

**STATE OF RHODE ISLAND AND PROVIDENCE PLANTATIONS**

**CRANSTON, RITT**

**RHODE ISLAND TRAFFIC TRIBUNAL**

**STATE OF RHODE ISLAND**

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v.

**C.A. No. T16-0017  
16102500807**

**DANA FREEMAN**

**DECISION**

**PER CURIAM:** Before this Panel on October 5, 2016—Magistrate Goulart (Chair), Magistrate Kruse Weller, and Associate Judge Parker, sitting—is Dana Freeman’s (Appellant) appeal from a decision of Judge Almeida (Trial Magistrate), sustaining the charged violation of G.L. 1956 § 31-22-30, “Text messaging while operating a motor vehicle.” The Appellant appeared before this Panel represented by counsel. Jurisdiction is pursuant to § 31-41.1-8.

**I**

**Facts and Travel**

At trial, Bristol Police Officer Michael Connors (Officer Connors) testified that on June 22, 2016, he observed Appellant driving on Hope Street in Bristol, Rhode Island at 9:05 a.m. (Tr. at 3.) Officer Connors testified, on that date—while the weather conditions were clear and he was approximately fifteen feet away from Appellant’s vehicle—he observed Appellant using her mobile device. *Id* at 5-6. Officer Connors went on to testify that he observed Appellant “holding a mobile device in her right hand, with her eyes diverted toward the mobile device.” *Id.* at 4. Officer Connors also stated that he “could see the thumb moving from [his] traffic post.” *Id.* He explained that “as [Appellant] passed my location her phone was at steering wheel

level and her eyes were diverted to the screen and her thumb was moving, and I felt that it was dangerous.” *Id.* at 19.

Officer Connors explained that after observing Appellant using her mobile device while operating her vehicle, he executed a traffic stop of her vehicle. *Id.* at 4, 6. While approaching the vehicle, Officer Connors noticed that the driver’s side brake light was in disrepair. *Id.* at 4. Upon further investigation, Officer Connors also learned that the vehicle’s inspection was not current. *Id.* Officer Connors testified that Appellant indicated she was aware that the break light was not working properly, but, she was unaware of the out-of-date inspection. *Id.* In addition, Officer Connors also testified that Appellant was unable to provide proof of insurance at the time of the traffic stop. *Id.* Officer Connors gave Appellant warnings for three of the four violations, choosing to only issue a citation for Appellant’s violation of § 31-22-30, “Text messaging while operating a motor vehicle.” *Id.* at 5. Appellant testified that she tried to provide proof that she was not texting to Officer Connors during the stop, but Officer Connors did not look at Appellant’s phone. *Id.* at 5, 7. Based on his observations, Officer Connors concluded the traffic stop at 9:17 a.m. by issuing Appellant the citation. *Id.* at 5.

Appellant introduced records from her cell phone account with T-Mobile. *Id.* at 12. Appellant testified that the exhibit did not show any text messages sent from her device between 8:51 a.m. and 9:20 a.m. *Id.* at 14-15. Appellant stated that she had not been using the phone for text messaging but instead as a global positioning service device (GPS). *Id.* at 15. Appellant added that occasionally she picks up the phone while she is using the GPS feature. *Id.* at 17.

On July 4, 2016, Appellant was again stopped and cited for texting while driving. *Id.* at 23. Appellant did not contest that charge and paid the fine related to that citation by mail. *Id.* at 24. Based on the conviction arising from the July 4 incident, the Trial Magistrate found that this

violation was a second offense and ordered Appellant's license be suspended for one month. *Id.* at 25. Appellant filed a timely appeal of the Trial Magistrate's decision. Forthwith is this Panel's decision.

## II

### Standard of Review

Pursuant to G.L. 1956 § 31-41.1-8, the Appeals Panel of the Rhode Island Traffic Tribunal possesses appellate jurisdiction to review an order of a Judge or Magistrate of the Rhode Island Traffic Tribunal. Section 31-41.1-8(f) provides in pertinent part:

“The appeals panel shall not substitute its judgment for that of the Judge or Magistrate as to the weight of the evidence on questions of fact. The appeals panel may affirm the decision of the Judge or Magistrate, or it may remand the case for further proceedings or reverse or modify the decision if the substantial rights of the appellant have been prejudicial because the Judge's findings, inferences, conclusions or decisions are:

- “(1) in violation of constitutional or statutory provisions;
- “(2) In excess of the statutory authority of the Judge or Magistrate;
- “(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.”

In reviewing a hearing Judge or Magistrate's decision pursuant to § 31-41.1-8, this Panel “lacks the authority to assess witness credibility or to substitute its judgment for that of the hearing Judge [or Magistrate] concerning the weight of the evidence on questions of fact.” *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)). “The review of the Appeals Panel is confined to a reading of the record to determine whether the Judge's [or Magistrate's] decision is supported by legally competent

evidence or is affected by an error of law.” *Link*, 633 A.2d at 1348 (citing *Envtl. Scientific Corp. v. Durfee*, 621 A.2d 200, 208 (R.I. 1993)). “In circumstances in which the Appeals Panel determines that the decision is clearly erroneous in view of the reliable, probative, and substantial evidence on the whole record or is affected by error of law, it may remand, reverse, or modify the decision.” *Link*, 633 A.2d at 1348. Otherwise, it must affirm the hearing Judge’s [or Magistrate’s] conclusions on appeal. *See Janes*, 586 A.2d at 537.

### **III**

#### **Analysis**

On appeal, Appellant argues that the Trial Magistrate’s decision was not supported by clear and convincing evidence. Specifically, Appellant contends that the Trial Magistrate’s decision to suspend Appellant’s license for one month was “[i]n violation of constitutional and statutory provisions,” “[m]ade upon unlawful procedure,” and “[c]learly erroneous in view of the reliable, probative, and substantial evidence on the whole record.” Sec. 31-41.1-8.

#### **A**

##### **Statutory Interpretation of § 31-22-30**

Section 31-22-30 prohibits the use of wireless communications devices while driving: “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.” The statute defines a personal wireless communication device as “a hand-held device through which personal wireless services (commercial mobile services, unlicensed wireless services, and common carrier wireless exchange access services) are

transmitted, but does not include a global navigation satellite receiver used for positioning, emergency notification, or navigation purposes.” Sec. 31-22-30(a)(6).<sup>1</sup>

Recently the Rhode Island Traffic Tribunal Appeals Panel ruled that “operation of the cell phone in order to read or look at anything displayed on the phone’s interface qualifies as ‘using’ the cell phone in violation of § 31-22-30.” *State of Rhode Island v. Joseph Furtado*, C.A. No. T16-0004 (2016). In *Furtado*, the panel based its decision on the language and legislative intent of § 31-22-30, stating that a person “need not be looking at letters or text exclusively, but rather, may be looking at symbols or characters displayed on the phones interface.” *Id.* at 7. Moreover, the panel in *Furtado* explicitly stated, “a reader may be looking at any visual display on the phone’s interface and be in violation of the statute. To hold otherwise would defeat the purpose of the statute: to prevent drivers from distractions caused by operation of a cell phone while driving.” *Id.* Based on its interpretation of the statute, the panel concluded that the manipulation of “a cell phone for any purpose, including GPS, is prohibited by the statute.” *Id.* at 9.

Accordingly, the Panel in this case adopts the interpretation of § 31-22-30 set forth in *Furtado*, whereby, manipulating a cell phone for any purpose, including GPS, is a violation of the statute. *Id.* In the case at hand, the Appellant testified that she was holding her phone while using it as a GPS. (Tr. at 17.) As the panel in *Furtado* stated, using GPS while holding a cell phone is a violation of the law.<sup>2</sup> (Tr. at 15.)

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<sup>1</sup> On October 11, 2017, the General Assembly enacted an additional provision under § 31-22-30. Section § 31-22-30(c)(4) states that the statute “shall not be construed to prohibit the use of any wireless handset or personal wireless communication device by; A person activating, viewing, or deactivating a global positioning or navigation device or a global positioning or navigation application.” The Appellant’s violation pre-dates this legislative enactment.

<sup>2</sup> The intent of the law was, and still is, to prevent and protect all drivers in Rhode Island from distracted driving. Alarming, in our country, at any moment of daylight there are 660,000

This Panel would like it to be clear that pursuant to the General Assembly's recent enactment of § 31-22-30(c)(4), the operator of a vehicle may activate, view, or deactivate a GPS application on a wireless communication device. This statutory change, however, does not disturb this Panel's decision. Generally, "statutory changes are normally given prospective effect; this court has ruled that where the Legislature itself expresses a contrary intent, that determination is controlling." *Pezzulli v. State*, 494 A.2d 540, 543 (R.I. 1985) (stating that "[t]he enactment clause of the [] legislation specifically provided that the act was to be applied to all petitions pending on the date of passage of th[e] act.") When the Legislature passed § 31-22-30(c)(4), there was no mention of the changes applying retroactively. Moreover, the language of § 31-22-30(c)(4) states that the act is effective upon passage. The date of the citation in this matter, precedes § 31-22-30(c)(4) effective date.

## B

### **"Clear and Convincing Evidence"**

Appellant argues that Officer Connors' testimony did not amount to clear and convincing evidence of a violation of § 31-22-30. *See* Traffic Trib. R. P. 17(a). Specifically, Appellant contends that there was no evidence presented during trial showing that she was texting while driving. (Tr. at 18.)

The prosecution must prove any violation in the Rhode Island Traffic Tribunal by clear and convincing evidence. Traffic Trib. R. P. 17(a). Clear and convincing evidence is evidence that will "produce in the mind of the factfinder, a firm belief or conviction that the allegations in

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drivers using cell phones or manipulating electronic devices while driving. U.S. Dep't of Transp., *Driver Electronic Device Use in 2011*, <https://crashstats.nhtsa.dot.gov> [hereinafter *Driver Electronic Device Use in 2011*]. In 2014, there were 3,179 fatal car crashes because of distracted driving. U.S. Dep't of Transp., *Traffic Safety Facts Research Notes: Distracted Driving 2014*, <https://crashstats.nhtsa.dot.gov> [hereinafter *Distracted Driving 2014*].

question are true.” *Cahill v. Morrow*, 11 A.3d 82, 88 n.7 (R.I. 2011) (quoting 29 Am.Jur.2d *Evidence* § 173 at 188–89 (2008)). This Panel’s review of the case is “limited to a determination of whether the hearing justice’s decision is supported by legally competent evidence.” *See Marran v. State*, 672 A.2d 875, 876 (R.I. 1996). The Trial Magistrate’s factual findings are treated with deference and are not to be disturbed by the Appeals Panel, unless the Trial Magistrate “overlooked or misconceived relevant and material evidence or was otherwise clearly wrong.” *Brown v. Jordan*, 723 A.2d 799, 800 (R.I. 1998) (internal citations omitted).

This Panel rejects Appellant’s claims that there was insufficient evidence offered at trial from which the Trial Magistrate could form a “firm belief or conviction.” *Cahill*, 11 A.3d at 88 n.7. Officer Connors testified that he witnessed Appellant operating the vehicle while using her mobile device. (Tr. at 3, 24-25.) Moreover, Officer Connors testified that he was only fifteen feet away when he observed Appellant driving on a day with clear weather conditions. *Id.* at 5-6. Appellant even admitted to manipulating the phone while driving the vehicle when she told Officer Connors that she was using her device as a GPS device. *Id.* at 15. After a review of the entire record, this Panel finds that the Trial Magistrate had sufficient evidence to sustain the violation. Moreover, the recent enactment of § 31-22-30(c)(4) post-dates Appellant’s violation and allows the use of a personal wireless communication device only for limited purposes. Therefore, this Panel finds the Trial Magistrate’s decision was not clearly erroneous in light of the evidence presented.

## C

### **Section 31-41.1-6(b)**

Next, Appellant argues that the Trial Magistrate did not make findings of fact on the record and that a failure to do so violates § 31-41.1-6(b). Section 31-41.1-6(b) requires, “[a]fter

due consideration of the evidence and arguments, the judge or magistrate shall determine whether the charges have been established, and appropriate findings of fact shall be made on the record.”

The record indicates that the Trial Magistrate stated:

“[B]ased on the officer's testimony that on th[at] day [and] time [] he [was] at the intersection of Hope and Franklin, fifteen feet away from...[Appellant's] vehicle, he observe[d] the phone in [Appellant's] hand being manipulated by [Appellant] while operating a motor vehicle, eyes down, and [the officer] pulled [Appellant] over.” (Tr. at 25.)

Appellant suggests that the Trial Magistrate's statement does not constitute findings of fact because the statement was not preceded by a formal announcement and the statement did not appear at the end of trial. However, this Panel would act in excess of its statutory authority if it were to impose a script at the end of each trial for a trial judge or magistrate to recite. This Panel is of the opinion that the Appellant's rights were not prejudiced by the Trial Magistrate stating the Court's findings of fact in such a manner. Thus, this Panel concludes that the Trial Magistrate's findings of fact were sufficient under § 31-41.1-6(b) and not made upon unlawful procedure.



**IV**

**Conclusion**

This Panel has reviewed the entire record before it. Having done so, the members of this Panel are satisfied that the Trial Magistrate's decision was not in violation of constitutional or statutory provisions, clearly erroneous in view of the reliable, probative, and substantial evidence on the whole record, or made upon unlawful procedure. The substantial rights of the Appellant have not been prejudiced. Accordingly, Appellant's appeal is denied, and the charged violations are sustained.

ENTERED:

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Magistrate Alan R. Goulart (Chair)

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Magistrate Erika Kruse Weller

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Associate Judge Edward C. Parker

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