**STATE OF RHODE ISLAND AND PROVIDENCE PLANTATIONS**

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

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| **DEPARTMENT OF ENVIRONMENTAL MANAGEMENT** | : | |
| | : | |
| **v.** | : | **C.A. No. T15-0027** |
| | : | **07417010855** |
| **MARILYN SHELDON** | : | |

## DECISION

**PER CURIAM:** Before this Panel on September 30, 2015—Judge Almeida (Chair), Judge Parker, and Magistrate Noonan, sitting—is Marilyn Sheldon's (Appellant) appeal from a decision of Magistrate Goulart of the Rhode Island Traffic Tribunal (Trial Magistrate), sustaining the charged violation of Department of Environmental Management (DEM) Fish and Wildlife Regulation §20-1-12, "Feeding Wildlife Prohibited," referred to as Regulation 10.11, and violation code 975. The Appellant appeared before this Panel *pro se*. Jurisdiction is pursuant to § 31-41.1-8.

## Facts and Travel

On March 26, 2015, DEM Officer Joseph Buban (Officer) charged Appellant with the aforementioned violation. The Appellant contested the charge, and the matter proceeded to trial on May 13, 2015. At trial, Appellant's neighbor Robert Newman testified as an eyewitness to Appellant's consistent feeding of water fowl. (Tr. at 12.) Mr. Newman claimed that he saw Appellant feed the geese in the common area outside of their apartments on or about March 17, 2015. Id. at 15. On this occasion, Mr. Newman took a video of Appellant feeding the geese. Mr. Newman testified that he personally witnessed this geese-feeding occur multiple times thereafter, and on March 26, 2015, he called DEM to report the Appellant. Id.

On cross-examination, Appellant attempted to establish that this is a case about retaliation and that Mr. Newman called DEM after a falling out occurred between the two. Id. at 18. The Trial Magistrate clarified that Mr. Newman's motives are not significant here, and the only relevant matter is whether Appellant was feeding the birds. Id. Appellant countered that there had been a "flood of people in the backyard feeding the birds." Id. at 27. The Trial Magistrate retold Appellant that it did not matter what everyone else was doing, the only relevant matter is whether Appellant was feeding the geese. Id. at 28.

Appellant next questioned Officer Buban. The Officer stated that on March 31, 2015, he interviewed the complainant, Mr. Newman. Mr. Newman reported that the geese were "aggressive and leave feces everywhere." Id. at 33. The Officer watched the video that Mr. Newman had recorded. Id. The video showed Appellant actively feeding the geese what appeared to be white bread. Id. The Officer then went to the Appellant's apartment. The Officer testified that he recognized the Appellant as the person he had met with in 2014 for the same complaint. Id. At that time, the Officer had explained to Appellant that she could not feed the geese and had provided Appellant with a Rhode Island DEM pamphlet titled, "Five reasons why feeding water fowl is harmful." Id. Additionally, the Officer warned Appellant that if she continued to feed the geese, enforcement action would be taken. Id. Thus, on March 31st, the Officer advised Appellant that another complaint had surfaced against her for feeding the geese. Id. at 35. The Officer stated that at first Appellant denied feeding the geese but soon admitted that the geese were malnourished and needed to be fed, so she was feeding them. Id. The Officer left Appellant with another pamphlet explaining why feeding water fowl is harmful and a Rhode Island Traffic Tribunal ticket to pay by mail. Id.

On cross-examination, Appellant attempted to argue that the pamphlet did not warn Appellant that she could be fined for feeding the geese. Id. at 40. Appellant also attempted to establish that the ticket was handed to her granddaughter, and not directly to Appellant. Id. at 43. The Officer clarified that he asked Appellant to sign the ticket; however, Appellant refused to sign the ticket and walked away from the Officer, so the Officer handed the ticket to Appellant's granddaughter. Id. Next, the Appellant questioned the Officer regarding the video tape. Appellant argued that the video only showed Appellant from the back, and thus, the Officer was "assuming" it was her but did not "ID [her] by face". Id. at 59, 61. The Officer maintained that he had seen Appellant before, because of the prior warning, and it appeared to be her in the video. Id.

After Appellant was given an opportunity to present a closing argument, the Trial Magistrate issued a thorough decision, sustaining the charged violation. Id. at 75. The Trial Magistrate found both witness' to be credible. Id. He found that the Appellant fed the geese on numerous occasions and her feeding created a problem with the other residents in the area. Id. at 70. The Magistrate was satisfied that it was Appellant in the videotape, and determined that whatever she was throwing on the ground was intended to be food for the geese. Id. at 71. The Magistrate reiterated DEM Regulation 10.11, stating "the regulation is clear . . . feeding and baiting wildlife in the State of Rhode Island is not permitted. . . ." Id. Based on these findings, the Trial Magistrate found that the State had met its burden of proof. Id. Thus, the feeding wildlife 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 affected by other error of law. Specifically, Appellant argues: (1) that when RITT provided her with a transcription of the trial, the transcript was "corrupted" and "dirty"; (2) the video shown at trial portrayed Appellant from the back and did not show her face, therefore, the Officer only "assumed" it was her; and (3) the ticket was handed to her granddaughter and not directly to Appellant.

### A

### Transcription of Testimony

Appellant argues that the transcription of the testimony heard at trial is inaccurate. Appellant maintains that the testimony presented at trial and the stenographer's subsequent copy do not match up. Specifically, Appellant points to the word "assume" in the transcript. (Tr. at 59.) Appellant is recorded as stating "[y]ou are assuming it was me." Id. Appellant contends that the word "assume" was not said in Court, and therefore, the transcript is not reliable.

The object of requiring stenographic reports of court proceedings is to secure an accurate and complete official transcript of the record of such proceedings. See Macchia v. Ducharme, 44 R.I. 418, 117 A. 651, 652 (1922). Upon completion of a transcription, the court reporter will certify that the transcript is a "true, accurate, and complete transcript of the hearing." See Butler Auto Sales, Inc. v. Skog, 98 R.I. 63, 64, 199 A.2d 597, 598 (1964). A party can rely on the presumption that "in the proper performance of [his or] her official duties the court stenographer would prepare a transcript containing a full report of the entire proceedings." Id. at 66, 598. In

the event of a conflict between a personal recollection and the transcript, the transcript must be accepted as accurate, and a court must "act upon the hypothesis that utterances which appear in the allowed transcript [have] been made in open court." See Schafer v. Thurston Mfg. Co., 48 R.I. 244, 137 A.2d (Mem.), 5 (1927).

In the case at hand, a recording of the hearing was sent to a court reporter who transcribed the trial testimony to the best of her ability. (Tr. at 78.) Furthermore, she certified that the transcript was true, accurate, and complete. Id. Appellant asserts that the recording was "corrupted" because one word did not conform to Appellant's recollection of the word used at trial. However, besides this allegation Appellant has failed to document a single inaccuracy in the transcript as a whole. See State v. Briggs, 886 A.2d 735, 752 (R.I. 2005) (finding the transcript to be accurate despite defendant's general assertion that the transcript was inaccurate without documenting a single inaccuracy). Here, the conflict is between Appellant's personal recollection and the transcript; therefore, pursuant to Schafer, the transcript must be accepted as accurate. Schafer, 48 R.I. at 244, 137 A.2d at 5.

Moreover, the transcription of the trial did not affect the Trial Magistrate's decision. 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)). After reviewing the record, this Panel determines that even if the word "assume" was not uttered at trial, the Trial Magistrate's decision was supported by legally competent evidence and was not affected by the inaccuracy or other error of law.

**B**

**Identification of Appellant**

Appellant also argues that the video shown at trial portrayed Appellant from the back and did not show her face, and therefore, the Officer could not be certain that it was her feeding the geese. It is well-settled that when a witness has personal knowledge of the defendant, the witness's subsequent identification of the defendant is reliable. State v. Grant, 840 A.2d 541, 547 (R.I. 2004); see also State v. Nhek, 687 A.2d 81, 83 (R.I. 1997) (finding personal knowledge where witness had previously observed defendant under "decent lighting conditions" and at a "relatively close distance"). Here, the Officer had encountered Appellant because of the same complaint approximately a year earlier. (Tr. at 34.) At that time, the Officer was face-to-face with Appellant at her apartment, and engaged in conversation with the Appellant. Id. This encounter provided the Officer with a sufficient opportunity to gain personal knowledge of the Appellant, including her address and her physical appearance. Id. at 58-59. At trial, the Officer testified that after personally viewing the video, the Officer was able to identify Appellant because of his personal knowledge of her. Id. at 59-61. He stated that he gained this personal knowledge because of their previous encounter. Id. Additionally, Appellants neighbor of approximately one year, Mr. Newman, testified at trial. Id. at 13. Mr. Newman personally observed Appellant feed the geese, recorded her feeding the geese, and identified Appellant as the individual in the recording. Id. at 14-15.

Furthermore, in situations where the "personal knowledge is a close question or '[i]f it was unclear or uncertain how much opportunity a witness actually had to view an assailant, the issue would become one of credibility . . . ." Grant, 840 A.2d at 546. The trial justice has broad discretion in determining the competency and credibility of a witness and his or her ruling on the

issue will not be disturbed on appeal absent a clear abuse of discretion. State v. Gatone, 698 A.2d 230, 236 (R.I. 1997). Here, the Trial Magistrate heard the testimony, watched the video, and determined that it was Appellant in the video. (Tr. at 70.) As the members of this Panel did not have an opportunity to watch the video or observe the live testimony of the witnesses, it would be impermissible to second-guess the Trial Magistrate's "impressions as he . . . observe[d] [the witnesses] [,] 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. Therefore, this Panel finds the Trial Magistrate's determination that it was Appellant in the video feeding the geese, to be supported by legally competent evidence and not affected by error of law.

**C**

**Notice of Citation**

Appellant argues that the ticket, referred to as a summons, was handed to her granddaughter and not directly to her, and that she never signed the summons. Rule 3 of the Rhode Island Traffic Tribunal Rules of Procedure sets forth, in pertinent part, "[t]he summons shall be signed by the issuing officer . . . and served upon the defendant in person or by mailing the summons to the defendant . . . which shall be sufficient proof of actual notice. . . ." See Traffic Trib. R. P. 3. The purpose of a summons is to provide a defendant with fair and adequate notice that an action has been commenced against his or her person. See Rosen v. Rosen, 122 R.I. 6, 9, 404 A.2d 472, 474 (1979) (finding that the placement of the citation and a copy of the divorce petition in the husband's pocket, rather than in his hands, constituted adequate service). It is generally held that "if the process server and the defendant are within speaking distance of each other, and such action is taken as to convince a reasonable person that personal service is

being attempted, service cannot be avoided by physically refusing to accept the summons." Id. (citing Nielson v. Braland, 264 Minn. 481, 484, 119 N.W.2d 737, 739 (1963) (holding that where a process server touched a defendant with the summons and then laid it on the fender of a nearby automobile, personal service had been accomplished even though the defendant refused to pick it up)).

Here, the Officer asked Appellant to sign the ticket. (Tr. at 44.) Appellant refused to sign the ticket and walked away from the Officer. Id. The Officer handed the ticket to Appellant's granddaughter, who was standing inside Appellant's residence because Appellant had walked away from the Officer. Id. There is no legal requirement that Appellant sign the ticket. There is only the requirement that the ticket be served upon the Appellant in person or by mail. Traffic Trib. R. P. 3. This requirement of personal service was satisfied here. The Officer spoke to Appellant, made it clear to the Appellant that she was being issued a ticket, and left the ticket at Appellant's residence. (Tr. at 44.) Appellant cannot now claim that service was insufficient because she physically refused to accept the summons. See Rosen, 122 R.I. at 9, 404 A.2d at 474.

The Trial Magistrate heard Appellant's argument regarding service of process and found that Appellant "initially spoke to [the officer], but then refused to sign the ticket or answer any additional questions." (Tr. at 71.) Furthermore, the Trial Magistrate found that despite Appellant's arguments, he was satisfied by clear and convincing evidence that Appellant fed the water fowl in violation of the regulation. Id. After a thorough examination of the record, this Panel is satisfied that there is no evidence in the record to suggest insufficient service of process upon the Appellant. Absent a clear abuse of discretion or other error of law, it would be "impermissible for this Panel to substitute its judgment for that of the hearing magistrate

concerning the weight of the evidence on questions of fact." Link v. State, 633 A.2d 1345, 1348 (R.I. 1993). Accordingly, this Panel concludes that the Trial Magistrate's decision to sustain the charged violation of "feeding wildlife prohibited" 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 sustained.

ENTERED:

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Judge Lillian M. Almeida (Chair)

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Judge Edward C. Parker

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Magistrate William T. Noonan

DATE: _____