

STATE OF RHODE ISLAND AND PROVIDENCE PLANTATIONS

CRANSTON, RITT

RHODE ISLAND TRAFFIC TRIBUNAL

CITY OF PROVIDENCE

v.

GERALD FOGEL

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C.A. No. T11-0055

STATE OF RHODE ISLAND  
TRAFFIC TRIBUNAL  
FILED  
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DECISION

PER CURIAM: Before this Panel on September 7, 2011—Judge Ciullo (Chair, presiding), Administrative Magistrate Cruise, and Magistrate Goulart, sitting—is Gerald Fogel’s (Appellant) appeal from a decision of Judge Almeida, sustaining the charged violation of G.L. 1956 § 31-20-12, “Stopping for school bus required – Penalty for violation.” The Appellant appeared before this Panel pro se. Jurisdiction is pursuant to § 31-41.1-8.

Facts and Travel

On May 5, 2011, Appellant was issued a traffic summons for the aforementioned traffic violation. Appellant was driving his son, Harry, to school on Garfield Avenue in Providence. A camera attached to a school bus videotaped the Appellant pass a bus, while the bus’ stop sign and lights were activated. Appellant contested the charges and the matter proceeded to trial. The trial judge sustained the charged violation and Appellant filed this appeal.

At trial, Officer John Sigillo (Officer) of the Providence Police Department testified. The Officer testified that on May 12, 2011, he responded to Smartbus Live. (Tr. at 3.) At the location, the Officer watched video of the Appellant’s vehicle on May 5, 2011 while on Garfield Avenue. Id.

The Officer testified that the Appellant was stopped in the middle of Garfield Avenue. Id. While stopped, a school bus pulled up alongside the Appellant’s vehicle. Id. According to

the Officer, the bus pulled up past the Appellant's vehicle. (Tr. at 4.) The bus activated the stop sign and the red lights on the bus. Id.

At this point, the Appellant placed his vehicle in reverse and backed up for "two or three feet." Id. Then the Appellant put the vehicle into drive, and drove past the bus while the stop sign and lights were still activated.

At trial, Appellant contested the Officer's account of the events, specifically that the stop sign and the lights were activated. (Tr. at 5.) Appellant admitted being stopped at the front of the bus. (Tr. at 6.) However, the Appellant could not offer an explanation for reversing his vehicle. Appellant went on to testify that he could not see the stop sign and lights. Id. Appellant attempted to admit a photograph into evidence demonstrating the difficulty of seeing the school bus stop sign and lights because of the height of his vehicle. Id. However, the photograph was never admitted into evidence. Appellant did admit to seeing the stop sign and the lights, in his rear-view mirror, after he has passed the bus.

After the Appellant's testimony was given, the Officer introduced the video into evidence. (Tr. at 10.) The Officer explained that there are four cameras mounted on the side of the bus. Id. Two of the cameras face forward and two face the rear of the bus. The Officer testified, that looking at the rear cameras, you could see the Appellant's vehicle behind the stop sign, which was deployed. The Officer went on to testify that the stop sign and lights remained on as the Appellant drove past the bus. Id.

After the video was played, the Appellant attempted again to introduce the photograph into evidence. (Tr. at 12.) The Appellant also asked to have his son testify to what he saw. (Tr. at 14.) The trial judge, however, did not allow his son to testify because the trial judge

determined that the child was too nervous to testify.<sup>1</sup> Id. Additionally, before trial, the Appellant's son stated that he did not understand the oath he was required to assent to in order to testify.<sup>2</sup> (Tr. at 2.)

At the close of evidence, the trial judge sustained the violation. Appellant was fined \$200 for the violation.

### 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 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'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 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

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<sup>1</sup> The trial judge stated "that child is very nervous being here. I'm not going to have him—I'm not going stand here and talk about any of this."

<sup>2</sup> The trial judge again stated "Do you understand about being under oath? (Pause) No. Alright, have a seat."

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, the Appellant contends that the trial judge's decision was characterized by an abuse of discretion. Specifically, Appellant contends that the trial judge erred when she disallowed the Appellant's son to testify. Appellant also avers that the trial judge committed error by not allowing the photograph offered by the Appellant to be admitted into evidence. Finally, Appellant contends that the trial judge misconstrued and misapplied Rhode Island G.L. 1956 § 31-20-12.

The Appellant attempted to call his son as a witness on at least one occasion during the trial. The trial judge determined that the child was "too nervous" to testify. (Tr. at 14.) The trial judge further stated that she was "not going to put [the Appellant's son] through that." Id. In short, the trial judge determined that the Appellant's son was not competent to testify.

Generally, a witness is presumed sane and competent to testify until proven otherwise. See State v. Franklin, 103 R.I. 715, 241 A.2d 219 (1968). However, children present unique circumstances regarding competency because of their age, intelligence, maturity, and experience.

Our Supreme Court has stated “[t]he trustworthiness of the testimony is the standard for determining the competency of a child to testify.” State v. Pettis, 488 A.2d 704, 706 (R.I. 1985).

Additionally, there are four testimonial capacities that are necessary in order for a child to be deemed competent. The four capacities are: (1) observe; (2) recollect; (3) communicate; and (4) appreciate the necessity of telling the truth. See State v. Girouard, 561 A.2d 882, 886 (R.I.1989). In State v. Cabral, our Supreme Court reiterated these four capacities and stated that “a child may not testify unless and until the trial justice has been satisfied that the proposed witness can” conform to the four requirements. 410 A.2d 438, 442 (R.I. 1980).

Here, the trial judge did not conduct such an analysis as is required by Girouard. The trial judge, only observed the Appellant’s son as nervous, and determined that the child should not testify. While it is true that a trial judge is afforded considerable discretion in making a competency ruling—the trial judge’s observations should not be the sole basis for determining competency. Seabra v. Trafford-Seabra, 655 A.2d 250 (R.I. 1995). This is especially true when considering the fact that trustworthiness of the child’s testimony is the issue to be determined. Pettis, 488 A.2d at 706. There is no evidence in the record that the trial judge considered the four factors or made a determination that the child’s nervousness would affect his ability to tell the truth.

### Conclusion

Having reviewed the record before it, this Panel is satisfied that the trial judge's decision sustaining the charged violation of § 31-20-12 was an abuse of discretion. Substantial rights of Appellant have been prejudiced. Accordingly, the decision of the trial judge is reversed and the violation is dismissed.