STATE OF RHODE ISLAND AND PROVIDENCE PLANTATIONS

CRANSTON, RITT **RHODE ISLAND TRAFFIC TRIBUNAL**

STATE OF RHODE ISLAND	:	
	:	
v.	:	**C.A. No. T20-0004**
	:	**19414500837**
STEPHEN J BARNES	:	

DECISION

PER CURIAM: Before this Panel on September 16, 2020—Magistrate Kruse Weller (Chair), Magistrate Goulart, and Magistrate DiChiro, sitting—is Stephen Barnes' (Appellant) appeal from a decision of Administrative Magistrate Joseph A. Abbate (Trial Magistrate) of the Rhode Island Traffic Tribunal, sustaining the charged violation of G.L. 1956 § 31-14-2, "Prima facie limits." The Appellant appeared before this Panel represented by counsel. Jurisdiction is pursuant to § 31-41.1-8.

I

Facts and Travel

On September 19, 2019 Officer Colin Esposito (Officer Esposito) of the Glocester Police Department issued a violation to the Appellant for speeding forty miles per hour in a thirty-five miles per hour zone on Putnam Pike. (Tr. 13, 16); *see* Summons No. 19414500837.

The Appellant pled not guilty to the charged violation on October 25, 2019, and the matter proceeded to trial on January 24, 2020. *Id.* at 4. At trial, Officer Esposito testified that on September 19, 2019, he was at a fixed traffic post located at 303 Putnam Pike when he observed a "white pickup truck traveling westbound at a high rate of speed." *Id.* at 11, 12. Officer Esposito stated that the area in which the vehicle was traveling had a posted speed limit of thirty-

five miles per hour. *Id.* at 10. Moreover, Officer Esposito testified that at the time he observed the vehicle, "his radar registered that the vehicle was traveling at a speed of sixty miles per hour." *Id.* at 12. At that point, Officer Esposito "waited for the Appellant to pass, pulled out westbound on 44, conducted a motor vehicle stop," and issued Appellant a citation for violating § 31-14-2. *Id.* at 13. However, Officer Esposito explained that "he charged Appellant with five over, forty miles per hour, in a thirty-five-miles per hour zone, even though Appellant's actual speed was sixty." *Id.*

Officer Esposito further testified about his training and experience and stated that he attended the Rhode Island Municipal Police Academy. *Id.* at 6. At the Academy, Officer Esposito explained that "he was trained in speed detection and the use of a radar." *Id.* Specifically, "the training consisted of the use of the radar, how to calibrate the radar, and driving with an instructor to learn how to properly be able to estimate speeds while driving." *Id.* Officer Esposito testified that on September 19, 2019, "he conducted testing on the internal radar itself, and externally with the tuning forks." *Id.* at 12. The tests indicated that the radar was accurate. *Id.*

At the end of trial, the Appellant made a motion to dismiss. *Id.* at 25. The Trial Magistrate denied the motion and found "there was sufficient evidence presented with regard to the training, use, and testing of the radar equipment . . . and that Officer Esposito testified that before his shift that day, he calibrated the radar and it was in good working condition." *Id.* at 26-27. Appellant further raised several arguments, including a constitutional violation and that he was prejudiced from Officer Esposito's testimony about the actual speed of the vehicle. *Id.* at 32-33. However, the Trial Magistrate ultimately found the Appellant guilty. *Id.* at 33. In his ruling, the Trial Magistrate found the testimony of Officer Esposito to be credible. *Id.* at 33. The Trial

Magistrate was satisfied based on the officer's testimony that "he was trained in the use of radar equipment and calibration and that the equipment was in good working order on that day based on internal and external calibration." *Id.* at 31. Based on that credible testimony, the Trial Magistrate found that the "Town provided sufficient clear and convincing evidence that the motorist was in violation of G.L. § 31-14-2." *Id.* at 33. As such, the court imposed the minimum sanction, $95 plus court costs. *Id.* at 35. The Appellant timely appealed.

II

Standard of Review

Pursuant to § 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 prejudiced 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." *Id.* (citing *Envtl. Sci. 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.* Otherwise, it must affirm the hearing judge's (or magistrate's) conclusions on appeal. *See Janes*, 586 A.2d at 537.

III

Analysis

On appeal, Appellant asserts five main arguments: (1) that the Trial Magistrate improperly prevented him from asserting his constitutions protections; (2) that the court violated procedural rules by allowing the officer to testify as to the actual speed of the vehicle; (3) the court improperly allowed the officer to utilize prosecutorial discretion; (4) that there was insufficient evidence as to the posted speed limit; and (5) that the officer failed to properly test his radar gun. *See* Appellant's Notice of Appeal.

A

Constitutional Protections

The Appellant asserts that his constitutional rights were violated because Officer Esposito was parked on private property when he observed the Appellant's speeding violation. Further, the Appellant contends that the Trial Magistrate was incorrect in his interpretation and application of the Constitution by not allowing the Appellant to present the defense because the Appellant did not first notify the Attorney General. *See* RIGL § 9-30-11 "Uniform Declaratory Judgments Act." Despite the Trial Judge's reference to the statute, the statute is not applicable

here because Appellant is not challenging the constitutionality of a statute but rather arguing his Fourth Amendment constitutional protections were violated as a result of the stop.

The Fourth Amendment of the United States Constitution provides "the right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated." Moreover, Article I, Section 6 of the Rhode Island Constitution provides "the right of the people to be secure in their persons, papers, and possessions, against unreasonable searches and seizures, shall not be violated; and no warrant shall issue . . ." The Appellant argues based on *Collins v. Virginia*, that Officer Esposito committed a technical trespass and thus cannot be rewarded by being allowed to conduct surveillance that leads to an arrest or an infraction. 138 S. Ct. 1663, 1672 (2018); *see* Appellant's Mem. App. 2.)

However, *Collins* is not applicable in this case. In *Collins*, the Supreme Court found the officer trespassed on to the curtilage of the defendant's home to conduct an illegal search of the defendant's automobile and no exceptions applied. 138 S. Ct. at 1675. Here, Officer Esposito did not trespass on to the Appellant's property. *See id.* Appellant was traveling on a public way. The fact that Officer Esposito was on private property when he observed the Appellant traveling on a public way is irrelevant, as the Appellant does not have any Fourth Amendment protections or rights as to another person's private property.

As such, the Fourth Amendment protections the Appellant is attempting to assert are inapplicable in this case and this Panel finds that the Trial Magistrate's decision was not improper.

B

Procedural Rules

The Appellant further argues the court improperly applied procedural rules during trial when the Trial Magistrate allowed the police officer to testify as to the actual speed. At trial, Officer Esposito testified as to what occurred during the traffic stop, which included testimony that he observed that Appellant was traveling at a speed of sixty miles per hour. (Tr. 13, 14). The Appellant objected to this testimony and indicated he was not aware of this fact and would be prejudiced by this testimony. *Id.* at 13. However, the Trial Magistrate noted that the Officer was able to testify as to his observations and further, the summons issued to the Appellant contained the actual speed of sixty miles per hour, so the Appellant would have been aware of this fact. *See id.*[1]

To prove a violation, the prosecution must present evidence that satisfies the "clear and convincing evidence" standard. *See* R.I. Traffic Tribunal Rule of Procedure 17(a). This would include testimony from the police officer about the traffic stop. Officer Esposito testified that he observed the Appellant's vehicle traveling sixty miles per and conducted a motor vehicle stop. (Tr. 13). The Trial Magistrate found that the Appellant was not prejudiced by this testimony because Officer Esposito was testifying as to what he observed prior to issuing the ticket and that notwithstanding, the prosecution need only provide evidence to prove the elements of the violation as charged. *Id.* at 14. Needless to say, testimony that the motorist was traveling sixty miles per hour necessarily requires that he was traveling at least forty miles per hour, as he was

[1] In the original summons issued to the Appellant, the zone speed, the charged speed and the "police use" speed are listed. The "police use" number is typically the actual speed that the motorist was traveling. As a clerical matter, when the ticket is populated into the electronic case management system to create an e-citation, the charged speed on the ticket is incorrectly populated in the field named actual speed, which may have led to the confusion.

charged. Further, the Appellant does not cite nor reference any procedural rule that he believes was violated by the Trial Magistrate in relation to the admission of this testimony. The Trial Magistrate's factual findings are treated with deference and are not to be disturbed by the Appeals Panel unless the Trial Magistrate "overlooked or misconceived relevant and material evidence or was otherwise clearly wrong." *Brown v. Jordan*, 723 A.2d 799, 800 (R.I. 1998).

Thus, after a review of the record, this Panel is satisfied with the Trial Magistrate's ruling and finds the court did not violate any procedural rules.

C

Prosecutorial Discretion

The Appellant asserts that Officer Esposito did not have prosecutorial discretion to reduce the speed charged on the citation, but rather seems to assert that the Appellant must be charged with the actual speed because the officer lacks the discretion to do so. The Appellant contends that "the Attorney General's Office is the office to have prosecutorial discretion, not the officer." (Tr. 14).

The Appellant relies on the case of *State v. Russell*, where the court in *Russell* found that a police detective did not have the authority to enter into a binding agreement of nonprosecution after the case was charged without the consent of the Attorney General. 671 A.2d 1222, 1223 (R.I. 1996) (Emphasis added). The circumstances in the present case are completely different.

A motor vehicle stop is reasonable if the officer has probable cause to believe that a traffic violation has occurred. *State v. Quinlan*, 921 A.2d 96, 106 (R.I. 2007). The officer has discretion after observing a traffic violation to decide whether to charge the motorist. It is inherent for a law enforcement officer to have the discretion to issue a summons during a traffic stop, or to not charge the motorist and simply issue a verbal warning or to decrease or charge the

motorist with a lesser offense. There is simply no authority that the Appellant has provided that a police officer must charge a motorist with the actual speed when issuing a violation. Furthermore, the police officer's conduct in *Russell* was after the defendant was already charged and was in the context of a criminal matter, not a traffic violation. *See* 671 A.2d at 1223.

Therefore, this Panel rejects Appellant's argument and finds that Officer Esposito had the discretion to issue the instant summons as charged and there was no error made by the Trial Judge.

D

Insufficient Evidence

The Appellant also asserts there was insufficient evidence to establish that the speed limit was thirty-five miles per hour on Putnam Pike at the time of the violation. Our Supreme Court has held that reviews by an appeals panel are "confined to a reading of the record." *Link v. State*, 633 A.2d 1345, 1348 (R.I. 1993). In reviewing the record, "the appeals 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." *Id.* (citing § 31-43-4.6).

Here, the record reveals that Officer Esposito testified at trial that the speed limit where the violation occurred on Putnam Pike was thirty-five miles per hour as evidence by a speed limit sign which was posted and visible when traveling westbound. (Tr. 10, 11).

While Appellant presented a photo that indicated the speed limit where the violation occurred was forty-five miles per hour, the photograph was date-stamped December 22, 2019, three months after the violation occurred. *Id.* at 23. Officer Esposito acknowledged the speed limit was subsequently changed to forty five miles per hour, but he testified that the speed limit

on the day in question was thirty-five miles per hour. *Id.* at 24. The Appellant did not proffer any evidence to the contrary as it relates to the date of the violation.

The Trial Magistrate found Officer Esposito's testimony to be credible and that sufficient evidence was presented that established the speed limit was thirty-five at the time of the violation. (Tr. 33). Since the speed limit in the area where the violation occurred is a question of fact to be determined by the Trial Magistrate, and on appeal the Trial Magistrate's factual findings are treated with deference, this Panel rejects the Appellant's claim that there was insufficient evidence to prove the speed limit at the time of the violation. *See Brown*, 723 A.2d at 800.

E

Radar Testing

Lastly, Appellant asserts the prosecution failed to present clear and convincing evidence that Officer Esposito properly tested his radar gun.

In order for a radar unit reading to be admissible at trial, the testifying officer must satisfy two preliminary requirements: "the operational efficiency of the radar unit was tested within a reasonable time by an appropriate method," and "testimony setting forth [the officer's] training and experience in the use of a radar unit." *State v. Sprague*, 113 R.I. 351, 355-357, 322 A.2d 36, 39-40 (1974). Moreover, "radar speed meter readings are admissible without a prior showing of the reliability of the [device] that was used to test the accuracy of the radar unit." *Id.* at 357, 40.

This Panel has previously ruled that calibration nine months earlier was okay as long as it was within a one year calibration testing period. *East Providence v. DaSilva*, RITT No. M16-0002 (RITT 2016). Additionally, this Panel has also found that testimony that the radar gun was

calibrated before, during and after stop without specifying method of calibration was sufficient to demonstrate reliability of reading. *State v. Lowell*, RITT No. T15-0035 (RITT 2016).

At trial Officer Esposito testified as to the operational efficiency of the radar unit that he used to determine the speed of Appellant's vehicle. (Tr. 12). It is clear that radar unit was "tested within a reasonable time and by an appropriate method" as Officer Esposito stated that he calibrated the radar "internally and externally and that the radar was accurate." *Sprague*, 113 R.I. at 355-357, 322 A.2d at 39-40; (Tr. 12). Officer Esposito also stated that he was "trained in the use of the radar at the Rhode Island Municipal Police Academy" which satisfies the second prong of *Sprague*. *Id.* at 355-57, 39-40; (Tr. 6).

The Trial Magistrate considered Officer Esposito's testimony and found the testimony to be credible. (Tr. 33). In doing so, the Trial Magistrate determined the radar gun was calibrated before the stop and in good working condition. *Id.* at 31. As this Panel "lacks the authority to assess witness credibility or to substitute judgment for that of the hearing judge concerning the weight or evidence on questions of fact," this Panel will not disturb the Trial Magistrate's factual findings or credibility determinations. *Link*, 633 A.2d 1348.

Therefore, based on a review of the record, this Panel is satisfied that the Trial Magistrate did not overlook or misconceive material evidence, and the decision was supported by reliable probative, and substantial evidence. *See* § 31-41.1-8(f)(5).

IV

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 not clearly erroneous in view of the reliable, probative, and substantial evidence of the whole record. *See* § 31-41.1-8(f)(5). The

substantial rights of the Appellant have not been prejudiced. Accordingly, Appellant's appeal is denied, and the charged violation is sustained.

ENTERED:

_____
Magistrate Erika Kruse Weller (Chair)

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Magistrate Alan Goulart

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Magistrate Michael DiChiro, Jr.

DATE: _____