STATE OF RHODE ISLAND AND PROVIDENCE PLANTATIONS

CRANSTON, RITT **RHODE ISLAND TRAFFIC TRIBUNAL**

STATE OF RHODE ISLAND	:	
	:	
v.	:	**C.A. No. T18-0012**
	:	**18201500819**
WILLIAM FALLON	:	

DECISION

PER CURIAM: Before this Panel on October 31, 2018—Administrative Magistrate Abbate (Chair), Associate Judge Almeida, and Chief Magistrate DiSandro, sitting—is William Fallon's (Appellant) appeal from a decision of Magistrate Alan R. Goulart (Trial Magistrate) of the Rhode Island Traffic Tribunal, sustaining the charged violation of G.L. 1956 § 31-14-2, "Prima facie limits." The Appellant appeared before this Panel represented by counsel. Jurisdiction is pursuant to § 31-41.1-8.

I

Facts and Travel

On May 10, 2018, Officer Johnathon Nickerson of the Coventry Police Department (Officer Nickerson) observed a gray Chevrolet pick-up truck travelling at a speed of forty miles per hour in a thirty miles per hour speed zone on Flat River Road. (Tr. at 2-3.) Officer Nickerson identified Appellant as the driver of the vehicle and issued Appellant a citation for the above mentioned violation. *Id.* at 3; *see* Summons No. 18201500819.

The Appellant subsequently pled not guilty to the violation, and the matter proceeded to trial on July 10, 2018. (Tr. at 1.) At trial, Officer Nickerson testified that on May 10, 2018, at approximately 5:56 p.m., he was on routine patrol travelling westbound on Flat River Road in

Coventry. *Id.* at 6-7. While on patrol, Sergeants DeSisto and DeMollis (collectively Sergeants) of the Coventry Police Department advised Officer Nickerson via radio that they were travelling behind Appellant, who was operating a gray Chevrolet pickup truck, and that Appellant turned right onto Flat River Road, travelling eastbound. *Id.* at 2. Officer Nickerson testified that the Sergeants also advised "that they had good reason to believe that [Appellant] . . . violated those restrictions of his [ ] license." *Id.*

Officer Nickerson then observed Appellant "travelling what [Officer Nickerson] estimated to be 40 mph," confirmed by a moving radar reading of 40 mph, which was "10 miles in excess of the posted 30 mph speed limit in that area." *Id.* at 2-3. Officer Nickerson also testified that he graduated from the Rhode Island Municipal Police Academy where he was trained to "care for, operate and[,] and calibrate the radar unit." *Id.* at 3. Moreover, Officer Nickerson checked the radar unit "prior to and after the stop," and determined the unit "to be in working order" after calibrating it with turning forks. *Id.*

During cross-examination, Officer Nickerson testified that he first encountered Appellant just prior to six o'clock in the evening on Flat River Road—approximately thirty minutes from the time he received the first call from Sergeants DeMollis and DeSisto. *Id.* at 6. At the time that Officer Nickerson first observed Appellant on Flat Fiver Road, Sergeant DeMollis directly followed Appellant in an unmarked patrol car, and Sergeant DeSisto followed behind Sergeant DeMollis in a marked patrol car. *Id.* at 8-9. Officer Nickerson further stated that he does not believe Sergeant DeMollis would have pulled over Appellant for speeding because the unmarked patrol car was neither calibrated nor had lights and sirens. *Id.* at 8-9.

The Appellant also testified at trial. (Tr. at 11.) During his testimony, Appellant stated that on May 10, 2018, he went to Dave's Market after work and observed a marked police

vehicle in the parking lot. (Tr. at 11-12.) When Appellant left Dave's Market, between five-thirty and six o'clock in the evening, he proceeded to Hill Farm Road. *Id.* at 12-13. On Hill Farm Road, Appellant noticed two police officers following him from his rear view mirror. *Id.* at 13. Appellant estimated that the officers followed him for "probably two miles." *Id.* During this time, Appellant was not concerned with the officers following behind him because he monitored his odometer while driving. *Id.* Appellant made sure not to travel more than thirty-five miles per hour and "no more than that." *Id.* at 14.

When Appellant switched on his blinker to turn onto Poor Farm Road from Hill Farm Road, Sergeant DeSisto activated the lights and sirens on the marked patrol car and stopped Appellant's vehicle. *Id.* at 15. At that point, Sergeant DeSisto notified Appellant that he had been stopped for speeding. *Id.* Appellant testified that Sergeant DeSisto stated that Appellant was "speeding by the fire station, which there's no fire state there, so, I don't know." *Id.* However, Appellant then stated that there is a fire station near Hopkins Hill Road as well as on Flat River Road. *Id.* at 15-16.

Upon examination by the Court, Officer Nickerson clarified that he radioed Appellant's speed to the Sergeants and began turning his patrol car around so that the patrol car would be behind Appellant's vehicle. Id. at 18. However, "Sergeant DeSisto activated his lights when [Officer Nickerson] told him [Appellant's] speed." *Id.* Officer Nickerson also explained that the speed limit in the area near the fire station where the violation occurred is thirty miles per hour, but changes to thirty-five miles per hour just prior to Poor Farm Road. *Id.*

After testimony concluded, the Trial Magistrate determined that "by [Appellant's] own admission he was driving in violation of the speed limit. He said he was doing 35 mph and no more than 35 mph . . . [and] by his own admission he's in violation of the statute." *Id.* Thus, the

Trial Magistrate found, "[B]ased on all the evidence in this case, I am satisfied by clear and convincing evidence, it's not beyond a reasonable doubt . . . that [Appellant] was in fact operating above the speed limit." *Id.*

II

Standard of Review

Pursuant to § 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:
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> "(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 Mut. 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." *Id.* (citing *Envtl. Sci. 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." *Id.* 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 to sustain the charged violation is "[c]learly erroneous in view of the reliable, probative, and substantial evidence on the whole record[.]" Sec. 31-41.1-8(f)(5). Specifically, Appellant contends that the speed limit where Appellant was stopped is thirty-five miles per hour, which is the speed at which Appellant was driving. *See* Appellant's Notice of Appeal at 2.

A

Presenting New Evidence on Appeal

Appellant attempted to present new evidence regarding the speed limit in the area where the violation occurred to the Panel. Our Supreme Court has held that reviews by an appeals panel are "confined to a reading of the record." *Link*, 633 A.2d at 1348. In reviewing the record, "the appeals 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." *Id.* (citing § 31-43-4.6). Therefore, an appellant may not introduce new evidence during an appeal if doing so would require that the Panel reconsider questions of fact. *See id.* These restrictions on

admitting new evidence prevent this Panel from considering evidence not contained within the record, including taking judicial notice for the first time on appeal. *Id.*

Rhode Island Rule of Evidence 201(f) permits the court to "take judicial notice at any stage of the proceeding."[1] However, "in interpreting this rule, other courts have found that '[w]here the issue of judicial notice is raised for the first time on appeal, the appellate court is faced with a conflict between the policy that decisions ought not to run contrary to indisputable facts and the procedural policy that prohibits a party from raising issues on appeal that were not raised below." *State of Rhode Island Department of Corrections*, 2006 WL 1628615, at *7 (bracket in original). Indeed, "if Rule 201 is interpreted as allowing judicial notice to be taken for the first time on appeal, when notice was not requested below, the traditional standard of review will be eviscerated." *Id.* (citing 21B Charles Alan Wright & Kenneth W. Graham, Jr., *Federal Practice and Procedure* § 5110.1 (2d ed. 2005)). Thus, "[j]udicial notice should not be used to rescue a party who has failed to produce sufficient evidence at trial." *Id.* (citing *Melong v. Micronesian Claims Comm'n*, 643 F.2d 10, 12 n.5 (D.C. Cir. 1980)).

Here, the record reveals that Appellant testified at trial that the speed limit where the violation occurred was thirty-five miles per hour. (Tr. at 17.) Appellant proffered no other evidence at trial establishing the speed limit in that area. During oral argument on appeal—in support of his request for judicial notice—Appellant's counsel sought to present to the Panel a photograph purporting to depict the speed limit in that area as thirty-five miles per hour. *See also* Appellant's Notice of Appeal at 2. However, Appellant had ample opportunity at trial to present additional evidence of the speed limit, and did not choose to present this photograph at

[1] Pursuant to Rule 15(b) of the Traffic Tribunal Rules of Procedure, the Rhode Island Rules of Evidence governs "all proceedings before the Traffic Tribunal."

trial. Since the speed limit in the area where the violation occurred is a question of fact to be determined by the Trial Magistrate, and because judicial notice cannot be introduced for the first time on appeal, this Panel is prohibited from considering the photograph—which is not contained within the record—as evidence. *See Link*, 633 A.2d at 1348.

B

Clear and Convincing Evidence

The Appellant further asserts that because the speed limit is thirty-five miles per hour, the charged violation must be dismissed because the Trial Magistrate stated that "but for Appellant's admission that he was going 35 mph, [the Trial Magistrate] was not convinced by clear and convincing evidence that the Coventry Police had proven the case." Appellant's Notice of Appeal at 2. However, the Appellant misconstrues the Trial Magistrate's comment. *See* Tr. at 19. In fact, the Trial Magistrate stated, "I'm not sure but for that admission whether I would have been satisfied by clear and convincing evidence of the violation, but nonetheless, based on all the evidence in this case, I am satisfied by clear and convincing evidence[.]" *Id.*

Pursuant to Rhode Island Traffic Tribunal Rule of Procedure 17(a), the prosecution must prove the violation by "clear and convincing evidence." Evidence that satisfies the "clear and convincing evidence" standard "must persuade the jury that the proposition is highly probable, or must produce in the mind of the factfinder a firm belief or conviction that the allegations in question are true." *Cahill v. Morrow*, 11 A.3d 82, 88 n.7 (R.I. 2011) (quoting 29 Am. Jur. 2d *Evidence* § 173 at 188–89 (2008)). However, the standard "does not require that the evidence negate all reasonable doubt or that the evidence must be uncontroverted." *Id.* The Trial Magistrate's factual findings are treated with deference and are not to be disturbed by the Appeals Panel, unless the Trial Magistrate "overlooked or misconceived relevant and material

evidence or was otherwise clearly wrong." *Brown v. Jordan*, 723 A.2d 799, 800 (R.I. 1998) (internal citations omitted).

This Panel rejects Appellant's claims that there was insufficient evidence offered at trial from which the Trial Magistrate could form a "firm belief or conviction" that the speed limit is thirty miles per hour. *Id.* A review of the record indicates that the Trial Magistrate found that the area in which the violation occurred is a thirty miles per hour speed zone. (Tr. 18-19.) The Trial Magistrate determined that "by [Appellant's] own admission he was driving in violation of the speed limit. He said he was going 35 mph and no more than 35 mph . . . but by his own admission he's in violation of the statute." *Id.* at 19. In doing so, the Trial Magistrate implicitly accepted Officer Nickerson's testimony that the speed limit was thirty miles per hour. *Id.*; *see also Notarantonio v. Notarantonio*, 941 A.2d 138, 147 (R.I. 2008) ("A trial justice need not categorically accept or reject each piece of evidence in his decision for this Court to uphold it because implicit in the trial justices [sic] decision are sufficient findings of fact to support his [or her] rulings.") (citations omitted). Since the Trial Magistrate accepted as his findings of fact that the speed limit was thirty miles per hour, and because the Appellant stated he drove thirty-five miles per hour, the Trial Magistrate need not consider whether the violation could be sustained by clear and convincing evidence *without* Appellant's admission. Therefore, the Trial Magistrate's statement must be interpreted as mere surplusage.

As 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[,]" it will not disturb the Trial Magistrate's determinations regarding the veracity of the witness' testimony. *See Link*, 633 A.2d at 1348 (citing *Janes*, 586 A.2d at 537); *A. Salvati Masonry Inc.,* 151 A.3d at 749 (quoting *Van Dongen*, 132 A.3d at 1076).

Consequently, this Panel is satisfied that the Trial Magistrate's decision was not clearly erroneous in light of the evidence presented.

V

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 clearly erroneous in view of the reliable, probative, and substantial evidence on the whole record. Sec. 31-41.1-8(f)(5). The substantial rights of the Appellant have not been prejudiced. Accordingly, Appellant's appeal is denied, and the charged violation is sustained.

ENTERED:

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Administrative Magistrate Joseph A. Abbate (Chair)

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Associate Judge Lillian M. Almeida

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Chief Magistrate Domenic A. DiSandro, III

DATE: ______________