By Wendy Lathrop, LS, CFM

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Operating Wirelessly

Carl Nelson is a lot like many of us, hooked to his electronics and living efficiently by multi-tasking. Unfortunately for him, he got caught at it.

On December 28, 2009, Mr. Nelson was ticketed by a police officer in Richmond, California for infraction of state law that prohibits use of a wireless telephone while driving a motor vehicle, unless the phone is configured for hands-free talking and listening, or unless such use falls under certain exceptions (such as emergencies). He did not qualify for any of the prescribed exceptions, and instead had decided to check his voice mail while stopped at a red light when he noticed an officer next to him and removed the phone from his ear. The officer pulled him over and gave him a ticket, which Nelson fought and which the appellate court has just reaffirmed (*The People v. Carl Nelson*, 2011 Cal. App. Lexis 1424, November 14, 2011).

There are a couple of reasons that this case caught my attention. The first is the increasing proliferation of wireless and other electronic devices that presumably make our lives easier: phones, GPS, tablet and laptop computers. We use them at work and we carry them around with us on our "off" hours. We calculate our position in the field or get directions, we check in with the office or a client to exchange information no matter where we are in the world, and we call our significant others from the grocery store to decide what flavor of soup to buy when the requested one is not available. The pressure to finish "one more thing" (a mantra in my household) is overwhelming as we assimilate a faster fuller life 24 hours a day, seven days a week. It becomes natural just to whip out the smartphone and check for messages in a slow moment.

The other reason this case attracted me was the parsing of statutory language Nelson undertook to show he had broken no laws. The opening words of California Vehicle Code §23123 are as follows: "*A person shall not drive a motor vehicle while using a wireless telephone unless . . . .*" We will stop right there, because Nelson argued that he was not driving; he was stopped at a red light. The vehicle was not moving. He had his foot on the brake.

First the traffic court, then the Costa County Superior Court, and finally the state's Appellate Court disagreed with Nelson's assessment of what he had been doing. Nelson's car was in gear and the engine was running while he had his foot on the brake. While other states may specify "operating" instead of or together with "driving" as a situation in which "hands on" phone operation is banned, the process of driving a vehicle does not mean that the vehicle is in motion at all times. The court noted that the process of moving from Point A to Point B entails the occasional "fleeting pause" during "contemporaneous volitional movement of the vehicle". This means that driving includes the requirement to obey laws demanding stops at certain signs and lights, and that both movement and stopping require hands, eyes, and brain all to be engaged to accomplish the task legally, accurately, and safely.

The case that Nelson had relied on to dispute that he had been driving while cited for illegal cell phone use was one in which a man had pulled his car to the side of a residential street and then

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passed out in a drunken stupor, leaving the engine running and lights on. Because it had been legally parked against the curb and that ticketing officer never saw the parked car move, the vehicle was not being "driven" on public roads. So the case of *Mercer v. Department of Mother Vehicles* (809 P.2d 404*)* was deemed inapplicable to Nelson's situation.

Nelson saw the officer, removed the phone from his ear, drove through the intersection when the traffic light changed, and was pulled over for ticketing. "*Notably, the record here suggests defendant ended his use of his wireless phone to listen to messages when he saw the police officer by the side of his car, not because the light was about to turn green.*" I'm sure there are plenty of us who have narrowly escaped such situations.

Like many surveyors, I love a good word fight. Among ourselves we discuss the meaning of "metes and bounds" and we argue over whether "GIS" includes "surveying" or the other way around. Such mental exercises wake up the brain cells as we investigate etymology, past and present connotations, alternate spellings and regional usage.

While this can be amusing, in the larger arena of our practice we really need to be on top of the nuances of different words, both those we encounter and those we choose to use. We must not only know for ourselves but also be able to explain to others the differences between "vacation" and "abandonment", between "reservation" and "exception", between "point of beginning" and "point of commencement". Our audiences are lawyers, courts with judges and juries, planning and zoning boards, and the non-surveying public at large.

Reading court opinions is one way to expand our vocabularies and understanding of how people with backgrounds differing from our own might approach and resolve (at least to their own level of understanding) various fact scenarios. Nelson apparently did not argue about whether or not he was operating a motor vehicle, only whether he was driving one. That may seem like a thin hair to split, but it is the kind of logic and nuanced differentiation surveyors should be familiar with, whether to agree with it or to be able to refute it successfully. Just be sure that your agreement or argument is not carried out over a handheld cell phone while behind the wheel of a motor vehicle within the traveled way of a public road.