STATE OF RHODE ISLAND AND PROVIDENCE PLANTATIONS

CRANSTON, RITT **RHODE ISLAND TRAFFIC TRIBUNAL**

STATE OF RHODE ISLAND	**:**	
	:	
v.	**:**	**C.A. No. T17-0022**
	:	**17203502311**
EDMUND E. HATHAWAY	**:**	

DECISION

PER CURIAM: Before this Panel on September 27, 2017,—Magistrate Kruse Weller (Chair), Chief Magistrate Guglietta, and Magistrate Noonan, sitting—is Edmund E. Hathaway's (Appellant) appeal from a decision of Judge Parker (Trial Judge), sustaining the charged violation of G.L. 1956 § 31-22-30, "Text messaging while operating a motor vehicle." The Appellant appeared before this Panel *pro se*. Jurisdiction is pursuant to G.L. 1956 § 31-41.1-8.

I

Facts and Travel

On April 30, 2017, Warwick Police Officer Aaron C. Kay (Officer Kay) observed the operator of motor vehicle using a cell phone while driving around a rotary on Post Road in the City of Warwick. Officer Kay conducted a motor vehicle stop during which he identified the operator as this Appellant, and subsequently issued Appellant a citation for the abovementioned violation. *See* Summons No. 17203502311.

The Appellant contested the charged violation and the matter proceeded to trial on July 14, 2017. At trial, Officer Kay testified that on April 30, 2017, he was on patrol in a marked police cruiser traveling southbound on the Post Road extension into the Apponaug area of Warwick. (Tr. at 1.) Before entering the rotary at the junction of the Post Road extension and

Post Road, Officer Kay stopped at a yield sign to allow the passage of oncoming traffic which had the right-of-way. *Id.* A silver-colored Toyota Camry operated by a male, who later was identified as Appellant, passed directly in front of Officer Kay's vehicle. *Id.*

Officer Kay testified that as Appellant passed by the front of his cruiser, he observed Appellant using his mobile device. *Id.* Specifically, Officer Kay testified that he observed that Appellant "had his cell phone in his left hand in a horizontal position[,]" and that the device was "positioned [in] the upper left of the steering wheel . . . ." *Id.* He also testified that Appellant "was looking down at his phone while he was manipulating the rotary curve," and that at that point, Appellant "began straddling both lanes of travel" within the rotary. *Id.*

Officer Kay pulled all the way into the left lane of the rotary behind Appellant, whereupon he observed the mobile device in the same position as before, and he "clearly was able to see [that Appellant] was playing a video on his screen for several seconds[.]" *Id.* at 1-2. Officer Kay further stated that he observed "the background changing on the phone[,] [and that Appellant] ke[pt] looking down at the phone, up at the rotary, down at the phone, and back up at the rotary and continued to drive . . . ." *Id.* at 2. According to Officer Kay, he had positioned his cruiser such that he was able to see into the driver-side window, and that in doing so, he observed "a video and it was changing screens . . . [i]t wasn't a phone call screen[,] it wasn't a text message screen." *Id.*

At that point, Officer Kay executed a traffic stop of Appellant's vehicle. *Id.* Officer Kay asked Appellant if he knew why he had been pulled over, to which Appellant replied that it was because he had been swerving. *Id.* Officer Kay then informed Appellant that he had observed Appellant looking at a video on his phone while operating his vehicle. *Id.* Officer Kay testified

that Appellant admitted to having a phone, but "did not further elaborate on it." *Id.* Thereafter, Officer Kay issued Appellant a citation for texting while driving. *Id.*

In his defense, Appellant testified that at the time of the incident, he had been using his mobile device to engage in a telephone call, and that he did not recall watching a video. *Id.* He then offered to introduce records from his cell phone account. *Id.* at 3. The Trial Judge rejected the offer, stating: "You're phone record doesn't mean anything. You could be . . . You could be reading . . . You could be watching [D]onald [D]uck I guess . . . stored in your machine . . . ." *Id.* The Appellant responded by stating "I was talking on the phone. I admit I was talking on the phone." *Id.*

Thereafter, the Trial Judge found that Appellant had violated the statute. The Appellant timely appealed the decision to this Panel. Forthwith is this Panel's decision.

II

Standard of Review

Pursuant to § 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 maintains that the Trial Judge's decision was made upon lawful procedure and characterized by abuse of discretion or clearly unwarranted exercise of discretion. Specifically, he contends that the Trial Judge erred in not allowing him to introduce the record of his cell phone account, which would have proven that he had been engaged in a telephone call during the relevant time period. He also questioned Officer Kay's ability to accurately observe a horizontal screen from the police vehicle.

Rule 401 of the Rhode Island Rules of Evidence defines "[r]elevant evidence" as "evidence having any tendency to make the existence of any fact that is of consequence to the determination of the action more probable or less probable than it would be without the evidence." R.I. R. Evid. 401. It is well-settled "that the admission or exclusion of evidence on grounds of relevancy is within the discretion of the trial justice, and absent a showing of abuse of this discretion" the court should "not disturb a ruling on the admissibility of evidence." *State v. Neri*, 593 A.2d 953, 956 (R.I. 1991) (citing *McKenna v. St. Joseph Hospital*, 557 A.2d 854, 858 (R.I.1989)). Moreover, "[a]n aggrieved party challenging the ruling of the trial justice additionally bears the burden of establishing that the excluded evidence was material and that its exclusion had an improper prejudicial influence on the factfinder." *State v. Calenda*, 787 A.2d 1195, 1199 (R.I. 2002). Furthermore, "there is no abuse when 'discretion has been soundly and judicially exercised * * * in the light of reason applied to all the facts with a view to the rights of all the parties to the action.'" *Id.* (quoting *Skaling v. Aetna Insurance Co.*, 742 A.2d 282, 288 (R.I.1999)).

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).

Additionally, 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 Judge's factual findings are treated with deference and are not to be disturbed by the Appeals Panel, unless the Trial Judge "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).

In the instant matter, Appellant stated that at the time of the incident, he had been talking on his phone. In support of this assertion, Appellant attempted to introduce records from his cell phone account allegedly showing that he indeed had been making a call during the relevant time period. The Trial Judge, however, deemed such evidence irrelevant, stating that it "doesn't mean anything. You could be . . . you could be reading . . . You could be watching [D]onald [D]uck I guess . . . stored on your machine." (Tr. at 3.) The Appellant responded: "I was talking on the phone. I admit I was talking on the phone." *Id.* However, without the benefit of the cell phone records, the Trial Judge found that Officer Kay's testimony about a "changing" screen on Appellant's cell phone to be indicative of "sending or receiving texts . . . ." *Id.* Accordingly, he found Appellant guilty of "distractive driving[.]" *Id.*

This Panel is of the opinion that the Trial Judge abused his discretion when he refused to admit Appellant's cell phone records in his defense of the charge. The Appellant defended the charge against him by asserting that he was on the phone when the incident occurred. However, he was prevented from introducing cell phone records that may have given credence to his defense. This Panel concludes that the Trial Judge overlooked relevant and material evidence and otherwise was clearly wrong. *See Brown*, 723 A.2d at 800. As a result, the substantial rights

of Appellant were prejudiced. This Panel hereby vacates the decision of the Trial Judge and remands the matter for a new trial.

IV

Conclusion

This Panel has reviewed the entire record before it. Having done so, the members of this Panel find that the Trial Judge's decision was made upon lawful procedure and characterized by abuse of discretion or clearly unwarranted exercise of discretion. The substantial rights of the Appellant have been prejudiced. Accordingly, Appellant's appeal is granted and the matter is remanded for further findings.

ENTERED:

_____
Magistrate Erika Kruse Weller (Chair)

_____
Magistrate William T. Noonan

DATE: _____

Note: Chief Magistrate William R. Guglietta participated in this Decision but was no longer a member of this Court at the time this Decision was issued.