

**IN THE SUPREME COURT FOR THE STATE OF IOWA  
NO. 19-0048**

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**DAVID MICHAEL JOHNSTON,  
Petitioner-Appellant,**

**vs.**

**IOWA DEPARTMENT OF TRANSPORTATION,  
Respondent-Appellee.**

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**APPEAL FROM THE IOWA DISTRICT COURT  
FOR POLK COUNTY,  
HONORABLE JEANIE VAUDT**

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**PETITIONER-APPELLANT'S REPLY BRIEF**

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## STATEMENT OF ISSUES

### **I. The IDOT has the Burden in Proving Johnston is a Habitual Offender Under Iowa Code Section 321.555.**

#### **Iowa Supreme Court Cases**

*McDowell v. Town of Clarksville*, 241 N.W.2d 904 (Iowa 1976).

*State v. Iowa Dist. Ct. for Buchanan Cty.*, 455 N.W.2d 918 (Iowa 1990).

#### **Statutes**

Iowa Code § 321.555

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EDWARD W. CLEARY, MCCORMICK ON EVIDENCE § 336 at 783–785 (2d ed. 1972).

### **II. Johnston's Deferred Judgment Cannot be Used to Calculate Whether he is a Habitual Offender Under Iowa Code section 321.555.**

#### **Iowa Supreme Court Cases**

*Schilling v. Iowa Dep't of Transp.*, 646 N.W.2d 69 (Iowa 2002).

*State v. Tong*, 805 N.W.2d 599 (Iowa 2011).

#### **Statutes**

Iowa Code § 321.555

### **III. Johnston's Conviction Dates Must be Used for Calculating Whether he is a Habitual Offender Under Iowa Code Section 321.555, Not the Offense Date.**

#### **Iowa Supreme Court Cases**

*Iowa Dep't of Transp. v. Iowa Dist. Ct.*, 539 N.W.2d 191 (Iowa 1995).

*State v. Brauer*, 540 N.W.2d 442 (Iowa 1995).

*State v. Phelps*, 417 N.W.2d 460 (Iowa 1988).

*State v. Wiseman*, 614 N.W.2d 66 (Iowa 2000).

#### **Statutes**

Iowa Code § 321.555

Iowa Code § 321.555(1)

Iowa Code § 321.555(2)

### **IV. Johnston put the IDOT on Notice of His Argument and has Successfully Preserved it for Appeal.**

### **Iowa Supreme Court Cases**

*Griffin Pipe Prods. Co. v. Bd. of Rev.*, 789 N.W.2d 769 (Iowa 2010).

*Lee v. State*, 815 N.W.2d 731 (Iowa 2012).

*State v. Coleman*, 890 N.W.2d 284 (Iowa 2017).

*State v. Prusha*, 874 N.W.2d 627 (Iowa 2016).

### **Statutes**

Iowa Code § 321.555(1)

## **V. There is No Evidence in the Record that Johnston Eluded a Pursuing Law Enforcement Vehicle and his Eluding Conviction Cannot be Used in Calculating Whether Johnston is a Habitual Offender.**

### **Iowa Supreme Court Cases**

*In re G.J.A.*, 547 N.W.2d 3, 6 (Iowa 1996).

*State v. Bond*, 493 N.W.2d 826 (Iowa 1992).

*State v. Burgs*, 479 N.W.2d 323 (Iowa 1992).

### **Other Iowa Cases**

*State v. Howard*, 610 N.W.2d 535 (Iowa Ct. App. 1999).

### **Statutes**

Iowa Code § 321.279

Iowa Code § 321.555

Iowa Code § 4.2

Iowa Code § 4.4(2)

Iowa Code § 4.8

## **ARGUMENT**

### **I. The IDOT has the Burden in Proving Johnston is a Habitual Offender Under Iowa Code Section 321.555.**

First, the Iowa Department of Transportation (hereinafter IDOT) appears to argue that Johnston has the burden of proof here to show that he should not be classified as a habitual offender under Iowa Code section 321.555. This is incorrect. The cases cited by the IDOT do not directly deal with the habitual offender statute, Iowa Code section 321.555.

Burden of Proof is defined as a “party's duty to prove a disputed assertion or charge; a proposition regarding which of two contending litigants loses when there is no evidence on a question or when the answer is simply too difficult to find.” *Burden of Proof*, BLACK’S LAW DICTIONARY (4th Pocket ed. 2011). Further, “[t]he words ‘burden of proof’ may refer to the burden of producing evidence or the burden of persuading the fact finder. *McDowell v. Town of Clarksville*, 241 N.W.2d 904, 908 (Iowa 1976) (citing EDWARD W. CLEARY, MCCORMICK ON EVIDENCE § 336 at 783–785 (2d ed. 1972)).

In *State v. Iowa District Court for Buchanan County*, the Iowa Supreme Court found:

The State sought revocation of VandeVoorde's license under the terms of **Iowa Code section 321.555(1)(c)**, which provides that anyone convicted of three or more offenses of driving while his or her license is under suspension within a six-year period shall be adjudicated a habitual offender. The State presented an abstract of VandeVoorde's driving record to the court indicating that he had accumulated four such convictions within a period of approximately fifteen months. The State thus satisfied *its burden* of proving a prima facie case.

455 N.W.2d 918, 919 (Iowa 1990).

Therefore, since we are dealing directly with the habitual offender statute, Iowa Code section 321.555, the IDOT has the burden of proof to show that their labeling of Johnston as such was proper.

## **II. Johnston's Deferred Judgment Cannot be Used to Calculate Whether he is a Habitual Offender Under Iowa Code section 321.555.**

The IDOT asserts *Schilling v. Iowa Department of Transportation* is controlling in determining a deferred judgment is a final conviction for purposes of the driver's license revocation statute. 646 N.W.2d 69, 73 (Iowa 2002). In *Schilling*, the Court based this determination partly on "whether the license revocation is aimed at the protection of the public or as a punishment measure." *Id.* at 73. The Iowa Supreme Court determined this by finding such a suspension did not serve the purpose of increasing the offender's criminal punishment. *State v. Tong*, 805 N.W.2d 599, 602 (Iowa 2011).

Here, the IDOT tries to portray *Tong* as wholly unrelatable to Johnston because *Tong* was dealing with a felon in possession of a firearm statute and argues that *Schilling* is still good law, no matter the *Tong* decision. The IDOT's application is unfounded. In *Tong*, the Court found *Schilling* was unhelpful when the law being applied serves the dual purpose of protection and punishment. *Id.* at 602. Here, as shown by the five (5) year suspension handed down by the IDOT to Johnston, Iowa Code section 321.555 serves both the dual propose of protection of the public by limiting Johnston's ability to operate on public road ways, but also serves to increase punishment by punitively restricting his license for not a short period of time, but for half of a decade for two series of events committed five (5) years and 11 months

apart. This increases punishment, *Tong* limited *Schilling* and Johnston's deferred judgment cannot be used as a conviction for Iowa Code section 321.555.

In furthering Johnston's argument that his deferred eluding charge should not be used, the court in *Tong* found "[f]or these reasons, we hold a deferred judgment constitutes a conviction for purposes of section 724.26 where the defendant (as here) has not completed his term of probation." *Tong*, 805 N.W.2d at 603. Johnston completed probation on May 6, 2019. The eluding charge was fully and finally expunged from his record. Using *Tong*, since Johnston has completed his term of probation, the deferred judgment should not be allowed to be used.

Johnston's deferred judgment, which has been fully and finally expunged from his record, should not and cannot be used for the purposes of calculating whether or not Johnston is a habitual offender and the District Court erred in upholding the IDOT's analysis and application in labeling Johnston as a habitual offender.

### **III. Johnston's Conviction Dates Must be Used for Calculating Whether he is a Habitual Offender Under Iowa Code Section 321.555, Not the Offense Date.**

The IDOT is correct in pointing out that *State v. Phelps* addressed the application of offense dates vs. conviction dates when determining whether to label an individual as a habitual offender. 417 N.W.2d 460 (Iowa 1988). Granted *Phelps* looked at the section two (2) of Iowa Code section 321.555, which deals with



offenses in a two-year period and not the six-year period Johnston is being labeled under. *Id.* at 461.

However, the IDOT ignores the fact that all the cases cited by Johnston for the proposition that the conviction date should be used were decided after the 1988 case of *Phelps*. In *State v. Brauer*, the Iowa Supreme Court found “Iowa Code section 321.555(1) defines a habitual offender as a person who has three or more convictions for specified offenses within a six-year period.” 540 N.W.2d 442, 443 (Iowa 1995). In *Iowa Department of Transportation v. Iowa District Court*, the Iowa Supreme Court found “[s]ection 321.555(1) provides that any person found guilty of three or more listed traffic offenses within a six-year period shall be considered an habitual offender.” 539 N.W.2d 191, 193 (Iowa 1995). Most recently, in *State v. Wiseman*, the Iowa Supreme Court agreed that Wiseman’s conviction date should be used and not his guilty plea date of offense date when calculating whether a prior guilty plea or conviction date should be used to enhance sentencing for an OWI. 614 N.W.2d 66, 67 (Iowa 2000).

Therefore, because the proposition in *Phelps* has effectively overruled by multiple Iowa Supreme Court cases, Johnston’s conviction dates, and not his offense dates should be used to calculate whether he falls within the definition of a habitual offender under Iowa Code Section 321.555.

#### **IV. Johnston put the IDOT on Notice of His Argument and has Successfully Preserved it for Appeal.**

The IDOT believes Johnston has failed to preserve his argument that his eluding conviction cannot be used in calculating whether he is a habitual offender. The IDOT's assertion lacks merit.

As outlined, Iowa's issue preservation rules are not designed to be hyper-technical nor do they place form over substance. *Lee v. State*, 815 N.W.2d 731, 739 (Iowa 2012). A challenge to an administrative ruling is properly preserved when the challenge is adequate to put the Respondent on notice of the nature of the protest. *Griffin Pipe Prods. Co. v. Bd. of Rev.*, 789 N.W.2d 769, 772 (Iowa 2010). Courts will not "exalt form over substance when the objectives of our error preservation rules have been met." *Lee*, 815 N.W.2d at 739.

With said case law in mind, Johnston properly preserved error on the argument that Iowa Code section 321.555(1) requires evidence the offender was eluding a *pursuing* law enforcement vehicle.

Recently, the Iowa Supreme Court in *State v. Coleman*, when discussing the preservation of a constitutional argument, found:

We find the state constitutional issue is *minimally* preserved. We have held that when a defendant in the trial court only identifies the Fourth Amendment as the basis for a search and seizure claim, the state constitutional claim has not been preserved at the district court. *State v. Prusha*, 874 N.W.2d 627, 630 (Iowa 2016).

Here, however, the defendant did not identify *either* constitution in the trial court although it was apparent that he was raising a search and seizure claim. This raises a different preservation question than that presented in *Prusha*. We have said that when a party brings a constitutional claim but fails to identify whether the party is proceeding under the Iowa or the Federal Constitution, claims under both the Iowa and the Federal Constitutions are preserved.

890 N.W.2d 284, 286-287 (Iowa 2017) (Internal citations omitted).

Using *Coleman*, Johnston put the IDOT on notice at the first stage of the administrative proceedings that he was challenging whether the IDOT had and presented substantial evidence to warrant the labeling of him as a habitual offender and the revocation of his license. This is more than minimal preservation of this argument and therefore error on this argument has been preserved.

**V. There is No Evidence in the Record that Johnston Eluded a Pursuing Law Enforcement Vehicle and his Eluding Conviction Cannot be Used in Calculating Whether Johnston is a Habitual Offender.**

The IDOT seems to lack any real argument for why the two statutes in question, the criminal eluding statute, Iowa Code section 321.279, and the habitual offender statute, Iowa Code section 321.555 are different. However, according to the IDOT, both statutes mean the same thing.

Iowa Code section 4.2 outlines

In enacting a statute, it is presumed that: 1. Compliance with the Constitutions of the state and of the United States is intended. 2. The entire statute is intended to be effective. 3. A just and reasonable result is intended. 4. A result feasible of execution is intended. 5. Public interest is favored over any private interest.

Here, there is a conflict between two statutes. Iowa Code section 321.279 does not require evidence of proof of eluding a pursuing law enforcement vehicle. Yet, Iowa Code section 321.555 does:

**321.555**

As used in this section and sections 321.556 through 321.562, “habitual offender” means any person who has accumulated convictions for separate and distinct offenses described in subsection 1, 2, or 3, committed after July 1, 1974, for which final convictions have been rendered, as follows:

g. Eluding or attempting to elude a **pursuing** law enforcement vehicle in violation of section 321.279.

**321.279**

a. The driver of a motor vehicle commits a serious misdemeanor if the driver willfully fails to bring the motor vehicle to a stop or otherwise eludes or attempts to elude a marked official law enforcement vehicle driven by a uniformed peace officer after being given a visual and audible signal to stop. The signal given by the peace officer shall be by flashing red light, or by flashing red and blue lights, and siren.

With this in mind, the only just and reasonable result is that the legislature intended the additional wording in Iowa Code section 321.555, requiring the IDOT, in labeling someone as a habitual offender using an eluding conviction, to prove that the individual was actively eluding a pursuing law enforcement vehicle. Iowa Code section 321.555.

As we know, when the legislature enacts a statute, “it is presumed that the entire statute is to be effective.” *State v. Howard*, 610 N.W.2d 535, 537 (Iowa Ct. App. 1999) (citing Iowa Code § 4.4(2)). Further, “[s]tatutes should not be construed so as to make any part of it superfluous; therefore, we presume the legislature enacted each part of the statute for a purpose and intended that each part be given

effect.” *Howard*, 610 N.W.2d 537 (citing *In re G.J.A.*, 547 N.W.2d 3, 6 (Iowa 1996)). Additionally, “[w]hen a statute's terms are unambiguous and its meaning plain, there is no room for second-guessing legislative intent.” *State v. Bond*, 493 N.W.2d 826, 828 (Iowa 1992); *State v. Burgs*, 479 N.W.2d 323, 324 (Iowa 1992).

Here, Iowa Code section 321.555 is not ambiguous and the meaning of the wording is plain “Eluding or attempting to elude *a pursuing law enforcement vehicle.*” There is no room for second guessing and the IDOT is required to show that additional evidence.

Further, Iowa Code section 4.8 outlines “if a general provision conflicts with a special or local provision, they shall be construed, if possible, so that effect is given to both. If the conflict between the provisions is irreconcilable, the special or local provision prevails as an exception to the general provision.” Here, we have two separate statutes. Iowa Code section 321.279 is the criminal eluding statute. Iowa Code section 321.555 is the habitual offender statute. As we know, Johnston is challenging his labeling as a habitual offender by the IDOT. Therefore, since Iowa Code section 321.555 is the specific statute for the habitual offender definition, we must use that statute, no others, in determining whether Johnston fits within the definition in the statute. Here, there is no evidence presented by the IDOT that Johnston was eluding or attempting to elude a pursuing law enforcement vehicle.

Therefore, the IDOT cannot use Johnston's criminal eluding conviction for calculating whether he is a habitual offender.

### **CONCLUSION**

David Johnston respectfully requests this Court reverse the district court's Order on Judicial Review in its entirety, vacate the IDOT's revocation of Johnston's driving privileges and enter judgment in favor of Johnston.

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**CERTIFICATES OF COMPLIANCE**  
**WITH TYPE-VOLUME LIMITATION, TYPEFACE REQUIREMENTS,**  
**AND TYPE-STYLE REQUIREMENTS**

This brief complies with the type-volume limitation of Iowa R. App. P. 6.903(1)(g)(1) because it contains words 2,182 (less 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.

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 2016 in font size 14, Times New Roman.

/s/ Christopher Stewart

Dated: August 19, 2019

Christopher Stewart

**CERTIFICATES OF FILING AND SERVICE**

I hereby certify that I e-filed the Appellant’s Reply Brief with the Electronic Document Management System with the Iowa Judicial Branch on the 19<sup>th</sup> day of August, 2019. The following counsel will be served by Electronic Document Management System:

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I hereby certify that on the 19<sup>th</sup> day of August, 2019, I did serve the Plaintiff-Appellant’s Reply Brief on Appellee, listed below, by mailing one copy thereof to the following Appellant:

David Michael Johnston  
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