State of Arizona

COMMISSION ON JUDICIAL CONDUCT

Disposition of Complaint 14-367

Judge:

Complainant:

ORDER

In three intertwined complaints, the complainant alleged that a civil traffic hearing officer, a superior court commissioner, and a superior court judge all improperly ruled against him on a speeding ticket.

The responsibility of the Commission on Judicial Conduct is to impartially determine if the judges and hearing officer engaged in conduct that violated the provisions of Article 6.1 of the Arizona Constitution or the Code of Judicial Conduct and, if so, to take appropriate disciplinary action. The purpose and authority of the commission is limited to this mission.

The commission does not have jurisdiction to review the legal sufficiency of the judicial officers' rulings. In addition, the commission found no evidence of ethical misconduct and concluded the judges and hearing officer did not violate the Code in this case. Accordingly, the complaint is dismissed in its entirety, pursuant to Rules 16(a) and 23.

Dated: December 10, 2014

FOR THE COMMISSION

/s/ George A. Riemer

George A. Riemer
Executive Director

Copies of this order were mailed to the
complainant, the judges and the hearing officer
on December 10, 2014.

This order may not be used as a basis for disqualification of a judge.

CONFIDENTIAL
State of Arizona
Commission on Judicial Conduct
1501 W. Washington Street, Suite 229
Arizona 85007

FOR OFFICE USE ONLY

2014-367

COMPLAINT AGAINST A JUDGE

Name: _____ **Judge's Name:** _____

Instructions: Use this form or plain paper of the same size to file a complaint. Describe in your own words what you believe the judge did that you believe constitutes judicial misconduct. Be specific and list all of the names, dates, times, and places that will help the commission understand your concerns. Additional pages may be attached along with copies (not originals) of relevant court documents. Please complete one side of the paper only, and keep a copy of the complaint for your records.

(See attached written complaint.)

The Complainant, wishes to file this complaint against County because he believes he did not get a fair and impartial case review by her. He believes she showed bias and partiality in reviewing how his case was handled in Court by Judge While she spent quite a bit of time and effort in her analysis of the hearing, case issues and Judge handling of the trial and hearing in she failed to thoroughly review, and respond to some significant case citations which Complainant raised to support his argument, and also engaged in some actions which would seem to be completely inappropriate for any judge or commissioner when hearing an from a lower court. This will be detailed in the body of this Complaint.

Factual Background:

1) Complainant, who was a defendant in a traffic violation citation case in the City of in challenged the citation referencing A.R.S. 28-701 (A), in Court.

2) His hearing and trial was held on before Court Judge

3) Judge found Complainant responsible for the citation, and Mr. paid the fine and various fees, totaling He decided he had not received a fair and impartial trial, so decided to his case to County Court.

4) His Court Case was assigned to of the County Court. Mr. prepared and filed his Memorandum on

5] She upheld the Court Judge's decision that Complainant was responsible for the citation he received and for violation of A.R.S. § 28-701 (A).

6) Complainant found serious issues with Record Ruling/Remand and decided to file a which he did on

Legal Errors Committed in the Court by Judge
Replicated in the Court by

Misreading and Misinterpreting A.R.S. § 28-701 (A).

It is settled law by various case precedents that in a traffic violation case involving driving in an unsafe and imprudent manner, which can involve excessive speed, that *all elements of A.R.S. § 28-701 (A) must be proven to establish that the driver is driving in an unsafe and imprudent manner.*

The Arizona Statute clearly says that *speed alone* is not a determinant of unsafe and imprudent driving, but that this must be viewed in the context of "...the circumstances, conditions

and actual potential hazards *then existing."* [A.R.S. § 28-701 (A)] Merely driving above the posted speed limit of a road or highway is prima facie evidence of unsafe and imprudent driving, which is rebuttable, depending on the conditions or hazards on the road then existing.

Complainant clearly established when questioning Police Officer on the conditions existing at the time of his stop related to any potential road hazards, construction, presence of pedestrians, bicyclists, other traffic on the road or waiting to enter and bad weather that *none* of these problematic or potentially hazardous conditions existed at the time of the stop.

Given that Complainant in his lower court case established that the second element of the Statute was non-existent—the actual conditions or hazards then existing– seemed to be motivated to find a rationale and reasons to uphold the lower court decision finding Complainant responsible for the citation. An example of this is when she quoted the Officer (first par., page 2 of her ruling): "The officer also added that the offense occurred on a and there are bicyclists and pedestrians in the area on weekend."

The Officer was speaking strictly in a *hypothetical manner* about what conditions might exist on this day afternoon, but he did not describe the actual situation or conditions then existing at the time of the stop. There were *no* bicyclists or pedestrians on the road or sidewalks of when Complainant had driven south toward by the Officer's own court testimony.

A.R.S. § 28-701 (A) does not talk in terms of hypothetical conditions or hazards that *might be present,* but addresses conditions or hazards *then existing.* is clearly misreading and misinterpreting A.R.S. § 28-701 (A). By quoting the Officer the way she did, she gives the misleading impression that there were actual pedestrians and bicyclists in the area on that day, when none were present.

overlooked the fact that the Officer had failed to prove that Complainant (Defendant) had driven in an unsafe and imprudent manner, given the conditions then existing on the road or in its vicinity, thus she ignored the fact that all elements of the statute hadn't been proved in the lower court proceeding.

<u>Failure to Address Existing Case Law Referenced by Complainant in</u>

Complainant cited in his Memorandum, Case, State of Idaho v. Albert E. Trimming (406 P. 2d 118). In this case, the found that Trimming was not driving in an unsafe and imprudent manner, even though he exceeded the posted speed limit on a highway by fifteen miles/hour. This higher Court said in their opinion:

> ...that *no condition or hazard whatsoever or at all existed* which would render appellant's driving at a speed of 75 miles an hour over a stretch of one-half mile, unreasonable or imprudent; that *no actual or potential hazard then and there existed,* including any weather or road hazard, or condition of appellant's automobile; that appellant so controlled his speed as was necessary to avoid colliding with any person, vehicle or other conveyance on or entering the highway in compliance with legal requirements...*although in fact there was no other person, vehicle or conveyance on or so entering the highway at the time and place.* (p. 121) (emphasis added)

The Idaho Court concluded its decision and ruled:

> There being no evidence of unreasonable or imprudent driving "under the conditions" then appellant was entitled to acquittal of the charge of unreasonable and imprudent driving as a matter of law, *the evidence being insufficient, as a matter of law, to support the court's finding of unreasonable and imprudent driving* "under the facts set forth in said stipulation." (p. 122) (emphasis added)

Complainant believes that the situation of Trimming and his case is analogous in many ways to his own case, though Trimming's speed was higher and his road was a highway and not a local street. failed to controvert or even address the case law established by Idaho v. Trimming in her Ruling.

in her Ruling, does briefly mention another case, Arizona v. James David Rich (118 Ariz. 119, Ct. App.) That case references State of Idaho v. Albert E. Trimming and it quotes that latter case, "The statutory provisions that establish or permit the establishment of prima facie safe speed limits are rules of evidence and not rules of substantive law. They raise rebuttable presumptions, which may be overcome by evidence." (State v. Trimming, 89 Idaho 440, 406 P. 2d 188, 1965) says that the Court "...determined Defendant had not overcome the statutory presumptions because *there was the possibility or potential for an accident to have been caused."* (emphasis added) She fails to give the full context and significance of this case.

She has misread and misinterpreted the meaning and intent of A.R.S. § 28-701 (A). The State law and statute do not talk about some *hypothetical conditions* that might exists at some future time, but speaks to circumstances, conditions and actual potential hazards *then existing*.

says on page four of her Ruling, "The trial court determined Defendant had not overcome the statutory presumption because there was *the possibility or potential for an accident to have been caused."* (emphasis added) Several legal cases establish that is improper for a trial court to speculate as to what may happen or possibly happen in a given situation, without the facts of the situation to back up that kind of speculation. These include:

> "In matters of proof, neither the courts nor juries are justified in inferring from mere possibility the existence of facts, since they cannot make mere conjecture or speculation as the foundation of their verdict, and test to be applied is whether the existence of a fact is a reasonable probability or a reasonable certainty." *Ager v. Baltimore Transit Company,* 132 A. 2d 469.

> "What 'could have been' is not sufficient to satisfy a plaintiff's burden of proof." *Hartford Fire Insurance Company, Appellant v. Electrical District No. 4 of Pinal County,* Arizona, Appellee, Court of of Arizona March 25, 1969, 4 Arizona Reports 374.

Yet this is exactly what and have done when language is used such as "there was the possibility or potential for an accident to have been caused." This is *not* how the State Statute in question reads.

Her statement about A.R.S. § 28-701 (A) is injecting into the statute language and meaning that *does not exist in the statute.* established by his questioning of the Officer as shown in the Court transcript of the hearing, that the Officer admitted that the actual conditions or circumstances then existing that could pose a problem or hazard, were non-existent.

It is improper for to read into a statute meaning that is not there. Complainant cited case law in his Memorandum that one does not read into a statute what is not literally stated in its wording. See pages 11 and 12 of Memorandum for these case citations. By doing what she did in misreading/misinterpreting the State statute, it suggests she doesn't understand its meaning, or is intentionally misinterpreting it so as to favor the State's or Plaintiff's case.

committed and error of law when she misinterpreted the meaning and intent of A.R.S. § 28-701 (A) and she failed to address the legal precedent offered by Idaho v. Trimming.

Complainant also referenced another Arizona case in his Memorandum, *Gibson v. Boyle* 139 Ariz. 512 (App.) which involved an intersection accident. The Court of found in this case:

> "It was permissible for jury to find that the speed of the other motorist though greater than the posted speed limit, was not greater than reasonable or prudent; (p. 513) The Court stated, "Driving over the posted speed limit merely creates a rebuttable presumption that the speed was greater than reasonable or prudent." (A.R.S. §§ 28-701 to 28-703) (139 Ariz. at 574) The Court further said: "...Appellee was entitled to overcome the presumption by presenting evidence that Kelly Boyle's speed was reasonable and prudent *under the circumstances."* (See *State v. Rich* 115 Ariz. 119) (emphasis added)

fails to address any of these other court precedents from either Idaho or Arizona in terms of proper interpretation and reading of A.R.S. § 28-701 (A).

<u>The Issue of the and its Capabilities:</u>

There was quite a bit of attention by in her ruling to the issue over the gun used by Officer and its design capabilities in tracking a vehicle's speed. Officer admitted in his opening statement, that he had used a model when he tracked vehicle speed and this was confirmed when showed him a picture of that device and he said it was the one he had used. This was *not* the directional model or Directional (Transcript p. 12, line 4) Judge of the Court, confused these two devices and their capabilities, either intentionally or by simple error.

Complainant, in preparing his case for lower court trial, took the time and trouble to call the manufacturer of the device, to verify its capabilities. In the he found there was no information on the company web site of any kind regarding the specifications. When he called the company, a sales person told him that this gun was no longer sold or distributed by as it was outmoded and outdated and had been replaced by a newer model. So, this would explain why Complainant could find no company web site specifications about the in the

reported in her Ruling (page 6) that she looked up the company's web site (she provided a URL in the footnote #36), and then made the statement, "In contrast, the can be set to either a Moving Mode Same Direction or a Moving Mode Opposite Direction." Complainant tried to verify this statement and information by inputting

the URL she listed in her footnote, and got the message: "The requested page could not be found." Her statement is incorrect about the based on the information on this device in Police Expert web site (exhibits introduced at trial by The model in table or chart shows it as being used in *stationary* mode, not moving mode, and capable of measuring speed on-coming only, not bi-directional as she depicted it.

Since Complainant could not verify her supposed description of the capability of the and since he found no information of that kind at all on the company's web site in the and since a salesman told him that the device was discontinued and outmoded, Complainant is at a complete loss to explain where she got her supposed information. Did she fabricate it? This is a valid question, since the URL or web address page was not available when Complainant tried to access it, and the company web site only had an owner's manual on the which did not have specifications on its operational capabilities.

Court Does Not Reweigh Evidence, Nor Should it Introduce New Evidence:

Complainant finds it unbelievable that Commission would take the step to go to this company's web site, in attempt to find on her own *new evidence* on the operational capabilities of the which was at issue in the lower court case. It would appear to be highly improper for an judge or commissioner to take this action to find and present new evidence, which wasn't already presented at trial, to buttress the lower court decision. In this context, Complainant, in his Memorandum, quoted another relevant case:

> "[5,6] When reviewing the sufficiency of evidence, an appellate court *does not reweigh the evidence to decide if it would reach the same conclusions as the trier of fact."* (emphasis added) *State v. Mincey,* 141 Ariz. 425, 532, 687 P. 2d 1130, 1187, cert. denied, 469 U.S. 1040, 105 S. Ct. 521, 83 L.Ed 2d 409 (1984); *State v. Brown,* 125 Ariz. 160, 162, 608 P. 2d 299, 301 (1980).

By doing what she did, it appears that even went one step beyond *reweighing the evidence*, to find and *introduce new evidence* by her own research. Introducing new supposed evidence (the capability of the contradicting that offered at trial, not only is improper legal or court procedure, but also would constitute an extreme example of abuse of judicial discretion. If it is improper for an appellant to introduce new evidence not introduced at trial, how can it be proper for a judge to do this?

Finding that Judge had not Abused Judicial Discretion:

It is clear from the testimony and dialog reported on the trial transcript (prepared by Complainant from an official CD recording of the trial, and copy provided by Complainant to the Court , that Judge went out of his way to dismiss or even confuse the clearly presented chart showing the capabilities of different devices, so as to favor the testimony of Officer at the trial. Several times, Judge said he "thinks" that the gun used by the Officer could measure vehicle speed both ways—both on-coming and going away—when the chart presented by Complainant clearly contradicted that assertion by the Judge. The chart is very clear in what it says, and it does *not* require Complainant's "interpretation" as asserts. If one can read plain English, no interpretation is necessary.

THE COMMISSION'S POLICY IS TO POST ONLY THE FIRST FIVE PAGES OF ANY DISMISSED COMPLAINT ON ITS WEBSITE.

FOR ACCESS TO THE REMAINDER OF THE COMPLAINT IN THIS MATTER, PLEASE MAKE YOUR REQUEST IN WRITING TO THE COMMISSION ON JUDICIAL CONDUCT AND REFERENCE THE COMMISSION CASE NUMBER IN YOUR REQUEST.