

STATE OF RHODE ISLAND AND PROVIDENCE PLANTATIONS

CRANSTON, RITT

RHODE ISLAND TRAFFIC TRIBUNAL

TOWN OF NORTH PROVIDENCE

v.

EUGENE SMITH

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C.A. No. M14-0003
13407502578

DECISION

PER CURIAM: Before this Panel on March 19, 2014—Magistrate Goulart (Chair, presiding), Magistrate DiSandro III, and Magistrate Abbate, sitting—is Eugene Smith’s (Appellant) appeal from a decision of the Town of North Providence Municipal Court, sustaining the charged violations of G.L. 1956 § 31-16-5, “Turn signal required.” Appellant appeared before this Panel pro se. Jurisdiction is pursuant to § 31-41.1-8.

Facts and Travel

On December 5, 2013, an Officer of the North Providence Police Department (Officer) charged Appellant with the aforementioned violation of the motor vehicle code. Appellant contested the charge, and the matter proceeded to trial on January 13, 2014.

At trial, the Officer testified that on December 5, 2013, at approximately 1:26 pm, he was at a fixed traffic post in front of Twin Pizza in the Town of North Providence. (Tr. at 2.) The Officer indicated that at that time, he observed that Appellant’s vehicle had tinted windows and he began following Appellant’s vehicle as it proceeded west on Mineral Spring Avenue. Id. Thereafter, the Officer testified that he observed Appellant’s vehicle “take a left hand turn towards Betty[’s] Restaurant heading south on Charles Street without using the vehicle turn signal.” Id. Moreover, the Officer indicated that he had a clear and unobstructed view of

Appellant make a left hand turn with his vehicle without using the turn signal. Id. At that point, the Town's Solicitor inquired whether "there [was] any other traffic in the vicinity that may have been affected by that movement" and the Officer responded in the negative. Id. Next, the Officer testified that Appellant took a right hand turn off of Charles Street without using his turn signal. (Tr. at 3.)

After the Town's Solicitor finished his direction examination of the Officer, Appellant proceeded to cross-examine the Officer. Id. In particular, Appellant inquired whether the Officer had any video surveillance of the incident in question and the Officer responded that he did not have any video footage. (Tr. at 3-4.) Thereafter, Appellant testified that there were actually five cars between himself and the Officer's police cruiser. (Tr. at 5-6.) In addition, Appellant testified that he used his turn signal for each turn involved in the instant matter. (Tr. at 6.)

Subsequently, the trial judge issued his decision sustaining the charged violation. (Tr. at 9.) Specifically, the trial judge credited the Officer's testimony that Appellant had initiated two turns without using his turn signal on both occasions. Id. Aggrieved by the trial judge's decision, Appellant timely filed the instant 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:

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 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." 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 judge's decision to sustain the charged violation was affected by error of law and clearly erroneous due to the lack of probative and substantial evidence on the whole record. In particular, Appellant asserts that the facts as presented by the Officer are insufficient to meet the statutory requirements of § 31-16-5. In

addition, Appellant asserts that the trial judge erred by crediting the Officer's testimony over his own testimony.

I

Section 31-16-5

Appellant asserts that the facts as presented by the Officer are insufficient to meet the statutory requirements of § 31-16-5. Section 31-16-5 reads as follows:

No person shall turn a vehicle at an intersection unless the vehicle is in proper position upon the roadway as required in §§ 31-16-2 and 31-16-3, or turn a vehicle to enter a private road or driveway, or otherwise turn a vehicle from a direct course or move right or left upon a roadway, unless and until the movement can be made with reasonable safety. No person shall so turn any vehicle without giving an appropriate signal in the manner described in this chapter in the event any other traffic may be affected by the movement. Violations of this section are subject to fines enumerated in § 31-41.1-4. See § 31-16-5

The record indicates that the Officer testified that he did not believe that any other traffic was affected by Appellant's moving his vehicle without utilizing the proper turn signal. See Tr. at 2. As a result, Appellant avers that the turn was not in violation of the statute because it was necessary for the Officer to testify that Appellant's turn had an affect on traffic. In addressing Appellant's contention that a safety assessment by the Officer was necessary, it is important for this Panel to note that a motorist may be in violation of § 31-16-5 for two separate and distinct types of movement. See § 31-16-5; State of Rhode Island v. Robert Plasse, C.A. No. T 10-0081, March 29, 2011, R.I. Traffic Trib. The first situation is reflected by language within § 31-16-5, which states that

No person shall turn a vehicle at an intersection unless the vehicle is in proper position upon the roadway as required in §§ 31-16-2 and 31-16-3, or turn a vehicle to enter a private road or driveway, or otherwise turn a vehicle from a direct course or move right or

left upon a roadway, unless and until the movement can be made with reasonable safety. See § 31-16-5 (emphasis added).

It is well-established that the clear and unambiguous language of the above-referenced portion of § 31-16-5 requires a police officer to testify that he made a safety assessment and found that the motorist turned his vehicle while it was unsafe to do so. See § 31-16-5. However, this portion of § 31-16-5 is not implicated by the facts of this case.

In the instant matter, Appellant was issued a citation for violating § 31-16-5 because he failed to utilize his turn signal. The relevant language of that part of § 31-16-5 reads that “[n]o person shall so turn any vehicle without giving an appropriate signal in the manner described in this chapter in the event any other traffic may be affected by the movement. See § 31-16-5 (emphasis added). This is not the first time that this Panel has been confronted with whether or not this portion of § 31-16-5 requires a safety assessment by the police officer. We have previously held that “[t]he words ‘may affect traffic’ do not require a safety assessment by the Officer.” Plasse, C.A. No. T 10-0081. The logic behind this ruling is that the word “may” is permissive in nature whereas the word “shall” sounds in a strict or necessary requirement.¹ See Lacorbiniere v. Michaelson, C.A. 76-4166, 1980 WL 336031 (R.I. Super. Feb. 29, 1980) (citing Nolan v. Representative Council of City of Newport, 73 R.I. 498, 502, 57 A.2d 730, 732 (1948)) (finding that “the usual and ordinary meaning of the word ‘may’ as used in a statute is permissive and not compulsive”); see also Lexecon Inc. v. Milberg Weiss Bershad Hynes & Lerach, 523 U.S. 26, 35 (1998) (stating that, unlike the word may, the term “shall . . . normally

¹ See MAY, Black's Law Dictionary (9th ed. 2009) (defining “may” as “[t]o be a possibility); May, MERRIAM-WEBSTER, <http://www.merriam-webster.com/dictionary/may> (defining “may” as “used to indicate possibility or probability”); see also SHALL, Black's Law Dictionary (9th ed. 2009) (defining “shall” as “is required to”); Shall, MERRIAM-WEBSTER, <http://www.merriam-webster.com/dictionary/shall> (defining “shall” as “used in laws, regulations, or directives to express what is mandatory”)

creates an obligation impervious to judicial discretion”). Thus in the context of § 31-16-5 the word “may” means that it is possible that the motorists movement affect traffic. See § 31-16-5. It is not requisite that the movement has a definite affect on traffic as would be the case had the Legislature chosen to employ the word “shall” when drafting and enacting the statute. See § 31-16-5.

The situation, implicated by the facts of the case herein, is where a motorist “fails to activate his turn signal in spite of the presence of traffic in the area.” See Plasse, C.A. No. T 10-0081, 5; § 31-16-5. This Panel reaffirms its holding that an officer need not make a safety assessment in order to properly cite a motorist for violating this portion of § 31-16-5, nor must a judge or a magistrate of this Tribunal make specific findings that the turn had an affect on traffic. See Plasse, C.A. No. T 10-0081, 5; State v. Lombardi, 727 A.2d 670, 673 (1994) (holding that any amount of traffic present, however small, provides circumstances sufficient to uphold a violation of § 31-16-5); see also Nolan, 73 R.I. at 502, 57 A.2d at 732; Lexecon Inc., 523 U.S. at 35.

Here, Appellant testified that there were five motor vehicles between himself and the Officer’s police cruiser. See Tr. at 5-6. It is clear from Appellant’s testimony that there were other motor vehicles in in the vicinity of Appellant’s vehicle at the time the Officer testified that he observed Appellant fail to use his turn signal. For these reasons, this Panel finds that Appellant’s own testimony satisfied that requirement that there be some traffic present at the time of the infraction. See Plasse, C.A. No. T 10-0081, 5; § 31-16-5; see also Lombardi, 727 A.2d at 673. This Panel accepts the trial judge’s legal ruling based upon his findings of fact.

Confining our review to its proper scope, this Panel finds that the trial judge’s decision to sustain the charged violation was supported by reliable, probative, and substantial evidence on

the whole record and not based on an error of law. Specifically, the trial magistrate's decision was based on the testimony of the Officer and Appellant. See Link, 633 A.2d at 1348. Moreover, the trial magistrate's interpretation and application of § 31-16-5 is consistent with the plain meaning of the statute, this Panel previous holdings, and guidance from our Supreme Court. See § 31-16-5; Lombardi, 727 A.2d at 673; Plasse, C.A. No. T 10-0081, 5.

II

Credibility

Additionally, Appellant asserts that the trial judge's decision to sustain the charged violation was an abuse of discretion. Specifically, Appellant argues that the trial judge erred by crediting the Officer's testimony over his own testimony.

In Link, our Supreme Court made clear that 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, 633 A.2d at 1348 (citing Liberty Mutual Insurance Co. v. Janes, 586 A.2d 536, 537 (R.I. 1991)). As the members of this Panel did not have an opportunity to view the live trial testimony of the Officer or Appellant, it would be impermissible to second-guess the trial judge's "impressions as he . . . observe[d] [the Officer and Appellant] [,] listened to [their] testimony [and] . . . determine[ed] . . . what to accept and what to disregard[,] . . . what . . . [to] believe[] and disbelieve[]." Environmental Scientific Corp., 621 A.2d at 206.

After listening to the testimony, the trial judge determined that the Officer's testimony was not only credible, but the testimony was also sufficient to sustain the charged violation. See Tr. at 9. "[The appellate court] [is] not privileged to assess the credibility of witnesses and may not substitute our judgment for that of the trial [magistrate] concerning the weight of the

evidence on questions of fact).” Environmental Scientific Corp., 621 A.2d at 208 (quoting Liberty Mutual Insurance Co. v. Janes, 586 A.2d 536, 537 (R.I. 1991)). In his decision, the trial judge adopted the Officer’s testimony as his findings fact. See Tr. at 9. In addition, the trial judge specifically found that there was at least one motor vehicle in-between Appellant’s vehicle and the Officer’s vehicle. See id. Moreover, the trial judge noted that he credited the Officer’s testimony that he observed Appellant fail to utilize his turn signal on two separate occasions. See id. It is also worth noting that the trial judge listened to Appellant’s testimony, but still determined that the Town had proven each and every element of the charge by clear and convincing evidence. See id.

Confining our review of the record to its proper scope, this Panel is satisfied that the trial judge did not abuse his discretion, and his decision to sustain the charged violation is supported by legally competent evidence. Environmental Scientific Corp., 621 A.2d at 209 (the appellate court] should give great deference to the trial judge’s findings and conclusions unless clearly wrong).

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 supported by the reliable, probative, and substantial evidence of record. This Panel is also satisfied that the trial judge did not abuse his discretion and his decision was not affected by error of law. Substantial rights of Appellant have not been prejudiced. Accordingly, Appellant’s appeal is denied, and the charged violation sustained

ENTERED:

Magistrate Alan R. Goulart

Magistrate Domenic A. DiSandro, III

Magistrate Joseph A. Abbate

DATE: _____