STATE OF RHODE ISLAND & PROVIDENCE PLANTATIONS

PROVIDENCE, Sc. DISTRICT COURT

SIXTH DIVISION

Jacob Botella	:	
	:	
v.	:	**A.A. No. 12 - 046**
	:	
State of Rhode Island	:	
(RITT Appellate Panel)	:	

O R D E R

This matter is before the Court pursuant to § 8-8-8.1 of the General Laws for review of the Findings & 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 & Recommendations of the Magistrate are adopted by reference as the Decision of the Court and the decision of the appellate panel of the Traffic Tribunal is AFFIRMED.

Entered as an Order of this Court at Providence on this 19th day of June, 2012.

By Order:

____/s/_____
Clerk

Enter:

___/s/_____
Jeanne E. LaFazia
Chief Judge

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

JACOB BOTELLA	:	
	:	
V.	:	**A.A. No. 2012 – 0046**
	:	**(C.A. No. T11 – 075)**
STATE OF RHODE ISLAND	:	
(RITT APPELLATE PANEL)	:	

F I N D I N G S & R E C O M M E N D A T I O N S

Ippolito, M. In this appeal, Mr. Jacob Botella urges that an appeals panel of the Rhode Island Traffic Tribunal (RITT) erred when it affirmed a trial magistrate's imposition of penalties upon him pursuant to the provisions of the Colin B. Foote Act[1] — which is codified as Gen. Laws 1956 § 31-27-24. Jurisdiction for the instant appeal is vested in the District Court by Gen. Laws 1956 § 31-41.1-9 and the applicable standard of review is found in subsection 31-41.1-9(d). This matter has been referred to me for the making of findings and recommendations pursuant to

[1] See P.L. 2010, ch. 242, § 1 and P.L. 2010, ch. 253, § 1 for the designation of the name of the Act; within the Motor Vehicle Code, the law's title is simply — "Multiple Moving Offenses." See Gen. Laws 1956 § 31-27-24.

Gen. Laws 1956 § 8-8-8.1. After a review of the entire record I find — for the reasons explained below — that the decision of the panel is supported by reliable, probative, and substantial evidence of record and is not clearly erroneous and should be affirmed; I so recommend.

I. FACTS & TRAVEL OF THE CASE

Because the instant appeal centers on the applicability vel non of the enhanced penalty statute known as the Colin B. Foote Act, we shall not need to examine the circumstances of Mr. Botella's most recently received citation in great detail. Instead, it may suffice to relate that on August 23, 2011 Jacob Botella was charged with speeding, in violation of Gen. Laws 1956 § 31-14-2. He was arraigned before the Traffic Tribunal on October 5, 2011. At that proceeding the presiding magistrate warned Mr. Botella that — "… if convicted, you come under Colin Foote. You're going to lose your license for one to two years." Appellant's Memorandum of Law[2], at 4 and State's Memorandum In Opposition, at 3-4 citing Arraignment Transcript, at 3.

The matter was scheduled for trial on November 16, 2011. On that date he pled guilty. The trial judge then imposed enhanced penalties under the authority of

[2] At the conference held before the undersigned on March 13, 2012, Appellant's counsel indicated he would rely on the Memorandum submitted to the appeals panel on December 5, 2011. The State subsequently filed its Memorandum in Opposition on April 12, 2012. Finally, Appellant filed a Reply Memorandum on April 20, 2012.

Gen. Laws 1956 § 31-27-24 — the Colin B. Foote Act — which provides for enhanced penalties for motorists "convicted of moving violations on four separate and distinct occasions within an eighteen month period." Aggrieved by this decision, Mr. Botella appealed, and presented substantive and procedural assertions of error to the Tribunal's appellate panel.

First, Mr. Botella asserted that — substantively — he did not fall within the ambit of the Colin B. Foote Act. He argued that, since he was first cited on May 8, 2010, the eighteen-month enhancement period had expired before he was convicted of his fourth offense on November 16, 2011. Appellant Memorandum of Law, at 1-3. His second and third arguments to the appellate panel were procedural. He asserted that he was entitled to a written notice that he was subject to sentencing under the Colin Foote law. Appellant Memorandum of Law, at 3-4. Next, he argued that the trial judge failed to fulfill a requirement of the Act that she make findings as to his dangerousness as a driver. Appellant Memorandum of Law, at 4-5. Fourth and finally, he argued that his sentence was fundamentally unfair. Appellant Memorandum of Law, at 5-6.

On September 21, 2011, the appeal was heard by a panel comprised of: Chief Magistrate William Guglietta (Chair), Magistrate Domenic DiSandro, and Magistrate Alan Goulart. In a decision dated February 7, 2012, the appeals panel affirmed the decision of the trial judge — except that it remanded the case for finding to be made

on the issue of dangerousness. On February 17, 2012, Mr. Botella filed the instant complaint for judicial review in the Sixth Division District Court pursuant to Gen. Laws 1956 § 31-41.1-9.

II. STANDARD OF REVIEW

The standard of review which this Court must employ is enumerated in Gen. Laws 1956 § 31-41.1.-9(d), which provides 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 prejudicial 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 standard is akin to the standard of review found in Gen. Laws 1956 § 42-35-15(g), the State Administrative Procedures Act (APA).

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.' "[3] Thus, the Court will not substitute its judgment

[3] Guarino v. Department of Social Welfare, 122 R.I. 583, 584, 410 A.2d 425 (1980)

for that of the panel as to the weight of the evidence on questions of fact.[4] Stated differently, the findings of the panel will be upheld even though a reasonable mind might have reached a contrary result.[5]

III. APPLICABLE LAW

In the instant matter the Appellant was penalized pursuant to the Colin B. Foote Act, which is codified as section 31-27-24 of the General Laws. Section (a) is presented in its entirety:

> **31-27-24. Multiple moving offenses. —** (a) Every person convicted of moving violations on four (4) separate and distinct occasions within an eighteen (18) month period may be fined up to one thousand dollars ($1,000), and shall be ordered to attend sixty (60) hours of driver retraining, shall be ordered to perform sixty (60) hours of public community service, and the person's operator license in this state may be suspended up to one year or revoked by the court for a period of up to two (2) years. Prior to the suspension or revocation of a person's license to operate within the state, the court shall make specific findings of fact and determine if the person's continued operation of a motor vehicle would pose a substantial traffic safety hazard.(Emphasis added).
>
> (b) [procedure for reinstatement at expiration of penalties].
>
> (c) [enumeration of "moving violations"].

When construing an analogous provision of the criminal code, the Habitual Offender Statute, our Supreme Court noted its anti-recidivist purpose — "to deter and punish

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citing R.I. GEN. LAWS § 42-35-15(g)(5).

4 Cahoone v. Board of Review of the Dept. of Emp. Security, 104 R.I. 503, 246 A.2d 213 (1968).

5 Id., at 506-507, 246 A.2d at 215.

incorrigible offenders." State v. Burke, 811 A.2d 1158, 1168 (R.I. 2002) citing State v. Smith, 766 A.2d 913, 924 (R.I. 2001).

IV. ISSUE

The issue before the Court is whether the decision of the appeals panel was supported by reliable, probative, and substantial evidence in the record or whether or not it was clearly erroneous or affected by error of law.

V. ANALYSIS

This case presents a number of issues involving the interpretation and application of the Colin B. Foote Act, which provides for enhanced penalties for repeat traffic offenders. These shall now be considered seriatim.

A. THE APPLICABILITY OF THE COLIN B. FOOTE ACT.

In resolving the first issue raised by Appellant Botella — the applicability vel non of the Colin B. Foote Act (§ 31-27-24) to his particular situation — the appeals panel employed a rather straightforward analysis. See Decision of Panel, at 3-4. First, it noted that the Colin B. Foote Act provides for enhanced penalties to be imposed upon persons convicted on four moving violations within an eighteen-month period. Decision of Panel, at 3. Next it determined that, since the appellant's first conviction occurred on June 2, 2010,[6] the window for enhanced penalties under § 31-27-24 did

[6] Of course, this date is at variance with the date cited by the Appellant — May 8, 2010. The appellate panel found that to be the date of citation. Decision of Panel, at 3. In finding that June 2, 2010 was the date of conviction, the panel made a

not close until December 2, 2011[7] — after the instant summons (11-404-502024) was adjudicated on November 16, 2011. Id. As a result, it reasoned that the trial judge did not commit error by imposing sanctions pursuant to the Colin Foote Law upon Mr. Botella. Decision of Panel, at 4.

I believe this analysis is entirely correct. By finding that the eighteen month window began on June 2, 2010, the appellate panel implicitly held that the opening date — for purposes of calculating the Appellant's Colin Foote Law window — was in fact the date of his first conviction and not the date of his first citation, i.e. the date of offense.

This procedure is in accord with the "prevalent" view that has been adopted

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specific finding that the ticket was paid by mail on that date. Id. Appellant Botella, his Reply Memorandum, urges that the RITT is bound by the driving abstract issued by the Registry, and objects to the appellate panel's discovery — apparently by inquiring into the Tribunal's electronic data system — of the travel of appellant's earlier citations. [I say apparently because no such facts are included in the record presented to the District Court]. If the panel did so, I believe this was a proper exercise in the taking of judicial notice. Moreover, I believe it would have been proper for the panel to so inquire even if the records were from another Rhode Island court. See Foster-Glocester Regional School Committee v. Board of Review of the Department of Labor and Training et al., 854 A.2d 1008, 1015 fn. 4 (R.I. 2004).

7 We may further note that, with regard to enhanced penalties in the criminal arena, the operative date applied for the new offense (for which the defendant is being sentenced) is the date of offense, not the date of conviction. In the instant case, the appellate panel viewed the date of conviction as being operative. Because his fourth offense date (August 22, 2011) is also — obviously — within the Foote law window, we need not decide this issue in the instant case.

with regard to enhancement statutes in criminal cases — that it is the date of conviction of the predicate offenses that is deemed operative, not the date of offense. ANNOT., Chronological or Procedural Sequence of Former Conviction As Affecting Enhancement of Penalty Under Habitual Offender Statutes, 7 A.L.R.5th 263, 289 (1992). See also 24 CORPUS JURIS SECUNDUM, Criminal Law, § 2316 at 413-416.

B. THE NEED FOR A WRITTEN NOTICE.

In his second assignment of error the appellant argues that, under principles of due process, he should have been provided with a written notice that he was being subjected to enhanced penalties under the Colin Foote law. See Appellant's Memorandum of Law, at 3-4. At the outset, I must say that I do agree with Appellant that fundamental due process concepts of "notice" and "opportunity to be heard" are indeed implicated when a motorist is subjected to Colin B. Foote Act penalties. See UNITED STATE CONSTITUTION, amend. 14. However, for the reasons I shall now relate, I believe this mandate was sufficiently satisfied in this case.

In support of this assignment of error Appellant Botella cites State v. Burke, 811 A.2d 1158 (R.I. 2002) in which the Supreme Court interpreted the Rhode Island habitual offender statute — Gen. Laws 1956 § 12-19-21, which includes an express mandate that a written notice be provided to the defendant. In Burke, the Court held that the State could amend a habitual offender notice it had previously provided to the defendant, correcting the list of felony convictions it had included therein. Burke,

811 A.2d at 1166-1169. The trial justice — noting that the statute did not require the notice to include such an enumeration — permitted the amendment. Burke, 811 A.2d at 1168. On appeal, the Supreme Court found no prejudice in the amendment. In doing so, the Court noted the purpose of a pre-trial notice:

> "Pretrial notice enables a defendant to know the full range of potential punishment he [or she] faces upon conviction; fundamental fairness and due process require that allegations that would enhance a sentence be made before trial so that the defendant can evaluate his [or her] options." State v. Benak, 199 Ariz. 333, 18 P.3d 127, 130-31 (Ariz.Ct. App.2001). "Notice * * * must be such that the defendant is not 'misled, surprised or deceived in any way by the allegations' of prior convictions." Id. at 131.

Burke, 811 A.2d at 1168. Thus, the purpose of a pretrial notice is to generally warn the defendant of the possible consequences he or she is facing, so that he or she can make a knowing decision.

In its review of this issue, the appellate panel did not discuss the Burke case. Instead, it commenced its analysis of this issue by noting that the Colin B. Foote Act, unlike the Habitual Offender Statute, contains no express mandate of written notice. Decision of Panel, at 4-5. In the absence of such a provision, the panel invoked the well-established principle that everyone is presumed to know the law. On the basis of this legal principle and the fact that appellant was warned at his arraignment that he was subject to enhanced penalties, the appellate panel held that a written notice was not mandated and that the trial judge did not abuse her discretion by imposing enhanced penalties. Decision of Panel, at 5.

Having set forth the appellate panel's analysis, I shall now present my own. I begin my reasoning by noting — as did the appellate panel — that the Colin B. Foote Act does not require notice to be given in written form. And, in my view neither does the constitutional right to due process.

I believe the case of State v. Price, 820 A.2d 956 (R.I. 2003) is especially instructive on this second point. The facts of Price are these: Mr. Craig C. Price, while in juvenile custody, was found in civil contempt for failing to cooperate with psychiatric treatment that had been ordered by the Family Court. Price, 820 A.2d at 963. Thereafter, he was cited for criminal contempt, afforded a jury trial,[8] and convicted. He appealed to the Supreme Court, which upheld his adjudication for civil contempt — which was the basis for the conviction for criminal contempt — by finding certain oral warnings given to Mr. Price by a Family Court Justice[9] to be sufficiently clear so as to remove any ambiguity regarding the Court's Order and the necessity of compliance to avoid contempt. Price, 820 A.2d at 962-63, 965-66. Although the Court did not frame the issue as falling under "due process," it did regard it as a "notice" issue. Price, 820 A.2d at 966. "Notice" and the "opportunity to

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[8] Sitting by special assignment, this trial was presided over by the Chief Judge of the District Court.

[9] The Family Court Justice was identified by the Supreme Court to be the Honorable Paul Suttell, who, in 2009, became the Chief Justice of the Supreme Court.

be heard" are the core elements of fundamental due process. I therefore conclude that oral notice is not per se inadequate under due process.[10]

We are thus left with one final question — Were the oral warnings Mr. Botella received legally and constitutionally sufficient? As stated above, the arraignment judge warned the defendant of that he was subject to Colin B. Foote Act penalties, including a substantial license suspension. Although brief, I believe this warning was sufficient. It provided the motorist with knowledge of the range of his possible punishment and gave him an opportunity to evaluate his options. This is the standard set forth in Burke, 811 A.2d at 1168 citing State v. Benak, 199 Ariz. 333, 18 P.3d 127, 130-31 (Ariz.Ct. App.2001), quoted supra at page 8.

Accordingly, I believe Mr. Botella's claim of error based on a lack of notice must be denied.

C. FAILURE TO MAKE FINDINGS.

Before the appellate panel, Appellant Botella argued that the trial judge's imposition of Colin B. Foote Act penalties must be set aside because she failed to make a finding that his continued driving would constitute a "substantial driving hazard." Gen. Laws 1956 § 31-27-24(a). The panel agreed and remanded the case to

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10 This is not to say that written notice would not be preferable in many ways. Nothing in this opinion should be taken as an implication that I believe it is the judiciary's role to provide notice. As in the case of section 12-19-21, it is customarily a prosecutorial (i.e., executive branch) function.

the trial judge for the making of additional findings. See Decision of Panel, at 5-6. At a further hearing on March 15, 2012, the trial judge did so. See Transcript of March 15, 2012 Hearing, passim. In his Reply Memorandum, filed with this Court on April 20, 2012, Appellant argues that these subsequent findings are also inadequate. See Appellant's Reply Memorandum, at 1. On this basis, he asks this Court relief from the enhanced penalties he suffered. As I shall now explain, I believe this Court is unable to consider this argument as it is not properly before this Court.

In essence, Appellant is asking this Court to review the sufficiency of the trial judge's March 15, 2012 findings on the issue of whether he is a hazardous driver. Having previously — on February 17, 2012 — filed his appeal to the District Court, he has added the proceedings of March 15, 2012 as a further claim for relief. Of course, one may amend a complaint to add a claim or an assertion of error. However, doing so in this case is not possible.

The sufficiency vel non of the trial judge's March 15, 2012 findings have not been considered by the appellate panel. This Court only has jurisdiction to review decisions of the appellate panel. See Gen. Laws 1956 § 31-41.1-9. We have no authority to directly review the trial decisions of RITT trial judges and magistrates. Therefore, this issue is not ripe for review by the District Court.

Accordingly, this claim for relief must be denied.

D. UNFAIR SENTENCE.

Finally, Mr. Botella's final argument, that his sentence was fundamentally unfair, may be briefly addressed. First, it was legal — within the parameters of section 31-27-24. Secondly, regarding discretionary factors, this Court is prevented from engaging in a meaningful analysis of the question because the proceedings of March 15, 2012 before the trial judge are not properly reviewable. See Section V-C, supra.

VI. CONCLUSION

To reiterate, the appellate panel's review of a trial judge's verdict is limited. And, when reviewing RITT cases, this Court's role is doubly limited: our duty in cases such as this is to decide whether the panel was "clearly erroneous" when it found Judge Almeida's sentencing of Mr. Botella was not "clearly erroneous" — in essence, we perform a limited review of a limited review. See Gen. Laws 1956 § 31-41.1-8(f) and Gen. Laws 1956 § 31-41.1-9(d). See also Link v. State, 633 A.2d 1345, 1348 (R.I. 1993)(opining, construing prior law — which was also "substantively identical" to the APA procedure — that the District Court's role was to review the trial record to determine if the decision was supported by competent evidence). In my view, the panel's decision satisfied this standard.

Therefore, in light of the standard of review which constrains us, and upon careful review of the evidence, I recommend that this Court find that the decision of the appellate panel was made upon lawful procedure and was not affected by error of

law. Gen. Laws 1956 § 31-41.1-9. Furthermore, said decision is not clearly erroneous in view of the reliable, probative and substantial evidence on the whole record. Gen. Laws 1956 § 31-41.1-9.

Accordingly, I recommend that the decision of the appeals panel be AFFIRMED.

/s/
Joseph P. Ippolito
MAGISTRATE

June 19, 2012