STATE OF RHODE ISLAND & PROVIDENCE PLANTATIONS

PROVIDENCE, Sc. **DISTRICT COURT**
SIXTH DIVISION

Barry Cook	:	
	:	
v.	:	**A.A. No. 2015 - 068**
	:	
Airport Police Department	:	
(RITT Appeals Panel)	:	

O R D E R

This matter is before the Court pursuant to § 8-8-8.1 of the General Laws for review of the Findings and Recommendations of the Magistrate.

After a de novo review of the record, the Court finds that the Findings and Recommendations of the Magistrate are supported by the record, and are an appropriate disposition of the facts and the law applicable thereto. It is, therefore,

ORDERED, ADJUDGED AND DECREED

that the Findings and Recommendations of the Magistrate are adopted by reference as the decision of the Court and the decision of the Appeals Panel is REVERSED.

Entered as an Order of this Court at Providence on this 29th day of February, 2016.

By Order:

_____/s/_____
Stephen C. Waluk
Chief Clerk

Enter:

_____/s/_____
Jeanne E. LaFazia
Chief Judge

STATE OF RHODE ISLAND & PROVIDENCE PLANTATIONS
PROVIDENCE, Sc. **DISTRICT COURT**
SIXTH DIVISION

Barry Cook	:	
	:	**A.A. No. 2015 – 068**
v.	:	**(C.A. No. T15-010)**
	:	**(07-422-000295)**
RI Airport Police Department	:	
(RITT Appeals Panel)	:	

F I N D I N G S & R E C O M M E N D A T I O N S

Ippolito, M. In this appeal, Mr. Barry Cook urges that an appeals panel of the Rhode Island Traffic Tribunal (RITT) erred when it affirmed a trial magistrate's verdict adjudicating him guilty of a civil traffic violation — "Text messaging while operating a motor vehicle" in violation of Gen. Laws 1956 § 31-22-30. Mr. Cook argues, as he did below, that he should not have been convicted because the prosecution failed to prove an element of the offense — that he was on a

public roadway when he was texting.

Jurisdiction for the instant appeal is vested in the District Court by Gen. Laws 1956 § 31-41.1-9 and the applicable standard of review is found in subsection 31-41.1-9(d). This matter has been referred to me for the making of findings and recommendations pursuant to Gen. Laws 1956 § 8-8-8.1. A briefing schedule was issued by the Court, in response to which both the Appellant and the Airport Corporation have submitted memoranda for this Court's consideration. After a careful review of the entire record as certified to this Court, I conclude that the decision of the appeals panel rendered in this case should be REVERSED; I so recommend.

I
FACTS AND TRAVEL OF THE CASE

On November 11, 2014, at approximately 2:20 p.m., Officer Steven D. Hopkins of the Airport Police Department was on-duty at the T.F. Green Airport; specifically, he was assigned to the "arrivals" roadway for crosswalk control, when he saw a taxi approaching his position.[1] The taxi failed to slow

[1] See Decision of Appeals Panel, at 1, citing Trial Transcript, at 3.

down or come to a stop at the crosswalk.[2] And, as it passed him, the officer could see that the driver was manipulating an electronic device with both thumbs.[3] The officer blew his whistle to get the operator's attention, pulled him over, and cited him (Mr. Cook) for "texting" and "flashing signals."[4]

Mr. Cook entered pleas of not guilty at his arraignment on December 18, 2014 and, after his motion for discovery was granted on January 20, 2015, the case proceeded to trial on February 12, 2015.[5] At trial, the officer testified in conformity with the foregoing narrative.[6]

Mr. Cook presented several defenses to the two charges against him. As to the first charge, he stated that both red and yellow lights were flashing.[7] And regarding the second charge, "text messaging," Mr. Cook argued that the arrivals roadway was not a public road.[8] He also asserted that the device he was

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2 Id.

3 See Decision of Appeals Panel, at 2, citing Trial Transcript, at 3.

4 See Decision of Appeals Panel, at 2, citing Trial Transcript, at 3-4. The "flashing signals" citation was dismissed by the trial judge. See "Traffic Summons Judgment Card, in the electronic record at 67.

5 See Docket Sheet, in the electronic record at 50.

6 See Trial Transcript, at 2-5.

7 See Decision of Appeals Panel, at 2, citing Trial Transcript, at 10.

8 See Decision of Appeals Panel, at 2, citing Trial Transcript, at 11.

holding was a global positioning system (GPS) and not a device for texting.[9]

At the close of all the testimony, the trial judge made her ruling, in which she found Mr. Cook to be not guilty of the flashing-lights charge but guilty of the texting citation.[10]

Aggrieved by this decision, Mr. Cook filed a timely appeal, which, on May 6, 2015, was heard by an RITT appeals panel composed of: Administrative Magistrate DiSandro (Chair), Judge Parker, and Magistrate Noonan. In a decision dated June 26, 2015, the appeals panel rejected each of Mr. Cook's arguments and affirmed the decision of the trial judge.

On July 3, 2015, Mr. Cook filed a further appeal to the Sixth Division District Court pursuant to Gen. Laws 1956 § 31-41.1-9.

II
STANDARD OF REVIEW

The standard of review which this Court must employ is enumerated in Gen. Laws 1956 § 31-41.1.-9(d), which provides as follows:

> (d) Standard of review. The judge of the district court shall not substitute his or her judgment for that of the appeals panel as to the weight of the evidence on questions of fact. The district court

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[9] See Decision of Appeals Panel, at 2, citing Trial Transcript, at 12.

[10] See Decision of Appeals Panel, at 3, citing Trial Transcript, at 23.

> judge may affirm the decision of the appeals panel, or may remand the case for further proceedings or reverse or modify the decision if the substantial rights of the appellant have been prejudiced because the appeals panel's findings, inferences, conclusions or decisions are:
> (1) In violation of constitutional or statutory provisions;
> (2) In excess of the statutory authority of the appeals panel;
> (3) Made upon unlawful procedure;
> (4) Affected by other error of law;
> (5) Clearly erroneous in view of the reliable, probative, and substantial evidence on the whole record; or
> (6) Arbitrary or capricious or characterized by abuse of discretion or clearly unwarranted exercise of discretion.

This standard is akin to the standard of review found in Gen. Laws 1956 § 42-35-15(g), the State Administrative Procedures Act (APA).

Under the APA standard, the District Court "* * * may not substitute its judgment for that of the agency and must affirm the decision of the agency unless its findings are 'clearly erroneous.' "[11] Thus, the Court will not substitute its judgment for that of the appeals panel as to the weight of the evidence on questions of fact.[12] And so, except in the case where the panel's decision is

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[11] Guarino v. Department of Social Welfare, 122 R.I. 583, 584, 410 A.2d 425 (1980)(citing Gen. Laws 1956 § 42-35-15(g)(5)).

[12] See Link v. State, 633 A.2d 1345, 1348 (R.I. 1993)(citing Liberty Mutual Insurance Co. v. Janes, 586 A.2d 536, 537 (R.I. 1991)(decision rendered during the existence of Administrative Adjudication Division[AAD])).

affected by error of law, the decision of the panel must be affirmed as long as it is supported by legally competent evidence.[13]

III
APPLICABLE LAW

The so-called texting statute — Gen. Laws 1956 § 31-22-30 — is somewhat extended, as it includes ten definitions in subsection (a) and three exclusions is subsection (c). It is in subsection (b) that the elements of the offense are set forth —

> (b) No person shall use a wireless handset or personal wireless communication device to compose, read, or send text messages while driving a motor vehicle on any public street or public highway within the state of Rhode Island.

(emphasis added). And subsection (e) provides the penalties —

> (e) Any person who violates any of the provisions of this section shall, upon conviction, be subject to a fine of one hundred dollars ($100), or a license suspension for up to thirty (30) days, or both; for a second conviction a person shall be subject to a fine of one hundred fifty dollars ($150), or a license suspension for up to three (3) months, or both; and for a third or subsequent conviction a person shall be subject to a fine of two hundred fifty dollars ($250), or a license suspension for up to six (6) months, or both.

[13] Link, 633 A.2d at 1348 (citing Environmental Scientific Corporation v. Durfee, 621 A.2d 200, 208 (R.I. 1993).

All violations arising out of this section shall be heard in the Rhode Island traffic tribunal.

IV
ANALYSIS

A
Decision of the Appeals Panel

In affirming the magistrate's decision, the appeals panel made three main points, which we shall now present seriatim.

1
The Discovery Request

The first issue addressed by the appeals panel was Mr. Cook's argument that the trial judge committed prejudicial (and reversible) error by declining to dismiss the case because the prosecution failed to provide him with a copy of the videotape of the incident, even though his discovery request for the tape had been granted pursuant to Traffic Tribunal Rule 10(b).[14] The panel found no error, because the tape had already been re-used and it was therefore impossible for the prosecution to comply with the court's discovery order.[15]

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[14] See Decision of Appeals Panel, at 4-5.

[15] See Decision of Appeals Panel, at 5 (citing Trial Transcript, at 6 and Rule 10(b)).

2

The Status of the Roadway

The appeals panel next addressed Mr. Cook's argument that the roadway he was on — the "arrivals" roadway — was not a public roadway. It rejected Mr. Cook's argument that it could not be a public roadway because is maintained by private companies.[16] Instead, the panel relied upon Gen. Laws 1956 § 42-13-2, which states that the Airport Division of the Department of Transportation "operates all state-owned airports … including passenger and cargo terminals, parking facilities, and other supporting facilities, emergency services, and security services."[17] And the fact that the responsibility to maintain roads may have been satisfied by engaging a private firm does not alter that relationship.[18]

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[16] See Decision of Appeals Panel, at 5.

[17] See Decision of Appeals Panel, at 5 (citing Gen. Laws 1956 § 42-13-2). It is noteworthy that this language of the statute was stricken in 2015, by P.L. 2015, ch. 141, art. 15, § 5, effective June 30, 2015.

[18] See Decision of Appeals Panel, at 5 (citing In re Advisory Opinion to the Governor, 627 A.2d 1246, 1250 (R.I. 1993)).

3

The Nature of the Device

Mr. Cook's third argument concerned his testimony that he was using a GPS device, not a phone or other texting device; and that, if he was, he must be acquitted of the charge.[19] The appeals panel noted that the officer testified as to the manner in which Appellant was manipulating the electronic device.[20] And so, it affirmed the trial judge's guilty verdict on the texting charge.[21]

The appeals panel ruled that, since it was not allowed "to substitute its judgment for that of the trial [judge] concerning the weight of the evidence on questions of fact[,]"[22] given the limited standard of review in effect.[23]

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[19] See Decision of Appeals Panel, at 5-6 and Gen. Laws 1956 § 31-22-30(a)(6).

[20] See Decision of Appeals Panel, at 6 citing Trial Transcript, at 3-4.

[21] See Decision of Appeals Panel, at 6.

[22] See Decision of Appeals Panel, at 6 (citing Environmental Scientific, ante at 5 n. 3, 621 A.2d at 208 quoting Liberty Mutual Insurance, ante, 586 A.3d at 537).

[23] See Decision of Appeals Panel, at 6 (citing Environmental Scientific, ante, 621 A.2d at 209).

B

Position of the Parties

1

Mr. Cook's Position

In the seven-page memorandum he filed in support of his appeal, Mr. Cook makes but one argument — that the prosecution did not prove that the incident in question (in which he was allegedly texting while driving) occurred on a public roadway. But, he bifurcates this argument: firstly, that the "arrivals roadway" is not, as a matter of fact and law, a public roadway; and secondly, even if we assume that the arrivals road is a public way, the prosecution's testimony and evidence did not prove that element.

a

The Arrivals Roadway — Proof of Status

On the substantive issue, Mr. Cook suggests that the trial judge misunderstood the point he was making regarding the arrivals roadway. He was not questioning the authority of the airport police in the area; instead, he was asking the judge to find out what proof the officer had that the arrivals roadway

was a public roadway.[24] He then asserts that no proof was offered as to the status of the arrivals roadway.[25] Mr. Cook concludes by speculating that the judge must have assumed that it was a public road.[26]

b

The True Status of the Arrivals Roadway

Mr. Cook also urges, substantively, that the arrivals roadway is not a public roadway. He asserts that the legal process to make the airport roadways public has never been undertaken.[27] And, he complains that he was not allowed by the trial judge to present his full argument on this point.[28]

2

The Position of the Airport Police

In the memorandum it submitted to this Court, the Airport Corporation responded to both of Mr. Cook's arguments.

a

The Status of the Arrivals Roadway

At the outset, the Corporation notes that the term private road is defined

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24 See Appellant's Memorandum of Law, at 1-2 (citing Trial Transcript, at 11-12).

25 See Appellant's Memorandum of Law, at 2.

26 See Appellant's Memorandum of Law, at 2-4.

27 See Appellant's Memorandum of Law, at 4-5.

28 See Appellant's Memorandum of Law, at 5.

in our Motor Vehicle Code to be "every way or place in private ownership that is used for the vehicular traffic only by the owner and by those others having express or implied permission from the owner."[29] It then concedes that some parts of the airport's road system are undoubtedly private roads.[30] But, the Corporation submits, consent is not required to use those airport roads which allow for "access to or egress from the airport."[31] And so, since consent is not required for their use, the airport access and egress roads are not private roads under Title 31.[32] Of course, the foregoing analysis is based upon the application of the statutory provisions which govern the grounds of the airport.[33] But, according to the Corporation, the result (and the rationale) would be the same under the common law test for a roadway's status (i.e., public or private) — which turned on the intent of the owner.[34]

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[29] See Appellee's Memorandum of Law, at 3 (citing Gen. Laws 1956 § 31-1-23).

[30] See Appellee's Memorandum of Law, at 3 (citing Gen. Laws 1956 § 1-4-10.2(11)).

[31] See Appellee's Memorandum of Law, at 3 (citing § 1-4-10.2(11)).

[32] See Appellee's Memorandum of Law, at 3-4 (citing §§ 1-4-10.2(11) and 31-1-23).

[33] Id.

[34] See Appellee's Memorandum of Law, at 4 (citing Drescher v. Johannnessen, 45 A.3d 1218, 1230 (R.I. 2012) and Newport Realty, Inc. v. Lynch, 878 A.2d

b

The Arrivals Roadway — Proof of Status

The Corporation also responded, briefly, to Appellant's argument that the status of the arrivals road, whatever it might truly be, was not proven by the officer. Its argument seems to be grounded on the assertion that the trial judge's decision was not arbitrary or capricious.[35] However, the Corporation does not point out any evidence or testimony upon which such a finding could have been predicated.

C

Discussion and Resolution

In this case, we are called upon to determine whether the appeals panel (in affirming the ruling of the trial judge) correctly applied the statute in question — Gen. Laws 1956 § 31-22-30. For convenience's sake, let us set forth the elements of the offense once more —

> (b) No person shall use a wireless handset or personal wireless communication device to compose, read, or send text messages

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1021, 1033 (R.I. 2005)).

[35] See Appellee's Memorandum of Law, at 5 (citing Autocrat Coffee v. Lebrun, 648 A.2d 371, 373 (R.I. 1994)).

> while driving a motor vehicle on any public street or public highway within the state of Rhode Island.

(emphasis added). It is clear that this provision requires the prosecution to prove that the proscribed conduct occurred while the vehicle was traveling on a public street or highway. It is an element of the offense. Consequently, no conviction for this traffic offense may be sustained unless evidence is presented sufficient to allow the trial judge to make a finding that the violation occurred on a public road.

I have reviewed (and re-reviewed) the transcript of the trial. To my reading, the officer never mentioned (or alluded to) the status of the arrivals road. No exhibit or other item of evidence was received which would have tended to show that the arrivals road was a public road. Consequently, the trial judge could not (and did not) make findings of fact or law on this issue.[36] As a

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[36] In its memorandum, the Corporation concedes that — "Certain roads on the grounds of T.F. Green Airport may well constitute "private roads." Appellee's Memorandum, at 3. And so, if we follow the Corporation's view — i.e., that § 1-4-10.2(11) is the key provision — the testimony would have to show that the arrivals road provides "access to or egress from the airport[;]" and not, merely, access to the terminal to those already on airport property. I believe this cannot be considered a pure issue of law.

And, I believe another statute also leads us to the ineluctable conclusion that the status of the arrivals road is a question of fact which must be proven. I refer here to Gen. Laws 1956 § 1-2-1.1(a)(1)(ii), in which the Corporation is

result, Mr. Cook's conviction under § 31-22-30 must be vacated.

V
CONCLUSION

In this case, I need not reach, and do not reach, Mr. Cook's substantive argument that the arrivals road is, in fact and law, a private road. As stated above, it is sufficient for our purposes that an element of the charge of driving while texting § 31-22-30 — i.e., the status of the arrivals road (as a public road) — was not proven.

And so, after a careful review of the record certified to this Court by the Traffic Tribunal, I recommend that the decision of the appeals panel be reversed.

/s/
Joseph P. Ippolito
MAGISTRATE

February 29, 2016

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authorized — "To regulate the access of vehicular traffic to airport properties by excluding one or more classes of vehicular traffic from accessing portions of airport roadways, parking lots, curbsides and other vehicular facilities." Clearly, the question of whether the public has been excluded from a particular roadway is a question of fact that must be proven in each case.