STATE OF RHODE ISLAND & PROVIDENCE PLANTATIONS

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

Joseph Furtado	:	
	:	
v.	:	**A.A. No. 16 - 101**
	:	
State of Rhode Island	:	
(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 and the memoranda of counsel, the Court finds that the Findings & 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 on this 9th day of January, 2019.

By Order:

/s/
Stephen C. Waluk

Enter:

/s/
Jeanne E. LaFazia
Chief Judge

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

Joseph Furtado	:	
	:	
v.	:	**A.A. No. 2016-101**
	:	**(T16-0004)**
State of Rhode Island	:	**(15-001-516934)**
(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 case Mr. Joseph Furtado urges that an appeals panel of the Rhode Island Traffic Tribunal (RITT) erred when it affirmed his conviction for a civil traffic violation — "Text Messaging while Operating a Motor Vehicle," as provided in G.L. 1956 § 31-22-30. Jurisdiction for the instant appeal is vested in the District Court by G.L. 1956 § 31-41.1-9; the applicable standard of review is found in G.L. 1956 § 31-41.1-9(d). This matter has been referred to me for the making of findings and recommendations pursuant to G.L. 1956 § 8-8-8.1.

For the reasons I will explain in this opinion, and based upon the

record before me, I have concluded that the appeals panel's ruling affirming Mr. Furtado's conviction for text messaging while operating a motor vehicle was clearly erroneous and contrary to law. I shall therefore recommend to the Court that the decision rendered by the appeals panel in Mr. Furtado's case be REVERSED.

I
Facts and Travel of the Case

The facts of the incident which led to the charge of driving while texting being lodged against Mr. Furtado are fully and fairly stated in the decision of the appeals panel. But, for the ease of the reader, we shall recapitulate them here.

A
The Investigation and the Arrest

On July 1, 2015, at approximately 5:35 p.m., Trooper Michael O'Neill of the Division of State Police was traveling northbound on Route 95 in Providence when he saw that in the next vehicle (a beige Buick) the operator was operating a cell phone with his right hand. *Amended Decision of Appeals Panel,* at 1 (citing *Trial Transcript,* at 1). During the time in which both vehicles continued from Route 95 onto Route 146 north, the Trooper noticed that the Buick's operator kept looking up and down from the traffic to his cell phone. *Amended Decision of Appeals Panel,* at 1 (citing *Trial Transcript,* at 2). As a result, the Trooper decided to stop the vehicle,

which he did in the vicinity of Admiral Street. *Amended Decision of Appeals Panel,* at 1-2 (citing *Trial Transcript,* at 2).

When he approached the vehicle, the Trooper identified the operator as Mr. Furtado and advised him regarding the reason for the stop. *Id*. Mr. Furtado responded that he was not texting, but operating his cell phone's GPS application. *Id*. Nevertheless, Trooper O'Neill issued a citation for "Text Messaging while Operating a Motor Vehicle," pursuant to G.L. 1956 § 31-22-30, to Mr. Furtado.[1]

B

The Trial

Mr. Furtado entered a plea of not guilty at his arraignment and the matter was reassigned to February 24, 2016 for trial.

At Mr. Furtado's trial, the State called only one witness, Trooper O'Neill. *See Trial Transcript,* at 1-4. On direct examination, Trooper O'Neill gave testimony consistent with the narrative presented *ante*. *Id*. at 1-2. Then, at the outset of the cross-examination by counsel for Mr. Furtado, the Trooper conceded that he could not say that he saw Mr. Furtado typing, but maintained that he saw him "negotiating" the phone with his right hand; he

[1] During the 2017 session of the General Assembly, § 31-22-30 was amended to make it perfectly clear that using a GPS device or a GPS application on any other device *does not* constitute texting while driving. *See* P.L. 2017, ch. 460. Accordingly, the many references in this opinion to § 31-22-30 allude exclusively to the statute as it existed on the date the instant citation was issued.

further recalled that the phone was black, and being held alongside the steering wheel. *Amended Decision,* at 2 (citing *Trial Transcript,* at 2).

Then, in answer to a further question posed by counsel, the Trooper would not contradict Mr. Furtado's statement that he was using his phone as a GPS, but maintained that Appellant, by, "repeatedly looking up and down from his cell phone to traffic" was "using" his cell phone, and thereby violated the anti-texting-while-driving law, § 31-22-30. *Amended Decision,* at 2 (citing *Trial Transcript,* at 3). *Also, Trial Transcript,* at 4.

After the Trooper's testimony concluded, Mr. Furtado was sworn and gave testimony. *See Trial Transcript,* at 5-6. He stated that, on the afternoon in question, he was using his cell phone's GPS to get to the Lincoln Police Station. *Amended Decision,* at 2 (citing *Trial Transcript,* at 5). Mr. Furtado flatly denied that he sent or received any text messages during the incident in question. *Id. (*citing *Trial Transcript, id.).* This testimony was confirmed by telephone records for the cell phone which counsel introduced into evidence. *Id.* (citing *Trial Transcript,* at 5-6).[2] The defense then rested. *Trial Transcript,* at 6.

At this point the defense made its summation. First, counsel argued that § 31-22-30 "only prohibits the use of a wireless handset or

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[2] The telephone records were received into evidence as Defendant's Exhibit No. 1. *Trial Transcript,* at 6.

personal wireless communication device to compose, read or send text messages while driving." *Amended Decision,* at 3 (citing *Trial Transcript,* at 7). Counsel added that "… using your phone as a GPS alone is not sending, receiving or reading a text message within the meaning of the [statute]." *Id*.

However, the trial magistrate rejected these arguments, holding that, although reading a GPS device was not the same as sending or receiving a text message, that activity was a form of distracted driving which the legislature wished to discourage. *Amended Decision,* at 3 (citing *Trial Transcript,* at 9-10). And so, since the trial magistrate found the trooper's testimony to be credible, he found the violation of § 31-22-30 to have been proven to the standard of clear and convincing evidence. *Amended Decision,* at 3 (citing *Trial Transcript,* at 11). The trial magistrate then imposed the minimum fine of $100 and required the Appellant to attend driver retraining. *Amended Decision,* at 3-4 (citing *Trial Transcript,* at 12). *Amended Decision,* at 4.

C

Proceedings Before the Appeals Panel

From this conviction Mr. Furtado filed an appeal, which was heard on May 18, 2016 by an RITT appeals panel composed of Administrative Magistrate DiSandro (Chair), Chief Magistrate Guglietta, and Judge Parker. *Amended Decision,* at 1, 4. From his arguments, the

appeals panel discerned three assertions of error: *first,* that the statute was ambiguous; *second,* that the statute was void for vagueness; *and three,* that the findings of fact made by the trial magistrate were insufficient to sustain the finding of guilt. *Amended Decision,* at 5. In its written decision, the panel addressed these arguments *seriatim*.

1

The Ambiguity Argument

First, the panel held that the statute was not ambiguous. The panel began its analysis by quoting the elements of the offense:

> 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.

Amended Decision of Appeals Panel, at 5 (quoting subsection 31-22-30(b)). The panel determined that the statute could not be deemed ambiguous, particularly because the statute — in subsection (a) — includes definitions for each of the key terms used. *Amended Decision of Appeals Panel,* at 6.

The panel then examined four of the statutory definitions more closely. It presented the definition of a "wireless handset," which, in subsection 31-22-30(a)(10), is declared to be "…a portable electronic or computing device, including cellular telephones and digital personal assistants (PDAs), capable of transmitting data in the form of a text

message." *Amended Decision of Appeals Panel,* at 6. The panel also presented the definition of a "personal wireless communications device," in subsection 31-22-30(a)(6), which is described as "… a hand-held device through which personal wireless services … are transmitted, but does not include a global navigation satellite receiver used for positioning, emergency notification, or navigation purposes." *Id*. The Panel emphasized that GPS devices which only *receive* transmissions were specifically excluded from this definition. *Amended Decision of Appeals Panel,* at 6-7.

Thirdly, the panel discussed § 30's definition of "text message," which I shall present here, in full:

> "Text message," also referred to as short messaging service (SMS), means the process by which users send, read, or receive messages on a wireless handset, including, but not limited to, text messages, instant messages, electronic messages, or e-mails, in order to communicate with any person or device.

Subsection 31-22-30(a)(8). The panel then noted a dictionary definition of "read" as being "to look at and understand the meaning of letters, words, symbols, etc." *Amended Decision of Appeals Panel,* at 7 (quoting *Miriam-Webster Dictionary* (2015)). On this ground, and because subsection (8) employs the phrase "including, but not limited to" when defining the types of communications which constitute text messages, the panel concluded that an expansive interpretation of the term was appropriate; it therefore

concluded that "a reader may be looking at any visual display on the phone's interface and be in violation of the statute." *Amended Decision of Appeals Panel,* at 7. In the panel's estimation, any other interpretation "would defeat the purpose of the statute: to prevent drivers from distractions caused by operation of a cell phone while driving." *Id.* (citing and quoting from 115 *Am. Jur. Proof of Facts 3d* 1).

Finally, the panel discussed the statute's definition of "use." *Id.,* at 8 (citing subsection 31-22-30(a)(9)). The panel observed that the definition had been amended earlier in 2015 to include operation "in a manner inconsistent with hands-free operation." *Amended Decision of Appeals Panel,* at 8-9 (citing P.L. 2015, ch. 87). For this reason, the panel found that this definition also merited an expansive reading. *Id.,* at 9. And so, based on its reading of the four definitions it discussed, the appeals panel found that § 31-22-30 was not ambiguous.[3]

In conclusion, based on the interpretation of the four definitions it discussed, the appeals panel concluded that § 31-22-30 prohibits the operation of a cell phone (in a non-hands-free manner) for any purpose, the use of its GPS function. *Id.*

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[3] To my reading, the panel's decision did not specifically reject Mr. Furtado's void-for-vagueness argument. However, it follows logically that, if the statute was not ambiguous, it also could not be vague.

2

The Sufficiency of Findings

Under this heading, the appeals panel discussed and rejected Mr. Furtado's claim that Trooper O'Neill's observations, as recounted to the trial magistrate, were insufficient to justify and sustain the violation, because he could not say that Appellant was typing on the device prior to being stopped. *Amended Decision of Appeals Panel,* at 9-10. The panel decided that the Trooper's observations — *i.e.,* that the motorist "was operating a cell phone with his right hand," that the motorist "continually repeatedly was looking up and down from traffic to his cell phone," and the motorist "was negotiating his cell phone[,]" were sufficient to show that "Appellant was using his cell phone, while driving, in a manner prohibited by § 31-22-30." *Id*. (citing *Trial Transcript,* at 1-2). And so, the panel affirmed Appellant's conviction under § 31-22-30. *Amended Decision of Appeals Panel,* at 11.

On September 10, 2016, Mr. Furtado filed an appeal of the appeals panel's decision in the Sixth Division District Court. A conference was held before the undersigned on October 25, 2016 and a briefing schedule was set. Both parties have submitted memoranda which relate their respective viewpoints.

II

Standard of Review

The standard of review which must be employed in this case is enumerated in G.L. 1956 § 31-41.1.-9(d), which states 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 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 provision is a mirror-image of the standard of review found in G.L. 1956 § 42-35-15(g) — a provision of the Rhode Island Administrative Procedures Act (APA). Accordingly, we are able to rely on cases interpreting the APA standard as guideposts in this process.

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.'" *Guarino v. Dep't. of*

Soc. Welfare, 122 R.I. 583, 584, 410 A.2d 425 (1980)(*citing* G.L. 1956 § 42-35-15(g)(5)). *See also Link v. State,* 633 A.2d 1345, 1348 (R.I. 1993). And our Supreme Court has reminded us that, when handling appeals from our traffic court, reviewing courts lack "the authority to assess witness credibility or to substitute its judgment for that of the hearing judge concerning the weight of the evidence on questions of fact." *Link,* 633 A.2d at 1348 (*citing Liberty Mutual Ins. Co. v. Janes,* 586 A.2d 536, 537 (R.I. 1991)). This Court's review "… is confined to a reading of the record to determine whether the judge's decision is supported by legally competent evidence or is affected by an error of law." *Link,* 633 A.2d at 1348 (*citing Envtl. Sci. Corp. v. Durfee,* 621 A.2d 200, 208 (R.I. 1993)).

III
Applicable Law
A
The Offense

As was made obvious during our exposition of the panel's decision, we know that, for a civil motor vehicle offense, § 31-22-30 is a rather substantial statute, including definitions for terms it employs in subsection (a) and exceptions to the coverage of the offense in subsections (c) and (d); however, the core of the offense, which is contained in subsection (b) of § 31-22-30, is rather brief:

> No person shall use a wireless handset or personal wireless communications 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.

As I analyze it, the statute has four elements which must be proven: *first*, the violator must be a person who is driving on a public street or highway; *second,* the motorist must have a wireless handset (or a personal wireless communications device) in his or her possession; *third,* the motorist must "use" that device, which means to employ it in a manner inconsistent with handsfree operation; *and fourth,* the motorist must use it for a particular purpose — to compose, read, or send text messages.

B

Statutory Construction — The Plain Language of the Statute

Generally, the words of a statute must be accorded their plain and ordinary meaning. This is the so-called "plain-meaning rule" of statutory construction. *See generally,* 2A N. SINGER AND S. SINGER, SUTHERLAND STATUTORY CONSTRUCTION, § 46:1, *The Plain Meaning Rule* (7th ed., Nov.2017 Update).

For a fairly recent (and splendidly concise) statement of our Supreme Court's teaching regarding the plain-meaning rule, we may turn to its 2012 decision in *Arnold v. Department of Labor and Training Board of Review,* 822 A.2d at 168-69, in which the Court declared:

> The resolution of this appeal depends upon questions of statutory interpretation. "When construing a statute 'our ultimate goal is to give effect to the purpose of the act as intended by the Legislature.' " *Oliveira v. Lombardi,* 794 A.2d 453, 457 (R.I. 2002) (quoting *Webster v. Perrotta,* 774 A.2d 68, 75 (R.I. 2001)). This Court must literally interpret a clear and unambiguous statute and attribute the plain and ordinary meanings to its words. *Solas v. Emergency Hiring Council of Rhode Island,* 774 A.2d 820, 824 (R.I. 2001). When examining an unambiguous statute, "there is no room for statutory construction and we must apply the statute as written." *Id*. (quoting *State v. DiCicco,* 707 A.2d 251, 253 (R.I. 1998)). We ascertain the Legis-lature's intention behind an ambiguous statute by considering "the entire statute, keeping in mind its nature, object, language and arrangement." *LaPlante v. Honda North America, Inc.,* 697 A.2d 625, 628 (R.I. 1997) (quoting *Algiere v. Fox,* 122 R.I. 55, 58, 404 A.2d 72, 74 (1979)). Although this Court is the ultimate arbiter of law, we give deference to an agency's interpretation of an ambiguous statute that it has been charged with administering and enforcing, provided that the agency's construction is neither clearly erroneous nor unauthorized. *See In re Lallo,* 768 A.2d 921, 926 (R.I. 2001). Our ultimate interpretation of an ambiguous statute, however, is grounded in policy considerations and we will not apply a statute in a manner that will defeat its underlying purpose. *See Pier House Inn, Inc. v. 421 Corporation,* 812 A.2d 799, 804 (R.I.2002).

While we could highlight every line of this quotation, there are, in my view, three essential elements that we must glean as guidance for use in the instant case — which are: (1) if the language of a statute is clear and unambiguous, (2) it is the best indicator of the legislative intent, and, in such situations, (3) the words of the statute must be given their plain and

ordinary meaning.

In addition, there is a corollary to the plain-meaning rule which directs that, when construing statutes, our judges "… must give effect to each and every word used in the statute." *Tarzia v. State,* 44 A.3d 1245, 1253-54 (R.I. 2012) (*citing State v. Clark,* 974 A.2d 558, 571 (R.I.2009) (*citing State v. Bryant,* 670 A.2d 776, 779 (R.I. 1996))). *See also* 2A N. SINGER & S. SINGER, § 46.6., *Each Word Given Effect* (7th ed., Nov.2017 Update).

IV
Analysis
A
Overview of G.L. 1956 § 31-22-30(b)

We shall now discuss whether the State provided competent evidence on each of the four elements of the offense.

I shall begin by putting off any discussion of whether Route 95 in Providence is a public highway, even though Appellant has argued that this element was not proven. Doing so will allow us to avoid (unnecessarily) discussing whether this issue was preserved for review at trial or before the appeals panel and whether any alleged lapse could be cured by judicial notice of the highway's status.

The second and third elements of the offense are not contested. Mr. Furtado concedes that he had in his possession a cell phone capable of

sending and receiving text messages (at least as that term is ordinarily used). In addition, Mr. Furtado agreed that he was holding the cell phone in his hand. *Trial Transcript,* at 5. This is conduct which, by definition, is inconsistent with *handsfree* operation.

And so, in my view, it is our interpretation of the fourth element — *i.e.,* that Mr. Furtado was using his cell phone "to compose, read, or send text messages" — upon which the resolution to this case will turn. Of course, the appeals panel did not find that Mr. Furtado was using his cell phone in order to compose, read, or send a "text message" as that term is ordinarily used; instead, the panel found that Mr. Furtado's use of his phone's GPS application constituted reading a text message, within the meaning of the § 31-22-30. And so, the precise question which we must answer is whether reading the visual display of a cell phone running a GPS app constitutes "reading" a "text message." I believe it does not, based on the statute's definition of text message, as it is stated in § 31-22-30(8).

B

Interpreting the Term "Text Message"

Although it was set forth *ante,* at 7, let us restate here the definition of the term "text message" which is contained in § 31-22-30(8):

> "Text message," *also referred to as short messaging service (SMS),* means the process by which users send, read, or receive messages on a wireless handset, including, but not limited to, text messages, instant

> messages, electronic messages, or e-mails, *in order to communicate with any person or device.*

(Emphasis added). As we proceed through our analysis, we shall see the importance of both the initial appositive phrase and the final clause of § 31-22-30(8) to our resolution of this case.

1

The Term — "Short Messaging Service (SMS)"

As we can readily see, near its beginning, the definition contains an appositive phrase — "also referred to as short messaging service (SMS)." I find it unfortunate that the panel neglected to include it when it quoted the definition in its decision, because I believe it to be most significant. *See Amended Decision of Appeals Panel,* at 7. *See also Appellee's Brief,* at 5-6 (also omitting the appositive phrase).

But, why is it significant? What is an SMS? We may note that, according to the *Merriam-Webster Online Dictionary,* the term is of recent vintage, first used in 1991; it means "a technology for sending short text messages between mobile phones." *See also New Oxford American Dictionary,* at 1651 (defining SMS as a "short message (or messaging) service, a system that enables cellular phone users to send and receive text messages"). So, at core, the term SMS refers to a system of technology which permits persons to send short messages to each other. There is

nothing in the record to suggest that GPS systems generally, or the one Mr. Furtado was using, employ SMS technology or processes.

2

"In Order to Communicate With Any Person or Device"

After enumerating an incomplete list of proscribed forms of communication (*i.e.,* text messages, instant messages, electronic messages, e-mails, or others), the definition limits the coverage of § 31-22-30 to those sending, receiving and reading these proscribed messages to those who are doing so for a particular purpose — *i.e.,* "in order to communicate with any person or device." In my estimation, using a GPS device or application is not a form of communication between persons; it is a data retrieval system, a modern version of looking at a map.

C

Summary

And so, for the foregoing reasons, I find that § 31-22-30(b), as it existed at the time when Mr. Furtado was stopped by Trooper O'Neill, did not include within its ambit persons using a GPS application on their cell phones. I believe it is this interpretation which best reflects the plain meaning of § 31-22-30 generally — and subsection (b) in particular — insofar as it repeatedly declares the legislature's desire to limit prosecutions under this section to those communicating with another while driving.

V
Conclusion

Upon careful review of the evidence presented and the pertinent law, I recommend that this Court find that the decision rendered by the appeals panel in this case was clearly erroneous and contrary to law. Accordingly, I recommend that the decision that the Traffic Tribunal appeals panel issued in this matter be REVERSED.

/s/
Joseph P. Ippolito
MAGISTRATE

JANUARY 9, 2019