

STATE OF RHODE ISLAND AND PROVIDENCE PLANTATIONS

CRANSTON, RITT

RHODE ISLAND TRAFFIC TRIBUNAL

STATE OF RHODE ISLAND

v.

MICHAEL HERSEY

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**C.A. No. T12-0081
07001028668**

DECISION

PER CURIAM: Before this Panel on February 6, 2013—Magistrate Noonan (Chair, presiding), Magistrate DiSandro, and Magistrate Goulart sitting—is Michael Hersey’s (Appellant) appeal from a decision of Judge Parker (trial judge), sustaining the charged violation of G.L. 1956 § 31-14-2, “Prima facie limits.” Appellant was represented by counsel before this Panel. Jurisdiction is pursuant to § 31-41.1-8.

Facts and Travel

On August 3, 2012, Lieutenant Eric Lariviere (Lieutenant Lariviere) of the Rhode Island State Police Department charged Appellant with the aforementioned violation of the motor vehicle code. Appellant contested the charge, and the matter proceeded to trial on November 28, 2012.

At trial, Lieutenant Lariviere stated he was traveling southbound on Route 295 on the evening of August 3, 2012 when he observed a vehicle driving directly behind him. (Tr. at 3.) Shortly thereafter, he received a call from the police dispatcher regarding road debris in his area. Id. He then sped up to report to the scene in a timely manner. Id. Lieutenant Lariviere thereafter observed that the vehicle behind him sped up and maintained the same speed as the Lieutenant. Id. At the time, Lieutenant Lariviere was traveling approximately eighty miles per

hour (mph), and then accelerated to eighty-four mph. Id. The vehicle behind the Lieutenant maintained the same distance between his vehicle and the Lieutenant's despite the fact that the Lieutenant sped up.

Another trooper reported to the road debris emergency; therefore, Lieutenant Lariviere was relieved from reporting to the scene. (Tr. at 4.) Lieutenant Lariviere pulled over to the side of the road to let the vehicle behind him pass by him. Id. Once the vehicle passed, the Lieutenant pursued the vehicle. Id. Lieutenant Lariviere estimated that he clocked the vehicle for over a third of a mile. (Tr. at 5.) At this time, Lieutenant Lariviere conducted a motor vehicle stop and issued the operator—identified as the Appellant at trial—a citation for speeding. (Tr. at 4-5.) Lieutenant Lariviere cited the speeding vehicle for traveling seventy-five mph in a sixty-five mph zone. (Tr. at 5.)

During Lieutenant Lariviere's testimony, he attempted to introduce a calibration sheet to show that the speedometer was calibrated at the time of the traffic stop. (Tr. at 4.) Appellant objected to the introduction of this evidence at trial. Id. Subsequently, the judge accepted the document.¹ However, the document was not marked for identification and was not introduced as a full exhibit. Id.

The trial judge adopted the Lieutenant's testimony and sustained the charged violation. (Tr. at 7.) Aggrieved by the trial judge's decision, the 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:

¹ In response to the Appellant's objection, the trial judge stated, "I'm going to accept it and I'll note your objection." (Tr. at 4.)

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 light of the reliable, probative, and substantial evidence on the record. Specifically, Appellant contends that the evidence of calibration was not properly admitted at trial. Consequently, he avers the prosecution has failed to satisfy its burden in proving the charge.

In State v. Sprague, our Supreme Court held that 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. 113 R.I. at 357, 322 A.2d at 39-40 (1974); see also State v. Mancino, 115 R.I. 54, 58-59, 340 A.2d 128, 132 (1975) (holding that State is required to show as part of a prima facie case that speedometer used to clock defendant was tested against another speed-testing standard and that speedometer was operating properly at time of alleged violation). In order to prove a speeding violation in Rhode Island, it is mandatory that the calibration sheet be entered into evidence. See Mancino, 115 R.I. at 54, 340 A.2d at 128; State v. Barrows, 90 R.I. 150, 156 A.2d 81 (1959). Here, the record reveals that no such evidence was ever admitted.

At trial, Lieutenant Lariviere did not testify as to the calibration of the radar, speedometer, or odometer units or to his qualifications, by virtue of his professional training and experience, to operate the units. Furthermore, the State failed to properly introduce a calibration sheet for the radar equipment used to clock Appellant's speed, but it was merely handed to the trial judge after an objection by the Appellant. As the record is devoid of any other admissible evidence presented as to Appellant's speed, this Panel finds that upon careful review of the entire record, the trial judge's decision as to the speeding violation was made upon unlawful procedure

and was clearly erroneous in view of the reliable, probative, and substantial evidence on the record. Mancino, 115 R.I. at 54, 340 A.2d at 128.

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 clearly erroneous in light of the reliable, probative, and substantial evidence on the record. Substantial rights of Appellant have been prejudiced. Accordingly, Appellant's appeal is granted, and the charged violation dismissed.

ENTERED:

Magistrate William T. Noonan (Chair)

Magistrate Domenic A. DiSandro, III

DATE: _____

GOULART, M., concurring: While I concur with the decision of the majority, that that the trial judge committed error, I disagree with the reasoning supporting its conclusion. The majority concludes that because the calibration sheet considered by the trial judge was handed to him but not formerly marked or introduced, it was error for him to consider the document. I disagree that such formalistic process is required by the rules of evidence before a trial judge can consider admissible evidence. In this case, the record supports a finding that the defendant reviewed the calibration sheet and objected to its consideration by the trial judge. Compelling the actual marking of the document which the defendant understood was being considered by the judge in the case is merely a requirement of form over substance.

However, I do agree with the majority that it was error for the trial judge to consider the calibration sheet, as the document was hearsay.² Hearsay is defined as a statement, other than one made by the declarant while testifying at the trial or hearing, offered into evidence to prove the truth of the matter asserted. Rhode Island Rule of Evidence 801. Rhode Island In this case, the calibration sheet was an out of court statement offered to prove that the cruiser's speedometer was properly working. While it is likely that this calibration sheet would properly qualify as an exception to the hearsay rule as a business record, the State failed to lay the proper foundation for its consideration.

ENTERED

Magistrate Alan R. Goulart

DATE: _____

² The calibration sheet appears to qualify as a self-authenticating document pursuant to Rhode Island Rule of Evidence 902.