IN THE COURT OF APPEALS OF THE
STATE OF OREGON

STATE OF OREGON,
Plaintiff-Respondent,

v.

NGUYEN NGOC PHAM,
aka Nguyen N. Pham,
Defendant-Appellant.

Multnomah County Circuit Court
15CR47888; A161825

Kelly Skye, Judge.

Argued and submitted November 30, 2017.

Sarah Laidlaw, Deputy Public Defender, argued the cause for appellant. Also on the brief was Ernest G. Lannet, Chief Defender, Criminal Appellate Section, Office of Public Defense Services.

Peenesh Shah, Assistant Attorney General, argued the cause for respondent. Also on the brief were Ellen F. Rosenblum, Attorney General, and Benjamin Gutman, Solicitor General.

Before Armstrong, Presiding Judge, and Tookey, Judge, and Shorr, Judge.

ARMSTRONG, P. J.

Affirmed.

Shorr, J., dissenting.

ARMSTRONG, P. J.

Defendant appeals a judgment of conviction for driving under the influence of intoxicants (DUII), assigning error to the trial court's denial of his motion to suppress evidence that the police obtained as a result of stopping defendant for a traffic infraction. According to defendant, the stop was unlawful because the officers lacked probable cause to believe that defendant had committed an infraction. We conclude that the stop was supported by probable cause and affirm.

The following facts are not disputed. Police officers encountered defendant as he drove his car while holding a cell phone in his hand. One of the officers "saw the screen was lit up *** and *** could see [defendant] pushing something on the screen." However, the officer could not identify the specific action that defendant was performing on his phone. When defendant looked up and saw that the vehicle next to him was a police car, he immediately put his cell phone down.

The officers stopped defendant. When they approached defendant's car, they smelled an odor of alcohol coming from the car and asked defendant how much he had had to drink that night. Defendant replied that he had had three beers. The officers asked and defendant consented to perform field-sobriety tests. Defendant showed signs of intoxication in all of the tests, which led the officers to arrest defendant for DUII. Defendant subsequently submitted to a breathalyzer test that determined that defendant's blood-alcohol level exceeded the 0.08 limit specified in ORS 813.300.

Before trial, defendant moved to suppress all evidence obtained from the traffic stop, arguing that the stop was unlawful because the officers had not had probable cause to believe that defendant had committed a traffic infraction before they stopped him. Defendant contended that the officers lacked probable cause to believe that he was "using" a cell phone in violation of state law because the law prohibited only the act of using a cell phone as a communication device, and the officers had an insufficient basis on which to believe that defendant was using his cell

phone to communicate with anyone. The trial court denied defendant's motion, concluding that "the fact that [the officer] indicated [] defendant was pushing on the screen of the cell phone [was] enough to be probable cause that [defendant was] using it, either dialing or texting."

On appeal, defendant reprises his argument, challenging the trial court's denial of his suppression motion. We review a trial court's denial of a suppression motion for legal error. *State v. Carson*, 287 Or App 631, 634, 404 P3d 1017 (2017).

An officer can lawfully stop and detain a person for a traffic infraction only if the officer has probable cause to believe that the person has committed an infraction. *State v. Matthews*, 320 Or 398, 403, 884 P2d 1224 (1994). Probable cause has both subjective and objective components; to satisfy those requirements, the state must establish that an officer subjectively believed that the person whom the officer stopped had commited an infraction and that the officer's belief was "objectively reasonable under the circumstances." *Id*. For an officer's belief to be objectively reasonable, we consider the totality of circumstances at the time of the stop and all reasonable inferences that an officer may draw from those circumstances. *State v. Keller*, 280 Or App 249, 253, 380 P3d 1144 (2016). The state must show that "the facts, *as the officer perceives them*, *** actually constitute a violation." *State v. Stookey*, 255 Or App 489, 491, 297 P3d 548 (2013) (emphasis in original).

Both parties agree that the subjective prong of the probable cause inquiry is satisfied here. Hence, the issue is whether the officers' belief that defendant had committed an infraction was objectively reasonable under the circumstances. The state contends that the officers had probable cause to believe that defendant had violated ORS 811.507[1] by using his cell phone as a communication device while

[1] The legislature amended ORS 811.507 in 2018. *See* Or Laws 2018, ch 32, § 1. However, we apply the 2013 version of that statute, which was the version in effect when the officers stopped defendant. Hence, all references to ORS 811.507 in this opinion are to the 2013 version. That version of the statute provided, in part, "A person commits the offense of operating a motor vehicle while using a mobile communication device if the person, while operating a motor vehicle on a highway, uses a mobile communication device." ORS 811.507(2).

driving. ORS 811.507 prohibits the use of a "mobile communication device" while operating a motor vehicle. The statute defines "mobile communication device" as "a text messaging device or a wireless, two-way communication device designed to receive and transmit voice or text communication." ORS 811.507(1)(b).

Defendant argues that, based on the facts known to the officers, the officers did not have probable cause to believe that he had violated ORS 811.507. Defendant relies heavily on our decision in *State v. Rabanales-Ramos*, 273 Or App 228, 359 P3d 250 (2015), as support for his argument. In *Rabanales-Ramos*, a state trooper observed "light coming up to [the defendant's] face," which the trooper believed was coming "from a device that was in [the defendant's] hand that she was looking down at." *Id.* at 231. The light remained on for approximately ten seconds. *Id.* The trooper stopped the defendant for using a cell phone while driving. *Id.* Construing ORS 811.507, we concluded that the statute applies only when a mobile communication device is being used "for the purpose of voice or text communication." *Id.* at 235. Based on the officer's limited observations in that case, we concluded that it was not objectively reasonable for the officer to believe that the defendant was violating the statute, because there was nothing to indicate that the defendant was using the phone for either voice or text communication, as distinguished from a lawful use such as "merely looking down at" a cell phone. *Id.* at 239-40.

The state argues that this case is distinguishable from *Rabanales-Ramos* because the officers saw defendant "pushing something on the screen" while he held the phone in his hand. The state contends that that additional information was enough to give the officers probable cause to believe that defendant had violated ORS 811.507 by using his phone as a mobile communication device.

We agree with the state that the officers' observations were sufficient to establish probable cause. The officers saw defendant looking at his phone and pressing buttons on the screen while he was driving, which raises the reasonable inference that defendant was using a mobile communication device, under the terms of ORS 811.507.

Cf. Rabanales-Ramos, 273 Or App at 239 (stating that the trooper lacked probable cause to stop the defendant because "he did not see defendant push any buttons or hold the device up to her ear"). Once defendant realized that police officers were driving in a car next to his, defendant immediately put his phone down, which suggests that defendant believed that his use of his cell phone was unlawful. *See State v. Scarborough*, 103 Or App 231, 234-35, 796 P2d 394 (1990) (although furtive movements on their own do not give rise to probable cause, they "may add to a finding of probable cause when they are contemporaneous with the officer's observations of other information consistent with criminal activity"). Given those observations, it was reasonable for the officers to infer that defendant was unlawfully "using [his phone] to receive and transmit voice or text communication." *Rabanales-Ramos*, 273 Or App at 240. Hence, the trial court did not err by concluding that the officers had probable cause to support the stop and, accordingly, by denying defendant's suppression motion.

Affirmed.

SHORR, J., dissenting.

I respectfully dissent from the majority because I would conclude that the officer did not have an objectively reasonable belief that defendant had violated ORS 811.507 (2013) when the officers stopped defendant. As discussed below, I would reverse the trial court's denial of defendant's motion to suppress.

As the majority correctly recites, the officers stopped defendant after one officer observed defendant driving his car while holding a cell phone with a "lit-up" screen. 295 Or App at ___. That officer could see defendant "pushing something on the screen." *Id*. At the time this occurred, our case law interpreting the 2013 version of ORS 811.507, which has since been substantially amended, provided that the statute "was intended to prohibit a specific type of distraction while driving—talking and texting on a mobile communication device." *State v. Rabanales-Ramos*, 273 Or App 228, 238-39, 359 P3d 250 (2015). Thus, the question presented is whether the officer, based on the limited observations above, had

probable cause to believe that defendant was either talking on the phone (without a hands-free accessory)[1] or texting while operating a motor vehicle.

We know that the officer did not have probable cause to believe that defendant was talking on his phone (without a hands-free accessory) because the officer did not observe defendant talking on the phone, raising it to his ear, or otherwise appear to be listening to it. The officer only observed defendant pushing something on a lit-up cell-phone screen. The next question is whether the officer, after seeing defendant pushing on a cell-phone screen, had probable cause to believe that defendant was perhaps dialing on the phone to start talking with another person or texting.

Under Article I, section 9, of the Oregon Constitution,[2] "probable cause exists only if the arresting officer subjectively believes that it is *more likely than not* that an offense has been committed *and that belief is objectively reasonable*." *State v. Williams*, 178 Or App 52, 60, 35 P3d 1088 (2001) (emphases added). We consider the totality of the circumstances presented to the officer and the reasonable inferences that may be drawn from those circumstances. *State v. Keller*, 280 Or App 249, 253, 380 P3d 1144 (2016). As the majority notes, the parties do not contest that the officer had a subjective belief that defendant was talking or texting on a cell phone. I disagree, however, with the majority that the officer had a reasonable belief that more likely than not defendant was talking or texting on a cell phone based on the officer observing defendant push buttons on a lit-up screen.[3]

A cell phone today is both a complex computer and multifaceted tool with many uses beyond talking to others

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[1] A person over the age of 18 did not commit a violation of ORS 811.507 (2013) if the person was using the device for voice communication through a hands-free accessory. *Former* ORS 811.507(3)(d) (2013).

[2] Article I, section 9, guarantees that "[n]o law shall violate the right of the people to be secure in their persons, houses, papers, and effects, against unreasonable search, or seizure[.]"

[3] This case is factually distinguishable from *Rabanales-Ramos* to the extent that the officer in that case merely observed defendant looking down at a lit-up device for approximately 10 seconds. 273 Or App at 231. However, the facts here still fall short of establishing objectively reasonable probable cause.

or texting. The many other common reasons that a person may use a cell phone in a car, perhaps all unwisely, include, but are not limited to: programing or checking directions on a cell-phone map; checking a traffic map to reroute oneself through a traffic jam; finding an address; or looking up or turning on or off music, an audio book, or a podcast. Some more foolish uses include reading information on the internet while driving. Again, none of these may be wise reasons, and they may now be illegal under the current version of ORS 811.507. *See* Or Laws 2018, ch 32, § 1. Regardless, the officer at the time had no objective reason to believe that, "more likely than not," defendant's mere pushing of buttons on a lit-up screen indicated that he was talking or texting by phone with another person rather than engaging in any of the other very common cell-phone activities.[4]

Because the officers lacked probable cause to stop defendant, and because I would conclude that suppression of the evidence is required as a result, I would reverse the trial court. I respectfully dissent.

[4] I also do not consider it persuasive that defendant put down his cell phone upon realizing that he was being observed by an officer. That did not objectively indicate that defendant was engaged in a crime or traffic violation. As the majority notes, furtive movements alone—if defendant's motions were even furtive—do not give rise to probable cause and may add to such a conclusion only when "they are contemporaneous with the officer's observations of other information consistent with criminal activity." *State v. Scarborough*, 103 Or App 231, 235, 796 P2d 394 (1990). Here, as in *Scarborough*, there were no other observations indicating that defendant was engaged in criminal activity or a traffic violation. *See also State v. Jacobs*, 187 Or App 330, 336, 67 P3d 408 (2003) (concluding that "furtiveness in the act of engaging in what may nevertheless be entirely lawful conduct does not establish an objectively reasonable basis for a belief that a crime has been committed").