

**IN THE SUPREME COURT FOR THE STATE OF IOWA
NO. 17-1232**

**STATE OF IOWA,
Plaintiff-Appellee**

vs.

**JEREMY M. WERNER,
Defendant-Appellant.**

**APPEAL FROM THE IOWA DISTRICT COURT
FOR IOWA COUNTY,
HONORABLE ANDREW B. CHAPPELL**

DEFENDANT/APPELLANT'S FINAL REPLY BRIEF

Brandon Brown
Gina Messamer
Parrish Kruidenier Dunn
Boles Gribble Gentry
Brown & Bergmann L.L.P.
2910 Grand Avenue
Des Moines, Iowa 50312
Telephone: (515) 284-5737
Facsimile: (515) 284-1704
Email:
bbrown@parrishlaw.com
gmessamer@parrishlaw.com

Peter Riley
Tom Riley Law Firm, P.L.C.
4040 First Avenue NE
P.O. Box 998
Cedar Rapids, Iowa 52406
Telephone: (319) 363-4040
Fax: (319) 363-9789
Email:
peterr@trlf.com

TABLE OF CONTENTS

TABLE OF CONTENTS..... 2

TABLE OF AUTHORITIES 3

ARGUMENT 5

I. The State ignores the IDOT’s illegal policy..... 5

II. “Amendment implies a change” argument is properly before the Court. 7

III. No legislator had anything positive to say about the IDOT’s actions. 8

IV. Mr. Werner’s initial appearance before a magistrate does not undo the IDOT Officer Glade’s illegality. 9

V. The State misconstrues the separation of powers issue..... 10

VI. The State argument regarding Federal Motor Carrier Safety Assistance Program is outside the record and irrelevant. 11

VII. License revocation charge does not justify stop..... 11

VIII. Iowa Code § 313.12 does not justify stop. 12

IX. State doomsday scenarios cannot change the plain language of Iowa Code § 321.477..... 13

CONCLUSION..... 16

CERTIFICATE OF COMPLIANCE AND SERVICE 17

TABLE OF AUTHORITIES

Code Sections

Iowa Code § 80.22	13
Iowa Code § 313.12	12-13
Iowa Code § 321.2	13
Iowa Code § 321.477	passim
Iowa Code § 801.4	13
Iowa Code § 804.9	6
Iowa Code § 804.24	10

Cases

<i>Schonberger v. Roberts</i> , 456 N.W.2d 201, 203 (Iowa 1990)	5-6
<i>Star Equip., Ltd. v. State, Iowa Dep't of Transp.</i> , 843 N.W.2d 446, 455 (Iowa 2014)	12
<i>State v. Kurth</i> , 813 N.W.2d 270, 277 (Iowa 2012).....	13
<i>State v. Manna</i> , 534 N.W.2d 642, 644 (Iowa 1995).....	7
<i>Iowa State Ed. Ass'n-Iowa Higher Ed. Ass'n v. Pub. Employment Relations Bd.</i> , 269 N.W.2d 446, 447 (Iowa 1978).....	8

Other Authorities

2A Sutherland Statutory Construction § 48:1, Extrinsic aids to interpretation (7th ed.)	8
Frederick Schauer, <i>Slippery Slopes</i> , 99 Harv. L. Rev. 361, 381 (1985)	14
Senator Danielson, Iowa Senate public comment on House File 473 at 03:42:25, 03:48:30 (April 4, 2017).....	9

ARGUMENT

I. The State ignores the IDOT's illegal policy.

The crucial fact that the State does not address head on is that the IDOT had an *official policy* authorizing MVE officers to stop vehicles for purposes unrelated to those listed in Iowa Code § 321.477, and that MVE Officer Glade acted pursuant to that policy. The State admits that this policy existed: “Of course, [IDOT] officers have been told they may enforce the traffic laws when they witness offenses.” (State Brief at 40). Yet in its analysis the State ignores the import of the IDOT's policy to circumvent the statutory limitations on its authority.

The State instead hangs its hat on citizen's arrest as a loophole to the statutory restrictions found in Iowa Code § 321.477. The State asks the Court to find that IDOT Officer Glade—a State employee labeled by the IDOT as a “peace officer” and equipped with a uniform, badge, weapon, radar detector, marked vehicle, siren, and flashing overhead lights—was completing a citizen's arrest when he effectuated the IDOT's policy to detain and cite those observed violating speeding laws. An *official law enforcement policy* of citizen's arresting. The absurdity is self-evident. Such absurdity “is a ‘stop’ sign in the judicial interpretation of statutes.” *Schonberger v. Roberts*, 456 N.W.2d 201, 203 (Iowa 1990). “It is indicative

of fallacy somewhere, either in the point of view or in the line of approach. In such case it becomes the duty of the court to seek a different construction, and to presume always that absurdity was not the legislative intent.” *Id.*

This Court should reject the State’s attempt to ignore the rule and focus on the exception. The question for this Court is: was the IDOT official policy to exceed the scope of Iowa Code § 321.477 illegal? And were IDOT Officer Glade’s actions, taken pursuant to that policy, illegal? It is the fact that the IDOT had an *official policy* to systematically exceed the scope of § 321.477 that precludes the citizens’ arrest defense.

Contrary to the State’s assertion, Mr. Werner’s position does not “read [Iowa Code § 804.9] right out of the Code book.” (State Brief at 56). An arrest under § 804.9 remains available to those truly effectuating a citizen’s arrest, while peace officers retain the power to arrest under Iowa Code § 804.7. When a uniformed officer is acting pursuant to an official policy, using the indicia and tools of the State, that officer’s actions should be taken under Iowa Code § 804.7, subject to the officer’s statutory enforcement limitations. This is a simple, commonsense way to give effect to both Iowa Code §§ 804.9 and 804.7—not to mention § 321.477.

II. “Amendment implies a change” argument is properly before the Court.

The State argues Mr. Werner did not “preserve error” on his argument that the recent amendment of Iowa Code § 321.477 supports his interpretation of that statute. (State Brief at 16, 55; *see also* Werner Brief section III(5) (“Recent Amendment of Iowa Code § 321.477 Demonstrates IDOT Officer Glad Lacked Authority”). To begin, this principle of interpretation—“amendment implies a change”—was not available to Mr. Werner at the time he presented his suppression argument to the district court, because § 321.477 was not amended until afterwards. Mr. Werner filed his Motion to Suppress on December 20, 2016; a hearing on the motion was held March 6, 2017; and the district court issued its ruling on the motion on April 27, 2017. The legislature did not amend § 321.477 until after all of this, on May 11, 2017.

But more importantly, Mr. Werner’s “amendment implies a change” argument is not an “issue” that requires preservation. *See State v. Manna*, 534 N.W.2d 642, 644 (Iowa 1995) (“Our preservation rule requires that *issues* must be presented to and passed upon by the district court before they can be raised and decided on appeal.” (emphasis added)). The *issue* in this case is whether the district court properly interpreted Iowa Code § 321.477 and related statutes governing IDOT officers’ law enforcement authority.

The recent amendment of Iowa Code § 321.377 is but a piece of evidence to assist the Court's interpretation of that statute. *See* 2A Sutherland Statutory Construction § 48:1, Extrinsic aids to interpretation (7th ed.) (recognizing "postenactment history, including amendments and any other developments relevant to a statute's operation subsequent to enactment" as an extrinsic "aid to interpretation").

III. No legislator had anything positive to say about the IDOT's actions.

The State complains that the public commentary by members of the Iowa legislature regarding House File 473 is not representative of the legislature as a whole. (State Brief at 62). Tellingly, the State cites no commentary from any member of the legislature supporting its assertion that the IDOT already had the authority the State claims. In fact, no legislator disagreed with the commentary presented in Mr. Werner's brief. This was a one-sided debate, with multiple legislators recognizing that they had been placed in a difficult position by the IDOT's unauthorized actions. It is also worth emphasizing that the statements quoted by Mr. Werner were made on the floor, during public debate. These are not post-hoc comments made by a legislator in response to litigation. *Cf. Iowa State Ed. Ass'n-Iowa Higher Ed. Ass'n v. Pub. Employment Relations Bd.*, 269 N.W.2d 446, 447 (Iowa 1978) (expressing unwillingness to rely on testimony given by legislators during

litigation). Here, watching the commentary reveals that the quotations presented in Mr. Werner's brief were made in the course of amending Iowa Code § 321.477, a process that was triggered by the legislature's discovery that the IDOT had been routinely exceeding the scope of its statutory authority. *See* Senator Danielson, Iowa Senate public comment on House File 473 at 03:42:25 (April 4, 2017).¹ The legislative commentary is consistent, reliable, and representative. Given these circumstances, it makes sense for the Court to consider that commentary in its statutory analysis.

IV. Mr. Werner's initial appearance before a magistrate does not undo IDOT Officer Glade's illegality.

Does the Iowa Code authorize IDOT officers to enforce speed laws? No, but that is precisely what IDOT Officer Glade was doing when he stopped Mr. Werner. Does the Iowa Code require a private citizen who has arrested another to accompany the arrestee before a magistrate? Yes, but IDOT Officer Glade did not do so. The State attempts to whitewash these illegalities by pointing to the booking procedures Mr. Werner underwent. (State Brief at 37).

Those procedures are all well and good, but they are not what the Iowa Code required under the circumstances. The State cannot have it both

¹ Available at <http://www.legis.state.ia.us/dashboard?view=video&chamber=S&clip=s20170404144554820&dt=2017-04-04&offset=2739&bill=HF%20463&status=r>

ways. Either IDOT Officer Glade was acting as state law enforcement, in which case he was operating outside his authority, or he was acting as a private citizen, in which case he needed to comply with Iowa Code § 804.24. The State does not get to rewrite the statute to create a blended rulebook, picking and choosing according to its whims. IDOT Officer Glade's illegalities are not water under the bridge; they cannot be rectified or excused by an initial appearance.

V. The State misconstrues the separation of powers issue.

The State confuses Mr. Werner's separation-of-powers point, contending there can be no separation-of-powers issue because the IDOT and the DPS are both within the executive branch. (State Brief at 43). The separation of powers issue arises because the IDOT, within the executive branch, is overriding restrictions placed upon it by the legislative branch.

This issue was addressed by Senator Danielson during public debate:

I consider the director's actions to be irresponsible given the language of the code. He should have come and asked us for permission to expand the mission of the DOT enforcement officers. He did not do that. He made a unilateral decision. . . . The director should have come to us, had an affirmative conversation, a bill, subcommittees, you name it, both floors, the governor's signature, yes you can expand your mission.

Senator Danielson, Iowa Senate public comment on House File 473 at 03:42:25 (April 4, 2017).²

VI. State argument regarding Federal Motor Carrier Safety Assistance Program is outside the record and irrelevant.

On pages 44 and 45 of its brief, the State alleges facts regarding the Federal Motor Carrier Safety Assistance Program and how that program is operated by DPS. These facts are outside the record, untested, and cannot be considered by the Court in deciding this appeal. The DPS's activities are also irrelevant. The State seems to suggest that the DPS is encroaching on the IDOT's authority, which is far beyond the scope of this case. What matters in this case is the statutory authority granted to the IDOT and whether the IDOT is systemically operating outside that authority.

VII. License revocation charge does not justify stop.

For the first time on page 52 of its brief, the State argues IDOT Officer Glade's stop of Mr. Werner was permissible because Mr. Werner's driver's license had been revoked. (State Brief at 52–53). This justification was not raised before the district court and accordingly is not preserved. On the merits, there is no dispute that IDOT Officer Glade stopped Mr. Werner

² Available at <http://www.legis.state.ia.us/dashboard?view=video&chamber=S&clip=s20170404144554820&dt=2017-04-04&offset=2739&bill=HF%20463&status=r>

for speeding, not due to his license status. (*See* App. 10). This after-the-fact excuse cannot justify IDOT Officer Glade’s initial, illegal stop.

VIII. Iowa Code § 313.12 does not justify stop.

The State weakly suggests that Iowa Code § 313.12 authorized IDOT Officer Glade’s stop of Mr. Werner. Iowa Code § 313.12 states:

The department is expressly charged with the duty of supervision, inspection, and direction of the work of construction of primary roads on behalf of the state, and of supervising the expenditure of all funds paid on account of such work by the state or the county on the primary road system and it shall do and perform all other matters and things necessary to the faithful completion of the work authorized in this section.

Iowa Code § 313.12. The State stops short of affirmatively asserting this statute empowered IDOT Officer Glade’s actions, instead proposing § 313.12 merely “casts severe doubt upon Werner’s notion DOT has absolutely no role in the enforcement of work zone violations.” (State Brief at 20).

The State’s equivocation on this argument makes sense given that the word “enforcement” is noticeably absent from Iowa Code § 313.12. When the legislature wishes to give a department the power to enforce the laws, it knows how to do so. *Cf. Star Equip., Ltd. v. State, Iowa Dep’t of Transp.*, 843 N.W.2d 446, 455 (Iowa 2014) (“If the legislature had intended to limit the remedy of subcontractors of TSBs to the retainage, it could have said

exactly that.”). Iowa Code §§ 80.22, 321.2(2), 321.477 are all useful comparators; each actually speaks to enforcement authority. This is no doubt why the State later attempts to shoehorn IDOT Officer Glade’s actions in under Iowa Code § 313.12 via the community-caretaking exception. (State Brief at 41).

The State did not raise a community-caretaking defense before the district court and it accordingly has not been preserved. Moreover, on the merits, IDOT Officer Glade’s actions do not constitute a “bona fide community caretaking activity.” *State v. Kurth*, 813 N.W.2d 270, 277 (Iowa 2012). The Iowa Supreme Court has recognized three categories of such conduct: “(1) the emergency aid doctrine, (2) the automobile impoundment/inventory doctrine, and (3) the ‘public servant’ exception noted in *Cady*.” *Id.* IDOT Officer Glade’s actions do not fall into any of these categories.

IX. State doomsday scenarios cannot change the plain language of Iowa Code § 321.477.

Lacking statutory support, the State relies heavily on scare tactics. The State leans on this crutch when faced with a difficult argument. How will the State explain away the fact that the definition of peace officer in Iowa Code § 801.4(11)(h) incorporates the limitations in Iowa Code § 321.477? The State won’t bother. Instead, it will make up a hypothetical where a driver

tells an IDOT officer to “Jump in a lake!” (State Brief at 26). What will the State do when faced with the universal disapproval of the Iowa legislature, caught on video and posted online for all to see? Why, imply that restricting the IDOT’s authority will pave the way for child molestation, drive-by playground shootings, and hit-and-runs of little girls stepping off school buses. (State Brief at 64). The State wails and gnashes its teeth, presenting doomsday scenarios bereft of the necessary legal analysis, attempting to distract from the fact that the IDOT has been systematically exceeding its statutory authority for years.

Two can play the slippery-slope game. *See* Frederick Schauer, *Slippery Slopes*, 99 Harv. L. Rev. 361, 381 (1985) (“[I]n virtually every case in which a slippery slope argument is made, the opposing party could with equal formal and linguistic logic also make a slippery slope claim.”). By the State’s logic, any State employee designated a “peace officer” by Iowa Code § 801.4(11) could begin patrolling Iowa roadways and issuing traffic citations under citizen’s arrest authority. Iowa Code § 801.4(11) includes the following within the definition of “peace officers”:

- Parole officers acting pursuant to section 906.2.
- Probation officers acting pursuant to section 602.7202, subsection 4, and section 907.2.

- Special security officers employed by board of regents institutions as set forth in section 262.13.
- Conservation officers as authorized by section 456A.13.
- Employees of an aviation authority designated as “peace officers” by the authority under section 330A.8, subsection 16.

Each of these departments could become a mini State Patrol.

Taking the hypotheticals in another direction, IDOT peace officers and any other peace officers listed in Iowa Code § 801.4(11) could also send employees to college bars to cite individuals for underage drinking. They could patrol the aisles of Wal-Mart to crack down on theft. These non-DPS officers could adopt a policy of enforcing any laws they wished under the guise of the citizen’s arrest statute.

Indeed, these are the hypotheticals that troubled the legislature when it debated House File 473. The legislature was wary of creating two state policy agencies. There are nuanced policy reasons why certain responsibilities are delegated to one department and not another. This Court should not tolerate the State’s attempt to use the citizen’s arrest statute as a backdoor to Iowa Code § 321.477. As Representative Baudler colorfully put it, the IDOT is a camel with its nose under the tent. If the Court sanctions the IDOT’s policy under the pretense of citizen’s arrest, the tent flaps will be opened wide.

CONCLUSION

At bottom, the State cannot explain what purpose Iowa Code § 321.477 serves if the IDOT is able to maintain an official policy of “citizen’s arresting” for violations outside the scope of § 321.477. The State’s position cannot be correct unless the Court excises Iowa Code § 321.477 from the code. The Court should give force and effect to the plain language of Iowa Code §§ 321.477, 80.9, and 80.24 by suppressing the evidence obtained as a result of IDOT Officer Glade’s illegal stop.

PARRISH KRUIDENIER DUNN BOLES GRIBBLE GENTRY BROWN & BERGMANN L.L.P.

By: /s/ Brandon Brown

Brandon Brown
Gina Messamer
2910 Grand Avenue
Des Moines, Iowa 50312
Telephone: (515) 284-5737
Facsimile: (515) 284-1704
Email: bbrown@parrishlaw.com
gmessamer@parrishlaw.com

Peter Riley
Tom Riley Law Firm, P.L.C.
4040 First Avenue NE
P.O. Box 998
Cedar Rapids, Iowa 52406
Telephone: (319) 363-4040
Fax: (319) 363-9789
Email: peterr@trlf.com
ATTORNEYS FOR DEFENDANT-APPELLANT

CERTIFICATE OF COMPLIANCE AND SERVICE

This brief complies with the type-volume limitation of Iowa R. App. P. 6.903(1)(g)(1) (no more than 14,000 words); excluding the parts of the brief exempted by Rule 6.903(1)(g)(1), which are the table of contents, table of authorities, statement of the issues, and certificates. The brief contains 2,509 words.

This brief complies with the typeface requirements of Iowa R. App. P. 6.903(1)(e) and the type-style requirements of Iowa R. App. P.6.903(1)(f) because this brief has been prepared in a proportionally spaced typeface using Microsoft Office Word 2010 in font size 14, Times New Roman.

I hereby certify that on April 25, 2018, I did serve Defendant-Appellant's Page Proof Brief on Appellant by mailing one copy to:

JEREMY M. WERNER
Defendant-Appellant

 /S/ Gina Messamer

Dated: April 25, 2018
Gina Messamer