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

State of Rhode Island	:	
	:	
v.	:	**A.A. No. 11 - 048**
	:	
James Sullivan	:	

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 2nd day of September, 2011.

By Order:

/s/
Clerk

Enter:

/s/
Jeanne E. LaFazia
Chief Judge

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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 the appeals panel of the Rhode Island Traffic Tribunal (RITT) erred when it affirmed a trial judge's verdict adjudicating him guilty of a moving violation: "Prima Facie Limits" (i.e., 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 General Laws 1956 § 8-8-8.1. After a review of the entire record I find that — for the reasons explained below — 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.

FACTS & TRAVEL OF THE CASE

The testimony given at the trial held in this case on January 21, 2009 by Trooper Kenneth Jones of the Division of State Police and by the appellant, Mr. James Sullivan, was fairly stated in the decision of the panel:

> At trial, Trooper Kenneth Jones testified that while he was on fixed radar post on Route 138 West in the "Aquidneck Island area," he observed Appellant to be operating his vehicle above the posted speed limit. (Tr. at 2) The trooper then initiated a traffic stop of Appellant's vehicle and later cited Appellant for traveling 55 miles per hour in a 45 miles per hour zone. Id. Later in his testimony, he informed the court that "h[is[radar was set internally and externally prior to going on post[,] [and] that [he] received training in the use of radar at the State Police Training Academy in June of 1997." Id.
>
> After Trooper Jones had finished his testimony, Appellant testified on his own behalf. He admitted to speeding but claimed he did so out of fear for his life. (Tr. at 3.) Prior to getting pulled over, Appellant claimed that "the rear of his vehicle was struck several times" by an enraged motorist. Id. In Appellant's view, traveling fast was aiding his attempt to avoid further danger. Also, Appellant informed the trial judge that Trooper Jones, who had testified earlier was not the trooper who had issued him the citation. Id. Appellant claimed that he told his story of speeding to avoid danger to the other trooper who conducted the traffic stop." Id.
>
> When asked by the trial judge if he had been present at the scene, Trooper Jones answered that he was there but was accompanied by another trooper. (Tr. at 4) In any event, the trooper claimed that he had never heard Appellant's story about evading danger. Id.

Decision of Panel, April 28, 2011, at 1-2.

At this juncture Mr. Sullivan was given a summons for speeding; he entered a not guilty plea at his arraignment on October 25, 2010; the matter proceeded to trial before Judge Edward Parker on January 24, 2011.

At indicated, Trooper Jones and appellant were the sole witnesses at the trial.

Following the trial, the trial judge sustained the violations and Mr. Sullivan was fined $85.00.

Believing himself aggrieved by this decision, appellant Sullivan filed a timely appeal, seeking review by an RITT appellate panel. On March 30, 2011, the appeal was heard by a panel comprised of: Magistrate William Noonan (Chair), Judge Lillian Almeida, and Magistrate R. David Cruise. In a decision dated April 28, 2011, the appeals panel affirmed the decision of the trial judge. The appeals panel rejected each of his arguments and affirmed the appellant's conviction on the speeding charge. On May 12, 2011, Mr. Sullivan filed the instant complaint for judicial review in the Sixth Division District Court pursuant to Gen. Laws 1956 § 31-41.1-9 of the General Laws.

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

APPLICABLE LAW

In the instant matter the Appellant was charged with violating section 31-14-2 of the Rhode Island General Laws which states in pertinent part:

> **31-14-2 Prima facie limits. –** (a) Whenever no special hazard exits that requires lower speed for compliance with § 31-14-1, the speed of any vehicle not in excess of the limits specified in this section or established as authorized in this title shall be lawful, but any speed in excess of the limits specified in this section or established as authorized in this title shall be prima facie evidence that the speed is not reasonable or prudent and that it is unlawful:
> …
> (3) Forty-five miles per hour (45 mph) in such other locations during the nighttime;
> …

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

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

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

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.

ANALYSIS

In this case Mr. Sullivan admitted he was speeding but asserted justification for doing so (i.e., self-preservation) based on his allegation that he had been bumped by another vehicle on the highway. See Trial Transcript, at 3. He testified that he told this to the other officer that stopped him. Trial Transcript, at 4. Despite this evidence, the trial judge found the motorist guilty and sustained the violation.

On appeal, Mr. Sullivan asserts that the trial judge denied his Sixth Amendment right to compulsory process. See Appellant's Memorandum, at 3. However, the record of the proceedings below reveals that Mr. Sullivan did not request the court to issue a subpoena for the "other" trooper. He did not therefore perfect the "compulsory process" issue below. And so, by application of the "raise or waive" rule, the issue was not preserved for appeal and no error can now be found. See State v. Nelson, 982 A.2d 602, 616(R.I. 2009).

Appellant also cites the confrontation clause of the Sixth Amendment. See Appellant's Memorandum, at 3. However, this provision was not violated. Officer Jones never testified as to what the other trooper said. He testified that he himself was the officer who operated the radar gun. See Trial Transcript, at 2.

Mr. Sullivan's complaint is that the officer whom he allegedly told of his bumping complaint was not there to testify. On this record his assertion that he was the victim of possible offenses from aggressive driving to assault with a dangerous weapon stands unchallenged. The prosecution could not contradict his testimony that he had told the other officer that he had been bumped. Obviously, however, the trial judge did not find this testimony convincing. And it is doubtful that the other officer's testimony, even if he confirmed that appellant made a prior statement on this point, would have altered the outcome here. After all, the officer had no evidence that appellant was bumped.

In any event, the issue of the potential testimony of the other trooper does not render Trooper Jones's testimony incompetent. The trial judge had every right to give it due consideration and such weight as he deemed appropriate. It appears he did so.

As stated above, in the review of the facts found below by the panel and the trial judge, this Court's role is limited. See "Standard of Review," supra, pages 3-4. Moreover, in reviewing RITT cases, this court's role is doubly limited: our duty in this case is to decide whether the panel was "clearly erroneous" when it found Judge Parker'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). 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).

CONCLUSION

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

September 2, 2011