

STATE OF RHODE ISLAND AND PROVIDENCE PLANTATIONS

CRANSTON, RITT

RHODE ISLAND TRAFFIC TRIBUNAL

STATE OF RHODE ISLAND

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:
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v.

**C.A. No. T14-0046
14001513398-3400-3402-3404**

JOHN McCARTHY

DECISION

PER CURIAM: Before this Panel on October 22, 2014—Magistrate Goulart (Chair), Administrative Magistrate DiSandro III, and Chief Magistrate Guglietta, sitting—is John McCarthy’s (Appellant) appeal from a decision of Magistrate Cruise (Trial Magistrate) sustaining the charged violations of G.L. 1956 § 24-12-37, “Penalty for nonpayment of toll.” Appellant appeared before this Panel represented by counsel. Jurisdiction is pursuant to § 31-41.1-8.

Facts and Travel

Appellant was issued five citations for violating § 24-12-37, “Penalty for nonpayment of toll.” Two (2) violations occurred on March 8, 2014; two (2) on March 11, 2014; and one (1) on April 10, 2014. Appellant contested the charges, and the matters proceeded to trial on July 22, 2014.

At trial, as a preliminary matter, the Trial Magistrate waived Appellant’s presence pursuant to Rule 23 of the Rhode Island Traffic Tribunal Rules of Procedure. (Tr. at 3.); see also Traffic Trib. R. P. 23 (stating “a defendant who is represented by an attorney may apply to the court for an order to waive the defendant’s presence . . .”). Thereafter, Trooper Vinton of the Rhode Island State Police testified that Appellant received five (5) violations for nonpayment of tolls. (Tr. at 4.)

Trooper Vinton explained that on March 14, 2014, he was contacted by Captain Swanberg of the Rhode Island Turnpike and Bridge Authority, now retired, regarding a frequent toll evader. Id. at 5. Captain Swanberg showed Trooper Vinton time-stamped photos of a unique turquoise-colored Harley-Davidson motorcycle that traveled through the E-ZPass lane, covering his rear registration plate. Id. The photos revealed the motorcycle had a War Veteran motorcycle plate ending in “32.” Id. Trooper Vinton contacted Lieutenant Doucette of the Enforcement Division of the Department of Motor Vehicles and informed Lieutenant Doucette of the photos. Id. Lieutenant Doucette was able to identify the motorcycle based on its unique color by running a data scan. Id. The results of the data scan indicated that Appellant owned the motorcycle. Id. at 6. This concluded Trooper Vinton’s testimony.

Captain Swanberg testified next. Captain Swanberg recalled that during the summer of 2013, there were at least three separate incidents where this unique motorcycle evaded tolls; however, no charges were ever filed. Id. at 7. Captain Swanberg then testified to the incidents during the spring and summer of 2014. Captain Swanberg explained that at approximately 4:00 p.m., on March 11, 2014, a toll collector observed this motorcycle driving through an open tolling lane. Id. at 8. Captain Swanberg contacted the State Police, informing them that a motorcycle matching the description of the one evading tolls in the summer of 2013 had again been observed evading a toll. Id. Trooper Vinton was assigned the investigation and Captain Swanberg provided Trooper Vinton with three photographs showing the motorcycle evading tolls. Id. Two of the photos were captured on March 8, 2014, and the remaining two on March 11, 2014. Id.

The investigation began, and on April 9, 2014, a maintenance employee observed the motorcycle approaching the toll plaza, traveling towards Newport. Id. at 9. Captain Swanberg

proceeded out into the toll plaza where he saw the motorcycle traveling into the open road tolling lane. Id. Captain Swanberg testified that he watched as Appellant proceeded to place his hand over his license plate; however, Captain Swanberg caught the Appellant's attention and the Appellant removed his hand from covering the plate. Id. Consequently, a picture was taken of the license plate. Id. Captain Swanberg passed the picture on to Trooper Vinton. Id. Several hours later, Appellant again passed through the open toll lane; however, this time his hand was covering his license plate. Id. Thereafter, Appellant was issued a citation dated April 10, 2014. Id. at 10.

Counsel for Appellant moved to strike Captain Swanberg's testimony relating to April 9, 2014, arguing that the citation was dated April 10th, and therefore, he received no notice of any offense occurring on April 9, 2014. Id. at 11. The Trial Magistrate agreed to strike the testimony. Id. The Trial Magistrate asked Trooper Vinton and Captain Swanberg if they had concluded their testimony; both replied affirmatively. Id.

At the close of the State's testimony, Appellant's counsel made a "McKone Motion" stating that there is no evidence on the record to support the allegation that the Appellant failed to pay the fee in the E-ZPass lane. Id. at 11-12; see also State v. McKone, 673 A.2d 1068, 1072 (R.I. 1996) (finding that in jury-waived trials, the appropriate motion by which a defendant may challenge the legal sufficiency of the state's evidence is by motion to dismiss"). The Trial Magistrate responded that he would infer from the photographs that the Appellant was willingly obstructing his license plate in an attempt to evade the toll system. (Tr. at 12.) Counsel for Appellant countered that even if the Appellant was obstructing his license plate, he may not have violated § 24-12-37 if the toll was paid. Id. Counsel maintained that the statute is "failure to pay a toll" and the State provided no evidence that the Appellant failed to pay the toll, only that the

Appellant concealed his license plate. Id. The Trial Magistrate asked the State whether any of the tolls had been paid. Id. at 13. Captain Swanberg replied that he was unaware whether the tolls had been paid. Id. Counsel for Appellant continued to argue his Motion, stating that there was no evidence that notice was sent to the Appellant, nor was there evidence that the Appellant failed to pay the ticket within 30 days as required by § 24-12-37. Id. Consequently, Appellant's counsel moved to dismiss all of the charged violations for lack of evidence. Id. at 14.

The Trial Magistrate denied the Appellant's Motion finding that the evidence presented was sufficient. Id. at 15. Specifically, the Trial Magistrate stated "[t]here is enough evidence for me here now through the citations which [are evidence of] notice . . . [and] the evidence of willful attempt to evade the system by the hand being placed over the registration." Id. The Trial Magistrate continued, "there is one clear registration here, and that is '53532,' which comes back registered to a Harley-Davidson owned by [the Appellant.]" Id.

Appellant's counsel then moved to dismiss the violation from April 10, 2014. Counsel argued that the citation is labeled with the location and time of violation; thus, the date and time on the citation should match the date and time of the violation. Id. at 16-17. Counsel claimed that here, the date of the violation listed on the citation is April 10th; however, the evidence presented by the State indicates that the violation occurred on April 9th. Id. Specifically, counsel stated, "[the citation] says . . . April 10th at 11:45 a.m. in Jamestown . . . the ticket is pretty clear. I mean, that's the alleged offense date, and the testimony is April 9th, not April 10th. So that must be an uncharged allegation." Id. at 17. Trooper Vinton responded that this discrepancy could have been "a clerical error." Id. Regardless, the Trial Magistrate dismissed the April 10, 2014 violation. Id.

At this time, the State rested. Id. at 18. Counsel for Appellant then argued that the pictures referenced throughout the State’s case were not entered as full exhibits, and therefore, cannot be used for substantive purposes. Id. at 19. The Trial Magistrate responded, “I’m going to use the photographs for substantive purpose.” Id. In conclusion, counsel reiterated his argument that there is no evidence establishing that Appellant failed to pay the tickets dated March 8, 2014 and March 11, 2014. Id.

After hearing the testimony presented, the Trial Magistrate found Trooper Vinton and Captain Swanberg’s testimonies to be credible. The Trial Magistrate stated, “[i]t’s clear before me that we have a frequent offender who is willfully obstructing the system at the Newport Bridge in an egregious way. He, obviously, is driving through with his hand over the plate in an attempt to evade paying the toll each time.” Id. at 20. The Trial Magistrate found the photographs and the testimony to constitute clear and convincing evidence that Appellant had intentionally evaded the toll. Id. Consequently, the Trial Magistrate sustained the four violations from March of 2014. Id. The Trial Magistrate imposed a fine of \$100 per violation and, in his discretion, suspended Appellant’s license for twelve months. Id. at 21. Counsel for Appellant requested a stay pending appeal and the Trial Magistrate denied the stay. Id. Aggrieved by the Trial Magistrate’s decision, Appellant timely filed this appeal.

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 prejudicial 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 concerning the weight of the evidence on questions of fact." Link v. State, 633 A.2d 1345, 1348 (R.I. 1993) (citing Liberty Mutual Ins. 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 decision is supported by legally competent evidence or is affected by an error of law." Link, 633 A.2d at 1348 (citing Envtl. 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 conclusions on appeal. See Janes, 586 A.2d at 537.

Analysis

On appeal, Appellant contends that the Trial Magistrate's decision was clearly erroneous in view of the reliable, probative, and substantial evidence on the whole record. Specifically,

Appellant claims there was no evidence that he had received notice of the violation, nor was there evidence establishing that he failed to pay the violation within thirty (30) days of notice.

Rhode Island General Law § 24-12-37 reads in pertinent part, “[a]ny person who fails or refuses to pay or prepay the required toll shall be required to pay the toll amount and an administrative fee . . . within thirty (30) days of issuance of the notice of violation.” See § 24-12-37 (a). Any person who fails to pay the due toll amount and administrative fee within the thirty days of issuance of the notice of violation, “shall be punished by a fine of eighty-five dollars (\$85.00) and may have his or her drivers license suspended” See § 24-12-37 (b).

Notably, § 24-12-37 requires that the motorist received notice of the violation, and subsequently failed to pay the violation within thirty (30) days of notice. See § 24-12-37 (c) (defining “toll violator” as any person who uses any project and fails to pay the required toll and accepts an Unpaid Toll Invoice from the Authority) (emphasis added). Therefore, if the State can establish that the motorist received notice of the violation, and subsequently failed to pay, then the motorist is subject to an eighty-five dollar (\$85.00) fine, and possible license suspension. See id.

Here, the State has not offered evidence to establish that Appellant actually received the citations. There is no evidence that the citation was mailed to Appellant. See Larocque v. Rhode Island Joint Reinsurance Ass'n, 536 A.2d 529, 532 (R.I. 1988) (“the term ‘giving notice’ absent anything more does require actual receipt of notice; however, this receipt may be presumed by proof of an ordinary mailing”) (emphasis added). Nor is there evidence of personal service upon the Appellant.

However, Appellant’s counsel appeared, on behalf of the Appellant, and took part in the trial. Therefore, Appellant’s appearance by attorney is, essentially, an admission of notice. See

Ryan v. Zoning Board of Review of New Shoreham, 656 A.2d 612, 616 (R.I. 1995) (explaining that a party who appears before the zoning board waives their right to object to an apparent deficiency in the notice for the hearing); see also Sprague v. Luther, 7 R.I. 581 (1863) (stating “appearance in person, or by attorney, is an admission of notice on the record; and operates as a waiver of the want of a citation, or any mere irregularity in its service”). We would err in concluding that Appellant had no notice or opportunity to be heard when Appellant’s counsel appeared in court, on behalf of the Appellant, to contest the citations.

This determination is consistent with that of the Trial Magistrate. At trial, counsel for the Appellant argued, “[n]otice [must] be sent to the motorist and there’s no evidence that notice was sent.” (Tr. at 13.) The Trial Magistrate replied, “[n]otice for the purposes [of this Court] is the ticket.” Id. We see no reason to disturb that conclusion.

In regards to the second prong of § 24-12-37 (c), failure to pay, the State did not offer any evidence that Appellant failed to pay the ticket. In fact, the Trial Magistrate asked Captain Swanberg whether the Appellant had paid the toll and the Captain replied that he was “not aware” of whether the tolls had been paid. (Tr. at 13.) Where the record is devoid of any proof of payment, or lack thereof, this Panel cannot conclude that the Appellant did, in fact, fail to pay the toll amount and administrative fee. As such, the State has failed to meet its burden pursuant to § 24-12-37. See Traffic Trib. R. P. 17(a) (“[t]he burden of proof shall be on the prosecution to a standard of clear and convincing evidence”).

After a careful review of the record, this Panel determines that although Appellant received notice of the violations, the Appellant’s failure to pay the toll amount and administrative fee, pursuant to § 24-12-37, was not sufficiently established at trial. Therefore, the charged violations cannot be sustained.

Conclusion

This Panel has reviewed the entire record before it. Having done so, the members of this Panel find that the Trial Magistrate's decision was in violation of statutory provisions and affected by other error of law. Substantial rights of Appellant have been prejudiced. Accordingly, Appellant's appeal is granted, and the charged violations dismissed.

ENTERED:

Magistrate Alan R. Goulart (Chair)

Administrative Magistrate Domenic A. DiSandro, III

Chief Magistrate William R. Guglietta

DATE: _____