STATE OF RHODE ISLAND AND PROVIDENCE PLANTATIONS

CRANSTON, RITT **RHODE ISLAND TRAFFIC TRIBUNAL**

STATE OF RHODE ISLAND	**:**	
	:	
v.	**:**	**C.A. No. T14-0057**
	:	**14001524235**
NABIL KIRIAKI	**:**	

DECISION

PER CURIAM: Before this Panel on December 3, 2014—Chief Magistrate Guglietta (Chair), Magistrate Noonan, and Magistrate Abbate, sitting—is Nabil Kiriaki's (Appellant) appeal from a decision of Judge Almeida, 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 G.L. 1956 § 31-41.1-8.

Facts and Travel

On July 7, 2014, Trooper Stephen Gaffney (Trooper Gaffney) of the Rhode Island State Police Department charged the Appellant with the aforementioned violation of the motor vehicle code. The Appellant contested the charge, and the matter proceeded to trial on October 2, 2014.

At trial, Trooper Gaffney testified that on July 7, 2014, he and Trooper Kenneth Marandola (Trooper Marandola) were on patrol out of the Wickford barracks. (Tr. at 4.) At approximately 11:51 p.m., the Trooper's observed a white Toyota Corolla heading northbound on Route 4 in the Town of North Kingstown. Id. The Toyota was drifting left to right in the first lane of travel. Id. Trooper Gaffney testified that Trooper Marandola, who was driving the cruiser, pulled alongside the Toyota Corolla. Id. At that point, Trooper Gaffney stated he observed the driver of the Toyota looking down at an electronic device. Id. Trooper Gaffney

noted that the interior cabin of the vehicle was illuminated by the electronic device. Id. Trooper Gaffney initiated a traffic stop, approached Appellant's vehicle, and inquired as to the source of the illumination. Id. at 6.

The Appellant informed Trooper Gaffney that the illumination was indeed coming from his cellular phone. However, the Appellant reasoned that he was using his cell-phone for Global Positioning System (GPS) navigation. Id. at 7. The Appellant explained that he works late into the night, performing maintenance on commercial buildings. Id. He noted that he utilizes the navigation system to stay apprised of any hazards on his route, such as road work, obstructions, or detours, so that he may save valuable time in transportation and complete his maintenance duties before the commercial buildings open. Id. at 14. Trooper Gaffney stated that § 31-22-30 broadly prohibits any use of a cell phone while driving. Id. at 7-8. Trooper Gaffney explained that the purpose of § 31-22-30 is to prevent distractions while operating a vehicle, including distractions that arise from utilizing a cell-phone for directional purposes. Id. at 8. Based on his understanding of § 31-22-30, Trooper Gaffney issued the Appellant a violation for "text messaging while operating a vehicle."

On cross-examination, Trooper Gaffney admitted that he never actually saw the electronic device, nor did he see Appellant holding the device in his hands. Id. at 9. Instead, he observed that the interior of Appellant's vehicle was illuminated, Appellant's head was buried down, and Appellant's eyes were not fixed on the road. Id. Based on these observations, the Trooper gathered that the Appellant "had his cell phone probably . . . in his lap." Id. at 10. Appellant did not contest these observations, but rather, submitted into evidence a data sheet from AT&T, Appellant's cell phone service provider, indicating that at the time of the traffic

stop, the GPS was in effect. Id. at 16. The data sheet also indicated that on July 7, 2014, there were no text messages sent or received from Appellant's phone. Id. at 15-16.

After hearing the testimony and viewing the evidence, the Trial Judge sustained the charge. Id. at 31. In sustaining the charge, the Trail Judge found that the purpose of § 31-22-30 is to prevent distractions while driving, and the use of GPS navigation constituted a distraction prohibited by the statute. Id. at 30. Aggrieved by the Trial Judge'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 Insurance 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 Environmental 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 conclusions on appeal. See Janes, 586 A.2d at 537.

Analysis

Appellant contends that the Trial Judge's decision was clearly erroneous in view of the reliable, probative, and substantial evidence on the whole record. Specifically, Appellant contends that he did not violate the statute because he was not physically "using" the cell phone.

Section 31-22-30 prohibits a person from "using 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." Sec. 31-22-30(b). The statute defines "use" as "hold[ing] a wireless handset or a personal wireless communication device in one's hands." [1] Sec. 31-22-30(a)(9). Therefore, based on the plain language of the statute, the motorist must be physically holding the electronic device in order to be in violation of § 31-22-30. See Tanner v. Town Council of Town of East Greenwich, 880 A.2d 784, 792

[1] The definition section of G.L. 1956 § 31-22-30 has changed during the 2015 Legislative Session. The statute now defines "use" as "operat[ing] a wireless handset or personal wireless communication device in a manner not consistent with hands-free operation." See House Bill 5881; see also Senate Bill 715. This Panel's decision is based on the definition of "use" in effect at the time of the offense. See State v. Flores, 714 A.2d 581 (R.I. 1998) (statute in effect at the time of the offense controls a defendant's duties and responsibilities).

(R.I. 2005) (stating "[w]hen interpreting a statute, a court shall not ignore its plain and unambiguous language and must avoid adopting a construction of a statute that would circumvent the evident purpose of its enactment").

Here, there was no testimony on the record to support a conclusion that Appellant was physically holding the cell phone while driving. To the contrary, there is evidence to support Trooper Gaffney's conclusion that the Appellant "had his cell phone probably . . . in his lap." (Tr. at 10.) The record reflects that the interior of Appellant's vehicle was illuminated, Appellant's head was buried down, and Appellant's eyes were not fixed on the road. Id. at 9. Moreover, Trooper Gaffney testified that "at no time did [he] actually physically see [Appellant] with the device in his hands[.]" Id. at 10. Based on the record, this Panel cannot conclude as a matter of law that at the time of the violation Appellant was "using" the cell phone while driving. Consequently, because there is insufficient evidence on the record to support the Trial Judge's findings, and in consideration of the charged violation, the decision must be reversed. See Link, 633 A.2d at 1348.

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 is not supported by the reliable, probative, and substantial evidence on the whole record. Substantial rights of Appellant have been prejudiced. Accordingly, Appellant's appeal is granted, and the charged violation dismissed.

ENTERED:

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Chief Magistrate William R. Guglietta (Chair)

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Magistrate William T. Noonan

_____
Magistrate Joseph A. Abbate

DATE: _____