STATE OF RHODE ISLAND AND PROVIDENCE PLANTATIONS

CRANSTON, RITT **RHODE ISLAND TRAFFIC TRIBUNAL**

STATE OF RHODE ISLAND	**:**	
	:	
v.	**:**	**C.A. No. T16-0004**
	:	**15001516934**
JOSEPH FURTADO	**:**	

DECISION

PER CURIAM: Before this Panel on May 18, 2016—Administrative Magistrate DiSandro III (Chair), Chief Magistrate Guglietta, and Judge Parker, sitting—is Joseph Furtado's (Appellant) appeal from a decision of Magistrate Abbate of the Rhode Island Traffic Tribunal (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.

Facts and Travel

On July 1, 2015, Trooper Michael O'Neill of the Rhode Island State Police (Trooper), charged the Appellant with the aforementioned violation of the Motor Vehicle Code. The Appellant contested the charge, and the matter proceeded to trial on February 24, 2016.

At trial, the Trooper testified that at approximately 5:35 p.m., he was traveling northbound in the first lane of travel on Route 95 in Providence, when he observed a beige Buick proceeding in the second lane of travel, directly next to his cruiser. (Tr. at 1.) The Trooper noticed that the driver of the Buick was operating a cell phone with his right hand. Id. The cell phone was positioned next to the steering wheel of the Buick. Id. Both the Buick and the Trooper continued on to 146 north. Id. at 2. The Trooper watched as the driver of the Buick "continually repeatedly was looking up and down from traffic to his cell phone." Id.

After a few moments, the Trooper positioned his cruiser behind the Buick and conducted a traffic stop on 146 north in the area of Admiral Street. Id. The Trooper identified the driver of the Buick as the Appellant and advised the Appellant as to the reason for the traffic stop. Id. The Appellant informed the Trooper that he was "operating his GPS on his cell phone." Id. Finding this statement to be unpersuasive, the Trooper issued Appellant a citation for § 31-22-30, "Text messaging while operating a motor vehicle."

At the conclusion of the Trooper's testimony, counsel for the Appellant questioned the Trooper regarding his observations, stating, "[y]ou didn't see [Appellant] typing at all, did you?" Id. The Trooper responded, "I don't recall necessarily typing, I do remember him negotiating the cell phone." Id. Counsel then reasoned that the Appellant could have been "using his phone as a GPS[.]" Id. at 3. The Trooper replied, "[a]s far as whether he was using his GPS or texting, all I can say is that he was using his cell phone with his right hand while driving the vehicle." Id. The Trooper continued, "I observed him repeatedly looking up and down from his cell phone to traffic. In my opinion, that constitutes using his cell phone. . . ." Id.

At the conclusion of cross-examination, counsel for the Appellant moved to dismiss the charged violation under the basis that the State had not established "that [Appellant] was using his cell phone to send or receive a message at the time of the stop." Id. at 4. The Trial Magistrate reserved ruling on the Motion, and Appellant presented his defense. Id.

In his defense, Appellant testified that he was "using [his cell phone] for GPS to go to the Lincoln Police Station." Id. at 5. He maintained that he was not sending or receiving any text messages. Id. In further support of Appellant's defense, counsel submitted into evidence phone records from Appellant's cell phone provider. Id. at 5-6. The records indicated that at the time of the traffic stop, 5:30 p.m., there were no calls or text messages sent or received. Id. at 6.

Counsel concluded, "§ 31-22-30 is clear . . . [i]t only prohibits the use of a wireless handset or personal wireless communication device to compose, read or send text messages while driving . . . using your phone as a GPS alone is not sending, receiving or reading a message within the meaning of the [statute]." Id. at 7.

After hearing the arguments presented, the Trial Magistrate sustained the charged violation, § 31-22-30. The Trial Magistrate based his decision, in part, on the Court's interpretation of the statute. Id. at 9. Interpreting the statute, the Trial Magistrate stated:

> "[t]he [L]egislature clearly separates and defines what a personal wireless communication device means. And it clearly segregates what the device is from a GPS navigating system and it also defines clearly what text messaging is. Text messaging . . . means the process by which a user sends, reads, or receive[s] messages on a wireless handset, including but not limited to text messages . . . [s]o the device does not have to actively been being [sic] used at that time to send or receive messages. You are merely reading what's on that cell phone, it's included." Id. at 9-10.

The Trial Magistrate concluded that the Legislature "clearly has a concern with distracted drivers." Id. at 10. Additionally, the Trial Magistrate based his decision on the testimony of the Trooper. Id. at 11. The Trial Magistrate found the Trooper's testimony to be both credible and clear and convincing evidence that Appellant was in violation of § 31-22-30. Id. As such, the Trial Magistrate sustained the charge. Id.

Prior to sentencing, counsel for the Appellant requested that the Trial Magistrate impose the minimum fine. Id. The Trial Magistrate replied, "[t]he Court has a whole lot of concern when somebody is cited for test [sic] messaging, even if they don't have a history of traffic violations." Id. The Trial Magistrate noted that the statute permits license suspension, even on the first offense. Id. at 12. However, in his discretion, the Trial Magistrate imposed the statutory

fine of one hundred dollars ($100.00), and driver retraining. Id. Aggrieved by the Trial Magistrate's decision, Appellant timely filed this appeal.

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.

Analysis

On appeal, Appellant contends that the Trial Magistrate's decision to sustain the charged violation is affected by error of law and clearly erroneous in view of the reliable, probative, and substantial evidence on the whole record. Specifically, Appellant submits that the Trial Magistrate misinterpreted § 31-22-30; that § 31-22-30 is ambiguous and void for vagueness; and that the record does not support the finding that Appellant violated § 31-22-30.

I

Statutory Interpretation

Appellant maintains that the Trial Magistrate misinterpreted § 31-22-30. Additionally, Appellant submits that the statute is ambiguous and void for vagueness. We begin by addressing Appellant's ambiguity claim.

Ambiguity exists "when a word or phrase in a statute is susceptible of more than one reasonable meaning." State v. Hazard, 68 A.3d 479, 485 (R.I. 2013). When a statute "expresses a clear and unambiguous meaning, the task of interpretation is at an end and this [Panel] will apply the plain and ordinary meaning of the words set forth in the statute." State v. Bryant, 670 A.2d 776, 779 (R.I. 1996).

Section 31-22-30 sets forth, in pertinent part, "[n]o 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." See

§ 31-22-30 (b). Section 31-22-30 is not ambiguous because the statute does not contain a word or phrase that is susceptible of more than one reasonable meaning. See Hazard, 68 A.2d at 485.

Moreover, the Legislature, anticipating attacks on the certainty of the statute, defined each term used in the statute. See § 31-22-30 (a). Where the Legislature has expressed its intended definition for each word used in the statute, our task of interpretation is at an end, and we will apply the defined meanings of the words as set forth in the statute. See Kaya v. Partington, 681 A.2d 256, 260 (R.I. 1996) (finding that a court's obligation is to ascertain the legislative intent behind the enactment and give effect to that intent). We will not import ambiguity into the statute by giving the language anything other than its intended meaning. State v. Ricci, 107 R.I. 582, 588-89, 268 A.2d 692, 696 (1970) ("[w]e perceive no ambiguity therein and will not import ambiguity into the statute by giving the language anything other than its plain and ordinary meaning").

In examining whether the Trial Magistrate misinterpreted § 31-22-30, we apply the defined meanings of the words set forth the statute, with particular focus on the provisions germane to Appellant's appeal. See Kaya, 681 A.2d at 260. The statute defines "wireless handset" as "[a] portable electronic or computing device, including cellular telephones, capable of transmitting data in the form of a text message." See § 31-22-30 (a)(10) (emphasis added). Separately, the statute defines a "personal wireless communications device" as "[a] hand-held device through which personal wireless services . . . are transmitted, but does not include a global navigation satellite receiver. . . ." See § 31-22-30 (a)(6) (emphasis added).

Based on the plain language of the statute, a navigation device that only "receives" transmissions is separate and apart from a wireless handset or a personal wireless communications device "capable of transmitting" data. See § 31-22-30 (a)(6)(10). This

distinction leads this Panel to the conclusion that global navigation satellites, which receive only, were intended to be excluded by the statute; however, a cell phone, which receives and transmits, was intended to be within the boundaries of the statute, regardless of the purpose for which it is used.

This understanding is supported by the statute's definition of "text message." See § 31-22-30 (a)(8) ("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). The word "read" is defined as "to look at and understand the meaning of letters, words, symbols, etc." See Miriam Webster Dictionary, online (2015). Therefore, in order to be "reading" pursuant to the statute, the reader need not be looking at letters or text exclusively, but rather, may be looking at symbols or characters displayed on the phones interface. Id.

Further demonstrating its intent for a broad application of "text message," is the Legislature's use of the words "including, but not limited to." See § 31-22-30(a)(8). By using this language, the Legislature evinced its intent for the definition of "text message" to encompass more than merely instant messages, electronic messages, or e-mails. See Bloate v. U.S., 559 U.S. 196, 208-09 (2010) (describing the phrase "including but not limited to" as an "illustrative rather than exhaustive" list); see also Black's Law Dictionary (9th ed. 2009) (defining "includes" and "includes but is not limited to" as indicating a partial list).

Consequently, based on the plain language of the statute, 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. See e.g. 115 Am. Jur. Proof of Facts 3d 1 ("[i]n the United States,

a growing number of jurisdictions attempt to regulate use of [cell phone] devices that lead to accidents resulting from distracted operation of motor vehicles").

Finally, we look to the statute's definition of "use." This term is defined as "to operate a wireless handset or a personal wireless communication device in a manner not consistent with hands-free operation."[1] See § 31-22-30 (a)(9). Our Supreme Court has defined "operate" as "to perform a function," and has defined "operation" as "exertion of power." See In Re Advisory Opinion to Governor, 856 A.2d 320, 331 (R.I. 2004) (citing Black's Law Dictionary 1286 (6th ed. 1990)). The statute does not limit the definition of "use" to only "listening" or "typing" or "reading" but has broadly restricted any operation of a cell phone "in a manner not consistent with hands-free operation." See § 31-22-30 (a)(9); c.f. People v. Spriggs, 224 Cal.App.4th 150, 156 (Ct. App. 5th Cal., 2014) ("[h]ad the Legislature intended to prohibit drivers from holding the telephone and using it for all purposes, it would not have limited the telephone's required design and configuration to 'hands-free listening and talking,' but would have used broader language, such as 'hands-free operation'"). As such, any exertion of power over the cell phone qualifies as "using" the cell phone pursuant to the statute; the user need not necessarily be typing or talking.

The legislative history of § 31-22-30 supports our interpretation. A review of the legislative history of the statute reveals that the statute's definition of "use" was enlarged during the 2015 legislative session. See 2015 Rhode Island Laws Ch. 15-87 (15-S 715). Originally, "use" was defined as "to hold a wireless handset or personal wireless communications device in

[1]Section 31-22-30 (a)(2) defines "hands free" as "the manner in which a wireless handset is operated for the purpose of composing, reading, or sending text messages by using an internal feature or function, or through an attachment or addition, including, but not limited to, an earpiece, headset, remote microphone, or short-range wireless connection, thereby allowing the user to operate said device without the use of hands, except to activate, deactivate, or initiate a feature or function thereof."

one's hands." Id. Now, operation in any manner inconsistent with hands-free operation is prohibited by the statute, regardless of whether the device is physically in the user's hands. See § 31-22-30 (a)(9). This amendment demonstrates the Legislature's intent to prevent all distractions that may arise through operation of a cell phone, not just distractions that accompany the physical holding of a cell phone.

In sum, based on the legislative history of the statute and the definitions set forth by our Legislature, we conclude that operating a cell phone for any purpose, including GPS, is prohibited by the statute. Our analysis is consistent with the findings of the Trial Magistrate. At trial, the Trial Magistrate stated:

> "[i]f you are looking at the device for any . . . [purpose], you don't have to be sending or receiving, [phone records] will not show that you're sending or receiving when you're reading [or] looking at the messages that were previously sent, that's all [prohibited under the statute], so the device does not have to actively been, being used at that time to send or receive messages. You are merely reading what's on the cell phone, it's included." (Tr. at 10.)

The Trial Magistrate concluded, "the [L]egislature clearly has a concern with distracted drivers." Id. We agree. Where the intent of the Legislature is clear, we decline to interpret the statute in a manner that would defeat the evident purpose of a statute. See State v. Gonsalves, 476 A.2d 108, 111 (R.I. 1984) ("[a statute] should not be interpreted in a manner that would thwart a clear legislative intent").

II

Sufficiency of Findings

Appellant maintains that the record does not support the finding that Appellant violated § 31-22-30. We disagree. The record before this Panel reveals that the Appellant "was operating a cell phone with his right hand. The cell phone was positioned directly next to the steering

wheel . . . [and] the [Appellant] continually repeatedly was looking up and down from traffic to his cell phone." (Tr. at 1-2.) The Trooper testified that he does "not recall [Appellant] necessarily typing" but does recall that Appellant "was negotiating the cell phone." Id. Moreover, Appellant admitted to using his cell phone while driving, but reasoned that the operation was solely for GPS purposes. Id. at 2.

Based on the foregoing analysis, this testimony establishes that the Appellant was using his cell phone, while driving, in a manner prohibited by § 31-22-30. Appellant need not be "typing" in order to be in violation of § 31-22-30. Nor must Appellant be "sending" or "receiving" a text message at the time of operation in order to be in violation of the statute. See Tr. at 4 (counsel moving to dismiss on the basis that the State had not "sustained the burden that [Appellant] was using his cell phone to send or receive a message at the time of the stop"). Rather, Appellant's 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.

Therefore, where the record clearly reflects that Appellant was operating his cell phone in order to look at an image displayed on the phones interface while driving, the Trial Magistrate's decision to sustain the charged violation, § 31-22-30, was not clearly erroneous. See Tr. at 1-2 ("[Appellant] continually repeatedly was looking up and down from traffic to his cell phone"); see also Tr. at 5 (Appellant stating, "I was using [the cell phone] for GPS to go to the Lincoln Police Station"). As such, the Trial Magistrate did not abuse his discretion and his decision to sustain the charged violation was not clearly erroneous in view of the reliable, probative, and substantial evidence on the whole record.

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 affected by error of law and was supported by the reliable, probative, and substantial evidence of record. Substantial rights of Appellant have not been prejudiced. Accordingly, Appellant's appeal is denied, and the charged violation is sustained.

ENTERED:

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Administrative Magistrate Domenic A. DiSandro III (Chair)

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Chief Magistrate William R. Guglietta

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Judge Edward C. Parker

DATE: _____