STATE OF RHODE ISLAND AND PROVIDENCE PLANTATIONS

CRANSTON, RITT **RHODE ISLAND TRAFFIC TRIBUNAL**

STATE OF RHODE ISLAND	**:**	
	:	
v.	**:**	**C.A. No. T18-0016**
	:	**18403501166**
MERIMEE CHRISTOPHERSON	**:**	

DECISION

PER CURIAM: Before this Panel on October 31, 2018— Administrative Magistrate Abbate (Chair), Associate Judge Almeida, and Chief Magistrate DiSandro, sitting—is Merimee Christopherson's (Appellant) appeal from a decision of Magistrate William T. Noonan (Trial Magistrate) of the Rhode Island Traffic Tribunal, sustaining the charged violation of G.L. 1956 § 31-22-31, "Mobile telephone usage by motor vehicle operators." The Appellant appeared before this Panel *pro se*. Jurisdiction is pursuant to § 31-41.1-8.

I

Facts and Travel

On June 5, 2018, Sergeant David Rosa (Sgt. Rosa) of the Cumberland Police Department observed the operator of a motor vehicle using a cell phone while driving on Diamond Hill Road in Cumberland. (Tr. at 2:7-10.) Sgt. Rosa conducted a motor vehicle stop, during which he identified the operator as Appellant, and subsequently issued Appellant a citation for the abovementioned violation. *See* Summons No. 18403501166.

The Appellant contested the charged violation, and the matter proceeded to trial on July 19, 2018. At trial, Sgt. Rosa testified that he observed Appellant travelling north on Diamond Hill Road for approximately "75 feet as she drove by," and noticed a cell phone in her right hand

near her right ear. (Tr. at 2:7-12.) Sgt. Rosa testified that after observing Appellant using her mobile device while operating her vehicle, he executed a traffic stop of the vehicle. *Id.* Sgt. Rosa explained to Appellant the reason for the stop, at which point Appellant became "argumentative," and replied that she was not holding a cell phone. *Id.* at 11-14. Thereafter, Sgt. Rosa issued Appellant a citation for using a mobile telephone while operating a motor vehicle. *Id.* at 2:16. Sgt. Rosa testified that after issuing the citation, Appellant continued to argue that she was not on her cell phone, and attempted to show Sgt. Rosa the call history on her cell phone. *Id.* at 2:17-23. Sgt. Rosa maintained at trial, "There is no doubt in my mind that there was a cell phone in her hand." *Id.* at 4:5-6.

In her defense, Appellant testified that at the time of the incident, she was scratching her right ear due to eczema in that area. *Id.* at 2:28-3:1-2. Appellant further testified that she does not have a Bluetooth device in her car because she does not use her cell phone while driving. *Id.* at 3:12-13. Appellant explained that she keeps her cell phone in her purse while she is driving, which is where her cell phone was when Sgt. Rosa initiated the stop. *Id.* at 3:15. In an attempt to show Sgt. Rosa that she did not use her cell phone while driving, Appellant testified that she took her cell phone out of her purse during the stop. *Id.* at 4:8-9.

During trial, Appellant offered into evidence a call log from her wireless cell phone provider. *Id.* at 3:20-21. The Trial Magistrate admitted the call log in full, but stated that such documents generally have "very, very, very limited relevancy, not just in this case Ms. Christopherson, but in all cases, [] because I don't know what phone you had or how many phones you have or anything else." *Id.* at 3:26-28.

After testimony concluded, the Trial Magistrate stated his findings of fact on the record. *Id.* at 4:16-26. The Trial Magistrate found the testimony of Sgt. Rosa credible, and concluded

that Appellant, while driving on Diamond Hill Road, "put her right hand to her right ear with a cell phone in it for approximately 75 feet." *Id.* at 4:17-21. As such, the Trial Magistrate "sustain[ed] the charge based on the credible testimony of the officer[,]" and found Appellant guilty of violating § 31-22-31. *Id.* at 5:7-8. Thereafter, Appellant filed a timely appeal. 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 Mut. 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." *Id.* (citing *Envtl. Sci. 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." *Id.* 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 contends that the Trial Magistrate's decision was "[c]learly erroneous in view of the reliable, probative, and substantial evidence on the whole record[.]" *See* § 31-41.1-8(f)(5). Specifically, Appellant avers that (1) the Trial Magistrate did not properly consider Appellant's testimony, and (2) that the cell phone records admitted into evidence at trial establish that she was not talking on her cell phone. *See* Appellant's Notice of Appeal.

A

Witness Credibility

Appellant maintains that the Trial Magistrate erred in crediting Sgt. Rosa's testimony over Appellant's testimony. However, it is well established that this 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." *Link*, 633 A.2d at 1348 (citing *Janes*, 586 A.2d at 537). The Trial Magistrate's "impressions as he or she observes a witness and listens to testimony 'are all important to the evidence sifting which precedes a determination of what to

accept and what to disregard.'" *Environmental Scientific Corp. v. Durfee*, 621 A.2d 200, 206 (R.I. 1993) (quoting *Laganiere v. Bonte Spinning Co.*, 103 R.I. 191, 196, 236 A.2d 256, 258 (1967)). The weight accorded to evidence "is determined by the touchstone of credibility. That touchstone, however, is not available to the [appellate division] which never sees the witness or hears him testify and which, on review, look only at a silent record." *Id.* (citing *Laganiere*, 103 R.I. at 196, 236 A.2d at 259) (brackets in original).

Furthermore, "[w]here the testimony of two witnesses is conflicting and the trier of fact expressly accepts the testimony of one of the witnesses, he implicitly rejects that of the other." *Turgeon v. Davis*, 120 R.I. 586, 592, 388 A.2d. 1172, 1175 (1978). Thus, a trial magistrate or judge "may not be said to have overlooked testimony to which he did not refer if, by pointing to the conflicting testimony on which he relied, his rejection of the other is clearly indicated." *Id.* (citing *Flynn v. Pearce*, 106 R.I. 323, 259 A.2d 401 (1969)). Accordingly, this Panel will not disturb a trial judge's decision to expressly accept the testimony of one witness, thereby implicitly rejecting the testimony of another. *Id.*

Based upon the record before this Panel, it is clear that the Trial Magistrate accepted Sgt. Rosa's testimony that Appellant held a cell phone to her ear while she was driving on Diamond Hill Road in Cumberland. (Tr. at 4:16-21.) In expressly crediting the testimony of Sgt. Rosa rather than the conflicting testimony provided by Appellant, the Trial Magistrate implicitly rejected Appellant's testimony that she did not have a cell phone in her hand, but was instead scratching her ear. *See id.* at 5:7-8; *Turgeon*, 120 R.I. at 592, 388 A.2d. at 1175.

As it is impermissible to second-guess a trial judge's credibility determination, this Panel will not question the Trial Judge's decision to reject Appellant's testimony on the basis of her credibility. *See* Tr. at 5:7-8; *Link*, 633 A.2d at 1348; *Environmental Scientific Corp.*, 621 A.2d at

206. Thus the Trial Judge's decision was not "[c]learly erroneous in view of the reliable, probative, and substantial evidence." Sec. 31-41.1-8(f)(5).

B

Weight of the Evidence

Appellant also argues that the Trial Magistrate's decision finding Appellant guilty of violating § 31-22-31 goes against the great weight of the evidence. Section 31-22-31(b) states:

> "(1) Except as otherwise provided in this section, no person shall operate a motor vehicle while using a hand-held personal wireless communication device to engage in a call while such vehicle is in motion.
>
> (2) An operator of a motor vehicle who holds a hand-held personal wireless communication device to, or in the immediate proximity of, the operator's ear while such vehicle is in motion is presumed to be engaging in a call within the meaning of this section. The presumption established by this subdivision is rebuttable by evidence tending to show that the operator was not engaged in a call." Sec. 31-22-31(b)(1)-(2).

Accordingly, to be found guilty of violating the statute, a trial judge or magistrate must find by clear and convincing evidence that the motorist: (1) operated a motor vehicle; (2) while using a hand-held wireless communication device; (3) to engage in a call; (3) while the vehicle is in motion.[1] Sec. 31-22-31(b)(1). A motorist is presumed to be engaged in a call where the evidence establishes that the motorist holds the device near his or her ear. Sec. 31-22-31(b)(2). However, this presumption may be overcome where evidence shows "that the operator was not engaged in a call." *Id.*

Here, the record contains evidence indicating that Appellant held a wireless communication device near her ear while driving. Sgt. Rosa observed Appellant driving for approximately seventy-five feet, and noticed a cell phone in Appellant's right hand held up to her

[1] It is undisputed that the Appellant was operating a motor vehicle and that the motor vehicle was in motion.

right ear. (Tr. at 2:8-11.) Sgt. Rosa testified that there was "no doubt in [his] mind that there was a cell phone in her hand." *Id.* at 4:5-6. The Trial Magistrate subsequently found the Appellant guilty of violating § 31-22-31 "based on the credible testimony of [Sgt. Rosa]." *Id.* at 5:7-8. The testimony of this credible witness provided the Trial Magistrate with a sufficient evidentiary basis to conclude that Appellant engaged in a call. Sec. 31-22-31(c).

The Appellant attempted to rebut this presumption by introducing a call log from her wireless provider. The Appellant argued that the absence of any calls on this log at the time of the incident demonstrates that she was not using her cell phone while driving. *Id.* at 3:23-26. While the Trial Magistrate admitted the call log in full, he did so "subject to the relevancy" of that document. *Id.* at 3:20-21. The Trial Magistrate did not accord great weight to the call log, stating that call logs generally have "very limited relevance," because the Trial Magistrate 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. *Id.* at 3:26-28. The Trial Magistrate did not err in according Appellant's call log little weight because Appellant did not provide an adequate foundation demonstrating the authenticity of the call log. *See* R.I. R. Evid. 901; *O'Connor v. Newport Hospital*, 111 A.3d 317, 323 (R.I. 2015) ("[A]uthentication and identification are regarded as a special aspect of relevancy; evidence is relevant only if it is in fact what the party seeking its admission claims it to be.").

In consideration of the fact the this Panel can neither "assess witness credibility" nor "substitute its judgment for that of the hearing judge concerning the weight of evidence on questions of fact[,]" the Trial Magistrate's findings will not be disturbed by the members of this Panel. *Link*, 633 A.2d at 1348 (citing *Liberty Mutual Insurance Co. v. Janes*, 586 A.2d 536, 537

(R.I. 1991)). As such, this Panel concludes that the Trial Judge's decision was supported by reliable, probative, and substantial evidence. Sec. 31-41.1-8(f).

V

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 is not clearly erroneous in view of the reliable, probative, and substantial evidence on the record. The substantial rights of the Appellant have not been prejudiced. Accordingly, Appellant's appeal is denied, and the charged violation is sustained.

ENTERED:

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Administrative Magistrate Joseph A. Abbate (Chair)

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Associate Judge Lillian M. Almeida

_____
Chief Magistrate Domenic A. DiSandro, III

DATE: _____