STATE OF RHODE ISLAND AND PROVIDENCE PLANTATIONS

CRANSTON, RITT **RHODE ISLAND TRAFFIC TRIBUNAL**

STATE OF RHODE ISLAND	:	
	:	
v.	:	**C.A. No. T16-0009**
	:	**16505500205**
SARA SMOLENSKI	:	

DECISION

PER CURIAM: Before this Panel on July 20, 2016—Magistrate Goulart (Chair), Judge Almeida, and Judge Parker, sitting—is Sara Smolenski's (Appellant) appeal from a decision of Magistrate Noonan (Trial Magistrate), sustaining the charged violations of both G.L. 1956 § 31-14-2, "Prima facie limits" ("Speeding") and § 31-47-9, "Penalties" ("Driving without financial security"). The Appellant appeared before this Panel represented by counsel. Jurisdiction is pursuant to § 31-41.1-8.

I

Facts and Travel

On March 14, 2016, Officer Anthony J. Zoglio (Officer Zoglio), of the Richmond Police Department, observed Appellant traveling on Hog House Hill Road in Exeter, Rhode Island. Officer Zoglio obtained a radar speed of Appellant's vehicle, which was travelling at thirty-five (35) miles per hour in a twenty-five (25) mile per hour zone. Officer Zoglio then conducted a motor vehicle stop of Appellant's vehicle. At that time, Officer Zoglio learned that Appellant's vehicle was not registered and that she was operating the vehicle without insurance.

Officer Zoglio issued Appellant two citations in connection with the aforementioned violations. Officer Zoglio also cited Appellant for violating § 31-3-1, "Operation of an unregistered vehicle."

Appellant appeared before the Trial Magistrate on April 5, 2016. On that day, Appellant pled guilty to the violations of §§ 31-14-2 and 31-47-9. (Tr. at 2.) The Trial Magistrate dismissed the charge of § 31-3-1 "Operation of an unregistered vehicle," in consideration of Appellant's successful efforts to register her vehicle. *Id.*

In speaking with Appellant, the Trial Magistrate noted that Appellant had one prior offense of operating a vehicle without insurance from May 24, 2007. Therefore, the current violation would constitute a second offense. *Id.* In response, Appellant stated that she believed the prior offense had been dismissed and that the offense in this matter should be treated as a first offense. *Id.* She added that the ticket she received from Officer Zoglio indicated that the violation was charged as a first offense. *Id.* at 3. To that, the Trial Magistrate responded;

> "I know it does, but it's not. That's a ticket. The police fill that out and the computers fill that out. What makes it a first offense is, it's your first offense, but as you know on May 24, 2007 the registry suspended you for three months for not having insurance." *Id.*

The Trial Magistrate went on to instruct Appellant to investigate the matter further in order to determine if in fact the 2007 offense had been dismissed. *Id.* The Trial Magistrate told Appellant that if she provided the court with a letter supporting her assertion, the Trial Magistrate would amend his decision and the sanctions, appropriately. *Id.* Ultimately, Appellant never provided the Trial Magistrate with proof of a prior dismissal.[1]

[1] During oral argument before this Panel, Appellant's counsel stated that the prior offense of operating without insurance had not been dismissed.

As a result of her plea on March 14, the Trial Magistrate suspended Appellant's license for six months and imposed a $500 fine. *Id.* at 2. The Appellant timely filed this appeal of the Trial Magistrate's decision. Forthwith is this Panel's decision.

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 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 [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 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 [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 *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 [or Magistrate's] conclusions on appeal. *See Janes*, 586 A.2d at 537.

III

Analysis

The Appellant argues that the Trial Magistrate's decision was made in violation of constitutional or statutory provisions, made upon unlawful procedure, and affected by other error of law. Sec. 31-41.1-8(f)(1),(3),(4). Specifically, Appellant presents four arguments on appeal: (1) the Trial Magistrate incorrectly found that the instant violation was Appellant's second offense; (2) the Trial Magistrate did not inform Appellant of her right to counsel or (3) afford her an opportunity for a continuance to obtain counsel; and (4) the Trial Magistrate did not inform Appellant of the consequences that may result from entering a guilty plea. This Panel will address each argument *in seriatim*.

A

Trial Magistrate's Decision to Charge Appellant with a Second Offense

Section 31-47-9(a) of the Rhode Island General Laws states:

> "(a) Any owner of a motor vehicle registered in this state who shall knowingly operate the motor vehicle or knowingly permit it to be operated in this state without having in full force and effect the financial security required by the provisions of this chapter, and any other person who shall operate in this state any motor vehicle registered in this state with the knowledge that the owner of it does not have in full force and effect financial security, except a person who, at the time of operation of the motor vehicle, had in effect an

> operator's policy of liability insurance, as defined in this chapter, with respect to his or her operation of the vehicle, may be subject to a mandatory suspension of license and registration as follows…

Any person found to be in violation of § 31-49-7 is subject to the statutorily defined penalties set forth in the three violation tiered system. Section 31-49-7(a)(1) states, "[f]or a first offense, [a driver may receive] a suspension of up to three (3) months and may be fined one hundred dollars ($100) up to five hundred dollars ($500)." Section 31-49-7(a)(2) states, "[f]or a second offense, [a driver may receive] a suspension of six (6) months; and may be fined five hundred dollars ($500)."

Appellant argues that her prior violation of § 31-47-9 from May 24, 2007 was dismissed; therefore, the current violation should have been treated as a first offense. The record does not contain any evidence that the 2007 violation had been dismissed. In fact, during oral argument Appellant's counsel stated that it had not been dismissed. Based on the record, this Panel rejects Appellant's argument and affirms the Trial Magistrate's decision to treat this violation as a second offense.[2] *See Link*, 633 A.2d at 1348. Accordingly, this Panel finds that the Trial Magistrate's decision was not made in violation of constitutional or statutory provisions nor was the decision made upon unlawful procedure. Sec. 31-41.1-8(f)(3).

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[2] Nevertheless, even if Appellant offered evidence of a dismissal, this Panel would still be required to affirm the Trial Magistrate's ruling. Section 31-47-9 describes these violations as "offenses," not as "convictions." If the statute used the word, "conviction," Appellant's argument would be more compelling as Appellant would need to have been convicted of the prior offense rather than merely being charged with a prior offense. The law defines "conviction," as "[t]he judgment (as by a jury verdict) that a person is guilty of a crime." *Black's Law Dictionary*, 408 (Bryan A. Gardner, ed., Thomson Reuters 2014) (1891). Meanwhile, the law defines "offense," as "[a] violation of the law" *Id.* at 1250. As defined, an "offense" is necessary for there to be a "conviction," but a "conviction" is not necessary for there to be an "offense." *See id.* at 408; 1250. As a result, if the prior offense had been dismissed it would be insignificant because the predicate offense occurred. *Id.* at 1250.

B

Right to an Attorney in Traffic Matters

Appellant next argues that she was not afforded the right to an attorney. According to the Rhode Island Traffic Tribunal Rules of Procedure 6(a), "[b]ecause a defendant is before the court for a civil violation[], the defendant is not entitled to appointed counsel but has the option to retain private counsel." "It is well established that as a general matter, the constitutional right to counsel… does not attach in civil cases that do not involve the potential deprivation of a liberty interest." *Pitts v. Shinseki*, 700 F.3d 1279, 1283 (Fed. Cir. 2012).

Rule 6(a) Traffic Tribunal Rules of Procedure clearly instructs that the Appellant was "before the court for a civil violation" and, is therefore, "not entitled to appointed counsel." Even though Appellant was not entitled to appointed council, the option to secure representation was available if Appellant so chose. *See* Traffic Trib. R. P. 6(a). Accordingly, the Trial Magistrate did not violate Appellant's constitutional rights because she was not entitled to such a right in this civil matter. Therefore, this Panel finds the Trial Magistrate's decision was not "in violation of constitutional or statutory provisions." Sec. 31-41.1-8(a).

C

Offer of a Continuance to Secure Counsel

Appellant next argues that the Trial Magistrate had an obligation to offer Appellant a continuance in order to obtain counsel. However, Appellant made no protestations about appearing on her own behalf. (Tr. at 2-4.)

On multiple occasions, the Rhode Island Supreme Court has adhered to the "raise or waive doctrine." *In re Shy C.*, 126 A.3d 433, 434–35 (R.I. 2015). In order for an appeals court to consider an issue on appeal, a lower court must have first considered that exact issue. Id. "It

is an established rule in Rhode Island that this Court will not review issues that are raised for the first time on appeal." *State v. Briggs*, 934 A.2d 811, 815 (R.I. 2007) (quoting *Union Station Associates v. Rossi*, 862 A.2d 185, 192 (R.I. 2004)). The Court has carved out an exception to this rule that applies only to unraised questions that, if left unaddressed, would violate constitutional rights. *In re Shy C.*, 126 A.3d at 435 (citing *State v. Russell*, 890 A.2d 453, 462 (R.I. 2006)). To fall within the exception, an appellant must use the record to prove that the trial court's error exceeds that which is considered to be harmless error. *Id.* (citing *State v. Mastracchio*, 672 A.2d 438, 446 (R.I. 2006)). To exceed harmless error, the error must be the consequence of "a novel rule of law that counsel would not reasonably have known during the time of trial." Nicholas Nybo, *Preserving Justice: A Discussion of Rhode Island's "Raise or Waive" Doctrine*, 20 Roger Williams U. L. REV. 375, 383–84 (2015). The Rhode Island Supreme Court rarely uses this exception to consider unraised objections. *State v. Dufour*, 99 R.I. 120, 125–26, 206 A.2d 82, 85 (1965) (finding that an issue regarding the validity of a confession is a novel constitutional issue at the time of trial and, therefore, considerable under the exception for unraised objections). However, if a narrow exception to the raise-or-waive rule is not identified by a party on appeal, the party waives the opportunity for relief under the exception. *State v. Breen*, 767 A.2d 50, 57 (R.I. 2001).

According to the record, Appellant made no motion for a continuance nor did she even mention a desire to obtain counsel. In addition, Appellant offered no argument to this Panel in support of applying the exception to the raise-or-waive rule. *Breen*, 767 A.2d at 57. Without a record of Appellant requesting either a continuance or a lawyer, the issue was not raised and this Panel, therefore, cannot consider it. *Briggs*, 934 A.2d at 815.

In sum, the fact that Appellant never requested a continuance or indicated to the Trial Magistrate that she wanted representation, this Panel finds that the issue was not properly raised before the trial court. Moreover, Rule 6(a) states that if a "defendant is before the court for a civil violation(s), the defendant is not entitled to appointed counsel but has the option to retain private counsel." Traffic Trib. R. P. 6(a). The language of that rule makes it clear that this case does not involve a novel constitutional issue—such as a violation of the Appellant's Sixth Amendment's right—thus, the exception to the raise-or-waive rule does not apply. *In re Shy C.*, 126 A.3d at 435. Further, Rule 7 of the Traffic Tribunal Rules of Procedure provides that a Trial Magistrate may exercise his or her discretion in accepting a guilty plea if the Trial Magistrate is satisfied that the plea is made voluntarily and the defendant understands the nature of the charge and the judgment to be imposed. In light of the facts presented in the record, this Panel finds that Appellant's argument is without merit; the Trial Magistrate's decision was not made in violation of any constitutional or statutory provisions.

D

Consequences of Entering a Guilty Plea

The Appellant also asserts that she was not aware of the consequences of pleading guilty to a violation of § 31-47-9, driving without insurance. Rule 7(a) of the Traffic Tribunal Rules of Procedure provides:

> **"(a) A Defendant May Plead "Guilty" or "Not Guilty" or Seek a Dismissal based on a Good Driving Record.** The court may refuse to accept a plea of guilty and shall not accept such plea without **first addressing the defendant personally and determining that the plea has been made voluntarily and with understanding of the nature of the charge and the judgment to be imposed.** If a defendant refuses to plead or if the court refuses to accept a plea of guilty, the court shall enter a plea of not guilty and the case will be placed on the trial calendar. The court shall not enter a judgment upon a plea of guilty unless it is satisfied that

> there is a factual basis for the plea. Pleas shall be in the form prescribed by this Rule." Traffic Trib. R. P. 7(a) (emphasis added).

The United States Supreme Court has held that a guilty plea in a criminal matter must "represent[] a voluntary and intelligent choice among the alternative courses of action open to the defendant." *North Carolina v. Alford*, 400 U.S. 25, 31 (1970). When a guilty plea is appealed, "the plea will be vacated unless the record shows that the court has conducted an on-the-record examination of the defendant before accepting his plea to determine if the plea is being made voluntarily with an understanding of the nature of the charge and the consequences of the plea." *Flint v. Sharkey*, 107 R.I. 530, 537, 268 A.2d 714, 719 (1970). The burden is on the defendant to prove by a preponderance of the evidence that he or she did not voluntarily and intelligently waive his or her rights in a criminal case. *Cole v. Langlois*, 99 R.I. 138, 142-43, 206 A.2d 216, 218-19 (citing *Moore v. Michigan*, 355 U.S. 155, 161-62 (1957)).

Though the Traffic Tribunal is not a criminal court, as it handles only civil matters, the Court often looks to the Superior Court's Rules of Criminal Procedure for guidance. Rule 11 of the Rhode Island Rules of Criminal Procedure states:

> "A defendant may plead not guilty, guilty or, with the consent of the court, nolo contendere. The court may refuse to accept a plea of guilty, and shall not accept such plea or a plea of nolo contendere without first addressing the defendant personally and determining that the plea is made voluntarily with understanding of the nature of the charge and the consequences of the plea. If a defendant refuses to plead or if the court refuses to accept a plea of guilty or if a defendant corporation fails to appear, the court shall enter a plea of not guilty. The court shall not enter a judgment upon a plea of guilty or nolo contendere unless it is satisfied that there is a factual basis for the plea."

According to the Traffic Tribunals Rules of Procedure, the pleading party must be aware of the nature of the charges. Traffic Trib. R. P. 7(a). In this case, the record is clear that the

Trial Magistrate informed Appellant of each violation and the consequences; therefore, this Panel questions Appellant's lack of awareness with respect to the consequences of pleading guilty. First, Appellant's license had already been suspended for three months in connection with the first offense in 2007. (Tr. at 2.) Second, at Appellant's first appearance in this matter, the Trial Magistrate stated: "Unfortunately Sara Smolenski, it's your second offense. It's a six month loss of license and a $500.00 fine." Id.

It appears that Appellant not only knew the consequences of her plea, but was also given an opportunity to mitigate the penalties if Appellant provided the Trial Magistrate with proof that the 2007 offense had been dismissed. (Tr. at 3.) Thus, it is clear that Appellant failed to show by a preponderance of the evidence that she pled guilty without understanding the nature of the violation and the consequences of pleading guilty to the violation. *See* Tr. at 2-4; *Cole*, 99 R.I. at 142-43, 206 A.2d at 218-19.

Furthermore, Appellant argues through counsel that she did not know that by pleading guilty, she was waiving her right to a trial. She argues that the Trial Magistrate should have informed her of this waiver.

Once a person enters a voluntary plea, and the court accepts that plea, the defendant waives his or her right to an additional hearing. "Plea bargains are advantageous to both the government and the defendant because they (1) allow a prosecutor to avoid the time and expenses inherent in a trial, and (2) provide the defendant with 'a measure of certainty and control relative to his sentence,' which may result in a promise of leniency." Kristen N. Sinisi, *The Cheney Dilemma: Should A Defendant Be Allowed to Appeal the Factual Basis of His Conviction After Entering an Unconditional Guilty Plea?*, 59 Cath. U. L. Rev. 1171, 1174 n.12 (2010) (quoting *Conditional Guilty Pleas*, 93 Harv. L. Rev. 564, 567 n.12 (1980)). Prosecutors

usually utilize plea deals to avoid trial; however, it is also common for defendants to use pleas to do the same for various reasons. *See Conditional Guilty Pleas,* 93 Harv. L. Rev. 564, 567 n.12 (1980); *see also* Curtis J. Shipley, *The Alford Plea: A Necessary but Unpredictable Tool for the Criminal Defendant*, 72 Iowa L. Rev. 1063 (1987).

The Appellant has only argued that she did not know that her plea would preclude a trial. Our Supreme Court has stated that a plea is "is tantamount to a conviction after trial since it is more than an admission of conduct; it is a conviction in its own right." *In re John D.*, 479 A.2d 1173, 1177 (R.I. 1984) (citing *Boykin v. Alabama*, 395 U.S. 238, 242 (1969)). There was nothing contained within the record that indicated Appellant did not understand she would be giving up her right to a trial. As this Panel may only consider the record before it and being that the record does not indicate any confusion on Appellant's behalf, this Panel cannot agree that Appellant was unaware of this consequence.

The Appellant has failed to show that she did not knowingly and intelligently plead guilty to the charges levied against her before the Trial Magistrate. Accordingly, the Trial Magistrate's decision was not in violation of constitutional or statutory provision, or based upon unlawful procedure, or error of law. Appellant's substantial rights, therefore, have not been prejudiced.

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 was not in violation of constitutional or statutory provisions, made upon unlawful procedure, or affected by other error of law. Substantial rights of the Appellant have not been prejudiced. Accordingly, Appellant's appeal is denied, and the Appeals Panel sustains the charges.

ENTERED:

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Magistrate Alan R. Goulart (Chair)

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Judge Lillian M. Almeida

_____
Judge Edward C. Parker

DATE: _____