STATE OF RHODE ISLAND AND PROVIDENCE PLANTATIONS

CRANSTON, RITT **RHODE ISLAND TRAFFIC TRIBUNAL**

TOWN OF SMITHFIELD	**:**	
	:	
v.	**:**	**C.A. No. T14-0014**
	:	**13411502467**
MATTHEW CONNOLE (II)	**:**	

DECISION

PER CURIAM: Before this Panel on April 30, 2014—Chief Magistrate Guglietta (Chair, presiding), Magistrate DiSandro III, and Magistrate Abbate, sitting—is Matthew Connole's (Appellant) appeal from a decision of Magistrate Noonan, sustaining the charged violation of G.L. 1956 § 31-20-9, "Obedience to stop sign." The Appellant appeared before this Panel represented by counsel. Jurisdiction is pursuant to § 31-41.1-8.

Facts and Travel

On October 1, 2013, Officer Gary McDole of the Smithfield Police Department (Officer) charged Appellant with the aforementioned violation of the motor vehicle code. The Appellant contested the charge, and the matter proceeded to trial on February 24, 2014.

At trial, the Officer testified that on October 1, 2013, he was at a fixed traffic post at the intersection of Douglas Pike and Douglas Drive in the Town of Smithfield. (Tr. at 4.) At that time, the Officer testified that he observed a silver Hyundai Sonata traveling eastward on Douglas Drive and proceed past the posted stop sign at the intersection of Douglas Circle without coming to complete stop. Id. Moreover, the Officer stated that he had a clear and

unobstructed view of the intersection. Id. Thereafter, the Officer initiated a motor vehicle stop and issued Appellant a citation. Id.

Afterwards, Appellant's counsel asked the Officer about how many feet there were between himself and the stop sign at the time he observed the violation. (Tr.a t 6.) The Officer answered that he was about seventy-five feet away. Id. Next, counsel inquired whether there were any bushes blocking the Officer's view and the Officer responded that the bushes in question did not block his view of Appellant or the stop sign. Id. Furthermore, Appellant's counsel asked if there was any vehicle in front of Appellant vehicle and the Officer responded in the negative. Id. Additionally, counsel asked whether Appellant's vehicle slowed down as it approached the stop sign. Id. The Officer replied that Appellant's vehicle slowed down enough to negotiate the turn, but failed to come to a complete stop. Id.

Subsequently, Appellant testified that he came to a complete stop when he reached the stop sign. (Tr. at 10.) Having heard testimony from the Officer and Appellant, the trial magistrate issued his decision sustaining the charged violation. The trial magistrate highlighted that he found the testimony of the Officer to be credible and stated that he adopted the Officer's testimony as his findings of fact. (Tr. at 11.) In particular, the trial magistrate noted that the Officer had credibly testified that he had a clear and unobstructed view of Appellant commit the violation. Id. In addition, the trial magistrate found that Appellant's continued operation of a motor vehicle poses a substantial safety hazard to people on Rhode Island roads because it was his fourth conviction for a moving violation within one year. Id. As a result, the trial magistrate found Appellant to be in violation of § 31-27-24, "Multiple moving offenses," and suspended Appellant's license for 12 months. (Tr. at 11-12.) Aggrieved by the trial magistrate'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 magistrate's decision was clearly erroneous in view of the reliable, probative, and substantial evidence on the whole record. Specifically, Appellant asserts that the trial magistrate erred by crediting the testimony of the Trooper over his testimony. In addition, Appellant asserts that the trial magistrate's imposition of sanctions, pursuant to § 31-27-24, was an error of law. In particular, Appellant argues that the trial magistrate could not consider two of the convictions he used to determine that § 31-27-24 was applicable because those convictions have been appealed to this Panel and may be ultimately be appealed to the Sixth Division of the District Court.

I

Credibility

Appellant contends that the trial magistrate's decision to sustain the charge was clearly erroneous. In particular, Appellant asserts that the trial magistrate erred when he credited the Officer's testimony over her own testimony.

In actions tried upon the facts without a jury, the trial justice sits as a trier of fact as well as of law, and consequently, the trial justice weighs and considers the evidence, passes upon the credibility of the witnesses, and draws proper inferences. See Parella v. Montalbano, 899 A.2d 1226 (R.I. 2006). In weighing and considering the evidence, the "trial justice has wide discretion in determining the relevancy, materiality, and admissibility of offered evidence . . . ." Accetta v. Provencal, 962 A.2d 56, 60 (R.I. 2009) (quoting State v. Lora, 850 A.2d 109, 111 (R.I. 2004)).

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 [magistrate] 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 magistrate determined that the Officer's testimony was not only credible, but the testimony was also sufficient to sustain the charged violation. See Tr. at 11. "[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 magistrate adopted the Officer's testimony has his findings of fact. See Tr. at 11. In particular, the trial magistrate noted that the Officer had credibly testified that he had a clear and unobstructed view of Appellant commit the violation. See id. Confining our review of the record to its proper scope, this Panel is satisfied that the trial magistrate's 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).

II

Application of Section 31-27-24

Appellant asserts that the trial magistrate's imposition of sanctions, pursuant to § 31-27-24, was an error of law. Specifically, Appellant argues that the trial magistrate could not consider two of the convictions he used to determine that § 31-27-24 was applicable to Appellant because those convictions have been appealed to this Panel and may be ultimately be appealed to the Sixth Division of the District Court. Moreover, Appellant further argues that this jurisdiction should adhere to the rule that prior convictions on appeal may not be used for sentence enhancement. However, this Panel would be less than candid if it did not state that Appellant has failed to provide this Panel with any legal authority to support his position. Regardless, in order to ascertain whether prior convictions on appeal may be used for sentence enhancement under § 31-27-24, this Panel must interpret the relevant language of that provision.

Section 31-27-24, reads, in relevant part, that

> "[e]very person *convicted* of moving violations on four (4) separate and distinct occasions within an eighteen (18) month period may be fined up to one thousand dollars ($1,000), and shall be ordered to attend sixty (60) hours of driver retraining, shall be ordered to perform sixty (60) hours of public community service, and the person's operator license in this state may be suspended up to one year or revoked by the court for a period of up to two (2) years. (emphasis added).

The merits of Appellant's contention is dependent on this Panel's interpretation of the word "conviction" as used in § 31-27-24 and the applicability of the doctrine of finality to sentence enhancement. This Panel finds that the word "convicted" in § 31-27-24 means "[a]n adjudication by a court of competent jurisdiction that the defendant committed a [offense] constitutes a conviction." See Model Penal Code § 7.05, "Definition of Conviction." Equipped with this definition or a close parallel thereof, other jurisdictions have found that a pending appeal on a prior conviction does not preclude its use for enhancement of sentence. See Whack

v. State, 338 Md. 665, 682-83, 659 A.2d 1347, 1355 (1995) (holding that mandatory or enhanced sentencing provisions are triggered by a judgment and sentence on a prior crime and are not stayed by the fact that the judgment is on appeal)..

For example, in State v. Heald, 382 A.2d 290 (Me.1978), the Supreme Judicial Court of Maine addressed the question of whether the phrase "had been before convicted" in an enhanced penalty statute required a final conviction. In rejecting a finality requirement, the court concluded that "[t]he legislative purpose would be frustrated if the statute applied only to previous convictions which later became final judgments. Indeed, the recidivist who appealed his previous conviction would escape the penal additive of the habitual offender statute, notwithstanding that his previous conviction was affirmed on appeal." Id. at 299.

Similarly, in People v. District Court, Etc., 192 Colo. 375, 559 P.2d 235 (1977), the Supreme Court of Colorado declined to read a finality requirement into the phrase "prior conviction" as used in an enhanced penalty statute for habitual criminals. The court reasoned that "[i]f prior convictions on appeal were not included, many recent felony convictions might be effectively exempted from the operation of the statute. This would be clearly inconsistent with the obvious purpose of the statute, which is to punish repeat offenders." Id. 559 P.2d at 236; see also Glick v. State, 286 Ark. 133, 689 S.W.2d 559, 562 (1985) ("not using a felony conviction for enhancement purposes until every possible remedy was exhausted would result in the rare application of the habitual offender statutes.").

Additionally, the Supreme Court of Mississippi considered the use of former convictions pending on appeal for purposes of sentence enhancement in Jackson v. State, 418 So.2d 827 (Miss.1982), and refused to read a finality requirement into the statute. The court noted that "[t]he intent of the Legislature in enacting an habitual criminal statute was to protect the public

from those criminals who are apparently indifferent to the normal mode of punishment." Id. at 832. The court also noted that acceptance of the appellant's contention that finality be required would "encourage frivolous appeals." Id.[1] We find that the finality of the appellate process should not preclude the imposition of an enhanced penalty. The relief sought by Appellant should be by Motion to Stay pending appeal rather than by prohibiting the imposition of sanctions by the trial court.

Finally, this Panel recognizes that "[p]roceedings to determine whether a driver is a habitual traffic offender are civil, not criminal, in nature, and such statutes are to be liberally construed to effectuate their purpose to remove dangerous drivers from the highway, in the interest of public safety." 7A Am. Jur. 2d Automobiles § 143 (May 2014). Accordingly, this Panel holds that prior convictions of this Tribunal on appeal with no final decision from the Appeals Panel do not prevent the imposition of sentence enhancement under § 31-27-24.[2]

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 supported by the reliable, probative, and substantial evidence of record. Substantial rights of Appellant have not been prejudiced. Accordingly, Appellant's appeal is denied, and the charged violation sustained.

[1] It is worth noting for purposes of this discussion that several other jurisdictions have approved the use of a prior conviction pending appeal as the predicate for an enhanced penalty. See e.g., Birchett v. State, 291 Ark. 379, 381-82, 724 S.W.2d 492, 493 (1987); Prock v. State, 471 So.2d 519 (Ala.Crim.App.1985); Wright v. State, 656 P.2d 1226 (Alaska Ct.App.1983); State v. Swartz, 140 Ariz. 516, 683 P.2d 315 (Ct.App.1984); People v. Sarnblad, 26 Cal.App.3d 801, 103 Cal.Rptr. 211 (Ct.App.1972); Maisonet v. State, 448 N.E.2d 1052 (Ind.1983); People v. Morlock, 234 Mich. 683, 209 N.W. 110 (1926).

[2] This question may be moot, due to the Rhode Island Traffic Tribunal Appellate Panel's decision in Connole (I).

ENTERED:

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Chief Magistrate William R. Guglietta

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Magistrate Domenic A. DiSandro, III

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Magistrate Joseph A. Abbate

DATE: _____