

STATE OF RHODE ISLAND AND PROVIDENCE PLANTATIONS

CRANSTON, RITT

RHODE ISLAND TRAFFIC TRIBUNAL

TOWN OF PORTSMOUTH

v.

KEVIN DIETZ

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**C.A. No. T14-0043
14304500654**

DECISION

PER CURIAM: Before this Panel on September 24, 2014—Magistrate Noonan (Chair), Judge Almeida, and Magistrate Goulart, sitting—is Kevin Dietz’s (Appellant) appeal from a decision of Magistrate Abbate (Trial Magistrate), sustaining the charged violations of G.L. 1956 § 31-14-2, “Prima facie limits,” and G.L. 1956 § 31-27-24, “Multiple moving offenses.” The Appellant appeared before this Panel pro se. Jurisdiction is pursuant to G.L. 1956 § 31-41.1-8.

Facts and Travel

On April 26, 2014, Sergeant Burns (Sergeant) of the Portsmouth Police Department charged Appellant with the aforementioned violations of the motor vehicle code. The Appellant contested the charge, and the matter proceeded to trial on July 18, 2014.

At trial, the Sergeant testified that he had been trained in the use of radar, and that his radar unit had been calibrated before and after his shift. (Tr. at 1.) Next, the Sergeant testified that on April 26, 2014 at 5:23 in the evening, he was on radar post on West Main Road when he observed the suspect vehicle traveling toward him at a high rate of speed. Id. At that time, the Sergeant activated his radar unit and received a reading of 62 miles per hour (mph). Id. Thereafter, the Sergeant stopped the motorist and identified the motorist as the Appellant. Id. The Sergeant issued a citation for traveling 62 mph in a 35 mph zone. Id.

On cross examination, the Appellant asked the Sergeant if he saw any vehicles passing the Appellant. Id. The Sergeant answered in the negative. (Tr. at 2.) Next, Appellant questioned the Sergeant about the speed limit. Id. The Sergeant explained that the speed limit where he clocked the Appellant's speed, on West Main Road near Raytheon, was 35 mph. Id. However, the Sergeant explained that the speed limit about a mile and a half down the road, near the "intersection before. . . the Mobil [gas station]" is 45 mph. Id. The Trial Magistrate clarified that the speed where the Sergeant engaged his radar device on the Appellant was 35 mph. Id.

Subsequently, Appellant testified that he was traveling about 50 mph, and was passed by a pickup truck. Id. The Appellant argued that the Sergeant's radar picks up the biggest and fastest vehicle on the road, and the radar probably picked up the truck. Id.

After both parties were given an opportunity to present evidence, the Trial Magistrate issued a decision sustaining the charged violation. (Tr. at 3.) The Trial Magistrate found that the Sergeant was trained to use his radar, and the radar was properly calibrated. Id. The radar indicated Appellant was traveling at 62 mph in a 35 mph zone. Id. Based on these findings, the Trial Magistrate established that the Sergeant had met his burden of proof. Id. Thus, the Trial Magistrate sustained the charged speeding violation. Id. Next, the Trial Magistrate explained to Appellant that he was eligible for enhanced penalties, pursuant to § 31-27-24, "Multiple moving offenses," (otherwise known as the Colin Foote Statute) because he received four or more violations in an eighteen month period. Id. The Appellant tried to explain his past tickets and stated his job would be in jeopardy if he lost his license. Id.

Thereafter, the Trial Magistrate found that the Appellant was cited on April 29, 2014 for the current speeding violation; on April 16, 2014 for obedience to a stop sign; on July 28, 2013 for a speeding violation; and on April 29, 2013 for another speeding violation. Id. The Court

found that these fines are all within an eighteen month period, and if the motorist continues to operate a motor vehicle in the State of Rhode Island, he will pose a potential hazard. Id. Based on these findings, the Trial Magistrate imposed enhanced sanctions under the Colin Foote Statute of a three hundred dollar fine, license suspension for two months, driver retraining, sixty hours of community service, and court costs. 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 [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

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 asserts that the Trial Magistrate erred by crediting the testimony of the Sergeant over his testimony. In addition, Appellant asserts that the Trial Magistrate’s imposition of sanctions, pursuant to § 31-27-24, was an error of law. Moreover, Appellant argues that the Trial Magistrate did not consider that he drives fifty to sixty thousand miles a year, and that the Colin Foote statute does not account for the number of miles a person drives.

I

Credibility

Appellant contends that the Trial Magistrate’s decision to sustain the charge was clearly erroneous. In particular, Appellant asserts that the Trial Magistrate erred when he credited the Sergeant’s testimony over his own testimony.

In actions tried upon the facts without a jury, the trial justice sits as a trier of fact as well as of law, and consequently, the trial justice 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 justice 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 [or magistrate] 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 Sergeant or Appellant, it would be impermissible to second-guess the Trial Magistrate’s “impressions as he . . . observe[d] [the Sergeant and Appellant] [,] listened to [their] testimony [and] . . . determine[ed] . . . what to accept and what to disregard[,] . . . what . . . [to] believe[] and disbelieve[.]” Environmental Scientific Corp., 621 A.2d at 206.

After listening to the testimony, the Trial Magistrate determined that the Sergeant’s testimony was not only credible, but the testimony was also sufficient to sustain the charged violation. “[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)). In his decision, the Trial Magistrate credited the Sergeant’s testimony that the handheld radar unit determined that Appellant’s motor vehicle was traveling 62 mph in a 35 mph area and that the unit was calibrated before and after his shift on the day of the stop. Id.

The Trial Magistrate concluded that he accepted the testimony of the Sergeant. The Trial Magistrate was “satisfied by clear and convincing evidence that the town ha[d] met its burden of proof in the case.” Id. Accordingly, the Trial Magistrate found the Appellant guilty.

II

Application of Section 31-27-24 (Colin Foote)

Appellant also asserts that the Trial Magistrate’s imposition of sanctions, pursuant to § 31-27-24, was an error of law. Specifically, Appellant argues that the Trial Magistrate did not consider the amount of miles the Appellant drives on a yearly basis.

Section 31-27-24 requires that “[p]rior to the suspension or revocation of a person’s license to operate within the state, the court shall make specific findings of fact and determine if the person’s continued operation of a motor vehicle would pose a substantial traffic safety hazard.” At trial, the Magistrate found that the Appellant poses a potential hazard to the motorists of Rhode Island, based on Appellant’s four driving violations within an eighteen month period. (Tr. at 3.) The Appellant’s trial record cites four specific violations, which satisfies the statute requirement of “specific findings of fact and determin[ations] [that] the person’s continued operation of a motor vehicle would pose a substantial traffic safety hazard.” See § 31-27-24. Here, the Trial Magistrate cited to the specific violations on April 29, 2014; April 16, 2014; July 28, 2013; and on April 29, 2013. (Tr. at 3.) Section 31-27-24 does not require the Trial Magistrate to consider the amount of miles Appellant drives a year. See § 31-27-24. The Trial Magistrate’s decision was supported by specific, reliable, and probative evidence on the record. Thus, the Trial Magistrate did not commit an error of law.

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. Substantial rights of Appellant have not been prejudiced. Accordingly, Appellant's appeal is denied, and the charged violations are sustained.

ENTERED:

Magistrate William T. Noonan (Chair)

Judge Lillian M. Almeida

Magistrate Alan R. Goulart

DATE: _____