**STATE OF RHODE ISLAND AND PROVIDENCE PLANTATIONS**

**CRANSTON, RITT** **RHODE ISLAND TRAFFIC TRIBUNAL**

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| **CITY OF EAST PROVIDENCE** | **:** | |
| | **:** | |
| **v.** | **:** | **C.A. No. T15-0024** |
| | **:** | **14404501213** |
| **CHERYL FOGARTY** | **:** | |

## AMENDED DECISION

**PER CURIAM:** Before this Panel on August 12, 2015—Judge Almeida (Chair), Chief Magistrate Guglietta, and Administrative Magistrate DiSandro III, sitting—is Cheryl Fogarty's (Appellant) appeal from a decision of Magistrate Abbate of the Rhode Island Traffic Tribunal (Trial Magistrate), sustaining the charged violation of G.L. 1956 § 31-14-2, "Prima facie limits." The Appellant appeared before this Panel represented by counsel. Jurisdiction is pursuant to G.L. 1956 § 31-41.1-8.

## Facts and Travel

On April 8, 2014, Sergeant John Andrews (Sergeant) of the East Providence Police Department charged Appellant with the aforementioned violation of the motor vehicle code. The Appellant contested the charge, and the matter proceeded to trial on May 21, 2015.

At trial, the Sergeant testified that on April 8, 2014, he worked a speed enforcement detail at the intersection of Roger Williams Avenue and Lowell in East Providence. (Tr. at 4.) The Sergeant specified that he was standing at a fixed position outside of his cruiser, using a handheld radar unit to detect vehicles traveling in excess of the 25 miles per hour speed limit. Id. at 4-5. The Sergeant stated that he was certified at the Rhode Island Police Academy in the use of a radar unit, and that on the day in question, the radar device was calibrated and functioning properly. Id. at 7-8.

Thereafter, the Sergeant recalled that at approximately 5:41 P.M. he observed a fast-moving vehicle heading towards him on Roger Williams Avenue. Id. at 10. Using the radar gun, the Sergeant clocked the vehicle at 41 miles per hour, exceeding the posted speed limit of 25 miles per hour. Id. At that point, the Sergeant pulled the vehicle over and issued the operator a citation for traveling 5 miles per hour over the speed limit in lieu of the vehicle's actual rate of travel—16 miles per hour over the speed limit. Id. Upon stopping the vehicle, the Sergeant identified the Appellant as the operator from her driver's license.

At the completion of the City's case, Appellant's counsel moved to dismiss based on the argument that no credible or competent evidence had been admitted. Id. at 11. The Trial Magistrate denied the motion, and Appellant's counsel conducted cross-examination. On cross-examination, the Sergeant confirmed that prior to engaging in the use of the radar gun, he made a visual estimate of the vehicle's speed. Id. at 12. The Sergeant explained that he has twenty-nine years of experience as a police officer; has received training in the use of the radar gun; and has been trained to make visual estimates of speed prior to engaging the radar gun. Id. at 13. Defense counsel questioned whether the Sergeant's familiarity with radar guns is outdated. Specifically, counsel focused on the fact that the radar gun used at this stop was different from the gun used during the Sergeant's training. Id. The Sergeant clarified that although he cannot remember the exact make and model of the gun used at this particular stop, radar guns "basically work the same. There has been no change in the way radar guns have worked in 29 years. . . ." Id. at 14.

Defense counsel further questioned whether the Sergeant's knowledge in general is outdated. Id. at 14-18. Counsel reasoned "[i]f you cannot remember the details of the training class how can we expect you to remember the details of the subject taught?" Id. at 18. The

Sergeant explained that although there is no recertification process, he consistently uses the radar gun pursuant to the manner in which he was certified, and believes himself to be a competent radar user. Id. at 19-21. Defense counsel subsequently honed in on this particular stop, asking specific questions such as whether the Appellant was wearing her hair the same, or whether anyone else was in the car—questions to which the Sergeant could not recall. Id. Counsel concluded "[i]s it fair to say that you don't have any independent recollection of the immediate facts that pertain to this stop?" Id. at 27. The Sergeant maintained "I remember the stop and on the ticket it says [speed] 41." Id. at 28. Counsel then questioned the Sergeant regarding the accuracy of the radar gun reading, insisting that because of the large number of radio transmitters in East Providence, the radio electromagnetic interference may have affected the accuracy of the radar unit. Id. at 42-43. The Sergeant maintained that based on the proper calibration of the radar gun, combined with his own visual observations, he believed the reading was accurate. Id. at 44.

Defense counsel, again, moved to dismiss on the basis of insufficient facts, stating, "[i]f there isn't sufficient reason to dismiss this case on the basis of inherent problems . . . then I don't know which case would be dismissible." Id. at 52. Counsel's motion was denied. Id.

After both parties were given an opportunity to present closing arguments, the trial magistrate issued a thorough decision, sustaining the charged violation. Id. at 54. The Trial Magistrate found the Sergeant's testimony to be credible. Id. He determined that the Sergeant was trained to use his radar unit, that the unit was working properly, and that the unit registered Appellant's vehicle to be traveling at a speed of 41 mph in a 25 mph zone. Id. Based on these findings, the Trial Magistrate found that the City had met its burden of proof. Id. Thus, the

speeding violation charge was sustained. Id. Aggrieved by the Trial Magistrate's decision to sustain the charge, 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:
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> (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 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 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 [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 Envtl. 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 or magistrate's conclusions on appeal. See Janes, 586 A.2d at 537.

## Analysis

On appeal, Appellant contends that the trial magistrate's decision was made upon unlawful procedure and was clearly erroneous in view of the reliable, probative, and substantial evidence on the whole record. Specifically, Appellant argues that the trial magistrate lacked jurisdiction over this matter, that the Court refused to allow the Appellant to conduct discovery, and that the decision reached at trial was against the clear weight of the evidence.

### Jurisdiction

The Appellant argues that the Rhode Island Traffic Tribunal (RITT) lacks jurisdiction over this matter and over the Appellant because the Appellant was never arraigned at RITT. Rather, Appellant contends that the East Providence Municipal Court arraigned Appellant and thereby exercised jurisdiction over this matter, thus, making East Providence Municipal Court the proper jurisdictional venue. Appellant further asserts that her file was summarily transferred in an ambiguous fashion to RITT without notice or an opportunity for Appellant to be heard.

Appellant fails to recognize that the transfer occurred as a consequence of Appellant's motion to remove the East Providence Municipal Court judge assigned to this matter. Appellant's counsel filed the motion alleging that the Municipal Court judge had improper ex-parte communications regarding this case. The facts allegedly establishing impropriety came from defense counsel's own sworn affidavit—no other supporting affidavits were filed. It is well-settled that while the existence of bias or prejudice on behalf of a justice is proper grounds

for recusal, the person seeking recusal "bears the burden of establishing a lack of real or apparent impartiality." See In re Antonio, 612 A.2d 650, 652-653 (R.I. 1992) (finding that a judge's conference with one attorney after opposing counsel had left courthouse was not ex parte communication, and did not show personal bias or prejudice on part of judge); see also State v. Clark, 423 A.2d 1151, 1158 (R.I. 1980) (finding that subjective feelings of defendant are not a proper test for disqualification of a justice).

Here, in an effort to avoid the apparent appearance of impropriety and the potential for prejudice, the East Providence Municipal Court ordered the transfer of Appellant's case to the traffic tribunal. Rule 14 of the Rhode Island Traffic Tribunal Rules of Procedure sets forth, in pertinent part:

> "If, a municipal court shall ascertain that all of the municipal judges are unable to hear and decide the matter within the jurisdiction of that municipal court pursuant to Chapter 18 of Title 8, it shall be the duty of the municipal court to order the transfer of the case, together with all the papers, documents, and records of testimony connected with the case, within five (5) days to the traffic tribunal. Upon the transfer, the traffic tribunal shall proceed to hear and decide the case in the same manner as if it had been instituted in that court in the first instance." See Traffic Trib. R. P. 14 (b).

The Municipal Court notified Appellant of the transfer. Subsequently, the traffic tribunal proceeded to hear and decide this case pursuant to the jurisdictional authority granted to it in the Traffic Tribunal Procedures Rule 14 (b). Appellant further relies on the misconception that upon transfer of this matter, Appellant should have been re-arraigned. In no area of the Traffic Rules of Procedure is there a provision requiring the re-arraignment of a defendant upon transfer of a case. See Traffic Trib. R. P.

**Discovery**

The Appellant argues that she was denied the opportunity to conduct discovery. Specifically, Appellant argues that the East Providence judge granted discovery, a decision that was later rejected by the RITT magistrate. Appellant believes that she was prejudiced by the failure of the prosecution to provide discovery.

The Rhode Island Traffic Tribunal Rules of Procedure vary greatly from the general Rhode Island Court Rules of Procedure—particularly in the rules of discovery. Rule 11 of the Rhode Island Traffic Tribunal Rules of Procedure establishes that for discovery purposes "[a] motion or written request under this rule shall be made only within fourteen (14) days after the first appearance or at such reasonable later time as the court may permit." See Traffic Trib. R. P. 11 (e). Here, the Municipal Court never granted discovery because Appellant never submitted a formal motion or written request. Rather, Appellant's counsel orally requested discovery. Appellant's counsel argues that this oral request was later codified in a thorough request for supporting documents. However, such codification is untimely, falling beyond the fourteen day window of opportunity. Id. Tr. at 36-37; see also State v. Letourneau, 446 A.2d 746 (R.I. 1982) (holding that because the motion was untimely filed, the court lacked jurisdiction to consider it).

The Appellant further contends that the East Providence Police waived any right to object to discovery by responding to the original discovery request. Nevertheless, Appellant contradicts this contention by later arguing that the Appellant was prejudiced by the failure of the prosecution to provide any discovery material. In fact, discovery material was provided to the Appellant. Appellant was provided with the radar calibration, user manual, tuning fork certification, a copy of the citation, witness list, and a print out of all contacts the Department has had with the Appellant. This material, however, did not conform to Appellant's extensive and

precise requests. Appellant requested the Sergeant's arrest record from the date of the citation and three months leading up to the citation, along with copies of the Sergeant's daily log, and repair and maintenance records of the patrol car. (App. Exhibit A.) Such material is beyond the custody and control of the state, is immaterial to the preparation of the Appellant's defense, and is unreasonable. See Traffic Trib. R. P. 11 (b). Regardless, the discovery issue is rendered moot, as no formal discovery request by the judge or magistrate was ever granted. See Traffic Trib. R. P. 11 (e).

**The Speeding Charge**

Appellant argues that there is insufficient evidence to establish that she was traveling over the posted speed limit of 25 miles per hour. Specifically, Appellant argues that the radar reading was interrupted by "electromagnetic interference" from radio transmitters in East Providence, and thus, not accurate.

Our Supreme Court has held that a radar speed reading is admissible into evidence if a two prong test is met. State v. Sprague, 113 R.I. 351, 355-357, 322 A.2d 36, 39-40 (R.I. 1974). In Sprague, the Court held that a radar reading is admissible upon a showing that "the operational efficiency of the radar unit was tested within a reasonable time by an appropriate method," and upon "testimony setting forth [the Officer's] training and experience in the use of a radar unit." Id. In his decision, the Trial Magistrate credited the Sergeant's testimony that he was trained in the use of the radar unit, it was tested and found to be functioning properly, and the device determined that Appellant's motor vehicle was traveling 41 mph in a 25 mph zone. (Tr. at 54.) The Trial Magistrate found the Sergeant's testimony to be "most credible" and recognized that the Sergeant "in his discretion, only cited [Appellant] for operating 30 mph in a 25 mph zone" rather than Appellant's actual speed of 41 mph in a 25 mph zone. Id.

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 [or magistrate] 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)). Furthermore, as the members of this Panel did not have an opportunity to observe the live testimony of the witnesses, it would be impermissible to second-guess the trial judge [or magistrate's] "impressions as he . . . observe[d] [the Sergeant] [,] listened to [his] 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 reviewing the record in its entirety, this Panel is satisfied that the Trial Magistrate did not abuse his discretion, and his decision to sustain the charged violation is supported by legally competent evidence.

## 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 was supported by the reliable, probative, and substantial evidence of record. Substantial rights of Appellant have not been prejudiced. Accordingly, Appellant's appeal is denied, and the charged violation is sustained.

ENTERED:

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Judge Lillian M. Almeida (Chair)

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Chief Magistrate William R. Guglietta

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Administrative Magistrate Dominic A. DiSandro III

DATE: _____