STATE OF RHODE ISLAND AND PROVIDENCE PLANTATIONS

CRANSTON, RITT **RHODE ISLAND TRAFFIC TRIBUNAL**

STATE OF RHODE ISLAND	:	
	:	
v.	:	**C.A. No. T13-0079**
	:	**13001525400**
JOHN O' HARA	:	

DECISION

PER CURIAM: Before this Panel on April 23, 2014—Magistrate Abbate (Chair, presiding), Administrative Magistrate Cruise, and Judge Almeida, and sitting—is the State of Rhode Island's (Appellant) appeal from a decision of Chief Magistrate Guglietta, dismissing the charged violations of G.L. 1956 § 31-47-9, "Operating without proof of insurance," and § 31-27-2.1, "Refusal to submit to chemical test." The Appellant was represented by counsel before this Panel. Jurisdiction is pursuant to § 31-41.1-8.

Facts and Travel

This matter arises from a motor vehicle stop that took place on August 15, 2013. On October 16, 2013, the refusal violation proceeded to a hearing before Chief Magistrate Guglietta. On November 21, 2013 Chief Guglietta issued a decision dismissing the violation for refusing a chemical test. The sole issue raised by the State on appeal is whether or not the arresting Trooper created a sworn report of the incident in question. This Panel will recite only the facts relevant to that issue.

At the hearing, Trooper Washington (Trooper) testified that he created a sworn report in connection with John O' Hara's (Appellee) arrest for failure to submit to a chemical test. (10/16/2013, Tr. at 25-26.) Thereafter, a Law Enforcement Report was marked as State's

Exhibit 3 for identification. (10/16/2013, Tr. at 26.) The Trooper testified that he recognized the document presented to him as a "Refusal affidavit," that he had completed the information contained within said document, that he signed the document, that the signature was made in front of a notary, that he swore to the truth of the contents of the document, and that the document was created on August 15, 2013. (10/16/2013, Tr. at 27.)

During a period of re-cross examination, the Trooper admitted that two Law Enforcement Reports had been created for the instant case because the initial Law Enforcement Report contained an error and had to be corrected. (10/16/2013, Tr. at 72.) In particular, the error contained in the first affidavit was that it contained the wrong date of arrest. (10/16/2013, Tr. at 73.) Next, the Trooper attested he swore to the truth of the contents of the first Law Enforcement Report in front of Corporal Montminy (Corporal), the notary, that after he received the report back from the Corporal, and that he learned that the report contained errors that needed to be corrected. (10/16/2013, Tr. at 73-74.) The Trooper further testified that he made the requisite corrections and then returned the document to the Corporal. (10/16/2013, Tr. at 74.) Subsequently, counsel for the State inquired how the new Law Enforcement Report was provided to the Corporal. Id. In response, the Trooper stated "[b]y hand the same way . . . I did the first time." Id.

Afterwards, Appellee's counsel called the Corporal to the stand. (10/16/2013, Tr. at 95.) Appellee's counsel inquired whether the first Law Enforcement Report created by the Trooper contained any errors and the Corporal answered it contained "some sort of error" and that he had the Trooper "do it over." (10/16/2013, Tr. at 97.) Next, the Corporal testified that he saw the first Law Enforcement Report from the Trooper, that he recalled the Trooper signing his name to the document, that he specifically recalled that the Trooper swore to him under oath that the facts

contained therein were true and accurate. (10/16/2013, Tr. at 98.) Moreover, the Corporal testified that he notarized the Trooper's signature. Id. Next, Appellee's counsel brought the Corporal's attention to a conversation between them that had occurred on September 23, 2013. (10/16/2013, Tr. at 100.) Appellee's counsel then inquired if it was true that the Corporal had stated to him that the Trooper did not swear to the contents of the second Law Enforcement Report when he notarized it. Id. In response, the Corporal stated that he believed he said "I wasn't sure." Id. Thereafter, the Corporal was asked if on September 30, 2013, the Corporal had indicated, in front of the Assistant Attorney General, that the Trooper had not signed the second Law Enforcement Report in front of him. (10/16/2013, Tr. at 103.) The Corporal retorted "I thought I said, 'I, I don't remember doing it.'" Id. Once again, Appellee's counsel inquired, "[a]nd you don't recall whether or not, as he did in your office the first time, swore to in it front of you?" and the Corporal responded "I don't recall, no." Id. Subsequently, the trial magistrate inquired whether the Corporal remembered if the Trooper raised his hand and swore to the second Law Enforcement Report. (10/16/2013, Tr. at 110.) The Corporal answered that he could not recall. Id.

After the culmination of the trial, Appellee's counsel moved to dismiss the case on the basis that there was no sworn report created by the arresting officer and the trial magistrate reserved his decision on the matter. (10/16/2013, Tr. at 214 and 226.) The matter was scheduled for a decision on the motion to dismiss on November 21, 2013. After having the benefit of legal briefs submitted by both parties, the trial magistrate issued his decision dismissing the charged violation, finding that the arresting Trooper failed to create a sworn report as required by § 31-27-2.1(b). (11/21/2013, Tr. at 26-52.) In making his decision to dismiss the case, the trial judge stated the presentation of a sworn report is an element of the offense and that the State had failed

to prove by clear and convincing evidence that such a sworn report had been made in this case. (11/21/2013, Tr. at 51-52.) Specifically, the trial magistrate highlighted the fact that the testimony of the Trooper and the Corporal fell short of the standard of clear and convincing evidence on the issue of whether or not there was a sworn report created in this case. (11/21/2013, Tr. at 51.) Moreover, the trial magistrate noted that he was not satisfied that the Trooper raised his hand and subscribed and swore to the truth of the contents of the second Law Enforcement Report. Id. Aggrieved by the trial magistrate's decision to dismiss the charged violation, the State filed the instant 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:
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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 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.

Analysis

Appellant asserts that the trial magistrate's decision to dismiss the charge was clearly erroneous in view of the reliable, probative, and substantial evidence on the whole record. In particular, the State argues that that the Trooper's testimony that he created a sworn report was, in fact, clear. Moreover, the State highlights that the alleged sworn report was entered as a full exhibit.

I

Burden

The State argues that it sustained its burden. It is well-settled that a proceeding at the Rhode Island Traffic Tribunal is civil in nature. Accordingly, we look to our rules of civil procedure to determine who bears the burden and the standard associated with that burden. Rule 17 of Traffic Tribunal Rules of Procedure reads, in relevant part: "[t]he burden of proof shall be

on the prosecution to a standard of clear and convincing evidence."[1] Therefore, in order for the charge to be sustained, there must be clear and convincing evidence in the record of each and every element of the charge. Here, the trial magistrate determined that the prosecution had failed to prove each element of the charge. See 11/21/2013, Tr. at 51-52; Traffic Trib. R. P. 17(a) ("The burden of proof shall be on the prosecution to a standard of clear and convincing evidence.").

Specifically, the trial magistrate made the finding that he was not satisfied, by clear and convincing evidence, that a sworn report was created in this case. See 11/21/2013, Tr. at 51-52; Robert K. Samson v. State, No. 12-285 (R.I., filed April 18, 2013) (Unpublished Order) (our Supreme Court accepted state's *Concession of Error* and vacating refusal charge because the state admitted that a sworn report is required in a refusal case and the defect cannot be overlooked at a hearing to determine a motorist's violation of a breathalyzer refusal statute); see also Nabeil Sarhan v. State of Rhode Island, No.12-311 (R.I., filed April 18, 2013) (Unpublished Order) (the state conceded error for the same reasons expressed in the contemporaneously filed *Concession of Error* in Samson); Sleiman, C.A. No. T12-0022, August 1, 2013, R.I. Traffic Trib.

[1] "The standard of clear and convincing evidence means 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. "To verbalize the distinction between the differing degrees more precisely, proof by a preponderance of the evidence' means that a jury [or judge] 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 [or judge] must believe that the truth of the facts asserted by the proponent is highly probable." State v. Fuller-Balletta 996 A.2d 133, 142 (R.I. 2010) (quoting Parker v. Parker, 103 R.I. 435, 442 238 A.2d 57, 60-61 (1968)).

(finding that "[a]bsent a sworn report, the State . . . is unable to establish reasonable grounds that the arrestee was operating under the influence of alcohol or other substance and therefore cannot prove an element required . . . .").; Town of Smithfield v. Badoui Sleiman, A.A. No. 12-22 Summons No. 11-411500622 (2013) (affirming Traffic Tribunal's holding that a sworn report is required to sustain a charge under § 31-27-2.1). Confining our review of the record to its proper scope, this Panel is satisfied that the trial magistrate's decision is not based upon an error of law or clearly erroneous in view of the reliable, probative, and substantial evidence on the whole record.

II

Factual Determinations

In addition, the State contends that the trial magistrate's findings were clearly erroneous. In actions tried upon the facts without a jury, the trial magistrate sits as a trier of fact as well as of law, and consequently, the trial magistrate weighs and considers the evidence, passes upon the credibility of the witnesses, and draws proper inferences. See Parella v. Montalbano, 899 A.2d 1226 (R.I. 2006). In weighing and considering the evidence, the "trial [magistrate] has wide discretion in determining the relevancy, materiality, and admissibility of offered evidence . . . ." Accetta v. Provencal, 962 A.2d 56, 60 (R.I. 2009) (quoting State v. Lora, 850 A.2d 109, 111 (R.I. 2004)).

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." Link, 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 Corporal, it would be

impermissible to second-guess the trial magistrate's impressions because he observed the Trooper and Corporal, listened to their testimony and made a determination of what he would accept and what he would disregard. See Environmental Scientific Corp., 621 A.2d at 206.

After listening to the testimony, the trial magistrate determined that the testimony of the Trooper and Corporal failed to convince him, by clear and convincing evidence that a sworn report was created for this case. See 11/21/2013, Tr. at 51. "[The appellate court] [is] not privileged to assess the credibility of witnesses and may not substitute our judgment for that of the trial magistrate concerning the weight of the evidence on questions of fact." Environmental Scientific Corp., 621 A.2d at 208 (quoting Liberty Mutual Insurance Co. v. Janes, 586 A.2d 536, 537 (R.I. 1991)). Therefore, we find no reversible error.

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 supported by the reliable, probative, and substantial evidence of record. This Panel is also satisfied that the trial magistrate's decision was not affected by error of law. Substantial rights of Appellant have not been prejudiced. Accordingly, Appellant's appeal is denied.

ENTERED:

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(Chair) Magistrate Joseph A. Abbate

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Administrative Magistrate R. David Cruise

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Judge Lillian M. Almeida

DATE: ______________