STATE OF RHODE ISLAND AND PROVIDENCE PLANTATIONS

PROVIDENCE, S.C. **RHODE ISLAND TRAFFIC TRIBUNAL**

STATE OF RHODE ISLAND	:	
	:	
v.	:	**C.A. No. T09-0036**
	:	
GEORGE PHILIP	:	

DECISION

PER CURIAM: Before this Panel on June 17, 2009—Magistrate Noonan (Chair, presiding) and Judge Parker and Judge Almeida sitting—is George Philip's (Appellant) appeal from a decision of Magistrate Cruise, sustaining the charged violation of G.L. 1956 § 31-14-2, "Prima facie limits." The Appellant appeared pro se before this Panel. Jurisdiction is pursuant to G.L. 1956 § 31-41.1-8.

I

Facts and Travel

On January 12, 2009, a trooper (Trooper) of the Rhode Island State Police charged Appellant with the aforementioned violation of the motor vehicle code. The Appellant contested the charge, and the matter proceeded to trial.

At trial, Appellant moved to dismiss the charged violation based on the alleged failure of the State to comply with discovery. (Tr. at 2.) The Appellant had filed an initial discovery request pursuant to Rule 11 of the Traffic Tribunal Rules of Procedure (Rule 11).[1] When the

[1] Rule 11 provides in pertinent part:

> "Reports of examinations and tests: Police reports and statements showing a person has been advised of his or her rights shall be made available to the defendant upon written request by the defendant; the Attorney for the state, city, town or agency shall permit the defendant to inspect and copy or photograph said statements and reports."

State Police allegedly failed to comply with Appellant's Rule 11 motion, he filed a motion to compel discovery on March 10, 2009 pursuant to Rule 11(f).[2] The hearing magistrate granted Appellant's motion to compel on March 19, 2009 and ordered the State Police to produce the following materials within ten days: (1) videotapes depicting the Appellant, his vehicle, or the traffic stop; (2) records of mechanical work performed on the Trooper's cruiser; (3) training records of the Trooper; (4) the name, model, and serial number of the speed measurement device used to record the speed of Appellant's vehicle; and (5) maintenance and certification records of the speed measurement device.

As of the date of trial, the Trooper failed to provide any of the additional items requested by Appellant and ordered to be produced. With regard to the videotape, the Trooper testified at trial that there was no such tape in the possession, custody, or control of the Rhode Island State Police. (Tr. at 3.) Additionally, with respect to the requested mechanical records, the Trooper testified that he had no mechanical records other than his cruiser's calibration sheet. Id. The Appellant also complained that the requested training records and the serial number, maintenance, and certification records of the speed measurement device had not been provided. (Tr. at 4.) Further, Appellant moved to strike the Trooper's testimony on the grounds that the Trooper did not have the capacity to testify regarding mechanical work performed on his cruiser, but the trial magistrate denied that motion. Id.

[2] Rule 11(f), "Continuing duty to disclose; failure to comply," provides in pertinent part:

> If at any time during the course of the proceedings it is brought to the attention of the court that a party has failed to comply with this rule or with an order issued pursuant to this rule, the court may order such party to permit the discovery or inspection of materials not previously disclosed, grant a continuance, or prohibit the party from introducing in evidence the material not disclosed, or it may enter such other order as it deems just under the circumstances.

Turning to the events that transpired on the date in question, the Trooper began to testify regarding the events of January 12, 2009, but Appellant objected several times because it appeared that the Trooper was reading from a paper. (Tr. at 5.) The trial magistrate then instructed the Trooper to read the paper and then testify from his recollection of the underlying events, and the Trooper complied. Id. He testified that at approximately 10:35 a.m., he was on patrol when he observed Appellant's vehicle traveling at a high rate of speed. (Tr. at 6.) The Trooper then recorded the speed of the vehicle for approximately one half mile at 75 m.p.h. in a posted 55 m.p.h. zone. Id. The Trooper initiated a stop of the vehicle, identified the operator as Appellant, and issued a citation. (Tr. at 7.)

The Trooper explained that he charged Appellant with traveling 65 m.p.h. in a posted 55 m.p.h. zone, rather than the clocked speed of 75 m.p.h. Id. The Trooper then provided the Court with the calibration sheet for his cruiser's radar unit. Id. He also testified that he received training in the use of radar units during his time at the Rhode Island State Police Academy in 1992. (Tr. at 8.)

On cross-examination, Appellant suggested that the radar unit used by the Trooper to record the speed of his vehicle had not been properly calibrated. (Tr. at 9-10.) The Appellant pointed out that the calibration of the Trooper's radar unit had been performed on October 23, 2008 and that the Trooper had no control over any mechanical work that may have been performed on the cruiser since that time. Id.

At the conclusion of the trial, the trial magistrate sustained the charged violation of § 31-14-2. The Appellant, aggrieved by this decision, filed a timely appeal to this Panel. Our decision is rendered below.

II

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 prejudiced 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 Insurance 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 Environmental 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.

III

Analysis

On appeal, Appellant argues that the trial magistrate's decision is affected by error of law, characterized by abuse of discretion, and clearly erroneously in view of the reliable, probative, and substantial evidence on the whole record. First, Appellant argues that the trial magistrate's decision to sustain the charged violation of § 31-14-2 in light of the Trooper's failure to comply with court-ordered discovery constitutes an abuse of his discretion. Next, Appellant contends that the trial magistrate abused his discretion by choosing to credit the Trooper's testimony regarding the underlying events and by choosing to discount his own testimony. Third, Appellant argues that the trial magistrate's decision is not supported by legally competent record evidence, as there was no in-court identification of Appellant as the operator of the suspect vehicle. Lastly, Appellant claims the trial magistrate's decision was clearly erroneous or affected by error of law because there was no evidence the Trooper's radar unit had been properly calibrated on the date in question.

A

The Appellant first argues that the trial magistrate's decision is characterized by abuse of discretion because the trial magistrate seemingly ignored the State Police's alleged failure to comply with court-ordered discovery pursuant to Rule 11(f). Accordingly, Appellant contends that the appropriate remedial measure for the Trooper's alleged failure to comply with discovery is dismissal of the charged violation of § 31-14-2; as such, the appellant maintains the trial

magistrate's decision to continue with the trial rather than dismiss the charge is an abuse of his discretion.

Although the extensive discovery requested by Appellant was ordered by the trial magistrate, the members of this Panel are satisfied that the trial magistrate's decision to sustain the charged violation in light of the Trooper's noncompliance is not affected by error of law or characterized by abuse of his discretion. It is well-settled in Rhode Island that a "final judgment dismissing an action for noncompliance with a discovery order is within the discretion of the motion justice," and that decision of the trial justice will only be reversed upon abuse of discretion. Mumford v. Lewiss, 681 A.2d 914, 916 (R.I. 1996). The Court in Mumford indicated that it would dismiss a case only "in the face of a party's persistent failure to comply with discovery obligations." Id. (citing Roberti v. F. Ronci Co., 486 A.2d 1087, 1088 (R.I. 1985)). In Woloohojian v. Bogosian, 828 A.2d 522 (R.I. 2003), the Court reaffirmed Mumford and added that there must be evidence "demonstrating persistent refusal, defiance or bad faith" in order to dismiss for failure to comply with discovery. Id. at 523 (holding that a defendant's failure to respond to three sets of interrogatories, failure to produce documents requested, and disregard for a court order demonstrated bad faith). The Court later affirmed a hearing justice's discretionary decision to dismiss a case in Goulet v. OfficeMax, Inc., 843 A.2d 494 (R.I. 2004). There, "[g]iven the plaintiff's continuous and willful noncompliance with discovery orders, the Superior Court [justice] acted well within [his] discretion in dismissing the plaintiff's complaint." Id. at 496.

Regarding discovery in Traffic Tribunal proceedings, Rule 11(a) of the Traffic Tribunal Rules of Procedure provides that "[p]olice reports and statements showing a person has been

advised of his or her rights shall be made available to the defendant upon written request by the defendant." Rule 11(b) covers additional discovery requests, and states that:

> Upon motion of a defendant the court may order the attorney for the state to permit the defendant to inspect and copy or photograph books, papers, documents, photographs, tangible objects, buildings or places, or copies or portions thereof which are within the possession, custody or control of the state, upon a showing of materiality to the preparation of the defendant's defense and that the request is reasonable.

Thus, enforcing additional discovery under Rule 11 requires a showing of materiality to the defendant's defense as well as a showing of the reasonableness of the request. Traffic Trib. R.P. 11(b).

It is clear that the trial magistrate's decision not to dismiss the charged violation based on the State Police's non-compliance with his discovery order is not characterized by an abuse of his discretion; rather, it is consistent with the materiality and reasonableness requirements set forth in Rule 11. The Appellant's specific requests of videotapes, mechanical records of the Trooper's cruiser, training records of the Trooper, the specifications of the speed measurement device, and the maintenance records of that device are both unnecessary and unreasonable for the preparation of Appellant's defense to the underlying charge. The State Police complied with Rule 11(a) in providing the police report, and even referred Appellant to section 11(b) for further requests. At trial, the Trooper testified that the requested videotape evidence did not exist, and he did not have maintenance records for the cruiser. (Tr. at 3.)

Further, Appellant never made a showing of materiality to his defense or of the reasonableness of the requests. He requested records of the Trooper's training and of the radar's maintenance and specifications, but to the extent necessary, that information was all provided in testimony at trial by the Trooper, thereby complying with the standard set forth in State v.

Sprague, 322 A.2d 36, 39-40 (1974) (holding radar speed reading admissible in evidence upon showing unit was tested within reasonable time by appropriate method and officer was trained and experienced in use of radar). Thus, not having that information provided in discovery had no substantially prejudicial effect on the Appellant's case. The materiality and reasonableness of mechanical records of the cruiser was never established, and this Court is not persuaded that there was any error of law or abuse of discretion exhibited by the trial magistrate in proceeding without the State providing this additional discovery.

B

Additionally, Appellant claims that the trial magistrate abused his discretion in assessing the credibility of the Trooper as a witness at trial. Specifically, Appellant argues that the Trooper's testimony was not credible because he appeared to read from a paper while testifying as to the events that transpired on the date in question and made a mistake regarding the color of the vehicle that he stopped.

In Link, our Supreme Court made clear that this Panel "lacks 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." 633 A.2d at 1348 (citing Liberty Mutual Insurance Co. v. Janes, 586 A.2d 536, 537 (R.I. 1991)). As the members of this Panel did not have an opportunity to view the live trial testimony of the Trooper or Appellant, it would be impermissible to second-guess the trial magistrate's impressions as he observed and listened to the witnesses, and determined what to accept and disregard. See Environmental Scientific Corp., 621 A.2d at 206.

Here, Appellant calls into question the credibility of the Trooper because he appeared to be reading from a paper and because he made a mistake as to the color of the Appellant's

vehicle. Based on the record before us, the members of this Panel are satisfied that the trial magistrate appropriately instructed the Trooper not to read from the paper while testifying and to instead do so from his recollection. Further, the trial magistrate had the opportunity to observe both the Trooper and the Appellant and to weigh their credibility. The trial magistrate chose to accept the credibility of the Trooper, a 17-year veteran of the State Police, despite a minor mistake regarding the color of the suspect vehicle. See Link, 633 A.2d at 1348 (establishing that appeals panel lacks authority to assess witness credibility). Accordingly, this Panel will accept the trial magistrate's witness credibility determinations on appeal.

C

As his third appellate argument, Appellant argues there was no in-court identification of himself as the operator of the suspect vehicle. As there was no in-court identification, Appellant asserts that the prosecution failed to prove the charged violation of § 31-14-2 to a standard of clear and convincing evidence.[3]

Although our Rules do not expressly define "clear and convincing evidence," this Panel is guided by the definition that appears in our Supreme Court's decision in Parker v. Parker, 103 R.I. 435, 238 A.2d 57 (1968). In Parker, our Supreme Court stated:

> The phrase "clear and convincing evidence" is more than a mere exercise in semantics. It is a degree of proof different from a satisfaction by a "preponderance of the evidence" which is the recognized burden in civil actions and from proof "beyond a reasonable doubt" which is the required burden in criminal suits. If we could erect a graduated scale which measured the comparative degrees of proof, the "preponderance" burden would be at the lowest extreme of our scale; "beyond a reasonable doubt" would be situated at the highest point; and somewhere in between the two extremes would be "clear and convincing evidence." Parker, 103 R.I. at 442, 238 A.2d at 60-61.

[3] Rule 17 of the Rules of Procedure for the Traffic Tribunal reads, in pertinent part: "The burden of proof shall be on the prosecution to a standard of clear and convincing evidence."

The Parker Court went on to state:

> To verbalize the distinction between the differing degrees more precisely, proof by a "preponderance of the evidence" means that a jury must believe that the facts asserted by the proponent are more probably true than false; proof "beyond a reasonable doubt" means the facts asserted by the prosecution are almost certainly true; and proof by "clear and convincing evidence" means that the jury must believe that the truth of the facts asserted by the proponent is highly probable. Id.

Having reviewed the record evidence to determine whether it is "highly probable" that Appellant was the operator of the vehicle on January 12, 2009, this Panel is satisfied that the prosecution proved the charged violations to a standard of clear and convincing evidence. Though there may not have been an in-court identification of the Appellant by the Trooper, Appellant was addressed by and responded to his name numerous times at trial, and that same name appears on the citation issued to him. (Tr. at 3-4.) When this is considered in conjunction with the trial magistrate's decision to credit the Trooper's testimony, it becomes "highly probable" that Appellant was the operator of the vehicle. Accordingly, this Panel concludes that there was "clear and convincing evidence" on the issue of Appellant's identity and that the trial magistrate's decision to sustain the charged violation is supported by legally competent record evidence.

D

The Appellant's final contention is that the trial magistrate's decision was affected by error of law regarding the radar gun. Appellant claims that there is no evidence the gun was calibrated or working properly on the day of the traffic stop, and the evidence should be inadmissible.

In order to deem radar evidence admissible in Court, it must meet the standards set forth in Sprague. 322 A.2d at 36. In Sprague, our Supreme Court held that a radar speed reading is

admissible in evidence upon a showing that "the operational efficiency of the radar unit was tested within a reasonable time by an appropriate method," and that there is "testimony setting forth [the officer's] training and experience in the use of a radar unit." Sprague, 322 A.2d at 39-40. The language of Sprague is clear on its face, stating that the radar must be calibrated "within a reasonable time." Id.

Having reviewed the evidentiary record in its entirety, the members of this Panel conclude that the trial magistrate did not err in applying the Sprague factors to the evidence before him. Here, the trial magistrate chose to credit the Trooper's testimony that he was trained in the use of radar at the Academy in 1992 and that the radar was calibrated on October 23, 2008, less that three months prior to the date of the citation. (Tr. at 7-9). This evidence meets the reasonable standards set forth in Sprague. Accordingly, the members of this Panel are satisfied that the decision to sustain the charged violation of § 31-14-2 is supported by legally competent evidence and is not otherwise affected by error of law.

IV

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 is not affected by error of law, characterized by abuse of discretion, or clearly erroneously in view of the reliable, probative, and substantial evidence on the whole record. Substantial rights of Appellant have not been prejudiced. Accordingly, Appellant's appeal is denied, and the charged violation is sustained.

ENTERED:

DATE: 8-18-09