STATE OF RHODE ISLAND AND PROVIDENCE PLANTATIONS

CRANSTON, RITT **RHODE ISLAND TRAFFIC TRIBUNAL**

CITY OF WOONSOCKET	:	
	:	
v.	:	**C.A. No. M16-0001**
	:	**15412551511**
MATTHEW MACHADO	:	

DECISION

PER CURIAM: Before this Panel on June 15, 2016—Magistrate Abbate (Chair), Judge Noonan, and Judge Parker, sitting—is Matthew Machado's (Appellant) appeal from a decision of Judge Lloyd Gariepy of the Woonsocket Municipal Court (Trial Judge), sustaining the charged violation of G.L. 1956 § 31-18-5, "Crossing other than at crosswalks." The Appellant appeared before this Panel represented by counsel. Jurisdiction is pursuant to § 31-41.1-8.

Facts and Travel

On November 2, 2015, Officer Andrew Girard (Officer Girard), charged the Appellant with the aforementioned violation of the Motor Vehicle Code. Appellant contested the charge, and the matter proceeded to trial on February 3, 2016.

At trial, Officer Girard testified that at approximately 6:10 p.m., he was on patrol with Officer Bienkiewicz, when they were called to the area of Diamond Hill Road and Wood Avenue in Woonsocket for a report of a motor vehicle accident involving a pedestrian. (Tr. at 3.) Upon arrival at the scene, Officer Girard located the pedestrian and the vehicles involved. Id. Officer Girard recalled that the pedestrian, later identified as the Appellant, was "laying on the ground" at the intersection of Diamond Hill and Wood Avenue, across from 4623 Wood Avenue. Id. at 5. The Appellant was "ambulatory, but clutching his hip area." Id. at 3. Rescue arrived and

began treating the Appellant while Officer Girard spoke with Crystallee Desautell (Ms. Desautell), the driver of the Ford Escape involved in the accident. Id. at 5.

Ms. Desautell told Officer Girard that she was traveling out of the city, toward Wal-Mart, when Appellant "ran out into traffic in front of her vehicle." Id. Ms. Desautell added that she was traveling approximately the speed limit, twenty-five miles per hour, and the front area of her vehicle struck the Appellant. Id. After speaking with Ms. Desautell, Officer Girard remained on scene until rescue transported the Appellant. Id. at 6.

The Trial Judge questioned Officer Girard as to who cited the Appellant for violating § 31-18-5. Id. at 7. Officer Girard responded, "I did not [cite the Appellant]." Id. Thereafter, counsel for the Appellant cross-examined Officer Girard, asking "you didn't actually witness the accident, correct?" Id. at 8. Officer Girard responded, "I did not." Id. This concluded Officer Girard's testimony.

The prosecution called its second witness, Officer Bienkiewicz. Id. Officer Bienkiewicz testified that at approximately 6:00 p.m., he responded with Officer Girard to the scene of the accident. Id. at 9. Officer Bienkiewicz testified that when he arrived at the scene, he observed "a 2005 red Ford Escape with some front end damage, consistent with being struck by a pedestrian or striking a pedestrian." Id. at 10-11. Officer Bienkiewicz also observed a Toyota that was in an adjacent driveway. Id. at 11. The Toyota had very minor front end damage to the front bottom grill. Id. At this point, Detective Berthelette and Detective Flood arrived at the scene. Id. Detective Flood cited Appellant for violating § 31-18-5. Officer Bienkiewicz added that the Ford Escape was "approximately five hundred feet from the intersection with Wood Avenue and Bellingham Street." Id. at 12.

After Officer Bienkiewicz's testimony, the Trial Judge posed a few questions for clarification. Id. The Trial Judge asked, "[t]he 2005 red Ford with the front end damage, that was owned by . . . Ms. Desautell?" Id. at 11. Officer Bienkiewicz answered, "[y]es." Id. The Trial Judge also asked, "[w]as [the Ford Escape] heading inner city or outer city?" Id. at 12. Officer Bienkiewicz responded, "[o]ut, heading out." Id.

At the conclusion of Officer Bienkiewicz's testimony, Ms. Desautell testified. Id. at 14. Ms. Desautell recalled that she was traveling outbound in Woonsocket toward Wal-Mart, took a right turn off Rathbun Street and onto Diamond Hill Avenue, stopped at the red light, and then proceeded on Diamond Hill Avenue toward Social Street. Id. at 15. Ms. Desautell stopped at another red light and then continued through the intersection of Diamond Hill Road and Social Street toward the intersection of Diamond Hill Road and Wood Avenue. Id. Ms. Desautell recalled, "I went under the light and about 100 feet away, there is a telephone pole, which is where I struck [the Appellant]." Id. Ms. Desautell added, "[a]fter I realized I hit [Appellant], all I saw was legs in front of my headlights. It was dark out. He was wearing all black, black shoes, and when I hit him, all I saw [was] all black in my windshield." Id. at 15-16. Ms. Desautell stopped her vehicle and was walking toward the Appellant when he was struck by a second vehicle. Id. at 16. Ms. Desautell testified, "[Appellant's] foot was stuck in the lady's grill. He was asking for help to get it out. We didn't want to touch him. We didn't want to hurt him . . . [h]e said he was sorry." Id.

On cross-examination, Ms. Desautell testified, "it was pretty dark. There are some lights, but it was nighttime. The streetlights were on . . . ." Id. at 22. Ms. Desautell added that there are four streetlights at the intersection of Diamond Hill Road and Wood Avenue and as she was approaching the intersection, there was nothing obstructing her view. Id. at 24. Ms. Desautell

also indicated that she is attentive to pedestrians and bicyclists while driving, and on that particular night, she did not see anybody on the sidewalk. Id. at 22-23. Furthermore, Ms. Desautell stated that the Appellant "was not at the corner. He was at about the [telephone] pole. He was not near the crosswalk." Id. at 37. Ms. Desautell added, "[m]y car was several feet away from the crosswalk when I struck him." Id. Ms. Desautell conceded that while stopped at the red light on Rathbun Street and Diamond Hill Road, she had sent a text message from her cell phone; however, she maintained that at the time of the accident she was not using her cell phone. Id. at 25.

At the close of the prosecution's case, counsel for the Appellant moved to dismiss the case on the bases that the officer who issued the citation was not present at trial and the prosecution had failed to meet its burden. Id. at 42-43. The Trial Judge denied the motion, and the Appellant presented his defense. Id. at 43.

In his defense, Appellant testified that he was walking up Wood Avenue toward the intersection of Diamond Hill Avenue and Wood Avenue. Id. at 44. At the intersection, Appellant "looked up and noticed the light was red," so he crossed the street. Id. at 45. Appellant stated, "the last thing I knew I seen [sic] a car come at me and everything went black." Id. Appellant maintained that he was walking within the boundaries of the crosswalk when he was struck. Id. at 46-47. After Appellant's testimony, counsel for the Appellant requested that the Trial Judge dismiss the charged violation, stating, "[Appellant] said he entered the crosswalk. He was hit . . . and flung . . . [Appellant] can't say exactly where he lands, but he knew where he began, [in the crosswalk] . . . so we are asking the Court to dismiss the ticket." Id. at 59.

After hearing the testimony presented, the Trial Judge concluded,

> "[e]ven in a marked crosswalk, the pedestrian has the duty of using some due care for his or her safety. Therefore, pedestrians may not

> walk into a roadway . . . [t]he [Appellant] has indicated that it was occurring at the crosswalk, but Officer Girard was on scene. He said it was further up from the crosswalk. Ms. Desautell indicated that the point of impact was further up from the crosswalk. Therefore, we must look to see, which is the most credible." Id. at 62.

In assessing the credibility of the witnesses, the Trial Judge found it "somewhat strange" that Appellant could be struck by two vehicles, each traveling the opposite way, at a well-lit intersection controlled by a traffic device. Id. at 63. The Trial Judge stated, "[i]t seems somewhat highly unlikely that, in fact, that type of situation of situation could happen at that particular point, [as Appellant suggests]." Id. Instead, the Trial Judge found Ms. Desautell's rendition of the facts to be "what really happened." Id. at 64.

The Trial Judge concluded, "Ms. Desautell's rendition of what happened was clear and convincing . . . I'm going to adopt as findings of fact that . . . the [Appellant] was not at the crosswalk . . . when this accident occurred. . . I believe that the accident was further up, as Ms. Desautell had testified to. . . ." Id. Accordingly, the Trial Judge sustained the charged violation, § 31-18-5, "Crossing other than at crosswalks." Aggrieved by the Trial Judge's decision, 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:

> "(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 Judge's decision was characterized by an abuse of discretion, affected by error of law, and clearly erroneous in view of the reliable, probative, and substantial evidence on the whole record. Specifically, Appellant argues that there was a lack of prosecution, that the Trial Judge exceeded his position of neutrality by

interrogating the witnesses, and that the record fails to establish that Appellant violated § 31-18-5.

Failure to Prosecute

Appellant maintains that there was a lack of prosecution at trial because the officer who issued Appellant the citation was not present to testify. Appellant fails to present this Panel with legal authority establishing that the issuing officer must be present to testify at trial, nor is this Panel aware of any basis to support such an argument.

A claim of "lack of prosecution" is generally brought by motion to dismiss in an action "which has been pending for five years or more." See § 9-8-3; see also Rodriques v. Santos, 466 A.2d 306, 310 (R.I. 1983) ("Section 9-8-3 permits all courts, in their discretion, to dismiss any action or proceeding for lack of prosecution which has been pending for five years or more"). Appellant was charged with violating § 31-18-5 on November 2, 2015, and proceeded to trial approximately three months later. See Tr. at 2. Therefore, this Court cannot conclude that there has been a lack of prosecution requiring dismissal.

Besides, extreme deference must be afforded to prosecutors in their prosecutorial decisions and official discharge of their duties. See State v. Price, 706 A.2d 929, 936 (R.I. 1998); see also Providence Teachers' Union Local 958, AFL-CIO, AFT v. City Council of City of Providence, 888 A.2d 948, 953 (R.I. 2005) (noting the "deferential manner with which [courts] traditionally review the decisions of prosecutors"). The prosecution need only meet its burden of proof and may do so in any manner it deems fit. See U.S. v. Sampson, 486 F.3d 13, 44 (1st Cir. 2007) (stating "the prosecution is entitled to considerable latitude in deciding how to present its case").

Here, the City of Woonsocket presented the testimonies of Officer Girard, Officer Bienkiewicz, and Ms. Desautell. Each witness had sufficient personal knowledge to testify regarding the matter. The Trial Judge weighed the credibility of the witnesses and concluded, based on the testimony presented, that the City of Woonsocket had met its burden of proof. (Tr. at 65). Specifically, the Trial Judge stated:

> "Ms. Desautell's rendition of what happened was clear and convincing. I find that when I apply the standard of proof, it is more likely than not, that Ms. Desautell's rendition . . . of the accident is what really happened . . . based upon the testimony given, I find that the City has met its burden of proof with respect to this matter." Id.

We see no reason to disturb that conclusion. Especially considering that the Traffic Tribunal Rules of Procedure are devoid of any requirement that the issuing officer appear at trial to testify.[1] See Traffic Trib. R. P. 6(a). Therefore, we affirm the Trial Judge's determination that the City of Woonsocket met its burden of proof and conclude that Appellant's argument, that the issuing officer must testify at trial, is unsubstantiated.

Examination by Court

The Appellant argues that the Trial Judge exceeded his position of neutrality by interrogating the witnesses. The Appellant maintains that the Trial Judge's improper interrogation of the witnesses was prejudicial.

It is well-settled that the "asking of questions of a witness by a trial justice is proper in the furtherance of justice." See State v. Fournier, 448 A.2d 1230, 1232 (R.I. 1982); see also State v. Nelson, 982 A.2d 602, 617 (R.I. 2009) (a trial justice may conduct a limited interrogation of a witness for clarification purposes). The parameters of judicial interrogation are

[1] Further, the record reveals that counsel for the defendant did not raise any due process issues or violations of any specific Rhode Island Traffic Tribunal Rule of Procedure at trial.

"narrowly confined to clarification of justifiably confusing matters." Id.; see also State v. Phommachak, 674 A.2d 382, 388-89 (R.I. 1996) (finding that the "authority of [the] trial justice to interrogate witness[es] extends to any relevant matters proper to be presented to [a] jury in [the] furtherance of justice").

In questioning a witness, the trial justice must proceed with caution and must "guard against even the appearance of changing his or her position from that of judicial officer impartially presiding at trial to that of partisan advocate interested in establishing position of either party." Phommachak, 674 A.2d at 388. Importantly, "[t]o the questions of a judge[,] the same rules apply as to the time and method of making objections and taking exceptions as govern the objections and exceptions of counsel to the questions of his adversary." Id. at 389. Essentially, defense counsel must object to a trial justice's questioning of a witness in order to preserve the challenge for appellate review. Id.

Review of the record before this Panel indicates that no objections were ever posed by Appellant's counsel to any of the questions asked by the Trial Judge. As such, Appellant's claim that the Trial Judge exceeded his position of judicial officer by questioning the witnesses is unfounded because it was not raised at trial. Id.

Nevertheless, even if this issue had been preserved for appellate review, we would not conclude that the Trial Judge failed to comport himself as an impartial arbiter. The record is devoid of any indication that the Trial Judge's questioning prejudiced the Appellant or took on an air of cross-examination. See Nelson, 982 A.2d at 617-18 ("[j]udicial interrogation that elicits inflammatory information from a witness is beyond the narrow parameters allowing only for clarification of confusing issues"). Rather, the Trial Judge posed questions that clarified testimony already presented by the witnesses, such as, "[w]ho cited the [Appellant]?" and

"[w]here was that vehicle on Diamond Hill Road?" (Tr. at 7, 11.) Based on the record before us, it is the opinion of this Panel that the Trial Judge's questions were made for clarification of justifiably confusing matters and were therefore proper in the furtherance of justice. See Fournier, 448 A.2d at 1232.

Sufficiency of Findings

Appellant argues that the record fails to establish that he violated § 31-18-5. Section 31-18-5 sets forth that, "[e]very pedestrian crossing a roadway at any point other than within a marked crosswalk or within an unmarked crosswalk at an intersection shall yield the right-of-way to all vehicles upon the roadway." See § 31-18-5. Appellant maintains that he had the right-of-way and was within the boundaries of the crosswalk when he was struck. (Tr. at 46-47.) However, the record does not support these contentions.

Rather, the record reflects that the Appellant, a pedestrian, was crossing Diamond Hill Road, at least several feet away from the crosswalk when he was struck by Ms. Desautell. Id. at 37. Ms. Desautell estimated that she was approximately one hundred feet away from the cross-walk when she struck the Appellant. Id. at 15. The Trial Judge determined that based on the testimony presented, Ms. Desautell had the right-of-way, and that Appellant failed to yield to vehicles having the right-of-way prior to crossing Diamond Hill Road. Id. at 65. The Trial Judge stated, "I'm going to adopt as findings of fact that . . . the [Appellant] was not at the crosswalk . . . when this accident occurred." Id. at 64. We agree with the Trial Judge. See Link, 633 A.2d at 1348 (an appellate court "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").

Based on the record before this Panel, we are satisfied that the Trial Judge's decision sustaining the charged violation, § 31-18-5, was not an abuse of discretion, affected by error of law, or clearly erroneous in view of the reliable, probative, and substantial evidence on the whole record. See Environmental Scientific Corp., 621 A.2d at 209 ("the [Appellate Court] should give great deference to the [Trial Judge's] findings and conclusions unless clearly wrong").

Conclusion

This Panel has reviewed the entire record before it. Having done so, the members of this Panel find that the Trial Judge's decision is supported by reliable, probative, and substantial evidence on the whole record. Substantial rights of the Appellant have not been prejudiced. Accordingly, Appellant's appeal is denied, and the charged violation sustained.

ENTERED:

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Magistrate Joseph A. Abbate (Chair)

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Magistrate William T. Noonan

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Judge Edward C. Parker

DATE: _____