STATE OF RHODE ISLAND AND PROVIDENCE PLANTATIONS

CRANSTON, RITT **RHODE ISLAND TRAFFIC TRIBUNAL**

TOWN OF HOPKINTON	**:**	
	:	
v.	**:**	**C.A. No. M13-0013**
	:	**07506006821**
JAMES DUCHESNEAU	**:**	

DECISION

PER CURIAM: Before this Panel on October 23, 2013—Magistrate DiSandro (Chair, presiding), Administrative Magistrate Cruise, and, Judge Parker, sitting—is James Duchesneau's (Appellant) appeal from a decision of Judge Steele of the Hopkinton Municipal Court (trial judge), sustaining the charged violation of G.L. 1956 § 31-15-2, "Slow traffic to right." Appellant appeared before this Panel pro se. Jurisdiction is pursuant to § 31-41.1-8.

Facts and Travel

On March 23, 2013, the Chief of the Hopkinton Police Department (Chief) charged Appellant with the aforementioned violation of the motor vehicle code. Appellant contested the charge, and the matter proceeded to trial on June 7, 2013.

At trial, the Chief testified that he first observed the Appellant operating his vehicle while traveling southbound on route 95. (Tr. at 5.) The Chief indicated that he followed the Appellant's vehicle within the high speed lane on a two lane portion of the highway for about three and one half (3.5) miles and the Appellant's vehicle was traveling between sixty (60) and sixty-five (65) miles per hour in a sixty-five (65) mile per hour zone. Id. The Chief also testified that the average speed of other vehicles on the southbound side of route 95 was between seventy (70) and seventy-five (75) miles per hour. Id. Moreover, the Chief stated that at no time during

that interval did the Appellant have to pass another vehicle; in fact, the right lane was clear at all times. Id. During that period, of time the Chief testified that he continually flashed his lights at Appellant, and he also observed approximately ten to fifteen vehicles pass the Appellant on the right because there was no other way for these vehicles to pass the Appellant. (Tr. at 5-6.) Furthermore, the Chief perceived that other vehicles were being forced to drive aggressively because of the Appellant's vehicle blocking traffic. (Tr. at 6.)

The Appellant addressed the hearing judge, and alerted the judge that he believed that the wrong date was provided on the citation. Specifically, the Appellant stated that the incident occurred on March 20, 2013, not as stated on the citation, March 23, 2013. (Tr. at 7.) In response, the Chief maintained that the date that he issued the citation for was March 23, 2013. (Tr. at 11.) In addition, the Appellant explained he was not exceeding the posted speed limit or going slower than the posted minimum speed. (Tr. at 9.) Furthermore, the Appellant cited § 31-13-2, "Devices on state highways," and § 31-14-4, "Obedience to devices," to support the proposition that because he was not speeding the charged violation could not be sustained. (Tr. at 7-8.) The Appellant added, "Just because everybody else is speeding, doesn't mean that I should follow the same rules." (Tr. at 7.) Finally, the Appellant argued that because he "was not in violation of the speed limit [his] receiving this ticket is in direct violation of [those] two statutes." (Tr. at 9.)

After both parties finished presenting evidence, the trial judge issued his decision sustaining the charge. (Tr. at 19.) The trial judge instructed the Appellant that the clear meaning of § 31-15-2 was that any vehicle proceeding at less than the normal speed of traffic at that time and place and under the conditions then existing shall be in the right-hand lane. (Tr. at 18.) Furthermore, the trial judge expressed that in his view, if "the legislator had wanted [the statute]

to read, then the normal speed of traffic at that time and place under the conditions then existing, but not to exceed the speed limit, that you would be in the right on this; however, that's not what they put in the statute." (Tr. at 19.)

The trial judge noted that both parties had testified consistently throughout the proceeding. (Tr. at 17.) Furthermore, the trial judge stated that he found the Chief's testimony to be credible; specifically, that the Chief had a clear and unobstructed view of the Appellant's vehicle traveling in the left-hand lane while other traffic was passing the Appellant in the right-hand lane. (Tr. at 18.) The trial judge also commented that the Appellant's operation of his vehicle was causing a "tremendous disruption" to the flow of traffic and creating a problem on the road. Id. Appellant timely filed this appeal.

Standard of Review

Pursuant to G.L. 1956 § 8-18-9, any person may appeal an adverse decision from a municipal court and seek review from this Panel pursuant to the procedures set forth in § 31-41.1-8. Section 31-41.1-8 states that 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 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 conclusions on appeal. See Janes, 586 A.2d at 537.

Analysis

On appeal, Appellant contends that the trial judge's decision was clearly erroneous in light of the reliable, probative, and substantial evidence of record. The Appellant also asserts that the trial judge's decision was affected by error of law. Specifically, Appellant contends that that because he was within the maximum and minimum posted speed he could not have been proceeding less than the normal speed of traffic at the time and place under the conditions then existing.

Section 31-15-2, "Slow traffic to right," states that

> Upon all roadways any vehicle proceeding at less than the normal speed of traffic at the time and place and under the conditions then existing shall be driven in the right-hand lane then available for traffic, or as close as practicable to the right-hand curb or edge of the roadway, except when overtaking and passing another vehicle proceeding in the same direction or when preparing for a left turn at an intersection or into a private road or driveway.

In the present controversy, the trial court record is devoid of any testimony regarding how the Appellant's vehicle's speed was ascertained by the Chief. The Chief only indicated that he had observed the Appellant's vehicle going between sixty (60) and sixty-five (65) miles per hour. (Tr. There is no indication whether a radar unit was utilized or whether the Appellant's vehicle was clocked. Where grounds for dismissal of the action exist, an action is subject to dismissal, as a general rule, on the court's own motion. See Traffic Trib. R.P. 16; see also 24 Am. Jur. 2d Dismissal § 76.

With respect to speedometer readings, in State v. Mancino, our Supreme Court reaffirmed its holding in State v. Barrows, 90 R.I. at 154, 156 A.2d at 83 (1959), that police officer testimony based on an observation of the speedometer readings in the arresting officer's motor vehicle is admissible in evidence upon a showing that the operational efficiency of the device has been tested by an appropriate method within a reasonable time. 115 R.I. 54, 340 A.2d 128 (1975). Furthermore, our Supreme Court opined that "we adhere to this rule as an appropriate middle ground between the extremes of presuming that a police cruiser speedometer is accurate and requiring evidence of the accuracy of the speed-testing device against which the police cruiser is tested." Mancino, 115 R.I. at 58-59, 340 A.2d at 132. For speedometer or radar evidence to support a charge of speeding, "the operational efficiency" of the device must be "tested within a reasonable time by an appropriate method," and the record must contain

"testimony setting forth the [Officer's] training and experience" in the use of the device. State v. Sprague, 113 R.I. 351, 357, 322 A.2d 36, 39-40 (1974).

Here, the requirements of Mancino and Sprague were not set forth during the Appellant's trial because there was no testimony or any other evidence presented to indicate that the Chief clocked the Appellant's vehicle or had his speedometer checked for operational efficiency and reliability. See 115 R.I. at 58-59, 340 A.2d at 132; see also 113 R.I. at 357, 322 A.2d at 39-40. In addition, there is nothing in the record that reveals the method or type of speed-testing device used to determine the speed of the Appellant's vehicle. Accordingly, the trial judge's decision to sustain the charged was an error of law because it was impossible to determine whether the Appellant's "vehicle was proceeding at less than the normal speed of traffic at the time and place and under the conditions then existing[.] See § 31-15-2.

Conclusion

This Panel has reviewed the entire record before it. Having done so, the members of this Panel are satisfied that the trial judge's decision was affected by error of law. Substantial rights of the Appellant have been prejudiced. Accordingly, Appellant's appeal is granted, and the charged violation dismissed.

ENTERED:

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Magistrate Domenic A. DiSandro III (Chair)

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Administrative Magistrate David R. Cruise

DATE: _____

PARKER J., CONCURRING:

I join this Panel's Decision granting Appellant's appeal and dismissing the charged violation. However, I would be less than candid if I did not comment on the Appellant's operation of his vehicle on March 23, 2013. The purpose of section 31-15-2, "Slow traffic to right," is to prevent motorists from creating hazardous road conditions including undue congestion caused by improper use of the passing lane. The Appellant may not have violated section 31-15-2, but there is little doubt in my mind that the Appellant caused unnecessary buildup of traffic and accordingly endangered other motorists. Appropriate roadside etiquette would entail proper use of the passing lane and that reality should not be lost, despite this Panel's Decision.

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Judge Edward C. Parker

DATE: _____