STATE OF RHODE ISLAND & PROVIDENCE PLANTATIONS
PROVIDENCE, Sc. DISTRICT COURT
SIXTH DIVISION

Donald Lisi	:	
	:	
v.	:	**A.A. No. 10-0068**
	:	
Town of Glocester	:	

O R D E R

This matter is before the Court pursuant to § 8-8-16.2 of the General Laws for review of the Findings & Recommendations of the Magistrate.

After a de novo review of the record, the Court finds that the Findings & Recommendations of the Magistrate are supported by the record, and are an appropriate disposition of the facts and the law applicable thereto.

It is, therefore, ORDERED, ADJUDGED AND DECREED,

that the Findings & Recommendations of the Magistrate are adopted by reference as the Decision of the Court and the decision of the appellate panel of the Traffic Tribunal is AFFIRMED.

Entered as an Order of this Court at Providence on this 11th day of July, 2011.

By Order:

_____/s/_____
Melvin Enright
Acting Chief Clerk

Enter:

_____/s/_____
Jeanne E. LaFazia
Chief Judge

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F I N D I N G S & R E C O M M E N D A T I O N S

Montalbano, M. Donald Lisi filed the instant complaint for judicial review of a final decision of the appeals panel of the Rhode Island Traffic Tribunal (RITT), which affirmed his conviction for speeding in violation of Gen. Laws 1956 § 31-14-2. In his appeal Mr. Lisi asserts that the testimony of the officer was unreliable and insufficient to meet the standard of proof for conviction in a civil traffic violation – clear and convincing evidence. *See* Gen. Laws 1956 § 31-41.1-6(a). Appellant also urges that the radar equipment used to detect his speed was inherently unreliable. In addition, appellant contends that the trial judge had predetermined his guilt and should have recused himself from presiding at the trial. Finally, appellant contends that he was denied his right of confrontation under the Sixth Amendment of the United States Constitution.[1]

[1] U.S. Const. amend. VI.

This matter has been referred to me for the making of findings and recommendations pursuant to General Laws 1956 § 8-8-16.2. Jurisdiction for the instant appeal is vested in the District Court by Gen. Laws 1956 § 31-41.1-9; the applicable standard of review is found in subsection 31-41.1-9(d). After review of the entire record, I find that the decision of the panel should be affirmed and I so recommend.

FACTS & TRAVEL OF THE CASE

The facts elicited at Mr. Lisi's trial which formed the basis for his conviction were well and concisely stated in the decision of the panel:

> On July 7, 2009, Appellant was charged with the aforementioned violation of the motor vehicle code by an Officer of the Glocester Police Department (Officer). The Officer recorded Appellant's vehicle traveling fifty-eight (58) miles per hour (mph) in a thirty-five (35) mph speed zone. Appellant contested the charge, and the matter proceeded to trial.
>
> The Officer began his trial testimony testifying that on the date in question, he was on a traffic radar post on Route 44 in the area of the Harmony fire station. (Tr. at 1.) At about 4:45 p.m., the Officer observed a vehicle traveling eastbound, past his radar post, at a high rate of speed. Subsequently the Officer fixed his radar unit on the vehicle and recorded its speed of fifty-eight (58) mph in a posted thirty-five (35) mph speed zone. The Officer initiated a traffic stop of the subject vehicle and cited the operator, later identified at trial as Appellant, for traveling forty (40) mph in a posted thirty-five (35) mph zone. Id. The Officer noted that Appellant's vehicle was "the fastest moving vehicle" traveling past his radar post. (Tr. at 3.)
>
> The Officer continued to testify that the radar unit used to calculate the speed of Appellant's vehicle was an "internally and externally calibrated radar unit that was calibrated, before, during and after use." (Tr. at 1.) The Officer described his expertise by explaining that he had been trained in the use of radar units during his time at the Rhode Island Municipal Police Academy in 2003. Id.

> On cross-examination by Appellant, the Officer testified that, on the date of the charged violation, it was raining and there was heavy traffic in the surrounding area. Appellant explained to the trial judge that due to the poor weather conditions, heavy traffic in the area, and the fact that his car was made out of plastic – and according to the Appellant, radar does not work properly on plastic vehicles – the arresting Officer could not have identified Appellant's vehicle as the one that was speeding. According to the Appellant, the officer did not "know what vehicle [the radar's] signal [was] bouncing off." (Tr. at 2.) Upon questioning by the trial judge, Appellant explained that he did not have any training or expertise in the use of radar units, nor was he prepared to present evidence or an expert to testify as to the radar unit's ability to detect the speed of plastic vehicles. (Tr. at 2-4.)
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> Following the trial, based on the Officer's testimony, the trial judge sustained the violation and ruled that the Officer had met the burden of clear and convincing evidence. (Tr. at 5.) The trial judge imposed a $95 fine and $35 court fee. (Tr. at 5.)
> *Decision of RITT Appellate Panel dated March 9, 2010 at pp. 1-2.*

The motorist appealed to the RITT appellate panel pursuant to Gen. Laws 1956 § 31-41.1-8 and the matter was given number C.A. No. T09-0096. On November 4, 2009, the appeal was heard by a panel comprised of: Chief Magistrate William R. Guglietta (Chair), Magistrate William T. Noonan and Magistrate R. David Cruise. In a decision dated March 9, 2010, the panel affirmed the decision of the trial judge. The panel found that the trial judge's decision "[was] not clearly erroneous in light of the reliable, probative, and substantial record evidence or affected by other error of law." *Decision of Panel, at p. 9.* The panel also found that "the substantial rights of the Appellant [had] not been prejudiced." *Id.*

Thereafter, Mr. Lisi filed the instant complaint for judicial review in the Sixth Division District Court pursuant to section 31-41.1-9 of the General Laws, pro se. The

Town of Glocester has declined to file a memorandum in this case. The matter was referred to me for consideration on May 31, 2011.

STANDARD OF REVIEW

The standard of review this Court must employ is enumerated in Gen. Laws 1956 § 31-41.1-9(d), which provides as follows:

> (d) *Standard of review.* The judge of the district court shall not substitute his or her judgment for that of the appeals panel as to the weight of the evidence on questions of fact. The district court judge may affirm the decision of the appeals panel, or 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 appeals panel's findings, inferences, conclusions or decisions are:
> (1) In violation of constitutional or statutory provisions;
> (2) In excess of the statutory authority of the appeals panel;
> (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.

The standard is akin to the standard of review found in Gen. Laws 1956 § 42-35-15(g), the State Administrative Procedures Act (APA).

Under the APA standard, the District Court " * * * may not substitute its judgment for that of the agency and must affirm the decision of the agency unless its findings are 'clearly erroneous.'"[2] The court will not substitute its judgment for that of the agency (here, the panel) as to the weight of the evidence on questions of fact.[3]

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[2] *Guarino v. Department of Social Welfare*, 122 R.I. 583, 584, 410 A.2d 425 (1980)(*citing* R.I. GEN. LAWS § 42-35-15(g)(5)).

[3] *Cahoone v. Board of Review of the Dept. of Employment Security*, 104 R.I. 503, 246 A.2d 213 (1968).

Stated differently, the findings of the panel will be upheld even though a reasonable mind might have reached a contrary result.[4]

APPLICABLE LAW

THE SPEEDING STATUTE

This case involves a charge of speeding pursuant to Gen. Laws 1956 § 31-14-2:

> **Prima facie limits.** (a) Where no special hazard exists that requires lower speed for compliance with § 31-14-1, the speed of any vehicle not in excess of the limits specified in this section or established as authorized in this title shall be lawful, but any speed in excess of the limits specified in this section or established as authorized in this title shall be prima facie evidence that the speed is not reasonable or prudent and that it is unlawful:
> (1) Twenty-five miles per hour (25 mph) in any business or residence district;
> (2) Fifty miles per hour (50 mph) in other locations during the daytime;
> (3) Forty-five miles per hour (45 mph) in such other locations during the nighttime;
> (4) Twenty miles per hour (20 mph) in an area within three hundred feet (300 ft.) of any school house grounds' entrances and exits during the daytime during the days when schools shall be open.
> (5) The provisions of subdivision (4) of this subsection shall not apply except when appropriate warning signs are posted in proximity with the boundaries of the area within three hundred feet (300 ft.) of the school house grounds, entrances, and exits.
> (b) Daytime means from a half hour before sunrise to a half hour after sunset. Nighttime means at any other hour.
> (c) The prima facie speed limits set forth in this section may be altered as authorized in § § 31-14-4 – 31-14-8.

ISSUE

The issue before the Court is whether the decision of the appeals panel was supported by reliable, probative and substantial evidence in the record or whether or not it was clearly erroneous or affected by error of law. More precisely, did the panel

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[4] *Id.* at 215.

err when it found that Mr. Lisi's conviction was supported by substantial evidence of record?

ANALYSIS

Applying the pertinent standard of review and giving due deference to the factual findings of the panel, I conclude the decision of the panel cannot be deemed erroneous.

To summarize the facts presented *supra* at pp. 2-3, the Officer of the Glocester Police Department testified he was posted on Route 44 in the area of the Harmony fire station when he observed a vehicle traveling eastbound at a high rate of speed, and that he clocked the vehicle by radar to be doing 58 miles per hour in a 35 miles per hour zone. (Tr. at 1.) Accordingly, he pulled over the vehicle and cited the operator – Mr. Lisi – for speeding. (Tr. at 1.) The Officer also testified that the radar unit used to calculate the speed was accurately calibrated "before, during and after use" and that he had been trained to use the radar unit at the police academy in 2003. (Tr. at 1.)

Appellant testified that due to poor weather conditions, heavy traffic in the area, and that "90 percent" of his car was made out of plastic, that the arresting officer could not have identified his vehicle as the speeding vehicle. (Tr. at 2.) Appellant contends that the Officer's trial testimony fails to satisfy the prevailing standard for admissibility of radar speed readings set forth in *State v. Sprague*.[5] Appellant contends that the Officer must prove that neither poor weather conditions, nor heavy traffic in the area, nor the fact that his car was made out of plastic, adversely impacted the radar

[5] *State v. Sprague*, 113 R.I. 351, 233 A.2d 36 (1974).

reading. However, in *Sprague,* our Supreme Court held that radar speed readings are admissible into evidence upon a showing that "the operational efficiency of the radar unit was tested within a reasonable time by an appropriate method," and upon "testimony setting forth [the officer's] training and experience in the use of a radar unit."[6] The Officer has satisfied all the factors set out in *Sprague*, therefore the trial court did not err in allowing the radar speed reading to be admitted into evidence.[7]

Appellant argues that he was denied the right to confront his accuser under the Sixth Amendment, *citing* Melendez-Diaz v. Massachusetts, 129 S.Ct. 2527 (2009)(in his view his "accuser" was a "print-out" from the radar unit evidencing the speed of his vehicle). The appellate panel correctly rejected this argument because the Officer in question was present at the trial and adequately available for cross-examination by the appellant. *Decision of Panel*, at 5. As to appellant's contention that the trial judge predetermined his guilt prior to listening to the evidence presented at trial, we agree with the panel's decision that there is no evidence in the record suggesting the trial judge had any preconceived beliefs about the defendant's guilt. *Decision of Panel*, at 6. In the trial record it is clear that the judge was attempting to instruct the pro se defendant about the legal process and advise him of his rights. (Tr. 1-4.) A mere accusation which is totally unsupported by substantial fact in the record does not require the trial judge to recuse himself in this case.[8]

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[6] *Sprague*, 113 R.I. at 357, 322 A.2d at 39-40.

[7] *Sprague*, 113 R.I. at 356, 233 A.2d at 39-40.

[8] *State v. Lessard*, 754 A.2d 756 (R.I. 2000); *See Decision of Panel*, at 6.

This Court's review of the panel's rulings is made pursuant to the statutory standard established in section 31-41.1-9(d). The statute does not permit the District Court to substitute its judgment for that of the panel as to the weight of the evidence on questions of fact; and, the District Court may only reverse if the panel's decision is clearly erroneous in light of the substantial evidence of record. *See Gen. Laws* 1956 § 31-41.1-9(d)(5), *quoted supra, p.4*. Giving the legally required due deference to the factual findings of the panel, I cannot say that it is clearly erroneous.

CONCLUSION

Upon careful review of the evidence, I recommend that this Court find that the decision of the appellate panel was made upon lawful procedure and was not affected by error of law. *See General Laws* 1956 § 31-41.1-9. Furthermore, said decision is not clearly erroneous in view of the reliable, probative and substantial evidence on the whole record. *Id.*

Accordingly, I recommend that the decision of the appellate panel of the Traffic Tribunal be AFFIRMED.

/s/
Joseph A. Montalbano
MAGISTRATE

July 11, 2011