a United States Supreme Court case, which held that "an officer's objectively reasonable mistake of fact or law may provide the reasonable suspicion necessary to justify a traffic stop. . . ."[79] Accordingly, even if Officer Bratsch's understanding of the facts was incorrect at the time of the traffic stop, he could still be found to have had reasonable suspicion to conduct the traffic stop if his mistake was an objectively reasonable one.[80]

Based on the officer's testimony, the North Dakota Supreme Court concluded that Officer Bratsch knew what activity constituted a violation of section 39-08-23.[81] Because of this, there could be no mistake of law.[82] Bratsch also did not provide any testimony describing what specific activity made

71. State v. $127,930 United States Currency, 2017 ND 282, ¶ 9, 904 N.W.2d 307, 310.
72. *Morsette*, 2019 ND 84, ¶ 16, 924 N.W.2d 434.
73. *Id.*
74. *Id.* at ¶ 17.
75. Heien v. North Carolina, 574 U.S. 54, 60-61 (2014).
76. *Id.* at 61.
77. *Morsette*, 2019 ND 84, ¶ 17, 924 N.W.2d 434.
78. *Id.*
79. *Id.* (citing Heien v. North Carolina, 135 S.Ct. 530, 536 (2014)).
80. *See id.*
81. *Id.* at ¶ 18.
82. *Id.*

him suspect Morsette was in violation, besides his observations of screen tapping.[83] Without articulating why the officer believed the observed conduct was against the law, there could be no mistake of fact.[84] The court concluded that such broad suspicion "would permit law enforcement to stop a substantial portion of the lawfully driving public. . . ."[85] This could potentially lead to excessive enforcement of the statute, and the court found that Bratsch's mistake was not reasonable.[86]

B. THE DISSENTING OPINION

Chief Justice VandeWalle was the lone dissent in *Morsette*.[87] He reasoned assuming arguendo a driver was using a cell phone for a permitted purpose, that mistake should not negate an officer's reasonable suspicion of a prohibited purpose.[88] His dissent argued that it is just as probable, under section 39-08-23, that a phone is being used for a prohibited use as it is a permitted use.[89] Because it is nearly impossible for officers to spot the exact usage of a device from distance, as they are likely to be required to do on duty, Chief Justice VandeWalle stated the court should look to how a reasonable suspicion standard is less stringent than probable cause.[90] Under a reasonable suspicion standard, he argued, it is reasonable to expect that officers are suspicious of all cell phone usage while driving.[91] Without some latitude for investigation, the majority opinion "substantially reduces, if not eliminates, the effective enforcement of the statute."[92]

IV. IMPACT OF DECISION

A. IMMEDIATE EFFECT ON NORTH DAKOTA DRIVERS

The immediate impact on North Dakota drivers is the apparent unenforceability of section 39-08-23.[93] After the court's decision in *Morsette*, an officer must actually observe a driver using their phone for a prohibited

83. *Id*. at ¶ 16, 18.
84. *Id*. at ¶ 18.
85. *Id*.
86. *Id*.
87. *Id*. at ¶ 21 (VandeWalle, C.J., dissenting).
88. *Id*.
89. *Id*.
90. *Id*. at ¶¶ 21-22.
91. *Id*. at ¶ 21.
92. *Id*. at ¶ 22.
93. N.D. CENT. CODE § 39-08-23 (2019); *see also Morsette*, 2019 ND 84, ¶ 22, 924 N.W.2d 434 (VandeWalle, C.J., dissenting).

purpose, as well as articulate what about the activity led them to conclude it was prohibited rather than permitted.[94] Under this new standard, an officer must testify to seeing an illegal activity on the screen of a driver's phone.[95] Officers must observe activity such as a message being sent, or a web page being visited.[96] Alternatively, an officer must observe phone use that gives an objectively reasonable suspicion of a violation.[97] It is difficult to observe this type of activity, especially at a distance.[98] Observing device usage by drivers in a manner like Morsette—that is, tapping an illuminated phone several times in a short period of time—will no longer constitute reasonable suspicion to effectuate a traffic stop.[99] Officers may be more hesitant to perform traffic stops over phone usage, unless it is very clear that the driver was sending or receiving electronic messages in violation of the law.[100]

B. LONG TERM OUTLOOK

Following the North Dakota Supreme Court's decision in *Morsette*, a legislative change appears necessary for section 39-08-23 to remain enforceable. If a statutory change does follow *Morsette*, it is possible North Dakota will take a stricter stance on what cell phone usage is permitted while driving a vehicle. Other states, including some in the Midwest like South Dakota, Minnesota, and Indiana, have made attempts to explicitly forbid nearly all use of cell phones while driving, allowing only a limited number of permissible uses.[101] North Dakota will likely look to incorporate similar statutory changes to enhance the enforceability of section 39-08-23.

Other states with statutes outlining a limited number of forbidden uses, like North Dakota's statute, have attempted to rewrite their language to encompass more offenses.[102] For instance, the North Dakota Supreme Court references an Indiana statute which prohibits typing, transmitting, or reading

94. *Morsette*, 2019 ND 84, ¶ 16, 924 N.W.2d 434 (majority opinion).

95. *Id*.

96. *Id*. at ¶ 10.

97. *Id*. at ¶ 16.

98. *Id*. at ¶ 9 (citing United States v. Paniagua-Garcia, 813 F.3d 1013, 1014 (7th Cir. 2016)).

99. *See id*. at ¶ 18.

100. *Id*.

101. *See* CAL. VEH. CODE § 23123.5 (West 2018); MINN. STAT. § 169.475 (2019); H.B. 1340, 121st Gen. Assemb, 2d Reg. Sess. (Ind. 2019); H.B. 1088, 94th Leg. Assemb., Reg. Sess. (S.D. 2019). Although Montana does not have a statewide ban on cell phone use while driving, several municipalities have enacted ordinances prohibiting such activity. *See Montana Cities, Counties and Reservations with Bans on the Use of Handheld Cell Phones While Driving*, MONT. DEP'T OF TRANSP., (Nov. 2019), https://www.mdt.mt.gov/visionzero/docs/CELL-PHONE-BAN-MAP.PDF.

102. *See* CAL. VEH. CODE § 23123.5 (West 2018); MINN. STAT. § 169.475 (2019); H.B. 1340, 121st Gen. Assemb, 2d Reg. Sess. (Ind. 2019); H.B. 1088, 94th Leg. Assemb., Reg. Sess. (S.D. 2019).

a text or electronic mail message while operating a moving motor vehicle.[103] Like the North Dakota statute, the Indiana statute prohibits a narrow scope of activity. In 2019, however, the Indiana Legislature introduced a bill to revise Indiana Code section 9-21-8-59 to proscribe "hold[ing] or handl[ing] an electronic communications device or view[ing], record[ing], or broadcast[ing] images or video" while driving.[104] The proposed amendment outlined a small number of allowable uses such as hands-free technology or navigation features of wireless devices.[105] This attempted change would have prohibited nearly all uses of a cellular device while driving, rather than the three uses currently forbidden under Indiana statute.[106]

Similarly, South Dakota's ban only prohibits using a handheld device to "write, send, or read a text-based communication."[107] The statute allows drivers to utilize their phones while parked, making a call, or using hands free operation.[108] This limited prohibition on phone usage has been the subject of criticism from transportation proponents.[109] In fact, the 2019 South Dakota Legislature attempted to amend the statute with language nearly identical to that of Indiana's proposition.[110] Under the proposed amendment, South Dakota would forbid any use of a mobile electronic device while operating a motor vehicle, excluding five exceptions:

> (1) A law enforcement officer, firefighter, emergency medical technician, paramedic, operator of an authorized emergency vehicle, or similarly engaged paid or volunteer public safety first responder during the performance of that person's official duties, and a public utility employee or contractor acting within the scope of that person's employment when responding to a public utility emergency;
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> (2) The use of a mobile electronic device for emergency purposes, including a text messaging device to contact a 911 system, an emergency call to a law enforcement agency, health care provider, fire

103. *Morsette*, 2019 ND 84, ¶ 9, 924 N.W.2d 434 (quoting IND. CODE ANN. § 9-21-8-59 (LexisNexis 2014)).

104. H.B. 1340, 121st Gen. Assemb, 2d Reg. Sess. (Ind. 2019).

105. *Id*.

106. *Compare* H.B. 1340, 121st Gen. Assemb, 2d Reg. Sess. (Ind. 2019) *with* IND. CODE ANN. § 9-21-8-59 (LexisNexis 2014).

107. S.D. CODIFIED LAWS § 32-26-47 (2014).

108. *Id*.

109. Lisa Kaczke, *Ban on Cell Phone Use While Driving in South Dakota Sees Early Support from Lawmakers*, ARGUS LEADER (Feb. 5, 2019, 3:21 PM), https://www.argusleader.com/story/news/2019/02/05/south-dakota-legislature-ban-cell-phone-use-while-driving-sees-early-support-lawmakers/2774347002.

110. H.B. 1088, 94th Leg. Assemb., Reg. Sess. (S.D. 2019).

> department, or other emergency services agency or entity, or to report to appropriate authorities a fire, traffic accident, serious road hazard, or medical or hazardous materials emergency, or to report the operator of another motor vehicle who is driving in a reckless or otherwise unsafe manner or who appears to be driving under the influence of alcohol or drugs, or to report a crime;
>
> (3) The use of a global positioning or navigation system feature of a mobile electronic device, but does apply to manually entering information into the global positioning or navigation system feature of the device;
>
> (4) Reading, selecting, or entering a telephone number or name in a mobile electronic device for the purpose of making or receiving a telephone call or if a person otherwise activates or deactivates a feature or function of a mobile electronic device; or
>
> (5) The use of a mobile electronic device in a voice-operated or hands-free mode if the operator of the motor vehicle does not use his or her hands to operate the device, except to activate or deactivate a feature or function of the device.[111]

This drastic departure from the original language changes the statute from one of few prohibited uses to one of few permissible uses. Although the bill seeking to amend the statute failed to pass , the proposal again shows the direction of midwestern states towards adopting stricter laws to combat the spread of texting and driving.[112]

Minnesota's statute is the strictest of states that border North Dakota.[113] Under Minnesota law, a person operating a vehicle may not use a wireless communications device to:

1. Initiate, compose, send, retrieve, or read an electronic message;
2. Engage in a cellular phone call, including initiating a call, talking or listening, and participating in video calling; and
3. Access the following types of content stored on the device: video content, audio content, images, games, or software applications.[114]

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111. *Id.*

112. *See* H.B. 1340, 121st Gen. Assemb, 2d Reg. Sess. (Ind. 2019); H.B. 1088, 94th Leg. Assemb., Reg. Sess. (S.D. 2019); *see also* Lynell Meeth, *Put the Phone Down! Distracted Driving Laws Get Tougher in the Midwest*, MRA (July 10, 2019), https://www.mranet.org/article/inside-hr/put-phone-down-distracted-driving-laws-get-tougher-midwest.

113. MINN. STAT. § 169.475 (2019).

114. *Id.*

Under this statutory language, nearly all usage of a cell phone is prohibited while driving. Minnesota gives exception only to selected uses, such as those that can be done using voice activation or actions that do not require the driver to hold their phone.[115]

Following *Morsette*, it is plausible that North Dakota lawmakers will follow Minnesota in adopting an amendment to section 39-08-23 that is more specific regarding prohibited behavior. Especially considering that such an amendment was already offered in 2017 but not adopted, legislators will likely look closely at dangerous cell phone use and rewrite the statute to forbid a larger number of uses while driving.[116] Such change will be necessary for law enforcement officers to continue to implement the statutory ban on electronic communications.

V. CONCLUSION

In *State v. Morsette*, the North Dakota Supreme Court held that seeing a driver tap an illuminated phone is not a reasonable and articulable suspicion of a violation of North Dakota law. In making that determination, the court found that under North Dakota Century Code section 39-08-23, an officer must observe more specific, culpable behavior than simply touching a phone's screen. This behavior could include witnessing a driver typing a text message or visiting a web page. The court's decision substantially impacts the enforceability of section 39-08-23 and leads to questions about future legislation regarding prohibited uses of a wireless communications device while driving. As a result, the North Dakota legislature may take action similar to other Midwestern states in creating a stricter statute.

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115. *Id.*

116. H.B. 1430, 65th Legis. Assemb., Reg. Sess. (N.D. 2017).

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