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

Merimee Christopherson	:	
	:	
v.	:	**A.A. No. 2018 - 186**
	:	
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 rendered by to the Appeals Panel in this case is hereby AFFIRMED.

Entered as an Order of this Court at Providence on this 11th day of July, 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

Merimee Christopherson	**:**	
	:	
v.	**:**	**A.A. No. 2018-186**
	:	**(T18-0016)**
State of Rhode Island	**:**	**(18-403-501166)**
(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 Ms. Merimee Christopherson urges that an appeals panel of the Rhode Island Traffic Tribunal (RITT) erred when it affirmed her conviction for driving while operating a cell phone. 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, I have concluded that the Appeals Panel's decision affirming Appellant's conviction should be AFFIRMED. I so recommend.

I

Facts and Travel of the Case

We may glean from the electronic record attached to this case that, on June 5, 2018, Ms. Christopherson was cited by a member of the Cumberland Police Department for a violation of G.L. 1956 § 31-22-31, "Mobile Telephone Usage by Motor Vehicle Operators." Then, the matter proceeded to trial before a Magistrate of the Rhode Island Traffic Tribunal on July 19, 2018.

A

The Trial

As the trial began, the citing officer, Sergeant David Rosa, testified as follows:

> On Tuesday, June 5, 2018, about 10:30 in the morning, I was [indiscernible] Pennsylvania Avenue that runs into Diamond Hill Road. I observed passenger XG336 traveling north on Diamond Hill Road with the operator. This right hand turn right here, and in her right hand was her cell phone. I judged for about 75 feet as she drove by me. I conducted a motor vehicle stop, and explained to the operator, Merimee Christopherson, that the reason for my stop. At that time, she was argumentative, and she explained to me that she had a condition with her right ear and she was scratching it. She did not have her cell phone. I then further explained that I did see a cell phone in her right hand at her right ear, and that's why I stopped her. From there I returned to my vehicle. I issued citation number 18403501166. I explained to her that she needed to [indiscernible]. I also

> explained if she showed receipt of a Bluetooth device, [indiscernible] the ticket would be dismissed. However, she again became argumentative, and explained to me that she wasn't going to do that because she wasn't on her phone. She attempted to show me her call history during the motor vehicle stop, and I explained to her again that this wasn't the time for that. And I told her if she wanted to challenge it, she could challenge it in court.

Trial Transcript, at 2 (ER, at 22) (recording times omitted). Ms. Christopherson immediately denied she was on her cell phone; moreover, she said the phone was not in her hand. *Id*. Instead, she testified that when the officer observed her, she was scratching her ear, because of a skin condition she suffered from. *Id*. at 3. She did concede that she was probably singing along to the radio at the same time. *Id*.

To support her testimony, she presented the usage log of her Trac phone as an exhibit. *Id*. at 2-3. According to Appellant, it showed no data usage and no incoming or outgoing calls on the day and time in question. *Id*. at 3. She added that she does not use her cell phone while driving because she does not wish to set that example for her son. *Id*.

At this juncture, the Trial Magistrate asked the officer if he was sure that Ms. Christopherson was using a cell phone when he observed her. *Id.* at 3. The officer replied that there was no doubt in his mind that she had

a cell phone in her hand. *Id.* After Appellant interjected that she only had one cell phone, the Trial Magistrate rendered his decision. *Trial Transcript,* at 3. He said:

> Okay. This is summons number 18403501166, charging mobile telephone usage by motor vehicle operator. The credible testimony of the officer, which
> [indiscernible] findings and fact, is that on June 5, 2018 at 10:29, this motorist was operating a vehicle on Diamond Hill Road. While this officer was observing her, she put her right-hand to her right ear with a cell phone in it for approximately 75 feet. He initiated a motor vehicle stop and issued the citation.
> The statute that this motorist is charged on 31-22-31, sub-section 2, reads as follows: And operator of a motor vehicle who holds a hand-held personal device to or in the immediate proximity of the operator's ear while operating the vehicle or while the vehicle is in motion, is presumed to be engaging in a call within the meaning of this section. The presumption established by this sub-division is rebuttal by evidence tending to show the operator was not engaged in a call. For me to find that, I would have to find the officer's lying, and I don't think he's lying.

Id. at 4-5. And so, based upon (what he found to be) the credible testimony of Sergeant Rosa, the Trial Magistrate found Ms. Christo-pherson guilty on the charge of using a cell phone while driving. *Id.* at 5. He imposed a fine of $100.00 but did not assess costs. *Id.*

B
Proceedings Before the Appeals Panel

Ms. Christopherson appealed and the matter was heard on October 31, 2018 at 2:00 p.m. by an appeals panel composed of Administrative Magistrate Abbate, Chief Magistrate DiSandro, and Associate Judge Almeida. *See Decision of Appeals Panel,* at 1. In her appeal, she argued that the Trial Magistrate's decision was clearly erroneous in that (1) he failed to give her testimony the consideration it deserved and (2) the cell phone records she submitted established that she was not speaking on her cell phone while driving. *Id.* at 4. The appeals panel responded to these assertions in its Decision issued on December 11, 2018.

1
The Credibility Determination

Regarding Appellant's first argument, the Panel recited the well-established principal that the Appeals Panel "lacks 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." *Decision of Appeals Panel,* at 4 (*citing Link v. State,* 633 A.2d 1345, 1348 (R.I. 1993) (*citing Liberty Mutual Ins. Co. v. Janes,* 586 A.2d 536, 537 (R.I. 1991)). This rule has its rationale in the fact that the appeals panel does not have the

opportunity to see and hear the witnesses testify, which is "all-important to the evidence sifting which precedes a determination of what to accept and what to disregard." *Decision of Appeals Panel,* at 4-5 (*quoting Environmental Scientific Corp. v. Durfee,* 621 A.2d 200, 208 (R.I. 1993) (*quoting Laganiere v. Bonte Spinning Co.,* 103 R.I. 191, 196, 236 A.2d 256, 258 (1967))).

Turning to the case at hand, the Panel held that, by finding the testimony of Sergeant Rosa to be credible, he implicitly found Appellant's testimony (that she was scratching her ear) to be otherwise. *Decision of Appeals Panel,* at 5. Consequently, the Panel found itself unable to second-guess the Trial Magistrate's credibility determination. *Id*. Therefore, it could not find the Trial Magistrate's decision to be clearly erroneous. *Id*. at 5-6.

2

The Weight of the Evidence (The Cell Phone Call Logs)

Under this heading, the Appeals Panel addressed Ms. Christopherson's attempt to negate the officer's testimony by submitting her Trac-Phone call logs into evidence; on appeal, Appellant argued that the Trial Magistrate failed to give proper weight to the Call Logs she submitted. *Decision of Appeals Panel,* at 6-8. During the course of the trial, the Trial Magistrate expressed the opinion that call logs generally have "very little

relevance," because the Court could not be sure that the defendant did not own more than one cell phone or that the call log matched the cell phone in Appellant's possession at the time of the incident. *Decision of Appeals Panel,* at 7 (*citing Trial Transcript,* at 7). And so, he accorded the documents little weight. *Id.* at 7.

However, the Appeals Panel affirmed the Trial Magistrate's decision to convict (notwithstanding the reception of the call logs into evidence) because it agreed that an adequate foundation had not been laid establishing the call log's authenticity. *Id.* (*citing* R.I. R. EVID. 901 *and O'Connor v. Newport Hospital,* 111 A.3d 317, 323 (R.I.2015)). And, concluding its discussion of the second issue, the Panel reiterated that it is not permitted to "substitute its judgment for that of the hearing judge concerning the weight of evidence on questions of fact." *Id.* at 7-8 (citing Link, 633 A.2d at 1348 (*citing Liberty Mutual Insurance Co. v. Janes,* 586 A.2d 536, 537 (R.I.1991))).

Ms. Christopherson filed an appeal from this judgment on December 27, 2018. *See* Notice of Appeal (ER at 5). As grounds for her appeal, she stated that "[t]he Judge ignored the cell usage record in order to back up the officer." *See* Notice of Appeal (ER at 7).

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 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
Analysis

According Appellant's statement of grounds for appeal its widest plausible scope, we shall address both of the issues which the members of the Appeals Panel discussed in their December 11th opinion. As we saw in our rehearsal of the travel of the case, *ante,* both are matters regarding the weight to be bestowed upon two items of evidence — *first*, Ms.

Christopherson's testimony and *second*, the cell phone logs presented by Appellant. After a thorough review of the entire record, I am convinced that each of Appellant's claims of error must be overruled and the decision rendered by the Appeals Panel must be affirmed.

Clearly, the Trial Magistrate placed great emphasis on the fact that the officer gave him his assurance that he saw Ms. Christopherson hold a cell phone in her hand while driving. As a result, he gave precedence to the officer's testimony, not Appellant's. This was his prerogative as the fact-finder. He saw and heard the witnesses testify. He could evaluate their demeanor — a privilege withheld from the members of the Appeals Panel and this Court. It is for this reason that the members of the panel and this Court are barred from substituting their judgment for that of a trial magistrate as to the weight of the evidence on questions of fact. *See* §§ 31-41.1-8(f) *and* 31-41.1-9(d). This is what the Court means when we refer to our standard of review as being limited on factual matters. And so, we cannot overrule the Trial Magistrate's credibility determination.

We now turn to the second issue raised by Ms. Christopherson — the call logs. The Appeals Panel supported the Trial Magistrate's decision to give little weight to this evidence because, as the Trial Magistrate said, he

"could not be sure how many cell phones Appellant owns or that the call log produced at trial matches the cell phone that Appellant had at the time of the incident." *Decision of Appeals Panel,* at 7 (citing *Trial Transcript,* at 3). In essence, he found that the call log was not supported by an adequate evidentiary foundation. *Id.*

Of course, we must acknowledge that Appellant did testify that the phone she had with her that day was her only cell phone. But, this testimony was otherwise unsupported. In any event, in cases brought under § 31-22-31, the prosecution need not prove that the motorist was using a *particular* phone, only that she (or he) was using *a* cell phone while driving. And so, in this case, the prosecution did not identify the phone Appellant was using.

Conversely, in order to establish the relevance of the call logs, the motorist must prove, to the satisfaction of the fact-finder, that the phone she (or he) was using on the day in question and the phone whose records were submitted were the one and the same device.[1] In the estimation of the Trial Magistrate, Ms. Christopherson's self-serving testimony was

[1] Perhaps the only way to cure this gap in proof is to make it standard practice for officers giving citations for phone use to offer to note the number of the phone; of course, this would have to be done voluntarily.

insufficient to satisfy this requirement. I cannot say that this ruling constituted error *per se*.

And so, at the end of the day, I cannot find that the Appeals Panel's deference (to the Trial Magistrate's finding that the officer's version of events was more credible than Appellant Christopherson's) was clearly erroneous in light of the reliable, probative, and substantial evidence of record.

IV
Conclusion

Upon careful review of the record and the positions of the parties, I conclude that the Decision issued by the appeals panel in this case was neither contrary to law nor predicated on an improper procedure. Accordingly, I recommend that this Court AFFIRM the decision rendered by the Appeals Panel.

/s/
Joseph P. Ippolito
Magistrate

July 11, 2019