

**STATE OF RHODE ISLAND & PROVIDENCE PLANTATIONS
PROVIDENCE, Sc.**

**DISTRICT COURT
SIXTH DIVISION**

Irwin Jacobowitz	:	
	:	
v.	:	A.A. No. 19 - 019
	:	
State of Rhode Island (RITT Appeals Panel)	:	

ORDER

This matter is before the Court pursuant to § 8-8-8.1 of the General Laws for review of the Findings and Recommendations of the Magistrate.

After a de novo review of the record and the memoranda of counsel, the Court finds that the Findings & Recommendations of the Magistrate are supported by the record, and are an appropriate disposition of the facts and the law applicable thereto.

It is, therefore, ORDERED, ADJUDGED AND DECREED, that the Findings and Recommendations of the Magistrate are adopted by reference as the Decision of the Court and the decision of the Appeals Panel is AFFIRMED.

Entered as an Order of this Court on this 28th day of October, 2019.

By Order:

 /s/
Stephen C. Waluk

Enter:

 /s/
Jeanne E. LaFazia
Chief Judge

STATE OF RHODE ISLAND & PROVIDENCE PLANTATIONS
PROVIDENCE, Sc. DISTRICT COURT
SIXTH DIVISION

Irwin Jacobowitz :
v. : A.A. No. 2019-019
State of Rhode Island : (T18-017)
(RITT Appeals Panel) : (17-001-533983)

FINDINGS & RECOMMENDATIONS

Ippolito, M. In this case Mr. Irwin Jacobowitz urges that an Appeals Panel of the Rhode Island Traffic Tribunal (RITT) erred when it denied his appeal from convictions for two civil traffic violations — namely, operating an unregistered vehicle and driving a vehicle which had not been inspected for safety violations.

Jurisdiction for this appeal is vested in the District Court by G.L. 1956 § 31-41.1-9; and the applicable standard of review is found in § 31-41.1-9(d). This matter has been referred to me for the making of findings and recommendations pursuant to G.L. 1956 § 8-8-8.1. For the reasons I will explain in this opinion, I have concluded that the decision of the Appeals Panel should be AFFIRMED; I so recommend.

I
Facts and Travel of the Case
A
The Citation and Initial Proceedings

On December 16, 2017 Mr. Jacobowitz was cited by a member of the Division of State Police for a violation of G.L. 1956 § 31-3-1, “Operation of Unregistered Vehicle,” a violation of G.L. 1956 § 31-38-3, “Violation of Inspection Laws,” and G.L. 1956 § 31-47-9, “Operating without Evidence of Insurance.” *See* Summons No. 17-001-533983, in the electronic record (*ER*) at 87. He failed to appear at his originally scheduled arraignment date, and he was defaulted as to all three counts against him. *See* electronic record (*ER*) at 85. Thereafter, he filed a Motion to Vacate, which was heard and granted on April 3, 2018. *ER* at 71 (Docket entry), 83-84 (Motion). The matter was initially assigned for trial on May 9, 2018, and then reassigned to June 20th, then to July 9, 2018, and finally, to August 7, 2018.

On August 7, 2018, Mr. Jacobowitz appeared at the Tribunal, ready for trial, but the Judge informed him that the Trooper who issued the citation had been called to the barracks. *ER*, at 27. The trial was therefore reassigned to September 18, 2018. *ER* at 37. However, his appearance was not entirely in vain, because the insurance charge was dismissed when he

presented proof that he had insurance coverage on the date of offense. *ER*, at 31, 33.

On September 18, 2018, Mr. Jacobowitz's trial on the instant citation was conducted by Associate Judge Edward Parker. *See Trial Transcript; ER*, at 45-53. The trial began with the testimony of Trooper Antonio Miguel, Jr. — the citing officer. *ER*, at 45. Trooper Miguel testified that he was on patrol in the Town of West Greenwich when he observed a Ford Taurus traveling west on the New London Turnpike (by Arnold Road) bearing only one license plate (Commercial Plate 26254). *Id.* He stopped the vehicle, and the operator, whom he identified as the Defendant, Mr. Jacobowitz, told him that "he was using the plates on the Ford Taurus until he can obtain the money to register and insure the vehicle." *Id.* The Trooper ran a check and learned that the registration associated with that plate was a commercial registration for a truck, and that the registration had been suspended. *Id.* Appellant was then cited for the civil violations enumerated above. *Id.* at 47.

Mr. Jacobowitz responded to this testimony by arguing that, under the law, he had two days to register the car. *Id.* at 49. But, when queried by the Court, he conceded that he did not show the officer a notarized bill of

sale. *ER*, at 49, 51. In fact, he added, he junked the car on December 22, 2017, because the vehicle would not pass a safety inspection. *ER*, at 49, 51. At this juncture, the Court found Appellant guilty and fined him \$85.00 on the two remaining counts. *Id.*

B

Review by the Appeals Panel

Mr. Jacobowitz filed an appeal and the matter was heard, on January 30, 2019, by a Traffic Tribunal Appeals Panel composed of Chief Magistrate DiSandro (Chair), Associate Judge Almeida, and Magistrate Noonan. A few weeks later, on February 25, 2019, the Panel issued its decision. *See Decision of Appeals Panel* (which may be found on pages 17 through 23 of the electronic record (*ER*)).

After reviewing the facts and travel of the case, the Panel cited and quoted the pertinent provisions of the Motor Vehicle Code, §§ 31-3-1 and 31-38-3, which, respectively, bar the operation of unregistered and uninspected vehicles. *See Decision of Appeals Panel*, at 1-5 (*ER*, at 17-21).

The Panel then found:

Based upon a review of the record, there is no question that Appellant operated an unregistered and uninspected motor vehicle; and further, that Appellant knew the vehicle to be unregistered and uninspected at the time of

the stop. (Tr. at 3, September 18, 2018); *see also Albanese v. Providence Police Department*, 711 A.2d 651 (R.I. 1998). First, Officer Miguel testified that he checked Appellant's registration, which revealed that the registration belonged to a different vehicle. *Id.* at 1. Second, the Appellant stated numerous times throughout trial that the vehicle was neither inspected nor registered at the time of the stop. *Id.* at 4. Indeed, Appellant persistently asserted that the vehicle could not be registered because it would not pass an inspection, which is why he did not keep the vehicle. *Id.*

Decision of Appeals Panel, at 5 (*ER*, at 21). Thus, the Appeals Panel found that the citations had been proven by the testimony of the trooper as complemented by the admissions of Mr. Jacobowitz.

Then, the Panel noted that it is not authorized to assess credibility. *Id.* (*ER, id.*) (citing *Link v. State*, 633 A.2d 1345, 1348 (R.I. 1993) (citing *Liberty Mutual Insurance Co. v. Janes*, 586 A.2d 536, 537 (R.I. 1991))). And so, the Panel concluded that Mr. Jacobowitz's convictions were supported by both the Trooper's testimony, which the trial judge found credible, and Appellant's admissions. *Id.* (*ER, id.*). As a result, the Panel decided it was required to affirm both convictions, as they were neither affected by error of law nor clearly erroneous. *Decision of Appeals Panel*, at 5-6 (*ER*, at 21-22).

C

Appeal to the District Court

Appellant filed an appeal to the District Court on March 20, 2019. A briefing schedule was set and memoranda have been received from both parties.

1

Brief Submitted by Appellant Jacobowitz

In his brief, Mr. Jacobowitz identified three issues for this Court's consideration: (1) whether the Appeals Panel had jurisdiction to decide his Appeal when the VIN number on the summons did not correspond with the VIN number on the vehicle (*Appellant's Brief*, at 2); (2) whether the Appeals Panel committed an error of law by affirming his conviction on the charge of operating an unregistered motor vehicle (*Id.*); and (3), whether the Panel committed an error of law by affirming his conviction on the charge of operating an uninspected motor vehicle (*Id.*). We shall now address each of these points *seriatim*.

a

First Argument: The Panel's Lack of Jurisdiction

Under this heading, Mr. Jacobowitz argued that the Appeals Panel had no jurisdiction to hear the appeal because the VIN number on his

vehicle did not match the VIN number on the summons issued by Trooper Miguel. *Appellant's Brief*, at 4.

But, still under this heading, he adds a second, unrelated argument, that he was parked “in an out of service gas station” near the Navigant Credit Union on New London Avenue. *Appellant's Brief*, at 5. He further complains that the Trooper presented no proof that his car was in motion. *Id.*

b

Second Argument: The Registration Issue

Appellant's second argument does not focus on § 31-3-1, the statute under which he was charged with operating an unregistered vehicle, but upon G.L. 1956 § 31-4-10, which Mr. Jacobowitz quotes, and which he cites for the principle that Rhode Islanders are allowed to drive a newly purchased vehicle for two days prior to getting it registered. He urges that he fell within the ambit of the statute's safe harbor.

The pertinent section provides, in pertinent part as follows:

§ 31-4-10. Temporary transfer of registration. —

(a) A person who transfers the ownership of a registered motor vehicle or trailer owned by him or her to another or who loses possession of it and who intends to transfer the registration of the motor vehicle or trailer to a newly acquired vehicle may, subject to other provisions of the

title, operate the newly acquired motor vehicle or trailer for a period beginning from the date of transfer until five o'clock (5:00) p.m. of the second division of motor vehicles business day following the date of transfer within the period of which the transferred vehicle was registered, provided that the number plates issued upon registration of the transferred motor vehicle are attached to the newly acquired vehicle, and a true copy of the bill of sale is sent to the division of motor vehicles within twenty-four (24) hours of the transfer.

(b) During these periods, any operator of a newly acquired vehicle shall carry an original copy of the bill of sale reciting the registration number to be transferred from the former vehicle to the newly acquired vehicle, the date of the sale or transfer, the make and identification number of the vehicle, and the signature and address of the seller.

Section 31-4-10 (as quoted in *Appellant's Brief*, at 5-6).

Acknowledging that the Trooper testified that he saw only one license plate displayed on Mr. Jacobowitz's vehicle, Appellant urges that he did have both plates displayed and that Trooper Miguel submitted no proof to the contrary. *Appellant's Brief*, at 6-7. Finally, Mr. Jacobowitz further asserts that the trial judge erred in requiring the bill of sale to be notarized. *Appellant's Brief*, at 7-8.

c

Third Argument: The Inspection Issue

Appellant's third and final assignment of error concerns his

conviction on the charge that he drove an uninspected vehicle, which he challenges as unfounded, on the principle that a vehicle may not be inspected until it is registered. *Appellant's Brief*, at 8-9. Moreover, the inspection must only be accomplished within five days after the vehicle is registered. *Id.* at 9 (citing § 31-38-5).

2

Brief Submitted by the Appellee/State

The Argument portion of the State's Brief is structured to respond, one-by-one, to the points made by the Appellant in his Brief.

Regarding the Appellant's first argument (*i.e.*, that the summons contained an incorrect VIN number, the State reminds us that Mr. Jacobowitz admitted that the vehicle was not registered. *State's Brief*, at 4. As to the second point made under this heading, the State argues that Appellant's insistence that his vehicle was parked was contradicted by Trooper Miguel's testimony, and assessing his credibility is a matter within the discretion of the trial judge. *Id.* (citing *Link, ante*, 633 A.2d at 1348).

The State next responded to Appellant's second argument, relating to the charge of driving an unregistered vehicle, by recalling that the only bill of sale presented at trial was one dated December 22, 2017, which was

prepared so he could “junk” the vehicle. *Id.* And so, the State declares, this was an issue of fact to be determined by the Trial Judge. *Id.*

Finally, the State urges that Mr. Jacobowitz was subject to the inspection mandate under the terms of § 31-3-1, which it quoted. *See State’s Brief*, at 4. Moreover, the State reminds us that § 31-38-3(c) requires that a vehicle’s registration must be suspended if it is found to be unsafe. *Id.* at 5. The State also calls to our attention the fact that Mr. Jacobowitz admitted that the vehicle could not pass inspection. *Id.* And, in conclusion, the State reiterates that credibility is a matter best left to the Trial Judge. *Id.*

3

Appellant’s Reply Brief

On October 16, 2019, Mr. Jacobowitz filed a Reply Brief. In the main, it presents factual arguments: some of which reiterate his trial testimony and others which go beyond it. Appellant asserted that he was parked and not traveling west on the New London Turnpike, as the trooper testified. *Reply Brief*, at 1-2, ¶¶ 2-3. He also denied that his vehicle had only one plate. *Reply Brief*, at 2, ¶ 4. Mr. Jacobowitz also reiterated that the commercial registration associated with the plate (or plates) being used was not under suspension on the date of the incident. *Reply Brief*, at 2, ¶ 5. In

support of these arguments Appellant attaches a series of photographs and a document he obtained during the pendency of this appeal from the DMV.

Mr. Jacobowitz also reiterated his legal argument that he was not required to have his vehicle inspected until after it was registered. *Reply Brief*, at 2-3, ¶¶ 6-8.

II Standard of Review

The standard of review which must be employed in this case is enumerated in G.L. 1956 § 31-41.1-9(d), which states as follows:

(d) *Standard of review.* The judge of the district court shall not substitute his or her judgment for that of the Appeals Panel as to the weight of the evidence on questions of fact. The district court judge may affirm the decision of the Appeals Panel, or may remand the case for further proceedings or reverse or modify the decision if the substantial rights of the appellant have been prejudiced because the Appeals Panel's findings, inferences, conclusions or decisions are:

- (1) In violation of constitutional or statutory provisions;
- (2) In excess of the statutory authority of the Appeals Panel;
- (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.

This provision is a mirror-image of the standard of review found in G.L. 1956 § 42-35-15(g) — a provision of our Administrative Procedures Act (APA). Accordingly, we are able to rely on cases interpreting the APA standard as guideposts in this process. Under the APA standard, the District Court “... may not substitute its judgment for that of the agency and must affirm the decision of the agency unless its findings are ‘clearly erroneous.’” *Guarino v. Dep’t. of Soc. Welfare*, 122 R.I. 583, 584, 410 A.2d 425 (1980)(citing G.L. 1956 § 42-35-15(g)(5)). See also *Link v. State*, 633 A.2d 1345, 1348 (R.I. 1993).

And our Supreme Court has reminded us that reviewing courts lack “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 Ins. Co. v. Janes*, 586 A.2d 536, 537 (R.I. 1991)). This Court’s review “... is confined to a reading of the record to determine whether the judge’s decision is supported by legally competent evidence or is affected by an error of law.” *Link*, 633 A.2d at 1348 (citing *Envtl. Sci. Corp. v. Durfee*, 621 A.2d 200, 208 (R.I. 1993)).

III Analysis

I shall address each of Appellant’s arguments *seriatim*.

A Appellant’s First Argument

Appellant’s first argument — that the Court lacked jurisdiction because the summons contained a reference to an incorrect VIN number — must fail for several reasons.

Procedurally, it must fail because it is unsupported in the record. Appellant did not testify as to this mistake during his September 18, 2018 trial. So, there is no evidentiary predicate for this argument. Moreover, the issue was not preserved for appeal. Under the “raise or waive rule,” a party cannot raise on appeal a theory or argument which he failed to raise before the trial judge. *See State v. Bettencourt*, 723 A.2d 1101, 1107 (R.I. 1999) (citing *State v. Toole*, 640 A.2d 965, 972-73 (R.I. 1994) (citing *State v. Warren*, 624 A.2d 841, 842 (R.I. 1993))); *see also* R.I. Rule of Evidence 103(a)(1).

Substantively, this argument must fail because Mr. Jacobowitz framed this as a jurisdictional issue. There is no question that the District

Court has subject matter jurisdiction over appeals from the Appeals Panel of the Traffic Tribunal under § 31-41.1-9. *See also Rivera v. Employees' Retirement System of Rhode Island*, 70 A.3d 905, 911-12 (R.I. 2013).

In addition, the identity of the car was not at issue in this case. Appellant *admitted* that the car he was driving (when he was cited) was unregistered. At most, the reference was a non-prejudicial misnomer — and not cause for acquittal. *See* Traffic Trib. R. P. 3(d).

The addendum to Appellant's first argument (that he was parked in the old gas station) must also be overruled. The Trooper testified that he saw the car being driven on the New London Turnpike. That was probative and competent evidence which the Trial Judge had every right to credit and rely upon in making his decision.

B

The Registration Charge

Before we bore into the specific arguments presented as to Appellant's conviction on this charge, let us look at the larger picture. Mr. Jacobowitz was charged with driving an unregistered vehicle, a Ford Taurus which, he concedes, was not registered. But, he argues that that he is not guilty of the no-registration citation because he was following a State

law which allows citizens who buy a new car to drive for two days under the authority of a registration they have on another vehicle.

In Mr. Jacobowitz's case, the registration at issue was a commercial registration for a truck. Now, as we related *ante*, Trooper Miguel ran a check on this registration and found it had been suspended. But this was not the basis of the Appeals Panel's decision to affirm Mr. Jacobowitz's conviction. Rather, it upheld his conviction for operating an unregistered vehicle based on his admissions that the vehicle was unregistered and, implicitly, that he failed to satisfy the preconditions for the safe harbor to which he refers in his brief, § 31-40-10.

Within the Motor Vehicle Code, § 31-4-10 provides an exemption from the general rule that all vehicles must be registered. In the law of statutory construction, this part of a statute is known as a *proviso*. See *generally* Norman Singer and Shambie Singer, 2A SUTHERLAND STATUTORY CONSTRUCTION § 47:8, *Provisos* (7th ed., Nov. 2018 Update). It is well settled that one desirous of enjoying the benefits of such a proviso (or exemption) must fulfill all its conditions.

Now, § 31-4-10 requires that:

... *the number plates issued upon registration of the*

transferred motor vehicle are attached to the new vehicle, and a true copy of the bill of sale is sent to the division of motor vehicles within twenty-four (24) hours of the transfer.

Section 31-4-10(a). However, according to Trooper Miguel's testimony, which the Trial Judge had every right to credit, Mr. Jacobowitz did not have both plates attached, just one. Therefore, the Trial Judge had a lawful basis to reject his § 31-4-10 defense.¹

C

The Inspection Charge

Finally, Appellant urges that, under § 31-38-5, he was not required to have his new vehicle inspected, until five days after it was registered. Of course, this section has a prerequisite, which Appellant failed to address, which is that the vehicle must have been purchased out-of-state.

¹ And this is not necessarily the *only* condition of § 31-4-10 which Appellant failed to satisfy; indeed, there are at least three more. *First*, there is no testimony (or evidence) in the trial record that he sent a true copy of the bill of sale to the division of motor vehicles within twenty-four (24) hours of the transfer, as is mandated by subsection 31-4-10(a). *Second*, there is no evidence in the trial record that he carried an original bill of sale signed by the seller, as required by subsection 31-4-10(b). In fact, there is no copy of a bill of sale in the trial record. And *third*, it is not clear if the car he was driving was of the same status as the truck which had earlier been registered. This is significant because, under subsection 31-4-10(c), the two-day grace period applies only to vehicles of the same type. The registration at issue was for a commercial vehicle. Was the Taurus to be registered as a commercial vehicle? This too, we do not know.

There is no indication in the trial record regarding where Mr. Jacobowitz purchased the Ford Taurus. Therefore, his claim for protection from prosecution pursuant to § 31-38-5 must fail.

IV
Conclusion

Upon careful review of the record and the positions of the parties, I conclude that the Decision entered by the Appeals Panel in this case was neither contrary to law nor predicated on an improper procedure; nor did it constitute an abuse of discretion; it was supported by the reliable, probative, and substantial evidence of record. Section 42-35-15(g)(3)-(6). Accordingly, I recommend that this Court AFFIRM the decision rendered by the Appeals Panel.

/s/
Joseph P. Ippolito
MAGISTRATE
OCTOBER 28, 2019

