

**STATE OF RHODE ISLAND AND PROVIDENCE PLANTATIONS**

**CRANSTON, RITT**

**RHODE ISLAND TRAFFIC TRIBUNAL**

**STATE OF RHODE ISLAND**

:  
:  
:  
:  
:

v.

**C.A. No. T15-0032  
15408500199**

**ABRAHAM KABA**

**DECISION**

**PER CURIAM:** Before this Panel on October 28, 2015—Administrative Magistrate DiSandro III (Chair, presiding), Chief Magistrate Guglietta, and Judge Parker, sitting—is Abraham Kaba’s (Kaba or Appellant) appeal from a decision of Magistrate Goulart (Trial Magistrate), sustaining the charged violations of G.L. 1956 § 31-27-2.1, “Refusal to submit to a chemical test,” and § 31-26-5, “Duty in accident resulting in damage to highway fixtures.” Appellant was represented by counsel before this Panel. Jurisdiction is pursuant to § 31-41.1-8.

**Facts and Travel**

On January 6, 2015, Patrolman Andrew Torres (Officer Torres) of the Pawtucket Police Department (Department) charged Appellant with the aforementioned violation of the motor vehicle code. Appellant contested the charge, and the matter proceeded to trial on July 17, 2015 and July 24, 2015.

On the evening of the arrest, Officer Torres observed a slowly moving vehicle come to a halt<sup>1</sup> in the middle of Main Street in Pawtucket, Rhode Island. (07/17/2015, Tr. 12:1-4.) The

---

<sup>1</sup> According to Officer Torres’ original reports, when he first observed the vehicle, it was at a standstill. (07/17/2015, Tr. 37:14-41:10.) After speaking with the city solicitor, Officer Torres submitted a supplemental narrative, explaining that he observed the vehicle moving very slowly and then shortly coming to a stop. (07/17/2015, Tr. 41:11-46:22; Tr. Ex. Def. C.) Officer Torres

front of the vehicle was severely damaged and leaking fluids. (07/17/2015, Tr. 12:4-6; 12:18-20; 12:5-12.) There were also fragments of wood stuck in the bumper of the vehicle. (07/17/2015, Tr. 13:10-12.) Officer Torres radioed dispatch and approached the vehicle. (07/17/2015, Tr. 12:15, 13:13-15.) Defendant Abraham Kaba was seated in the driver's seat of the vehicle, and the airbags had deployed. (07/17/2015, Tr. 13:23-14:14.) Officer Torres observed that Kaba had bloodshot and watery eyes, slowed and slurred speech, smelled like alcohol, and lacked fine motor skills. (07/17/2015, Tr. 14:24-15:8.) Kaba did not appear to be injured and stated that he did not require medical attention. (07/17/2015, Tr. 54:15-56:21.)

Officer Torres observed a fluid trail that emanated from the vehicle and continued up the street. (07/17/2015, Tr. 15:17-16:2.) Another officer was radioed to patrol the area for any object that may have been hit in the general vicinity. (07/17/2015, Tr. 16:2-8.) A telephone pole at the intersection of Grace Street and West Avenue was eventually located, approximately one quarter of a mile from where Officer Torres found Kaba and his vehicle. (07/17/2015, Tr. 16:12-15; 17:5-11.) Broken pieces of glass and debris from the vehicle, as well as fluid leakage, were found at the telephone pole. (07/17/2015, Tr. 16:18-20.) When Kaba was asked about the accident, he responded that something hit his vehicle. (07/17/2015, Tr. 17:18-21.) He claimed that he was close to solving a murder and that he believed the accident was an act of retaliation against him. (07/17/2015, Tr. 18:1-5.)

Officer Torres asked whether Kaba had been drinking, and Kaba responded that he had consumed two beers. (07/17/2015, Tr. 18:6-14.) Officer Torres then conducted two field sobriety tests: the "walk and turn" and the "one-leg stand." (07/17/2015, Tr. 18:18-19:5.) Kaba failed both tests, and Officer Torres concluded based on his training that Kaba was impaired.

---

testified that he supplemented his original reports to clarify his findings. (07/17/2015, Tr. 45:16-45:22.)

(07/17/2015, Tr. 20:1-23:4.) Kaba was placed into custody, read his Miranda rights, and transported to the police station for processing. (07/17/2015, Tr. 24:3-6; 25:23-5; 26:11-15.)

Kaba was placed in a room and asked whether he would submit to a chemical test. (07/17/2015, Tr. 28:14-16.) He responded that he would take the chemical test; he signed a consent form and was observed for fifteen minutes. (07/17/2015, Tr. 28:15-29:17; Tr. Ex. State 2.) When asked to blow into the breathalyzer, Kaba initially did not supply enough air and then began to blow air into his hand that was positioned over the mouthpiece apparatus. (07/17/2015, Tr. 30:2-31:8.) Officer Torres gave Kaba another opportunity to give a sufficient breath sample. (07/17/2015, Tr. 31:11-12.) However, Kaba again began blowing into his hand and refused to take the test unless Officer Torres informed him of when the breathalyzer had been last calibrated. (07/17/2015, Tr. 31:12-22.) The chemical test was terminated, and Kaba was placed in a cell block. (07/17/2015, Tr. 32:1-7.)

Kaba was subsequently charged with refusing a chemical test under § 31-27-2.1. The charge was sustained on the second day of trial, July 24, 2015. An appeal was filed on August 3, 2015 and heard on October 28, 2015.

### **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 Mut. Ins. 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 Envtl. 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." Id. 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 constituted an abuse of discretion, was affected by error of law, in violation of statutory provisions, and not supported by reliable, probative, and substantial evidence on the whole record. Specifically, Appellant claims that (1) the Trial Magistrate exceeded his authority by litigating for the State; (2) the State failed to prove the certification of the breathalyzer; (3) a negative inference should be drawn in

favor of the State because the video surveillance provided to Appellant lacked audio and depiction of the refusal; and (4) the decision was erroneous because there was insufficient evidence to connect the Appellant to the accident scene.

### **I. Trial Magistrate's Exercise of Authority**

Appellant argues that the Trial Magistrate exceeded his role as a neutral fact finder by advocating on behalf of the State. Specifically, Appellant argues that the Trial Magistrate “guided and coached” Officer Torres’ testimony and solicited responses that assisted the State in meeting its burden of proof. (Notice of Appeal, Summons No. 15408500199, at 2.)

It is well settled that a judge does not become an advocate by merely posing questions to witnesses in a “meticulous, impartial manner.” State v. LaRoche, 683 A.2d 989, 1001 (R.I. 1996) (citing State v. McKenna, 512 A.2d 113 (R.I. 1986); R.I. R. Ev. 614(b)). The trial justice has the discretion to elicit testimony that will clarify any confusion caused by prior examination. See State v. Figueras, 644 A.2d 291, 293 (R.I. 1994) (citing State v. Giordano, 440 A.2d 742, 745 (R.I. 1982)); see also State v. Jimenez, 882 A.2d 549, 554 n.8 (R.I. 2005). In addition, even if a trial justice exceeds his or her authority, the error is harmless if the justice’s overall demeanor is neutral and impartial. See id. at 294.

Upon a detailed review of the trial transcript, the record reveals that the Trial Magistrate posed several questions to Officer Torres. However, the vast majority of such questions were asked in an attempt to clarify the Officer’s testimony.<sup>2</sup> In addition, these questions were only

---

<sup>2</sup> See, e.g., 07/17/2015, Tr. 10:8-16 (clarifying whether Officer Torres made six DUI stops or arrests); 16:21-23 (clarifying the location of the telephone pole); 22:13-20 (clarifying Appellant’s response when asked whether he had any physical impairments that would make it difficult to complete a field sobriety test); 56:18-22 (clarifying testimony on who determined that Appellant did not need medical attention at the scene); 73:6-12 (clarifying whether Officer Torres was testifying to the first or second sample of breath); 92:6-18 (clarifying the registration

asked after counsel proceeded to a new topic and it was clear that the confusion would not be resolved. See Giordano, 440 A.2d at 745 (stating that the trial justice “should first allow counsel every opportunity to refine the witness’s testimony”).

While recapping the sequence of events, the Trial Magistrate did question Officer Torres about matters that were not raised on either direct, cross, or re-direct examination. See 07/17/2015, Tr. 92:22-96:19. Specifically, the Trial Magistrate inquired about the tone that the breathalyzer emits when reading a breath and whether the breathalyzer emitted a tone when the Appellant attempted to blow into the breathalyzer. The testimony revealed that the breathalyzer was initially emitting a tone but stopped when the Appellant began blowing into his hand. The record evidences that the Trial Magistrate was attempting to eliminate confusion as to whether this case was one of refusal or insufficient reading. 07/17/2015, Tr. 93:17-20 (“And if it does not emit the tone, it means that the individual is not blowing appropriately, correct?”). While this line of questioning inquired into details that were not discussed on direct or cross examination, the Trial Magistrate remained an overall neutral and impartial demeanor throughout the trial. Compare Figueras, 644 A.2d at 294 (holding the error harmless because the judge was neutral overall, even though it appeared at points that the judge assumed the defendant was the murderer), with State v. Nelson, 982 A.2d 602, 617-18 (R.I. 2009) (holding that the judge’s errors were reversible because the judge “hammer[ed] in” arguments that were already clear on the record). The Trial Magistrate also found Officer Torres highly credible, and Officer Torres testified extensively as to the chain of events that occurred in regards to Appellant’s refusal. See 07/12/2015, Tr. 116:6-122:6. Even if we were to assume the questioning was improper, substantial rights of the Appellant were not prejudiced because there is no evidence that the

---

on the vehicle and whether the defendant ever reported the vehicle stolen); 97:21-98:8 (clarifying the time it takes to recalibrate a breathalyzer).

questions posed by the Trial Magistrate improperly influenced his decision in light of the overwhelming evidence against the Appellant.

## **II. Certification of the Breathalyzer**

Appellant further argues that the State was required to introduce evidence that the breathalyzer was certified and properly calibrated at the time of its use. In relying on this argument, Appellant claims that this evidence was necessary to rebut the allegation that Appellant provided a deficient breath.

Appellant was charged under § 31-27.2-1 for refusing to submit to a chemical breathalyzer test. Whether the breathalyzer was certified or calibrated is irrelevant to this case as the Appellant refused to take the test. The Trial Magistrate also made this point clear during trial. See 07/17/2015, Tr. 58:23-60:20. To the extent that Appellant claims that this case should have been categorized as an insufficient breath sample case, as opposed to a refusal, such an argument is unavailing. Even assuming that Appellant originally blew into the breathalyzer correctly, Appellant refused to continue with the test when directed by Officer Torres to blow a second sample of air. Appellant's reasoning for refusing to submit to the test is immaterial. He refused to complete the chemical test, and therefore, the certification or calibration of the breathalyzer is not relevant to our analysis. The omission of such evidence was not in violation of constitutional or statutory provisions. Nor were the substantial rights of the Appellant prejudiced.

## **III. Video Surveillance**

Appellant urges this Court to draw a negative inference against the State. In Appellant's opinion, the State failed to preserve relevant video surveillance of the refusal that contained audio.

Appellant received video surveillance from the Pawtucket Police Department in the District Court. The video provided did not contain audio or depict the refusal. Clovis Gregor (Gregor), Appellant's counsel, claims that he was assured that no other video existed other than the one provided. See 07/17/2015, Tr. 82:5-10. Nevertheless, Appellant filed a discovery request in the Traffic Tribunal on March 25, 2015 for all relevant documents. (Traffic Trib. R. P. 11.) The State did not produce any additional videos because it did not have any videos in its possession. Therefore, Gregor did not move to compel discovery of any additional videos because he believed that the videos did not exist and was informed by the State that any relevant information would be provided. See 07/17/2015, Tr. 81:16-82:10.

Under Rule 11(e) of the Rhode Island Traffic Tribunal Rules, “[a] motion or written request [for discovery] shall be made only within fourteen (14) days after the first appearance or at such reasonable later time as the court may permit.” Appellant was arraigned on January 21, 2015. Therefore, a discovery request must have been made to the Traffic Tribunal by February 4th. Appellant's discovery request of March 25, 2015 was well beyond the deadline provided in Rule 11(e), rendering it untimely. The request was almost two months past the deadline, and Appellant has not presented any evidence to justify this delay. See Traffic Trib. R. P. 11(e). Counsel merely claims that he relied on the Pawtucket Police Department's statement that the video provided was the only video in existence. Despite this assertion, Appellant did proceed to file a discovery request regardless of the Department's assertions. In any event, the Appellant's discovery request is untimely and a violation of the requirements of Rule 11.

Furthermore, even if Appellant's request was timely, Appellant has no evidence that the video exists or ever existed in order to support his conclusion that the video was improperly withheld or destroyed. See City of Woonsocket v. DeBlois, T13-0017 (RITT 2016). “The

doctrine of spoliation provides that ‘the deliberate or negligent destruction of relevant evidence by a party to litigation may give rise to an inference that the destroyed evidence was unfavorable to that party.’” McAdam v. Grzalczyk, 911 A.2d 255, 261 (R.I. 2006) (quoting Mead v. Papa Razzi Restaurant, 840 A.2d 1103, 1108 (R.I. 2004); Tancrelle v. Friendly Ice Cream Corp., 756 A.2d 744, 748 (R.I. 2000)). Appellant first raised the issue that another video surveillance tape may exist at trial. See Traffic Trib. R. P. 11(e). He never filed a motion to compel, nor did he present any evidence to justify his sudden assertion at trial that a video must exist. The fact that the Pawtucket Police Department has video cameras is insufficient to support Appellant’s claims that there must be a video with audio or that the refusal must have been recorded. See Tri-County Motors, Inc. v. Am. Suzuki Motor Corp., 494 F. Supp. 2d 161, 177 (E.D.N.Y. 2007) (“Such speculative assertions as to the existence of documents do not suffice to sustain a motion for spoliation of evidence.”). The State has indicated that it has never seen another video, nor does it have possession of any video surveillance. See 07/17/2015, Tr. 87:2-16. In fact, the State did not even have the opportunity to review the video in Appellant’s possession until trial. See 07/24/2015, Tr. 6:13-20. Appellant has failed to produce even a scintilla of evidence that another video exists. Accordingly, the fact that the Trial Magistrate did not draw a negative inference in favor of the State is not affected by error of law.

#### **IV. Sufficiency of Evidence**

Appellant claims that there was insufficient evidence presented at trial in order connect the Appellant to the alleged accident scene. In addition, Appellant claims that there was contradicting evidence as to whether the Appellant was operating a motor vehicle. In essence, Appellant claims that the Trial Magistrate’s decision was “clearly erroneous in view of the reliable, probative, and substantial evidence on the whole record.” We disagree.

Officer Torres testified that the fluid leaking from the Appellant's vehicle trailed to the telephone pole where the accident occurred. See 07/17/2015, Tr. 12:4-6; 12:18-20; 12:5-12; 15:17-16:2. Moreover, Officer Torres testified that wood chips were found in the bumper of Appellant's vehicle, and car particles were found beside the telephone pole. See 07/17/2015, Tr. 13:10-12; 16:18-20. Finally, no evidence was introduced that another individual was found at the scene that could have been operating the vehicle. Officer Torres found the Appellant in his vehicle alone, while sitting in the driver's seat. See 07/17/2015, Tr. 13:23-14:14. The fact that the air bags were deployed also indicates that the Appellant's vehicle was involved in a collision. See id. In light of the above testimony, we find that there is sufficient evidence to connect the Appellant's vehicle to the accident scene and that the Appellant was operating the motor vehicle at the time.

In regards to the contradicting evidence, Officer Torres testified as to why he supplemented his original police report. He testified that he supplemented the report in order to clarify that the Appellant's vehicle was "crawling" to a halt, as opposed to being stopped. See 07/12/2015, Tr. 12:12:3; 46:1-7. The Appellate 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. The Trial Magistrate determined that Officer Torres was "highly competent" and "extremely credible," see 07/12/2015, Tr. 116:6-122:6, and Appellant barely presented any relevant evidence. In summary, the record contains sufficient evidence to find that Appellant struck a telephone pole while operating his vehicle, subsequently driving up the road before arriving at a halt. In light of the above evidence presented at trial, the Trial Magistrate's decision was supported by reliable, probative, and substantial evidence.

**Conclusion**

This Panel has reviewed the entire record before it. For all the reasons stated above, the members of this Panel are satisfied that the Trial Magistrate’s decision was not an abuse of discretion, affected by error of law, or in violation of statutory provisions. Also, the decision was supported by reliable, probative, and substantial evidence on the whole record. Substantial rights of the Appellant have not been prejudiced. Accordingly, Appellant’s appeal is denied, and the charged violation sustained.

ENTERED:

---

Administrative Magistrate Domenic A. DiSandro, III (Chair)

---

Chief Magistrate William R. Guglietta

---

Judge Edward C. Parker

DATE: \_\_\_\_\_