STATE OF RHODE ISLAND AND PROVIDENCE PLANTATIONS

CRANSTON, RITT		**RHODE ISLAND TRAFFIC TRIBUNAL**
STATE OF RHODE ISLAND	**:**	
	:	
v.	**:**	**C.A. No. T13-0056**
	:	**13001519371**
JASON KILSEY	**:**	

DECISION

PER CURIAM: Before this Panel on October 30, 2013—Chief Magistrate Guglietta (Chair, presiding), Judge Parker, and, Magistrate Abbate, sitting—is Jason Kilsey's (Appellant) appeal from a decision of Judge Almeida (trial judge), sustaining the charged violation of G.L. 1956 § 31-22-30, "Text messaging while operating a motor vehicle." Appellant appeared before this Panel represented by counsel. Jurisdiction is pursuant to section 31-41.1-8.

Facts and Travel

On June 23, 2013, Trooper D'Angelo ("Trooper") of the Rhode Island State Police charged Appellant with the aforementioned violation of the motor vehicle code. Appellant contested the charge, and the matter proceeded to trial on August 13, 2013.

At trial, the Trooper stated that he was on patrol on Route 95 South in the City of Warwick, at approximately 12:45 a.m., when he observed the Appellant's 2012 silver Mini Cooper operating in the left travel lane—the fourth travel lane. (Tr. at 4.) The Trooper testified that the Appellant's vehicle made a lane change into the third travel lane as he approached the rear of Appellant's vehicle. Id. Thereafter, the Trooper further described that he passed the Appellant's vehicle in the fourth lane of travel and observed the Appellant holding his illuminated cell phone at eye level. Id. After this observation, the Trooper continued four to five car lengths past the Appellant's vehicle in order to observe the Appellant's manner of operation.

Id. The Trooper explained that he viewed the Appellant's vehicle as it "veered to its left and crossed the skips, the broken . . . white line and then . . . moved back to the right and maintained its lane after crossing." (Tr. at 4-5) In addition, the Trooper added that at the time the Appellant's vehicle veered to its left and crossed the "skips," there were other motorists on both sides of the Appellant's vehicle. (Tr. at 5.)

Subsequently, the Trooper testified that he was able to pass the Appellant's vehicle slowly enough to clearly witness the Appellant holding an illuminated cell phone with the text message screen open and in plain view. (Tr. at 5.) Thereafter, the Trooper initiated a motor vehicle stop, positively identified the Appellant as Jason A. Kilsey, and cited the Appellant for the abovementioned violation of the motor vehicle code. (Tr. at 6.) During cross-examination by Appellant's counsel, the Trooper described a cell phone screen as a multi-colored illuminated screen with dimensions of about three inches in length and one inch and one-half to two inches wide. (Tr. at 6-7.)

After the Trooper concluded his testimony, Appellant's counsel called the Appellant to the stand and asked the Appellant to describe the "mood lighting" feature on his Mini Cooper. (Tr. at 7.) The Appellant described "mood lighting" as a base feature that included overhead LED lights that change colors as the Mini Cooper is operated. (Tr. at 8.) Thereafter, Appellant identified a document as his text message records from June 23, 2013. (Tr. at 10.) The Appellant testified that the document indicated that there were no sent or incoming text messages within the timeframe of the stop. Id. Subsequently, the Appellant's text messaging records from

June 23, 2013 were entered as a full exhibit without objection from the State.[1] See Defendant's Exhibit A; (Tr. at 28-30.)

The Appellant further testified that he believed that the Trooper confused the lights emanating from the "mood lighting" feature with the light originating from his cell phone. (Tr. at 14.) The Appellant described the light from the "mood lighting" feature as coming from all directions and deriving from the rearview mirror, seatbelts, and doors. (Tr. at 15.) Appellant's Counsel also attempted to frame the issue for the trial judge by stating that the test messaging records indicate that there was "[n]o texting anywhere near [the traffic stop], either received or sent, and you know, the final question is, 'Were you texting?'" (Tr. at 19.) The Appellant responded to his counsel's inquiry in the negative. Id.

During closing argument, Appellant's counsel asserted that "it's a very reasonable mistake for any officer to make, especially given the size of the car, the distance away from [Appellant], [Appellant's] testimony, the [text messaging] records, again, I think it's a very reasonable mistake and ask that [the Appellant] be found not guilty of this charge." (Tr. at 21.) In reply, the trial judge asked Appellant's counsel to identify the Trooper's mistake. Id. Appellant's counsel responded that the mistake was that the Trooper failed to mention or notice the "mood lighting" illumination and as a result was unable to discern that the light was not coming from the Appellant's cell phone. (Tr. at 22.)

At the close of the evidence, the trial judge issued her decision sustaining the charged violation by clear and convincing evidence. (Tr. at 32.) The trial judge noted that the text messaging records indicated that there were no text messages sent or received by Appellant at or

[1] While not at issue in the instant matter, we note the evidentiary concerns that admitting text messaging records pose; namely, a party's ability to authenticate the documents pursuant to our rules of evidence. See R.I. R. Evid. 901.

near the time of the traffic stop.[2] See Defendant's Exhibit A; (Tr. at 30.). However, the trial judge specifically mentioned that § 31-22-30, "Text messaging while operating a motor vehicle," prohibits activity that would not be reflected within the Appellant's text message records from June 23, 2013, such as manipulating the phone and reading a text. See Tr. at 26-29; Tr. at 31. In addition, the trial judge credited the testimony of the Trooper stating that he observed the Appellant holding his cell phone in his hand, had a clear and unobstructed view of the text messaging screen, and witnessed the Appellant manipulating the cell phone with his hand as the Appellant's vehicle swerved from the left to the right. Id. 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.

[2] The text messaging records indicate that the Appellant did not send or receive a text message until 4:36 A.M. that day, almost fours after the traffic stop within. (Tr. at 10.)

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 [or magistrate's] conclusions on appeal. See Janes, 586 A.2d at 537.

Analysis

On appeal, Appellant contends that the trial judge's decision to sustain the charged violation was characterized by abuse of discretion. Specifically, Appellant asserts that the Trooper made a reasonable mistake regarding his observations of the Appellant, the Trooper's testimony was not reliable, and the State failed to provide sufficient evidence at trial to sustain the charge. In addition, Appellant argues that the trial judge's decision was in violation of statutory provisions. Particularly, the Appellant avers that because his text messaging record from or near 12:45 a.m. on June 23, 2013 is devoid of any sent or incoming messages, it is manifest that the Appellant was not engaged in activity prohibited by § 31-22-30, "Text messaging while operating a motor vehicle."

I. Credibility

Appellant disputes the reliability of the Trooper's testimony and claims that the trial judge's decision to credit the Trooper's testimony over that of the Appellant's testimony was an abuse of discretion. Specifically, the Appellant alleges that the Trooper confused the lights emanating from the "mood lighting" feature in Appellant's vehicle with the light originating from Appellant's cell phone. (Tr. at 14.)

In Link, our Supreme Court made clear 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 Liberty Mutual Insurance Co. v. Janes, 586 A.2d 536, 537 (R.I. 1991)). As the members of this Panel did not have an opportunity to view the live trial testimony of the Trooper or Appellant, it would be impermissible to second-guess the trial judge's "impressions as he . . . observe[d] [the Trooper and Appellant] [,] listened to [their] testimony [and] . . . determine[ed] . . . what to accept and what to disregard[,] . . . what . . . [to] believe[] and disbelieve[]." Environmental Scientific Corp., 621 A.2d at 206.

After listening to the testimony, the trial judge determined that the Trooper's testimony was not only credible, but the testimony was also sufficient to sustain the charged violation. (Tr. at 31-32.) "[The appellate court] [is] not privileged to assess the credibility of witnesses and may not substitute our judgment for that of the trial [judge] concerning the weight of the evidence on questions of fact)." Environmental Scientific Corp., 621 A.2d at 208 (quoting Liberty Mutual Insurance Co. v. Janes, 586 A.2d 536, 537 (R.I. 1991)). In her decision, the trial judge accepted the Trooper's testimony that he observed the Appellant holding his cell phone in his hand, had a clear and unobstructed view of the text messaging screen, and witnessed the

Appellant manipulating the cell phone with his hand as the Appellant's vehicle swerved from the left to the right. (Tr. at 31.) The trial judge specifically noted that the Trooper's testimony made it clear that he was focused on the light shining from the Appellant's cell phone screen and was not distracted or confounded by the illumination originating from the "mood lighting" feature. Id. The trial magistrate's decision was supported by the Trooper's testimony. See Link, 633 A.2d at 1348. This Panel concludes that these facts, which were determined by the trial judge, cannot be reevaluated by this Panel. See Environmental Scientific Corp., 621 A.2d at 208.

II. Statutory Interpretation

Appellant argues that the trial judge's decision was in violation of statutory provisions. Specifically, the Appellant avers that because his text messaging record from at or near 12:45 a.m. on June 23, 2013 is devoid of any sent or received messages, it is manifest that the Appellant was not engaged in activity prohibited by § 31-22-30, "Text messaging while operating a motor vehicle." The Appellant's argument allows this Panel its first opportunity to interpret the definitions in section 31-22-30 (b) of the Rhode Island General Laws.

Section 31-22-30 (b) of the Rhode Island General Laws states that "[n]o person shall use a wireless handset to compose, read or send text message while operating a motor vehicle on any public street or public highway within the state of Rhode Island." Section 31-22-30 (b) clearly and unambiguously states that reading text messages is a prohibited activity. "It is well settled that when the language of a statute is clear and unambiguous, this [Panel] must interpret the statute literally and must give the words of the statute their plain and ordinary meanings." Accent Store Design, Inc. v. Marathon House, Inc., 674 A.2d 1223, 1226 (R.I. 1996). Our obligation is to ascertain the legislative intent behind the enactment and give effect to that intent. Kaya v. Partington, 681 A.2d 256, 260 (R.I. 1996). "[A]mbiguity lurks in every word, sentence,

and paragraph in the eyes of a skilled advocate the question is not whether there is an ambiguity in the metaphysical sense, but whether the language has only one reasonable meaning when construed, not in a hyper technical fashion, but in an ordinary, common sense manner." Garden City Treatment Center, Inc. v. Coordinated Health Partners, Inc., 852 A.2d 535, 542 (R.I. 2004) (quoting Textron, Inc. v. Aetna Casualty and Surety Co., 638 A.2d 537, 541 (R.I. 1994)). While utilizing that standard, this Panel should "refrain from engaging in mental gymnastics or from stretching the imagination to read ambiguity where none is present." Mallane v. Holyoke Mut. Ins. Co. in Salem, 658 A.2d 18, 20 (R.I. 1995). Furthermore in construing the statute, we must adopt a construction that does not effect an absurd result. Rhode Island State Labor Relations Board, 505 A.2d at 1171 (citing Berthiaume v. School Committee of Woonsocket, 121 R.I. 243, 397 A.2d 889 (1979)).

Here, the plain and unambiguous meaning of the word, "read," is "to receive or take in the sense of (as letters or symbols) especially by sight or touch." See Read, MERRIAM-WEBSTER, http://www.merriam-webster.com/dictionary/read; see also Read, OXFORD, http://www.oxforddictionaries.com/definition/english/read (to look at and comprehend the meaning of (written or printed matter) by interpreting the characters or symbols of which it is composed). The legislature's intent when drafting and enacting section 31-22-30 (b) was to prohibit inattentive driving caused by composing, reading, or sending text messages. See Partington, 681 A.2d at 260. This Panel will not interpret clear statutory language in order to disregard the plain meaning of the word "read" or to eviscerate the clear intent of the legislature. See id.; see also Marathon House, Inc., 674 A.2d at 1226. While ambiguity may exist within section 31-22-30, that ambiguity does not originate from the word "read." Therefore, this Panel holds that the act of reading a text message while driving a motor vehicle is clearly and

unambiguously prohibited by section 31-22-30 (b). See Marathon House, Inc., 674 A.2d at 1226.

Accordingly, the Appellant's contention that the trial judge's decision was in violation of statutory provisions fails because the Appellant disregards the fact that reading text messages is encompassed within the statute and constitutes a proscribed act. See 31-22-30 (b). The trial judge specifically noted that the Officer testified that the Appellant had his cell phone "up near his eyes" and appeared distracted. (Tr. at 20.) The trial judge also acknowledged that the Appellant's act of reading "text messages" would not be captured within the text messaging records from the Appellant's service provider. (Tr. at 25.)

As a result, we find the trial judge's decision to sustain the charge—based on the Officer's testimony that the Appellant had his cell phone at "eye level"; that the Appellant was manipulating his cell phone; the trial judge's findings of fact; and the trial judge's acknowledgement that the Appellant's act of reading "text messages" would not be reflected in the text message report—to be based on reliable, probative, and substantial evidence on the whole record and not in violation statutory provisions. (Tr. at 31). See section 31-22-30 (b)

Confining our review of the record to its proper scope, this Panel is satisfied that the trial judge did not abuse her discretion. Her decision to sustain the charged violation is supported by legally competent evidence. Environmental Scientific Corp., 621 A.2d at 209 (the [appellate court] should give great deference to the [trial judge's] findings and conclusions unless clearly wrong).

Conclusion

The trial judge's decision to sustain the charged violation is supported by legally competent evidence. This Panel has reviewed the entire record before it. Having done so, the

majority of this Panel is satisfied that the trial judge's decision was not an abuse of discretion or in excess of statutory authority. Substantial rights of Appellant have not been prejudiced. Accordingly, Appellant's appeal is denied, and the charged violation sustained.

ENTERED:

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Chief Magistrate William R. Guglietta (Chair)

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Judge Edward C. Parker

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Magistrate Joseph A. Abbate

DATE: _____