STATE OF RHODE ISLAND & PROVIDENCE PLANTATIONS

PROVIDENCE, Sc. **DISTRICT COURT**
SIXTH DIVISION

James Sullivan	**:**	
	:	
v.	**:**	**A.A. No. 2016 - 069**
	:	
City of Woonsocket	**:**	
(RITT Appeals 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 and Recommendations of the Magistrate.

After a de novo review of the record, the Court finds that the Findings and 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 at Providence on this 10th day of November, 2016.

By Order:

__/s/_____
Stephen C. Waluk
Chief Clerk

Enter:

___/s/_____
Jeanne E. LaFazia
Chief Judge

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

James Sullivan	:	
	:	**A.A. No. 2016 – 069**
v.	:	**(C.A. No. M15-0042)**
	:	**(15-412-550161)**
City of Woonsocket	:	
(RITT Appeals 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. James Sullivan urges that an appeals panel of the Rhode Island Traffic Tribunal (RITT) erred when it affirmed a municipal court judge's verdict adjudicating him guilty of a moving violation: "Prima Facie Limits" (speeding) in violation of Gen. Laws 1956 § 31-14-2. 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 Gen. Laws 1956 § 8-8-8.1. After a review of the entire record, I conclude that the decision of the panel should be affirmed; I so

recommend.

I
FACTS AND TRAVEL OF THE CASE

The facts of the incident in which Mr. Sullivan was cited for speeding by Officer Enrique Sosa of the Woonsocket Police Department are sufficiently stated in that portion of the decision of the panel in which it enumerates the officer's testimony at trial. The core of the incident is described as follows:

> …
> The Patrolman stated that on April 21, 2015, he worked a safe street detail at the parking lot of the Ho Kong Restaurant, located at 366 Cumberland Hill Road in Woonsocket, Rhode Island. [Tr.] at 9. The Patrolman specified that he was standing at a fixed position, using a handheld laser unit to detect vehicles traveling in excess of the 25 mile per hour speed limit. Id. The Patrolman stated that on the day in question, the laser unit was calibrated and functioning properly. Id. at 8-9. The Patrolman recalled that sometime after his detail started at 4:00 P.M., he observed a black SUV traveling towards him at a high rate of speed. Id. at 9. Using the laser unit, the Patrolman determined the vehicle was traveling at 38 miles per hour, which exceeded the posted speed limit of 25 miles per hour. Id. At that point, the Patrolman pulled the vehicle over and issued the operator a citation for driving thirteen miles over the speed limit. Id. at 9-10, 12.

Decision of Panel, June 14, 2016, at 2. Appellant entered a plea of not guilty at his arraignment and the speeding citation proceeded to trial before the Honorable Lloyd R. Gariepy of the Woonsocket Municipal Court on December 2, 2015.

At the outset of the trial, Appellant moved to strike any lay (non-expert) testimony regarding the reliability of laser radar units. Decision of Panel, June 14, 2016, at 1, citing Trial Transcript, at 3-5. The motion was denied. Decision of Panel, June 14, 2016, at 1, citing Trial Transcript, at 5. The officer then testified as to the salient facts of the traffic stop in the manner related ante. Decision of Panel, June 14, 2016, at 2, citing Trial Transcript, at 8-12. He identified Mr. Sullivan as the motorist he cited and then explained how an officer operates a laser unit. Decision of Panel, June 14, 2016, at 2, citing Trial Transcript, at 10-13.

Mr. Sullivan then conducted an extensive and thorough cross-examination of the officer. Decision of Panel, June 14, 2016, at 2-4, citing Trial Transcript, at 13-60. Among the points he elicited on cross-examination were the following:

- That the witness, who was trained in the use of laser units at the Police Academy in 2009, had never been re-certified in their use (Decision of Panel, at 2-3, citing Trial Transcript, at 13-16);
- That the officer issues between four hundred and five hundred citations each year, many from the Ho Kong Restaurant parking lot (Decision of Panel, at 3, citing Trial Transcript, at 19-21);

- That the witness, who was very familiar with the parking lot at the Ho Kong, denied that there were any obstructions to his use of the laser unit at that location (Decision of Panel, at 3, citing Trial Transcript, at 19-20, 34-37);
- That the officer, who had been trained in the art of visually estimating speed, had concluded that Mr. Sullivan's vehicle was exceeding the speed limit before he determined its precise speed with the laser unit (Decision of Panel, at 3, citing Trial Transcript, at 52-60).[1]

At the close of his examination of the officer, Mr. Sullivan took the stand. He testified that on the date and time in question he was not exceeding the speed limit. Decision of Panel, at 4, citing Trial Transcript, at 74.

The trial judge then rendered his decision orally. He found the officer's testimony was credible. Decision of Panel, at 4, citing Trial Transcript, at 78. Regarding the laser unit, the trial judge found that the officer had been trained in its proper use, that on the day in question it was working properly, and that it indicated that Mr. Sullivan's vehicle was traveling at a speed in excess of the posted speed limit. Decision of Panel, at 4-5, citing Trial Transcript, at 74-77.

---

[1] Mr. Sullivan's extensive cross-examination regarding Officer Sosa's ability to visually estimate the speed of vehicles was ultimately ended by the trial judge because it was cumulative and irrelevant. Decision of Panel, at 4, citing Trial Transcript, at 60.

He therefore found that the City had met its burden of proving the violation; as a result, he sustained the speeding violation. Decision of Panel, at 4, citing Trial Transcript, at 74-77.

Believing himself to be aggrieved by this decision, Mr. Sullivan filed an immediate appeal. On March 9, 2016 his appeal was heard by an RITT appeals panel composed of: Magistrate Goulart (Chair), Administrative Magistrate DiSandro, and Judge Almeida. In a decision dated June 14, 2016, the appeals panel rejected the three arguments which Appellant Sullivan had presented.

Firstly, the appeals panel found that the laser unit's read-out of Mr. Sullivan's speed had been properly admitted into evidence. Decision of Panel, June 14, 2016, at 6-8. In so finding, the panel used the two-pronged test for the admissibility of radar unit speed readings which had been enumerated in State v. Sprague, 113 R.I. 351, 355-58, 322 A.2d 36, 39-40 (1974) — (1) that the device's operational efficiency had been tested using an appropriate method within a reasonable period of time and (2) that the officer's experience and training in the use of the device. Id. Mr. Sullivan had argued that the Sprague holding was inapt, because it concerned a different technology — radar. Decision of Panel, June 14, 2016, at 7.

But the appeals panel, noting the Sprague court's reliance on State v.

Barrows, 90 R.I. 150, 152, 156 A.2d 81, 82 (1950) — a case which had concerned a speedometer reading, not a radar reading — rejected Appellant's reading of Sprague as being overly narrow. Decision of Panel, June 14, 2016, at 7-8. And so, finding that Officer Sosa's testimony had satisfied both elements of the Sprague test with competent evidence, the appeals panel held that the laser-unit results had been properly admitted. Decision of Panel, June 14, 2016, at 8.

Secondly, the appeals panel rejected Mr. Sullivan's argument that his rights had been prejudiced by the fact that the officer spoke with a heavy accent and that, as a result, the transcript of the trial was inaccurate. Decision of Panel, June 14, 2016, at 8-9. The panel observed that the court reporter had certified the accuracy of the transcript; it also observed that Mr. Sullivan had not pointed out any inaccuracies in the transcript. Id. And so, the panel rejected this second assignment of error. Id.

Thirdly, the appeals panel found that the trial judge did not impermissibly limit Mr. Sullivan's cross-examination of the officer regarding his training in visually estimating the speed of vehicles. Decision of Panel, June 14, 2016, at 9-10. The panel began its analysis on this question by quoting from Rhode Island Rule of Evidence 403, which provides:

> … evidence may be excluded if its probative value is substantially outweighed by the danger of unfair prejudice, confusion of the issues, or misleading the jury, or by considerations of undue delay, waste of time, or needless presentation of cumulative evidence.

Decision of Panel, June 14, 2016, at 9. The panel also cited our Supreme Court's decision in State v. Oliveira, 730 A.2d 20, 24 (R.I. 1999) for the proposition that a trial judge has wide discretion to permit or limit cross-examination, which shall be disturbed on appeal only where there has been an abuse of discretion causing prejudice. Decision of Panel, June 14, 2016, at 9-10.

The appeals panel found no abuse of discretion and no prejudice in the trial judge's limiting of Mr. Sullivan's cross-examination of Officer Sosa regarding his ability to visually determine speed. Decision of Panel, June 14, 2016, at 10. It so found because the officer did respond to a number of Appellant's questions on this topic; and because the prosecution was not based on the officer's visual estimation of Mr. Sullivan's speed. Id.

And so, the appeals panel concluded that the verdict rendered in Mr. Sullivan's case was supported by legally competent evidence of record and was not affected by error of law; it therefore affirmed his conviction on the civil violation of speeding in violation of § 31-14-2. Decision of Panel, June 14, 2016, at 11. at 5.

On June 29, 2016, Mr. Sullivan filed a claim for judicial review by the Sixth Division District Court pursuant to Gen. Laws 1956 § 31-41.1-9. Helpful memoranda have been received from both parties.

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.' "[2] Thus, the Court will not substitute its judgment for that of the panel as to the weight of the evidence on questions of fact.[3] Stated differently, the findings of the panel will be upheld even though a reasonable mind might have reached a contrary result.[4]

However, when reviewing the factual determinations of the appeals panel, this Court's role is limited; indeed, it is doubly limited — our duty in this case is to decide whether the panel was "clearly erroneous" when it found Judge Gariepy's adjudication of Mr. Sullivan was not "clearly erroneous" — 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), quoted ante at 8. 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' role was to review the trial record to determine if the decision was supported by competent evidence).

---

2 Guarino v. Department of Social Welfare, 122 R.I. 583, 584, 410 A.2d 425 (1980) citing Gen. Laws 1956 § 42-35-15(g)(5).

3 Cahoone v. Board of Review of the Department of Employment Security, 104 R.I. 503, 246 A.2d 213 (1968).

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

III
ANALYSIS
A
Positions of the Parties
1
Appellant's Position

In his Memorandum of Law, Mr. Sullivan seems to reduce his assertions to two: the admissibility of the laser unit results and the limitation of his cross-examination. He urges that the appeals panel "erroneously applied the RI State v. Sprague test in lieu of Zhovner (Ohio) as indicated in their reasoning …." Appellant's Memorandum of Law, at 4.[5] Mr. Sullivan urges that the panel should have followed the rule pronounced by the Ohio Appeals Court in Zhorner. Id. He argues that the trial judge made, not one, but two errors, by admitting the results of the laser unit — (a) that he erred by taking judicial notice of the accuracy of the laser unit as a class of machines; and (b) that he erred in admitting the laser's read-out without requiring proof that the

[5] Id., at 506-507, 246 A.2d at 215. The Ohio case to which Appellant refers is State v. Zhovner, 987 N.E. 2d 333 (Ohio App. 2013), in which an Ohio appeals court ruled that a trial judge wrongly admitted the readings of a laser speed unit, because that technology had not yet been deemed reliable; the appeals court ruled that the trial judge erred when he relied upon cases finding radar speed units to be accurate. Zhover, 987 N.E. 2d at 341.

particular laser unit was accurate. Appellant's Memorandum of Law, at 4-5.

He also asserted error in the trial judge's limitation of his cross-examination. Appellant's Memorandum of Law, at 5.

2

Appellee's Position

In its response, the City argues that the trial judge properly applied the Sprague test, which governs "the admissibility of evidence from a speed detection device, whether a speedometer, radar gun, and by analogy, a laser gun …." Appellee's Memorandum of Law, at 3. The City further maintains that it presented testimony which satisfied both elements of the Sprague test. Appellee's Memorandum of Law, at 3-4.

The City also submits that the trial judge rightly limited Mr. Sullivan's cross-examination of Officer Sosa with regard to his ability vel non to visually determine the speed of a vehicle, because the prosecution was based on the laser unit evidence, not on the officer's visual determination. Appellee's Memorandum of Law, at 4-5. Moreover, testimony on that issue had already been elicited. Appellee's Memorandum of Law, at 5.

B

Discussion

1

The Admissibility of the Laser Device Results

At the outset of this discussion, I think it only proper to state my understanding of Appellant's argument regarding the admissibility of the results of speed-detection devices based on laser technology. It seems to me that he is arguing that the accuracy of such devices (as a class, not individually) must be proven by expert testimony, before laser device speed results may be admitted. In this argument, he relies upon a recent case from the Ohio Court of Appeals — State v. Zhovner, 987 N.E. 2d 333 (Ohio App. 2013). He asks us to embrace the rule pronounced in Zhovner and to reject the rule declared by our Supreme Court in State v. Sprague, which requires only proof that "… the operational efficiency of the radar unit was tested within a reasonable time by an appropriate method." Sprague, 113 R.I. at 357, 322 A.2d at 39-40. Mr. Sullivan does not seem to question that this is the Sprague rule, he merely asks us to reject it in favor of the Zhovner rule.

Quite simply, Mr. Sullivan does not know what he is asking of us; for this Court to adopt an Ohio rule, in preference to one declared by our own

Supreme Court, is simply unthinkable.[6] The Rhode Island Supreme Court is the court of last resort in this state. As such, in its decisions "it declares the law of Rhode Island and that law must be followed by the lower courts of our judicial system …." University of Rhode Island v. Department of Employment Security, Board of Review, 691 A.2d 552, 555 (R.I. 1997). In Sprague, the Court announced a rule for the admissibility of the speed readings emitted by speed calculating devices. I do not believe it is a fair reading of Sprague to infer an intent by the Court to limit the announced rule to the results given by radar devices. And so, we must follow the holding announced in Sprague whenever we admit speed reading from any source until such time as our Supreme Court chooses to overrule, revise, or limit the rule it declared in Sprague.

The only real question in the instant case (with regard to the admissibility of the laser gun results) is whether the prosecution satisfied the two elements of the Sprague test. It is clear, I think, that competent evidence was presented as to both facets.

---

[6] As a result, it is immaterial to us that, even in Ohio, the Zhovner case is viewed as having no precedential value, since two judges joined in the result only. See State v. Hari, 2016 WL 2853595 *2, --- N.E. 3d --- (Ohio App. 2016). But even if it was binding on Ohio's trial judges, we must also remember that this ruling did not emanate from Ohio's court of last resort, its Supreme Court.

First, Officer Sosa testified that he was a 2009 graduate of the police academy, where he received training in the proper use of laser (and radar) speed guns, which he completed successfully. Trial Transcript, at 3, 6. Regarding his experience, he said that, since graduation, he has written about 500 citations each year — the majority with a laser gun. Trial Transcript, at 7. He described himself as "very familiar" with its use. Id.

Second, Officer Sosa described how he tested the laser unit on the day in question — by pointing it at a vertical objects (such as utility poles) 50 and 75 feet away and listening for a constant tone, which means that the laser is aligned and the machine is working properly. Trial Transcript, at 8. He testified that the test, which takes from five to ten minutes, prompted no concerns. Trial Transcript, at 9. Later in his testimony he added that, if there's an error in the operation of the machine, it gives you an error reading. Trial Transcript, at 12-13. Taken together, this testimony constituted competent evidence regarding both elements of the Sprague test.

2

Limitation of Cross-Examination

Appellant's second assertion of error requires little discussion. Officer Sosa's ability (or inability) to visually determine the speed at which an

automobile is travelling was utterly immaterial in this case. The officer testified that his visual calculation of the speed of Mr. Sullivan's vehicle was merely prefatory to his use of the laser gun to obtain a more exact speed.[7] The City never attempted to prove its case through the officer's observations. The issue of Officer Sosa's ability to visually estimate the speed of a vehicle was therefore irrelevant and immaterial.

We recall the following principle pronounced in our Supreme Court's opinion in State v. Oliveira, ante:

> A trial justice may certainly preclude by pretrial ruling pursuant to a motion in limine, or later during trial, that counsel's proposed line of questioning if it is not relevant to the trial issue ….

Oliveira, 730 A.2d at 24. Thereafter, the Court also reminded us that

> … a trial justice is given wide discretion to permit or limit counsel's cross-examination of witnesses during trial, and that discretion, absent a showing of clear abuse, will not be disturbed on appeal, and then, only if such abuse constitutes prejudicial error.

Id.[8] I believe the trial judge was more than indulgent of Mr. Sullivan's inquiry into this irrelevant area. I see no abuse of discretion in his ruling on this point.

---

[7] An officer is not required, under the fourth amendment or otherwise, to visually determine that a vehicle is speeding before aiming a speed gun at it.

[8] In support of this statement the Court cited State v. Anthony, 422 A.2d 921, 924 (R.I. 1980) and State v. Carraturo, 112 R.I. 179, 189, 308 A.2d 828, 833 (1973).

IV
CONCLUSION

Upon careful review of the evidence, I recommend that this Court find that the decision of the appeals 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. Id. Substantial rights of the Appellant were not prejudiced.

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

/s/
Joseph P. Ippolito
Magistrate

November 10, 2016