

**IN THE MUNICIPAL COURT OF APPEALS
OF THE CITY OF EL PASO, TEXAS**

MARCUS CARMONA

Appellant,

v.

STATE OF TEXAS

Appellee.

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**No. 13-MCA-3670
Ticket No. T4014362**

OPINION

Appellant appeals his conviction in Municipal Court for using a wireless communication device, a cell phone, which is prohibited by Section 12.22.020 of the Municipal Code of the City of El Paso. A fine of \$50.00 was assessed.

The above section provides that an operator of a motor vehicle may not use a wireless communication device while operating a motor vehicle. The term “use” is not defined in the ordinance.

Appellant contends, as set out in his brief, that the presiding judge, the prosecutor and the officer all agreed that the act of simply “handling” a cell phone constitutes a violation of the above-cited ordinance. He states because of that belief held by them, that he was not allowed to present any evidence showing that the cell phone was not in use, but that the Appellant was only “handling” the device. He further contends that the prohibition of the ordinance was for using a cell phone as a communication device but does not prohibit just holding it. Appellant further contends, and he has provided this Court his cell phone call detailed records, which he contends show that his cell phone was not being used to make a call at the time the officer observed him. The citation reflects that it was issued to Appellant on February 7, 2013 at 8:25 a.m. The cell phone call records reflect that the first call that Appellant made on that date was at 8:39 a.m., nor

were any text messages received at or near that same time as reflected by those detailed cell phone records.

However, because Appellant says that the judge believed that handling the cell phone was a violation, he was not even allowed to present that evidence to show that it was not "in use." Whether the Trial Judge saw those records or how probative they are that Appellant was using the device to communicate telephonically or by text is not determinative of the disposition this Court makes of this case on appeal.

Although this Court construes Appellant's contention that he was merely holding the cell phone, his brief suggests to this Court that he believes that the prohibition for use of the cell phone is only as a communication device for voice calls or for texts, which he denies doing at the time. However, in his brief he also contends that using the cell phone to check the time or checking a cell phone (whatever that means to Appellant) presumably might include checking voice mails, checking the text messages, looking up a phone number, or trying to find a contact in order to make a call clearly would also constitute the use of the cell phone contrary to Appellant's position. It should also be noted that the citation that is a part of the record before this Court contains the officer's notes which state "I was behind van which was stalled just before on ramp DEF. passed in right lane was glancing down at phone in right hand, tumb [sic] moving across face to phone checking to see who called." How or whether the officer could have observed Appellant's use of the cell phone in that manner, although subject to question, is a determination to be made by the Trial Judge as factfinder and not this Court.

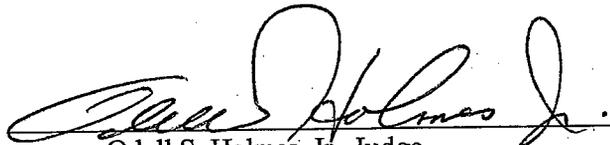
Clearly, if the record before this Court showed that Appellant was only cited for holding his cell phone, and not using it for any of its intended functions, then broader questions as to the validity of the ordinance, including perhaps its constitutionality, may have been presented. However, there clearly was a factual dispute between the evidence that was evidently presented to the Trial Judge, who, as a factfinder,

must resolve contested issues of fact. Such resolution falls squarely within in the province of the Trial Judge, particularly where there is no Reporter's Record contained in the record on appeal, which is the case in this matter. As stated often before, it is the responsibility of the Appellant to have requested a Reporter's Record, and then insure that it was prepared and presented as part of the record to this Court on appeal at his own expense. As provided by Section 30.00130, Tex. Government Code, "the court reporter is not required to take or record testimony in a case in which neither the defendant, the prosecutor, nor the judge demands it." In this case no demand for a Reporter's Record was made.

Therefore, this Court does not have the legal authority to second-guess the factual determinations of the Trial Judge, who must judge the credibility of the witnesses and the weight to be given to their testimony, and this Court cannot disturb that finding on appeal in the absence of a Reporter's Record.

Therefore, the judgment of the Trial Court is affirmed.

SIGNED this 16th day of October, 2013.


Odell S. Holmes, Jr., Judge
El Paso Municipal Court of Appeals

JUDGEMENT

This case came on to be heard on the Transcript of the Record of the Court below, the same being considered, it is ORDERED, ADJUDGED and DECREED by the Court that the case is affirmed.

SIGNED this 16th day of October, 2013.


Odell S. Holmes, Jr., Judge
El Paso Municipal Court of Appeals