STATE OF RHODE ISLAND AND PROVIDENCE PLANTATIONS

CRANSTON, RITT **RHODE ISLAND TRAFFIC TRIBUNAL**

CITY OF PROVIDENCE	**:**	
	:	
v.	**:**	**C.A. No. T13-0042**
	:	**07409101308**
AYSIA RIVERS	**:**	

DECISION

PER CURIAM: Before this Panel on September 11, 2013—Magistrate Goulart (Chair, presiding), Judge Parker, and, Magistrate Noonan, sitting—is Aysia Rivers' (Appellant) appeal from a decision of Chief Magistrate Guglietta (trial magistrate), sustaining the charged violation of G.L. § 31-15-5, "Overtaking on the Right." Appellant was represented by counsel before this Panel. Jurisdiction is pursuant to § 31-41.1-8.

Facts and Travel

On December 3, 2012, Police Officer Clary of the Providence Police Department (Officer) charged Appellant with the aforementioned violation of the motor vehicle code. Appellant contested the charge, and the matter proceeded to trial on June 5, 2013.

At trial, the Officer testified that he responded to an accident at the intersection of Harris Avenue and Atwells Avenue on December 25, 2013 at approximately 8:04 pm. (Tr. at 2.) The accident had occurred just before the intersection at the Seven Eleven convenience store driveway. Id. The Officer explained that there were two vehicles involved in the accident, and he promptly identified the driver of each respective vehicle as David O' Connor (O' Connor) and Aysia Rivers (Rivers or Appellant). Id. In addition, the Officer testified that upon arriving at the scene, he observed that O' Connor's service truck was angled attempting to get into the driveway

of Seven Eleven and that the front end of the Appellant's vehicle had made contact with the passenger side of O' Connor's truck. Id. Furthermore, the Officer described that this segment of Atwells Avenue is a one-way street, and the relevant segment of Harris Avenue is a two-way street. Id. The Officer also described his observations regarding the positioning of the two vehicles which led him to conclude that O' Connor was attempting to negotiate a right turn into Seven Eleven when Appellant's vehicle passed him on the right and collided with O' Connor's vehicle. Id.

O' Connor testified he was driving down Harris Avenue in order to make a delivery at Seven Eleven. (Tr. at 8.) O' Connor indicated that he slowed down, checked his mirrors, put his directional signal on and noticed a vehicle behind him. Id. In addition, O' Connor testified that as he negotiated a right-hand turn into Seven Eleven, another vehicle collided with the passenger side of his truck. Id. O' Connor identified the Appellant as the driver of the vehicle that struck his truck. Id. The Appellant's sole testimony concerning the aforementioned violation of the motor vehicle code was "[h]e was already in the left lane, and I was already on the side of him, turning in. He asked me if I was alright, I told him no, I wasn't." (Tr. at 10.)

The trial magistrate found the Officer's testimony to be credible. (Tr. at 12.) Specifically, the trial magistrate noted that the Officer had not been qualified as an accident reconstructionist during his testimony and as a result, the trial magistrate highlighted that he had not allowed the Officer to testify as such. Id. However, the trial magistrate remarked that the Officer's testimony revealed the vehicles' positions and the point of impact. Id. The trial magistrate found O' Connor's testimony to be credible. Id. The trial magistrate emphasized that O' Connor's testimony was compelling and significant to the trial magistrate's findings of fact. Id. Specifically, the trial magistrate highlighted O' Connor's testimony that O' Connor had been

making a delivery on Harris Avenue, put his right-hand directional signal on, and that while negotiating his turn, he was struck by Rivers' vehicle. (Tr. at 13.) The trial magistrate also noted that O' Connor had been able to identify the Appellant because he spoke with her after the collision to ensure the Appellant was not hurt. Id. In contrast, the trial magistrate found the Appellant's testimony that the accident occurred while O' Connor was in the left lane and closer to the intersection lacked credibility. Id.

In conclusion, the trial magistrate was satisfied by clear and convincing evidence that the Appellant had overtaken O Connor's truck on the right. Id. Accordingly, the trial magistrate sustained the charge. Id.

Standard of Review

Pursuant to G.L. § 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 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'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 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's [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 affected by error of law. Specifically, the Appellant challenges the admission of the Officer's testimony alleging that the Officer had no personal knowledge of the accident, had made no personal observations of the accident, and did not take any measurements at the accident scene. In addition, the Appellant claims that the city of Providence did not lay the proper foundation for the introduction of expert opinion testimony or lay opinion testimony regarding the cause of the accident at the center of this controversy.

I. Expert Testimony

The Appellant contends that the trial magistrate's decision to allow the Officer to give an expert opinion without first being qualified as an accident reconstructionist was affected by error

of law and was an abuse of discretion. The Appellant relies on State v. Bettencourt, to assert that a police officer must be certified as an accident reconstructionist in order to properly testify as an expert. 723 A.2d 1101 (R.I. 1999).

This Panel finds the Appellant's argument to be without merit. The trial magistrate made it clear that the Officer had not been qualified as an expert witness, and would not be allowed to offer any expert opinion. (Tr. at 7.) After a complete review of the whole record this Panel is satisfied that no expert opinion was offered at trial.

II. Lay Testimony

The Appellant argues that the trial magistrate's decision to allow the Officer to testify to his observations at the accident scene and to make reasonable inferences from his observations was affected by error of law. Specifically, the Appellant asserts that the Officer had no personal knowledge of the accident at issue and that without witnessing the accident, the Officer was not competent to testify. Appellant further argues that the trial magistrate erred when he allowed the Officer to draw a reasonable inference from the facts observed.

At trial, the Officer testified that he observed that there were two vehicles involved in the accident. (Tr. at 2.) He testified that O' Connor's service truck was angled attempting to get into the driveway of Seven Eleven and that the front end of Appellant's vehicle had made contact with the side of Connor's truck. Id. The Officer also stated that his observations regarding the positioning of the two vehicles led him to conclude that O' Connor was attempting to negotiate a right turn into Seven Eleven when Rivers' vehicle passed him on the right and collided with O' Connor's vehicle. Id.

Rule 602 of the Rhode Island Rules of Evidence provides "[a] witness may not testify to a matter unless evidence is introduced sufficient to support a finding that the witness has

personal knowledge of the matter." R.I. R. Evid. 602. "[A] witness's testimony is inadmissible under Rule 602 only if the trial justice finds that the witness could not have actually perceived or observed that to which he or she purports to testify." State v. Addison, 748 A.2d 814, 821 (R.I.2000) (quoting State v. Gatone, 698 A.2d 230, 236 (R.I.1997)). It is not required that the Officer's observations be contemporaneous with the accident. The Officer testified about what he observed when he arrived at the scene; namely, the condition and position of the vehicles involved in the accident. Id. Therefore, the trial magistrate's decision to allow the Officer to testify to his observations at the scene was not affected by error of law.

Appellant additionally claims that the Officer should not have been allowed to testify to the inferences he formed from his observations. Specifically, the Appellant asserts that the Officer's testimony regarding his observations adequately describes the circumstances of the present controversy and therefore renders any opinion testimony inadmissible.

Rule 701 of the Rhode Island Rules of Evidence provides "[i]f the witness is not testifying as an expert, the witness' testimony in the form of opinions is limited to those opinions which are (A) rationally based on the perception of the witness and (B) helpful to a clear understanding of the witness' testimony or the determination of a fact in issue." R.I. R. Evid. 701. The application of Rule 701 to police officer testimony has engendered both misunderstanding and disagreement. See Mark Hansen, Dr. Cop On the Stand, ABA Journal 31 (May 2002). Law enforcement officers are often qualified as experts to reconstruct crime scenes and offer opinions as to how accidents occurred. Additionally, police officers regularly, and appropriately, offer testimony under Rule 701 based on their perceptions and experiences. See United States v. Ayala-Pizarro, 407 F.3d 25, 28 (1st Cir. 2005). "The line between expert testimony [...] and lay opinion testimony [...] is not easy to draw." United States v. Colon

Osorio, 360 F.3d 48, 52-53 (1st Cir.2004). A police officer's testimony does not fall outside Rule 701 simply because his or her rational perception is based in part on the police officer's past experiences. See Ayala-Pizarro, at 28.

In State v. Fogarty, our Supreme Court permitted a lay witness, "as a means of shorthand rendition, to testify concerning conclusions or inferences relating to corporal appearance of persons and things." 433 A.2d 972, 974 (R.I. 1981). In Fogarty our Supreme Court gave more than a passing reference to 7 Wigmore, Evidence § 1917-1919 at 1-17 (Chadbourn rev.1978). Specifically, our Supreme Court noted Wigmore's postulation:

> "There is no virtue in any test based on the mere verbal or logical distinction between 'opinion' and 'fact.' In all the law of evidence, there is no instance in which the use of a mere catchword has caused so much error of principle and vice of policy: error of principle, because the distinction between 'opinion' and 'fact' has consistently and wrongly been treated as an aim in itself and a self-justifying dogma."
> Id. § 1919 at 14.

Our Supreme Court has endeavored to further demarcate the intersection between opinion and fact in the context of nonexpert testimony. Moreover, in State v. Lutye, our Supreme Court observed that "there is no hard and fast rule which tells us when a nonexpert may augment his testimony of what he saw with an opinion." 109 R.I. 490, 494, 287 A.2d 634, 637 (1972). Accordingly, our Supreme Court held that a nonexpert witness may give an opinion where the "subject matter of the testimony cannot be reproduced or described to the [finder of fact] precisely as it appeared to the witness at the time, and the facts upon which the witness is called to express an opinion are such as men in general are capable of comprehending." Id. (quoting Wilson v. N.Y., N.H. & H.R.R., 18 R.I. 598, 602, 29 A. 300, 301 (1894)). At the same time, our Supreme Court has reaffirmed the proposition that where observations can be sufficiently

described to a jury "and are such that their bearing on the issue can be estimated by all men, without special knowledge or training, opinions of witnesses, expert or other, are not admissible." Glennon v. Great Atl. & Pac. Tea Co., 87 R.I. 454, 457, 143 A.2d 282, 284 (1958) (quoting Fontaine v. Follett, 51 R.I. 413, 417, 155 A. 363, 364 (1931)).

An application of Rule 602 might properly have been determined by the trial magistrate to allow the Officer's testimony to describe what he had observed with his senses when he arrived at the accident scene. However, Rule 701 could be interpreted to allow the expression of an opinion since the factors observed after an accident are conditions that men and women in general are capable of comprehending. See Lutye, at 494, 287 A.2d at 637. Therefore, this Panel finds that the trial magistrate's decision with respect to the Officer's testimony clearly comported with Rule 602 and Rule 701 because the facts observed and inference offered were rationally based on the observations the Officer made in the aftermath of the accident and also helpful to the finder of fact in creating a clearer understanding of the Officer's testimony and the determination of facts in issue. See Fogarty, 433 A.2d at 976.

This Panel also finds Flower v. State, 373 Ark. 127, 282 S.W.3d 767, 771 (2008) to be instructive regarding the trial magistrate's decision to allow the Officer to testify to inferences made from his observations. In Flower, the Supreme Court of Arkansas held that the trial court did not abuse its discretion when it allowed lay opinion testimony by a police officer regarding the cause and manner in which a truck's back glass window had been broken. The police officer was allowed to testify that in his opinion, based on work experience and observations, the window had been broken from the outside. The officer based this opinion on his observing broken glass and a brick inside the truck. See Stumpf v. Reiss, 502 N.W.2d 620 (Iowa Ct. App. 1993) (trial court properly allowed opinion testimony of investigating police officer as to cause

of accident based on officer's experience and ability to assist the jury in understanding the accident scene); see also Hart-Anderson v. Hauck, 239 Mont. 444, 781 P.2d 1116 (1989) (in action arising out of a motor vehicle accident, trial court did not err in permitting police officer who investigated accident shortly after it occurred to testify in his opinion that the cause of the accident was the defendant driving too fast for road conditions. This opinion was offered based on interviews with parties involved, observations at the scene of the accident, observations of the vehicles, and observations of road conditions); see also Estate of Hunt v. Board of Com'rs of Henry County, 526 N.E.2d 1230 (Ind. Ct. App. 4th Dist. 1988) (state trooper was properly permitted to testify that cause of plaintiff's accident was due to excessive speed. The trooper had been certified as an accident investigator after accident but before testifying at trial); see also Dawson v. Casey, 178 W. Va. 717, 364 S.E.2d 43 (1987) (trial court properly admitted testimony by investigating officer that the cause of the accident was the driver's inadvertent shifting of gears into reverse while traveling fifty-five (55) miles per hour. The opinion was rationally based upon facts observed and known to trooper).

This Panel is satisfied that the trial magistrate's decision was not affected by error of law in allowing both the Officer to testify to his observations at the accident scene, and to drawing reasonable inferences from what he had observed. The testimony was rationally based on the perception of the Officer, and it was also helpful to a clear understanding of his testimony and to the determination of the manner in which the accident occurred.

III. Totality of Circumstances and Credibility

Appellant additionally disputes the veracity of the Officer's testimony. Specifically, Appellant argues that the trial judge erred in crediting the testimony of the Officer and O' Connor over Appellant's testimony.

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 Officer, O' Connor or Appellant, it would be impermissible to second-guess the trial magistrate's "impressions as he . . . observe[d] [the Officer, O' Connor, 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 testimony, the trial magistrate determined that he found O' Connor's testimony to be highly credible and the most significant testimony in the present controversy. (Tr. at 12.) In his decision, the trial magistrate noted O' Connor's familiarity with the location of the accident. Id. Furthermore, the trial magistrate highlighted that the testimony of the Officer and O' Connor in the aggregate made it manifest that the city of Providence had proven each element of the charge by clear and convincing evidence. (Tr. at 13.) This Panel cannot reassess the trial magistrate's impressions of testimony offered at trial. See Environmental Scientific Corp., 621 A.2d at 206. Confining our review of the record to its proper scope, 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. This Panel is also satisfied that the trial magistrate did not

abuse his discretion, and his decision was not affected by error of law. Substantial rights of Appellant have not been prejudiced. Accordingly, Appellant's appeal is denied, and the charged violation sustained.

ENTERED:

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Magistrate Alan R. Goulart (Chair)

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Judge Edward C. Parker

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Magistrate William T. Noonan

DATE: _____