

STATE OF RHODE ISLAND AND PROVIDENCE PLANTATIONS

CRANSTON, RITT

RHODE ISLAND TRAFFIC TRIBUNAL

CITY OF PAWTUCKET

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v.

C.A. No. M18-0005  
17408512833

DIANE ASSANTE

**DECISION**

**PER CURIAM:** Before this Panel on June 6, 2018—Magistrate Abbate (Chair), Magistrate Noonan, and Judge Almeida, sitting—is Diane Assante’s (Appellant) appeal from a decision of Judge John T. Gannon (Trial Judge) of the Pawtucket Municipal Court, sustaining the charged violation of G.L. 1956 § 31-14-2, “Prima facie limits.” The Appellant appeared before this Panel *pro se*. Jurisdiction is pursuant to § 31-41.1-8.

**I**

**Facts and Travel**

On December 6, 2017, Officer Rui Silva (Officer Silva) of the Pawtucket Police Department issued Appellant a citation for the aforementioned violation. (Tr. at 2.) The Appellant contested the charged violation, and the matter proceeded to trial on March 9, 2018. *Id.*

At trial, Officer Silva testified that he was at a “fixed traffic post, monitoring speeders using [his] gun, that [he] tested before and after [his] assignment.” *Id.* While at that location, Officer Silva “clocked [Appellant] doing 46 in a 25 mile per hour zone. *Id.*

During cross-examination, Officer Silva explained that he calibrated his laser before and after his assignment, to make sure it was in working order. *See Id.* at 4. Officer Silva further

explained that the laser used was not calibrated throughout his assignment; however, he stated that sometimes the laser would hit a stationary object and he could see that the laser was still calibrated. *Id.*

The Appellant also testified, stating that “an 18-wheeler tractor truck was right on the side of [her] and before that, I was at a red light.” *Id.* The Appellant further testified that at the time Officer Silva obtained her vehicle’s speed, she was applying her “brakes because [she] was pulling into [her] doctor’s office which was right after [the light].” *Id.* at 5.

After hearing all of the evidence, the Trial Judge found Officer Silva’s testimony to be credible. *Id.* Based on Officer Silva’s testimony, the Trial Judge concluded “that [Appellant’s] vehicle was going in excess of the 25 miles per hour.” *Id.* at 9. As a result, the Trial Judge sustained the violation. *See id.*

Thereafter, Appellant filed a timely appeal of the Trial Magistrate’s decision. Forthwith is this Panel’s decision.

## II

### Standard of Review

Pursuant to § 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 Mut. 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’s [or magistrate’s] decision is supported by legally competent evidence or is affected by an error of law.” *Id.* (citing *Envtl. Sci. 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.” *Id.* Otherwise, it must affirm the hearing judge’s (or magistrate’s) conclusions on appeal. *See Janes*, 586 A.2d at 537.

### III

#### Analysis

On appeal, Appellant argues that the Trial Judge’s decision was “affected by error of law.” *See* § 31-41.1-8(f). Specifically, Appellant asserts that the Trial Judge erred by (1) accepting Officer Silva’s inconsistent testimony regarding the equipment used to obtain the speed of Appellant’s vehicle and (2) deciding that Appellant was not prejudiced by the summons that indicated a radar was used to obtain the vehicle’s speed, when Officer Silva used a laser.

## A

### **Witness Credibility**

First, Appellant argues that the Trial Judge erred by finding Officer Silva's testimony credible. Specifically, Appellant asserts that Officer Silva's testimony was inconsistent regarding the equipment used to obtain the speed of Appellant's vehicle.

It is well established 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 *Janes*, 586 A.2d at 537). An appeals panel cannot review witness credibility as a trial judge may, since a trial judge "has had an opportunity to appraise witness demeanor and to take into account other realities that cannot be grasped from a reading of a cold record." *A. Salvati Masonry Inc. v. Andreozzi*, 151 A.3d 745, 749 (R.I. 2017) (quoting *State v. Van Dongen*, 132 A.3d 1070, 1076 (R.I. 2016)). As this Panel did not observe live testimony, this Panel can neither assess the demeanor of a testifying witness, nor can it disturb a trial judge's findings of credibility. *Id.*; *Link*, 633 A.2d at 1348 (citing *Janes*, 586 A.2d at 537). Therefore, this Panel will not question the Trial Judge's assessment of the witnesses' veracity during trial.

The record reveals that the Trial Judge heard and considered Officer Silva's testimony clarifying the equipment that was used to obtain the speed of Appellant's vehicle. (Tr. at 3.) Officer Silva gave testimony referring to the terms "clocked" and "laser" interchangeably. However, the Trial Judge had Officer Silva clarify which method he actually used to obtain the speed of Appellant's vehicle. *See Id.* at 2, 4. Thereafter Trial Judge found the officer's testimony to be credible. *See id.* at 9-10.

As this Panel, “lacks the authority to assess witness credibility,” it cannot substitute its judgment for that of the Trial Judge regarding Officer Silva’s credibility. *Link*, 633 A.2d at 1348 (citing *Janes*, 586 A.2d at 537). Accordingly, this Panel concludes that the Trial Judge’s determination was not “[c]learly erroneous in view of the reliable, probative, and substantial evidence on the whole record.” *See* § 31-41.1-8(f)(5).

## **B**

### **Due Process**

The Appellant further argues that the Trial Judge erred by finding that her due process rights were not violated. Specifically, Appellant contends that she was provided insufficient notice of the charged violation because the summons did not indicate that Officer Silva used a laser to obtain the speed of her vehicle.

Rule 3 of the Rhode Island Traffic Tribunal Rules of Procedure clearly states that “[a] summons which provides the defendant and the court with adequate notice of the violation being charged shall be sufficient if the violation is charged by using the name given to the violation by statute.” Traffic Trib. R. P. 3(d). The rule further states that “[a]n error or omission in the summons shall not be grounds for a reduction in the fine owed, for dismissal of the charged violation(s), or for reversal of a conviction if the error or omission did not mislead the defendant to his or her prejudice.” *Id.* Importantly, subsection (c) provides that the summons shall note “whether the violation requires a hearing or is one which may be eligible to be paid administratively pursuant to the law. If eligible for administrative payment, the officer shall also note on the summons the full amount of the fine[s] required to be paid.” Traffic Trib. R. P. 3(c).

A review of the record reveals that the summons contained the necessary information pursuant to Rule 3. *See* Summons no. 17408512833. The summons clearly conveys the statute

with which Appellant is charged with violating. Additionally Rule 3(c) of the Traffic Tribunal Rules of Procedure clearly states that “[a]n error . . . in the summons shall not be grounds for a reduction in the fine owed, for dismissal of the charged violation(s), or for reversal of a conviction if the error . . . did not mislead the defendant to . . . her prejudice.” *See* Traffic Trib. R. P. 3(d). Therefore, this Panel finds that the summons was not defective; the error on the summons was harmless, and Officer Silva’s testimony clarified which speed capturing method was used.

In light of this Panel’s finding, Appellant could not have been prejudicially misled by the summons. Accordingly, the Trial Magistrate properly found that the summons “did not mislead the defendant to [her] . . . prejudice[.]” and that Appellant’s due process rights were not violated.

## C

### **Insufficient Evidence**

Furthermore, this Panel must review the record and “determine whether the judge’s decision is supported by legally competent evidence. . . .[.]” *Link v. State*, 633 A.2d at 1348. In *State v. Sprague*, the Supreme Court held that “the operational efficiency” of the radar device must be “tested within a reasonable time by an appropriate method.”<sup>1</sup> 113 R.I. 351, 357, 322 A.2d 36, 39 (1974), The record must contain evidence of the officer’s training and experience in the use of a radar device. *See Sprague*, 113 R.I. at 357, 322 A.2d at 40. Here, the record does not contain evidence that the requirements of *Sprague* were sufficiently set forth.

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<sup>1</sup> Of note, in the District Court context, the court rejected the argument that it should adopt a different rule with respect to the admissibility of laser results than the rule set forth in *Sprague*. *See Sullivan v. City of Woonsocket*, A.A. No. 16-69, 4-6 (November 10, 2016). The District Court rejected that argument, holding that *Sprague* “announced a rule for the admissibility of the speed readings emitted by speed calculating devices,” not just for radar devices. *Sullivan*, A.A. No. 16-69 at 12-13. Accordingly, the District Court rejected the Defendant’s proposed rule for laser devices and affirmed the Appeals Panel’s decision. *See Sullivan*, A.A. No. 16-69 at 13.

First, the record does not indicate that Officer Silva received proper certification and training to operate the laser, as is required by *Sprague*. *See id.* Second, Officer Silva testified that the laser was calibrated before and after his assignment; however, he did not testify as to the device's operational efficiency. *See Id.* Therefore, the record is devoid of the evidence necessary to satisfy the requirements established in *Sprague*. As a result, the prosecution did not meet its burden of proof. Accordingly, the Trial Judge's decision was "affected by error of law" and "clearly erroneous in view of the reliable, probative, and substantial evidence on the whole record." Sec. 31-41.1-8(f).

## IV

### Conclusion

This Panel has reviewed the entire record before it. Having done so, the members of this Panel determine that the Trial Judge's decision was "affected by error of law" and "clearly erroneous in view of the reliable, probative, and substantial evidence on the whole record." Sec. 31-41.1-8(f). The substantial rights of the Appellant have been prejudiced. Accordingly, Appellant's appeal is granted, and the adjudicated violation is reversed.

ENTERED:

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Magistrate Joseph A. Abbate (Chair)

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Magistrate William T. Noonan

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Judge Lillian M. Almeida

DATE: \_\_\_\_\_