STATE OF RHODE ISLAND & PROVIDENCE PLANTATIONS

PROVIDENCE, Sc. **DISTRICT COURT**
SIXTH DIVISION

Dennis DeCorpo	:	
	:	
v.	:	**A.A. No. 10 - 0052**
	:	
State of Rhode Island	:	

ORDER

This matter is before the Court pursuant to § 8-8-8.1 of the General Laws for review of the Findings & Recommendations of the Magistrate.

After a de novo review of the record and the memoranda of counsel, the Court finds that the Findings & Recommendations of the Magistrate are supported by the record, and are an appropriate disposition of the facts and the law applicable thereto.

It is, therefore, ORDERED, ADJUDGED AND DECREED,

that the Findings & Recommendations of the Magistrate are adopted by reference as the Decision of the Court and the decision of the appellate panel of the Traffic Tribunal is AFFIRMED.

Entered as an Order of this Court at Providence on this 22nd day of February, 2011.

By Order:

Melvin Enright
Acting Chief Clerk
Melvin J. Enright
Acting Chief Clerk

Enter:

Jeanne E. LaFazia
Chief Judge

STATE OF RHODE ISLAND & PROVIDENCE PLANTATIONS

PROVIDENCE, Sc. DISTRICT COURT

SIXTH DIVISION

Dennis DeCorpo	:	
	:	
v.	:	**A.A. No. 2010-052**
	:	**(T09-0074)**
State of Rhode Island	:	
(RITT Appellate Panel)	:	

FINDINGS & RECOMMENDATIONS

Ippolito, M. In this case Mr. Dennis DeCorpo urges that an appeals panel of the Rhode Island Traffic Tribunal erred when it affirmed a trial magistrate's decision finding him guilty of refusal to submit to a chemical test, a civil violation, in violation of Gen. Laws 1956 § 31-27-2.1. This matter has been referred to me for the making of findings and recommendations pursuant to General Laws 1956 § 8-8-8.1. Jurisdiction for the instant appeal is vested in the District Court by Gen. Laws 1956 § 31-41.1-9; the applicable standard of review may be found in Gen. Laws 1956 § 31-41.1-9(d).

In his appeal Mr. DeCorpo presents two reasons why the decision of the panel should be set aside: first, that the panel failed to recognize that his right to a confidential phone call while in custody at the police station was abrogated; and second, that the trial magistrate failed to issue his decision within the time period required by statute. After a review of the entire record, and for the reasons stated below, I have concluded that the decision of the panel in this case is supported by reliable, probative and substantial evidence of record and was not clearly erroneous; I therefore recommend that the decision below be affirmed.

I. FACTS & TRAVEL OF THE CASE

The facts which led to the charge of refusal against appellant are fully and fairly stated (with appropriate citations to the trial transcript) in the decision of the panel. See Decision of RITT Appellate Panel, February 24, 2010, at 1-7; they may be summarized here as follows.[1]

On May 8, 2009 at approximately 2:15 A.M., Officer Shaun Lukowicz — a 2½-year veteran of the West Warwick Police Department, who was certified as a breathalyzer operator and trained to administer field sobriety tests — was on patrol when he observed a vehicle repeatedly cross back and forth over the double yellow line on Main Street. He stopped the vehicle, which was being driven by appellant, after it turned onto Legion Way. Officer Lukowicz observed Mr. DeCorpo's eyes to be watery and bloodshot; he also detected the odor of alcohol on his breath. After he produced his license and registration Mr. DeCorpo exited his vehicle. At the officer's request, appellant performed several field sobriety tests; Officer Lukowicz testified appellant failed the one-leg stand and walk-and-turn tests. Appellant admitted he failed the former. At this juncture, Mr. DeCorpo was placed under arrest. Deposited into the rear of the police cruiser, Mr. DeCorpo was read the "Rights For Use At Scene."

After being transported to the West Warwick Police Station, appellant was also

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1 What follows is a somewhat briefer version of the narrative presented by the panel in

read the "Rights For Use At Station." (Trial Transcript I, at 29-30, 117.) Mr. DeCorpo indicated to Officer Lukowicz that he understood his rights and invoked his right to make a phone call. (Trial Transcript I, at 31.) Mr. DeCorpo was given the opportunity to use a phone, but after five to ten minutes he reported he was unable to contact anyone. (Trial Transcript I, at 32.) At trial, appellant would admit that he made about eight phone calls before trying to contact an attorney. (Trial Transcript I, at 120-122.)

At this juncture Mr. DeCorpo was asked to submit to a chemical test. (Trial Transcript I, at 33.) He indicated he wanted to speak to a lawyer. (Trial Transcript I, at 33, 70.) He was allowed to use the phone again for about five to ten additional minutes, whereupon the officer reentered the room and repeated his earlier question. (Trial Transcript I, at 34, 71.) Appellant again stated he wanted to speak to a lawyer. Once more he was given the opportunity to use the phone (Trial Transcript I, at 72); but rather than calling a lawyer he called a friend. After a further five minutes, Officer Lukowicz reiterated the question and heard Mr. DeCorpo say once more that he wanted to speak to a lawyer. (Trial Transcript I, at 35.) After three attempts, the officer took appellant's failure to answer the question with a yes or no answer as a "no." (Trial Transcript I, at 35, 73-75, 129.) The officer told appellant he would do so. (Trial Transcript I, at 91-92.)

The officer explained that Mr. DeCorpo was allowed to use the telephone. Mr. DeCorpo was seated in a 5 by 10 room five feet away from the door to the room with a phone book and a police phone and — according to Mr. DeCorpo — his own cell phone. (Trial Transcript I, at 65-69.) The appellant challenged the officer's statement that

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its opinion.

he [the officer] left the room and stood five feet away from the door while appellant was using the phone. (Trial Transcript I, at 31-32, 79, 123.) Officer Lukowicz testified he could not see Mr. DeCorpo or hear his telephone conversations. (Trial Transcript I, at 79.) Overall, the officer estimated Mr. DeCorpo was allowed the use of the telephone for about 22 minutes. (Trial Transcript I, at 77.) Mr. DeCorpo testified that he made one phone call to a lawyer but could not get through. (Trial Transcript I, at 126.)

The defense presented testimony regarding an incident which allegedly occurred during Mr. DeCorpo's phone calling sessions. He indicated that he put the officer on the phone to convince his skeptical female friend that he was truly under arrest. (Trial Transcript I, at 123-24.) His friend, Jessica Burrell, confirmed this story. (Trial Transcript I, at 149.)

At the conclusion of the trial on June 10, 2009, the magistrate took the matter under advisement. Then, on June 30, 2009, the court rendered its decision — finding Mr. DeCorpo guilty on the charge of refusal. (See Trial Transcript II, *passim.*) Particularly, the magistrate found that appellant was not prejudiced by a lack of confidentiality regarding his phone calls and that his failure to respond to the officer's question had become a *de facto* refusal.

Mr. DeCorpo filed an appeal to the RITT appeals panel.

The matter was heard by the panel, comprised of Judge Lillian Almeida (Chair), Magistrate William T. Noonan, and Magistrate R. David Cruise on September 16, 2009. Before the panel Mr. DeCorpo asserted that the trial magistrate committed reversible error by failing to dismiss the refusal charge for two distinct reasons:

1. Mr. DeCorpo was not afforded a confidential phone call, which he asserted violated a right provided him by Gen. Laws 1956 § 12-7-20;

2. Mr. DeCorpo's rights were violated by the magistrate's failure to render a decision forthwith at the conclusion of the trial.

In its February 24, 2010 decision, the panel rejected both of these assertions of error.

As to the first issue, the panel decided that:

(a) Mr. DeCorpo's right to a confidential phone call was not abridged, since the officer was not able to hear any of the calls [Decision of Panel, at 10-12];

(b) Section 12-7-20, which is meant to allow for a meaningful exchange between the arrestee and his attorney, applies in civil chemical test refusal cases [Decision of Panel, at 13-15];

(c) Mr. DeCorpo's right to a confidential phone call was not abridged because he had been apprised of the right and was given a "reasonable opportunity" to exercise the right since he was allowed to make multiple calls [Decision of Panel, at 16-20].

Regarding the second issue, the panel held that the trial magistrate's compliance <u>vel</u> <u>non</u> with section 31-27-2.1(c)'s mandate that a judge issue a decision in a refusal case within seven days was not properly before the court since the issue had not been preserved for appeal. [Decision of Panel, at 19-22].

On March 2, 2010, appellant filed an appeal in the Sixth Division District Court. Memoranda have been received from appellant and the state.

II. <u>STANDARD OF REVIEW</u>

The standard of review which this Court must employ is enumerated in Gen. Laws 1956 § 31-41.1.-9(d), which provides as follows:

> (d) *Standard of review.* The judge of the district court shall not substitute his or her judgment for that of the appeals panel as to the weight of the evidence on questions of fact. The district court judge may affirm the decision of the appeals panel, or 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 appeals panel's findings, inferences, conclusions or decisions are:
> (1) In violation of constitutional or statutory provisions;
> (2) In excess of the statutory authority of the appeals panel;
> (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.

This standard is akin to the standard of review found in Gen. Laws 1956 § 42-35-15(g), the State Administrative Procedures Act ("APA"). Accordingly, I shall rely on cases interpreting the APA as guideposts in the review process.

Under the APA standard, the District Court "* * * may not substitute its judgment for that of the agency and must affirm the decision of the agency unless its findings are 'clearly erroneous.' "[2] The Court will not substitute its judgment for that of the agency (here, the panel) as to the weight of the evidence on questions of fact.[3] Stated differently, the findings of the panel will be upheld even though a reasonable mind might have reached a contrary result.[4]

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2 Guarino v. Department of Social Welfare, 122 R.I. 583, 584, 410 A.2d 425 (1980)(citing R.I. GEN. LAWS § 42-35-15(g)(5)).

3 Cahoone v. Board of Review of the Dept.of Employment Security, 104 R.I. 503, 246 A.2d 213 (1968).

4 Cahoone v. Board of Review of Department of Employment Security, 104 R.I. 503, 246 A.2d 213, 215 (1968).

III. APPLICABLE LAW

A. THE REFUSAL STATUTE.

This case involves a charge of refusal to submit to a chemical test. See Gen. Laws 1956 § 31-27-2.1. The civil offense of refusal is predicated on the implied consent law, which is stated in subsection 31-27-2.1(a):

> (a) Any person who operates a motor vehicle within this state shall be deemed to have given his or her consent to chemical tests of his or her breath, blood, and/or urine for the purpose of determining the chemical content of his or her body fluids or breath. No more than two (2) complete tests, one for the presence of intoxicating liquor and one for the presence of toluene or any controlled substance, as defined in § 21-28-1.02(7), shall be administered at the direction of a law enforcement officer having reasonable grounds to believe the person to have been driving a motor vehicle within this state while under the influence of intoxicating liquor, toluene, or any controlled substance, as defined in chapter 28 of title 21, or any combination of these. * * * (Emphasis added).

The four elements of a charge of refusal which must be proven at a trial before the Traffic Tribunal are stated later in the statute:

> * * * If the traffic tribunal judge finds after the hearing that: (1) the law enforcement officer making the sworn report had reasonable grounds to believe that the arrested person had been driving a motor vehicle within this state while under the influence of intoxicating liquor, toluene, or any controlled substance, as defined in chapter 28 of title 21, or any combination of these; (2) the person while under arrest refused to submit to the tests upon the request of a law enforcement officer; (3) the person had been informed of his or her rights in accordance with § 31-27-3; and (4) the person had been informed of the penalties incurred as a result of noncompliance with this section; the traffic tribunal judge shall sustain the violation. The traffic tribunal judge shall then impose the penalties set forth in subsection (b) of this section. * * *

Gen. Laws 1956 § 31-27-2.1(c).

B. SECTION 12-7-20 (RIGHT TO A CONFIDENTIAL PHONE CALL).

A second section which must be considered in the resolution in this case is

Gen. Laws 1956 § 12-7-20, which grants arrestees the right to a telephone call:

> **12-7-20. Right to use telephone for call to attorney — Bail bondsperson. —** Any person arrested under the provisions of this chapter shall be afforded, as soon after being detained as practicable, not to exceed one hour from the time of detention, the opportunity to make use of a telephone for the purpose of securing an attorney or arranging for bail; provided, that whenever a person who has been detained for an alleged violation of the law relating to drunk driving must be immediately transported to a medical facility for treatment, he or she shall be afforded the use of a telephone as soon as practicable, which may not exceed one hour from the time of detention. The telephone calls afforded by this section shall be carried out in such a manner as to provide confidentiality between the arrestee and the recipient of the call.

Thus, by its terms, the right established in § 12-7-20 applies only to persons arrested under this chapter — *i.e.*, chapter 12-7, which establishes procedures for felony and misdemeanor arrests — and to phone calls made for the purpose of securing an attorney and arranging for bail. While it specifically references the offense of "drunk driving," it is applicable to arrestees for all criminal offenses.

IV. ISSUE

The issue before the Court is whether the decision of the appeals panel was supported by reliable, probative, and substantial evidence in the record or whether or not it was clearly erroneous or affected by error of law. More precisely, did the panel err when it upheld Mr. DeCorpo's conviction for refusal to submit to a chemical test?

V. ANALYSIS

As summarized above, Mr. DeCorpo's complaint raises two issues. The first is whether his right to a confidential phone call pursuant to Gen. Laws 1956 § 12-7-20 was violated. The second is whether the magistrate violated proper procedure by failing to render his decision forthwith at the close of the testimony.[5] These questions shall now be considered.

A. Is the Panel's Decision Affirming the Trial Magistrate's Decision Not to Dismiss the Instant Case Based On A Breach of Appellant's Right to a Confidential Telephone Call Pursuant to Section 12-7-20 Clearly Erroneous?

I believe this question must be answered in the negative for several reasons: (1) I believe the right to a confidential phone call found in § 12-7-20 does not apply to those charged with the civil violation[6] — "Refusal to Submit to a Chemical Test" as defined in Gen. Laws 1956 § 31-27-2.1(b)(1), (2) assuming *arguendo* section 12-7-10 does apply in refusal cases, Mr. DeCorpo's right to a confidential phone call was never breached, and finally (3) even if such a right was indeed violated, the remedy of dismissal would not be appropriate.

1. There is No Right to a Confidential Telephone Call In Refusal Cases.

Although the RITT Panel held — *based on the particular facts of the case* — that Mr. DeCorpo's rights to a confidential phone call were not violated, it also held — *as a matter of law* — that Mr. DeCorpo and all refusal defendants are covered by the

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5 Although raised in his complaint, Mr. DeCorpo's memorandum does not discuss the second issue. I shall nonetheless comment upon this assertion of error.

6 It should be noted that the charges of Refusal to Submit to a Chemical Test (Second Offense Within 5 Years) and Refusal to Submit to a Chemical Test (Third Offense or Subsequent Within 5 Years) are misdemeanors. See Gen. Laws 1956 § 31-27-2.1(b)(2) and § 31-27-2.1(b)(3). Accordingly, persons charged with these crimes are undoubtedly entitled to the rights afforded by Gen. Laws 1956 § 12-7-20.

protections afforded in § 12-7-20. With this latter, legal finding I must take issue, for four reasons.

Of course, we must acknowledge at the outset that our Supreme Court has not yet addressed whether the provisions of § 12-7-20 applicable to refusal cases. Accordingly, since we are bereft of guidance, our task becomes one of prediction: we must attempt to anticipate our high court's likely response when the question arrives on its docket. Although there are undoubtedly legal and equitable arguments to be made in favor of the applicability of § 12-7-20 to refusal cases,[7] I believe the court will, when given the opportunity, decline to extend § 12-7-20's protections to defendants in refusal cases.

Firstly, proof that a refusal defendant was given a confidential phone call is not one of the four elements which must be proven — to a standard of clear and convincing evidence — in a refusal case. With the exception of the warnings, where the court has required that certain sanctions outside of section 31-27-2.1 be specified, the court has not added to the items to be proven in refusal cases.[8] I am

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7 Such arguments generally spring from an underlying notion that the charges of driving while under the influence and refusal to submit to a chemical test are intertwined. As I shall note below, while true in practical terms, this has not been accepted as a legal principle by the Supreme Court, which views the charges as "separate and distinct." See State v. Hart, 694 A.2d 681, 682 (R.I. 1997).

8 In Levesque v. Rhode Island Department of Transportation, 626 A.2d 1286 (R.I. 1993) the Court determined that registration suspension was a refusal penalty about which a motorist considering taking (or refusing) a chemical test must be warned. Thus, the fact that the suspension was subject to an intervening hearing did not, in the Court's view, vitiate the necessity of registration suspension being included with the more direct penalties, such as fines and assessments.

therefore reluctant to find the Court would be willing to, in essence, add an element to the offense.

Secondly, § 12-7-20 is found in Title 12, entitled "Criminal Procedure," and Chapter 12-7, entitled "Arrest." Refusal to Submit to a Chemical Test (1st Offense) is not a criminal charge but a civil violation; and even a brief examination of chapter 12-7 reveals that all the sections contained therein deal strictly with criminal procedures, regarding felonies and misdemeanors. Refusal (1st offense) is not a charge for which a defendant is arrested — instead, he or she is arrested for suspicion of drunk driving.

Thirdly, by its own terms, § 12-7-20 grounds the right to a phone call on the arrestee's need to arrange for bail and the arrestee's need to secure an attorney. The former is simply irrelevant in first offense refusal cases — no bail is necessary for no bail can be set; as to the latter, while refusal (1st offense) defendants certainly have the right to retain counsel for the defense of a civil violation, our Supreme Court has ruled that a drunk driving arrestee has no right to consult with an attorney[9] prior to deciding whether to take or refuse a chemical test. See Dunn v. Petit, 120 R.I. 486, 493-94, 388 A.2d 809 (R.I. 1978). Thus, any link between § 12-7-20 and the rights and needs of a refusal defendant seems extremely remote.

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9 Moreover, defendants charged with civil violations such as refusal to submit to a chemical test — for which imprisonment is not a possible penalty —have no right to appointed counsel, either under the United States Constitution [amendments 6 and 14] or the Rhode Island Constitution [Art. 1, § 10]. See In re Advisory Opinion to the Governor (Appointed Counsel), 666 A.2d 813, 815 -18 (R.I. 1995).

Finally, while charges of drunk driving under § 31-27-2 and refusal to submit to a chemical test under § 31-27-2.1 are often factually interrelated, the Rhode Island Supreme Court has stated and restated its firm belief that legally the misdemeanor and civil alcohol charges are separate and distinct offenses. See State v. Hart, 694 A.2d 681, 682 (R.I. 1997) and State ex rel. Middletown v. Anthony, 713 A.2d 207, 213 (R.I. 1998). They are not only distinct, they arise from different classes: one (DUI) is a criminal misdemeanor, the other (Refusal – 1st offense) a civil violation. And so, to put it simply, a motorist who is ultimately charged with refusal to submit to a chemical test (1st offense) may have been given a confidential phone call while detained; if so, the right to a phone call adhered to the motorist insofar as he or she was under arrest for drunk driving, not in their capacity as a potential refusal-1st defendant. Accordingly, I do not believe the Supreme Court of Rhode Island will be inclined to transfer a procedural prerequisite from one type of prosecution to another.

2. Substantial Evidence Supports the Panel's Finding That Appellant's Right to a Confidential Telephone Call — If Such a Right Was Indeed Applicable — Was Never Violated.

After reviewing the record on this case, the RITT panel which was seated in this case found that Mr. DeCorpo's right to a confidential phone call pursuant to § 12-7-20 was honored. I believe that the panel's finding of compliance with § 12-7-20 was supported by substantial evidence of record and is not clearly erroneous. For the reasons I shall now enumerate, I conclude the panel's decision to affirm the trial magistrate's decision should likewise be affirmed.

Firstly, there is simply no doubt that Mr. DeCorpo was given an ample opportunity to call from the station, using both a police phone and his own cellular phone. According to the officer, this first session alone was five to ten minutes; and appellant conceded that during the first calling session he was able to call eight people. While this first session would have been sufficient to satisfy § 12-7-20's mandate that the arrestee be afforded "… the opportunity to make use of a telephone …," both the officer and Mr. DeCorpo agreed that he was given a further opportunity to use the phone.

Secondly, there is more than substantial evidence in this record to support the panel's finding that claimant's calls were made under conditions which satisfied § 12-7-20's directive that the calls be "carried out in such a manner as to provide confidentiality between the arrestee and the recipient of the call."[10] The panel marshaled the evidence supporting this finding most concisely and persuasively on page 12 of its opinion, wherein it stated:

> … Appellant's telephone calls attempting to contact an attorney and multiple friends were all made in the privacy of a room provided him by the police department. The law enforcement officer was outside the door of the room and out of earshot range because he stood approximately 10 feet away from Appellant during the phone calls. (Tr. at 79.) The officer was at such a distance away from the doorway, that even though the door was not shut, he was not able to hear any of appellant's conversations. (Tr. at 83.) The members of this Panel are satisfied that there is reliable, probative and substantial evidence in the

[10] At this juncture, it should be noted that the Rhode Island Supreme Court has recognized that in drunk driving cases the detainee's right to make a confidential phone calls is counterbalanced against the officer's duty to continuously monitor the defendant in order to protect the integrity of the breathalyzer. See State v. Carcieri, 730 A.2d 11, 14-15 (RI 1999).

> record to evidence that Appellant's phone calls were made in privacy in accordance with the definition of "confidentiality." (footnote omitted)

Decision of Panel, February 24, 2010, at 12. Thus, the panel took a practical approach and held that, because the officer could not hear the phone calls appellant made, they were "confidential."

It is on this basis that the instant case is distinguishable from a recent case heard and decided by this court, State v. Quattrucci, A.A. No. 09-153 (Dist.Ct. 1/26/11)(McLoughlin, J.). In Quattrucci, Judge McLoughlin reviewed an RITT decision which had dismissed a refusal case based on a violation of § 12-7-20. Noting that the officer was in the room and sitting a mere five feet away from the spot where the motorist was exercising his right to phone calls, Judge McLoughlin affirmed[11] the RITT decision. Slip op. at 3. In finding a five foot distance insufficient to demonstrate confidentiality, the court was within the range of noted in State v. Carcieri, 730 A.2d 11, 13 (RI 1999). Because here the officer was further away during when the phone calls were made, the Quattrucci decision must be deemed inapposite.[12]

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11 In his decision, Judge McLoughlin assumed — but did not decide — the applicability of § 12-7-20 to civil refusal prosecutions.

12 In his June 30, 2009 decision, the trial magistrate noted, but did not analyze, the defense testimony in which it was alleged that — during one of Mr. DeCorpo's phone calls — Officer Lukowicz was put on the line to speak to an incredulous friend of Mr. DeCorpo in order to assure her he was indeed under arrest. (Trial Transcript II, at 13-14.) The officer was not called in rebuttal to confirm or deny the defense story.

Nevertheless, in light of the uncontested fact that Officer Lukowicz was repeatedly in and out of the room, this story was not necessarily inconsistent with the

In conclusion, I believe the panel's decision upholding the trial magistrate's finding that Mr. DeCorpo was given the opportunity to make confidential phone calls in compliance with § 12-7-20 is well-supported by the record and is not clearly erroneous.

3. Even if the Defendant's Right to a Confidential Phone Call Was Violated, Dismissal Is Not Warranted.

The State also urges that, even if appellant's rights under § 12-7-20 were violated, dismissal would have been an excessive and unwarranted remedy because Mr. DeCorpo cannot demonstrate prejudice. See State's Memorandum of Law, at 6-7. The State cites State v. Carcieri, 730 A.2d 11 (RI 1999), for the principle that prosecutorial misconduct will not require dismissal unless there is demonstrable proof of prejudice or a substantial threat thereof. Carcieri, 730 A.2d at 16 citing United States v. Morrison, 449 U.S. 361, 365 (1981). See also State v. Veltri, 764 A.2d 163, 167-68 (RI 2001). In Carcieri, the Court found a lack of prejudice where the police did not obtain incriminating information and the attorney-client relationship was not invaded — because Mr. Carcieri was not speaking to his attorney. Carcieri, 730 A.2d at 16-17. Applying the Carcieri decision to the facts of the instant case, we are led to the inescapable conclusion that Mr. DeCorpo cannot show prejudice because (1) Officer Lukowicz obtained no incriminating material from Mr. DeCorpo's phone calls and (2) he too never spoke to his attorney during his station-house phoning.

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officer's testimony that he was out of the room during appellant's telephoning sessions.

In sum, for this third reason as well, I conclude the panel's decision finding § 12-7-20 did not require dismissal of the instant charge to be supported by substantial evidence of record and to be not clearly erroneous.

B. Is the Panel's Decision Not to Set Aside Mr. DeCorpo's Conviction Because the Trial Magistrate's Decision was Not Rendered Within Seven Days of the Close of the Evidence Clearly Erroneous?

In his second assertion of error Mr. DeCorpo asserts that the trial magistrate violated a provision in section 31-27-2.1(c): "... Action by the judge must be taken within seven (7) days after the hearing, or it shall be presumed that the judge has refused to issue his or her order of suspension." In this case, after the evidence was closed on June 10, 2009, the magistrate continued the case until June 30, 2009, when he issued his decision. I believe this argument is without merit.

The panel found that — by agreeing to a continuance date of June 30, 2009 — the appellant failed to raise this issue before the trial magistrate. As a result, the panel decided that this issue was not properly waived and that, pursuant to the "raise or waive" rule, it could not be considered. I agree, but would go further: by agreeing to the June 30, 2009 continuance date, appellant essentially "invited" the error he alleges to have been committed by the trial magistrate. For this reason, I believe the panel did not err in denying this assertion of error.[13]

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13 Had this Court been required to reach the merits of this question, I may well have considered whether the provision quoted was truly a command to judges to act within a certain period or, as stated in its own terms, language that creates a *presumption of inaction*. If it is the latter, the trial magistrate's statement that he was continuing the matter for decision would seem to have overcome such a presumption

CONCLUSION

Upon careful review of the evidence, I recommend that this Court find that the decision of the appellate panel was made upon lawful procedure and was not affected by error of law. R.I. General Laws § 31-41.1-9. Furthermore, said decision is not clearly erroneous in view of the reliable, probative and substantial evidence on the whole record. R.I. General Laws § 31-41.1-9.

Accordingly, I recommend that the decision rendered by the RITT appellate panel in this case be AFFIRMED.

Joseph P. Ippolito
MAGISTRATE

FEBRUARY 22, 2011

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handily. I may well have also considered the applicability the doctrine of statutory construction, by which one determines whether affirmative commands found in statutes are "mandatory" or "directory." If the language of subsection 31-27-2.1(c) were determined to be merely of the latter type, no transgression could be found. See McLyman v. Holt, 51 RI 96, 151 A. 1, 3 (1930). 3 Sutherland Statutory Construction § 57:1 et seq. (7th ed.).