STATE OF RHODE ISLAND & PROVIDENCE PLANTATIONS

PROVIDENCE, Sc. **DISTRICT COURT**

SIXTH DIVISION

Leslie Haley	:	
	:	
v.	:	**A.A. No. 10 - 132**
	:	
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.

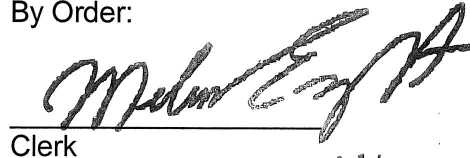
After a de novo review of the record and the memoranda of counsel, the Court finds that the Findings & Recommendations of the Magistrate are supported by the record, and are an appropriate disposition of the facts and the law applicable thereto.

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 REVERSED in part and AFFIRMED IN PART and the matter is REMANDED to the Traffic Tribunal for further proceedings.

Entered as an Order of this Court at Providence on this 18th day of February, 2011.

By Order:



Clerk

Melvin J. Enright
Acting Chief Clerk

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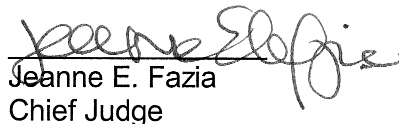

Jeanne E. Fazia
Chief Judge

February 18, 2011

STATE OF RHODE ISLAND & PROVIDENCE PLANTATIONS
PROVIDENCE, Sc. DISTRICT COURT
SIXTH DIVISION

Leslie Haley	:	
	:	
v.	:	**A.A. No. 2010-132**
	:	**(T09-0040)**
State of Rhode Island	:	
(RITT Appellate Panel)	:	

FINDINGS & RECOMMENDATIONS

Ippolito, M. In this case Ms. Leslie Haley urges, for four separate reasons, that an appeals panel of the Rhode Island Traffic Tribunal erred when it affirmed a trial magistrate's decision finding her 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 is found in subsection 31-41.1-9(d).

One of Ms. Haley's assertions of error is the most interesting and deserving of this Court's fullest consideration: that she, by consenting to take a preliminary breath test (PBT) after she was arrested for drunk driving, fully satisfied her duty under the implied consent law, precluding her conviction for refusal to submit to a chemical test.

After a complete review of the record, I conclude that her consent to the PBT after her arrest may well have the preclusive legal effect she asserts, depending only on the resolution of one question regarding the technological basis of the PBT administered to her. Accordingly, after a review of the entire record, I find that the decision of the panel should be reversed on this issue and the instant case should remanded be to the Traffic Tribunal for further proceedings.

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, June 8, 2010, at 1-4; they may be summarized here as follows.

On April 22, 2007, at approximately one o'clock in the morning, Officer Theodore Bulis of the Warwick Police Department was traveling eastbound on Main Avenue in his patrol vehicle when he saw a vehicle cross the solid yellow dividing line and continue to drive straddling the line until it came to a stop — for a stop light — one car length beyond the stop line at the intersection of Main and the Warwick Industrial Highway. When the light turned green the car continued east on Main Avenue, first crossing into the right travel lane without signaling, then crossing over the white line defining the shoulder of the roadway. Officer Bulis then stopped the vehicle.

Officer Bulis testified that when he asked the operator for her license, he detected the usual indicia of alcohol consumption: a strong odor of alcohol on her breath and eyes which were watery and bloodshot. Ms. Haley, whom he identified as

the driver, admitted she'd had "a couple of glasses of wine." When she exited her vehicle at the officer's request, she was "unsteady" on her feet and held her hands out for balance. The officer administered a battery of field sobriety tests and he deemed her to fail all.

Ms. Haley was handcuffed, arrested, and placed in the back of the cruiser, where Officer Bulis read her the "Rights For Use At Scene." Following his department's protocol, he called for a sergeant and Sergeant Connor responded. Sergeant Connor decided he would like to administer a preliminary chemical breath test to Ms. Haley and he did so — after obtaining her consent. Ms. Haley was then transported to the Warwick Police station, where: (1) she was read her "Rights For Use At Station," (2) she was allowed to make a confidential phone call, and (3) she refused to submit to a chemical test.

Ms. Haley was then charged with violations of Gen. Laws 1956 § 31-27-2.1 (refusal to submit to a chemical test), § 31-15-11 (laned roadway violation), and § 31-15-1 (Right half of road). Appellant was arraigned before the Traffic Tribunal on May 4, 2007 and on April 6, 2009 the refusal case proceeded to trial before Magistrate Dominic DiSandro. [Note – the ancillary charges had been tried separately in July of 2007 and Ms. Haley was acquitted]. The court heard from Officer Bulis and appellant Haley. The trial magistrate found (1) reasonable suspicion existed to stop appellant's vehicle, (2) reasonable grounds existed to arrest appellant for suspicion of drunk driving and (3) appellant refused the chemical tests at the station. Accordingly, Ms. Haley was found guilty of the civil violation of Refusal to Submit to a Chemical Test, as prescribed by Gen. Laws 1956 § 31-27-2.1. Ms. Haley filed an appeal to the RITT

appeals panel.

The matter was heard by the panel, comprised of Magistrate William T. Noonan (Chair), Judge Edward Parker and Judge Lillian Almeida, on June 3, 2009. Before the panel Ms. Haley asserted that the trial magistrate committed reversible error by failing to dismiss the refusal charge for four distinct reasons:

1. The record contained no evidence that Officer Bulis prepared the "sworn report" required by § 31-27-2.1;

2. Ms. Haley was not adequately advised of the penalties associated with a charge of refusal to submit to a chemical test;

3. The prosecution should have been estopped from introducing evidence of appellant's identity at her refusal trial since it failed to do so at a separate proceeding on the ancillary "laned roadway" and "right half of road" charges;

4. Ms. Haley's conduct did not constitute a violation of § 31-27-2.1, since she submitted to a preliminary breath test at the scene of the traffic stop.

The panel rejected each of these assertions of error and announced its decision orally.

On June 5, 2009, appellant filed an appeal in the Sixth Division District Court pursuant to § 31-41.1-9, a year before the panel issued its written decision on June 8, 2010. A memorandum was received from appellant; the state has chosen to rest on the decision of the panel.

II. STANDARD OF REVIEW

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.' "[1] 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.[2] Stated differently, the findings of the panel will be upheld even though a reasonable mind might have reached a contrary result.[3]

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1 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)).

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

3 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).

Section (d) of the refusal statute makes clear the types of tests which fall within its ambit:

> (d) For the purposes of this section, any test of a sample of blood, breath, or urine for the presence of alcohol which relies in whole or in part upon the principle of infrared light absorption is considered a chemical test.

Gen. Laws 1956 § 31-27-2.1(d)(Emphasis added). The 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)(Emphasis added).

Noting the presence in the statute of the phrase – "reasonable grounds" – the Rhode Island Supreme Court interpreted this standard to be the equivalent of "reasonable-suspicion." The Court stated simply, "* * * [I]t is clear that reasonable suspicion is the proper standard for evaluating the lawfulness of the stop." State v. Jenkins, 673 A.2d 1094, 1097 (R.I. 1996).

On most occasions an alcohol-related traffic offense (*i.e.,* driving under the influence or refusal) results after a motorist has been stopped for the violation of a lesser (non-alcoholic related) traffic offense.[4] Such stops have been found to comport with the mandate of the fourth amendment that searches and seizures be reasonable. See Whren v. United States, 517 U.S. 808, 810 (1996)(cited in State v. Bjerke, 697 A.2d 1060, 1072 (1997)). After the stop, the procedures necessary to sustain a refusal charge [usually beginning with the administration of field sobriety tests] may be commenced when an officer has reasonable-suspicion to believe that a person has been driving under the influence. See State v. Bjerke, 697 A.2d 1060 (1997); State v. Perry, 731 A.2d 720 (1999).

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4 See Gen. Laws 1956 § 31-27-12 (requiring officer who observes traffic violation to issue summons). In Rhode Island, most minor traffic offenses are civil violations. See Gen. Laws 1956 § 31-27-13(a).

A defendant can only be fully arrested for drunk driving if probable cause exists. See State v. Perry, 731 A.2d 720, 723 n. 1 (R.I. 1999):

> In the event that an officer arrests a person for the offense of driving under the influence of intoxicating liquor, the officer is required to have probable cause to believe that the suspect committed this offense. Probable cause exists when facts and circumstances known to a police officer or of which he or she has reasonably trustworthy information are sufficient to cause a person of reasonable caution to believe that a crime has been committed and the person to be arrested has committed the crime. See, e.g., Beck v. Ohio, 379 U.S. 89, 85 S. Ct. 223, 13 L. Ed. 2d 142 (1964); Draper v. United States, 358 U.S. 307, 79 S. Ct. 329, 3 L. Ed. 2d 327 (1959); State v. Bjerke, 697 A.2d 1069 (R.I. 1997); In re John N., 463 A.2d 174, 178 (R.I. 1983); State v. Jenison, 442 A.2d 866, 874 (R.I. 1982); State v. Bennett, 430 A.2d 424, 426-27 (R.I. 1981).

B. THE PRELIMINARY BREATH TEST STATUTE

Also relevant to this case is Gen. Laws 1956 § 31-27-2.3, which governs preliminary breath tests:

> **31-27-2.3. Revocation of license upon refusal to submit to preliminary breath test. --** (a) When a law enforcement officer has reason to believe that a person is driving or in actual physical control of any motor vehicle in this state while under the influence of alcohol, the law enforcement officer may require the person to submit to a preliminary breath analysis for the purpose of determining the person's blood alcohol content. The breath analysis must be administered immediately upon the law enforcement officer's formulation of a reasonable belief that the person is driving or in actual control of a motor vehicle while under the influence of alcohol, or immediately upon the stop of the person, whichever is later in time. Any chemical breath analysis required under this section must be administered with a device and in a manner approved by the director of the department of health for that purpose. The result of a preliminary chemical breath analysis may be used for the purpose of guiding the officer in deciding whether an arrest should be made. When a driver is arrested following a preliminary breath analysis, tests may be taken pursuant to § 31-27-2.1. The results of a preliminary breath test may not be used as evidence in any administrative or court proceeding involving driving while intoxicated or refusing to take a breathalyzer test, except as evidence of probable cause in making the initial arrest.

(Emphasis added). Thus, a plain reading of the statute shows that the procedures enumerated in section 2.3 all focus on the use of a PBT as a tool for a law enforcement officer to use in determining whether the motorist should be arrested for drunk driving.

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 Ms. Haley's conviction for refusal to submit to a chemical test?

V. ANALYSIS

In her appeal Ms. Haley has raised four issues. Three merit only brief consideration. Appellant's most substantial argument, which I shall consider first, is her fourth assertion of error: That she cannot be guilty of a refusal because her consent to the PBT after her arrest satisfied her obligation under the implied-consent law. After reviewing the Panel's approach to the question, I shall present my own.

A. The Panel's Approach: Between §§ 31-27-2.1 and 31-27-2.3.

The panel viewed the proper resolution of this issue as being dependent on a joint reading of § 31-27-2.1 [chemical tests] and § 31-27-2.3 [preliminary breath tests], noting that these statutes, since they address the same general subject matter, should be deemed in pari materia and should be read together and harmonized — to the extent possible. Decision of Panel, at 15-16. Having done so, the Panel found:

> However, the statute governing chemical tests refusals, § 31-27-2.1, only becomes operative when a motorist — "having been placed under arrest" — refuses to submit to a subsequent chemical test of his or her breath, blood, and/or urine at the station. While appellant contends that the decision of an individual to submit to a preliminary breath test at the scene of a traffic stop precludes law enforcement from asking the individual, following a DUI arrest, to submit to a chemical test of his or her breath, blood, and/or urine at the station, this argument is contrary to the plain and clear language of the preliminary chemical breath test and chemical test statutes.

Decision of Panel, at 15. Thus, the Panel decided that the consensual administration of a PBT at the scene of a traffic stop did not preclude the administration of further chemical tests at the station. And with this general principle I must wholeheartedly agree. Read in pari materia, it is clear that the two statutes fully anticipate a PBT being given to establish probable cause and further tests being given at the station.

Ms. Haley urges that the facts of her case fall outside the scope of this rule. Her position is that because she agreed to a PBT after she had been arrested her obligation under the implied-consent law was satisfied and she had no duty to agree to further chemical tests at the station. Appellant's Supplemental Memorandum of Law, at 4. Quite simply, the Panel's opinion does not fully address the issue raised by appellant.

B. My Approach: Focus on the Elements of the Offense in § 31-27-2.1.

In my view this case cannot be resolved by synthesizing sections 2.1 and 2.3; in fact, I believe § 31-27-2.3 is largely (though not entirely) irrelevant to the issue before the Court for two reasons: (1) section 2.3 addresses the circumstance in which a PBT is used to determine whether there exist reasonable grounds to arrest a motorist for drunk driving and (2) appellant is not charged with violating section 2.3, but is charged with violating section 2.1's penal provision — the civil violation

"Refusal to Submit to a Chemical Test." Accordingly, we must focus on the provisions of § 31-27-2.1, the implied-consent law, which provides that motorists must take certain tests after they have been arrested for drunk driving or suffer certain penalties. Our role is similar to that of an appellate court reviewing the denial of a motion for judgment of acquittal in a criminal case:[5] the reviewing court to apply the facts of the case to the elements of the offense. This I shall now do.

As quoted supra, page 6, the elements of refusal are that a motorist, (1) whom an officer had reasonable grounds to believe was driving under the influence, (2) and who, in fact, has been arrested for drunk driving, refuses a chemical test after (3) being advised of her right to obtain an alternative test and (4) being warned of the penalties of the motorist's failure to do so. See Gen. Laws 1956 § 31-27-2.l(c).

It is the second element which is in question here: Does the voluntary taking of a PBT after he or she is arrested satisfy a motorist's duty to take a chemical test under the implied-consent law, precluding conviction for refusal under section 31-27-2.1(c)? The answer to this question depends on the outcome of a subsidiary one: Is the PBT administered to her a "chemical test" within the meaning of § 31-27-2.1? Fortunately, § 31-27-2.1 provides us with the means to answer this question — by a subsection which defines chemical tests which fall within its ambit — subsection (d):

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5 Legally, of course, the standards of review differ. In reviewing the denial of a Rule 29 motion the appellate court applies the same standard as the trial justice, viewing the evidence in the light most favorable to the state, without weighing the evidence or assessing credibility, drawing inferences consistent with guilt. State v. Caba, 887 A.2d 370, 372 (R.I. 2005). Here, we must accept the facts found and the decision made by the appellate panel unless they are clearly erroneous.

> (d) For the purposes of this section, any test of a sample of blood, breath, or urine for the presence of alcohol which relies in whole or in part upon the principle of infrared light absorption is considered a chemical test.

Thus, the definition is technical: if the test for alcohol is one which relies on "the principle of infrared light absorption" is a chemical test under the refusal law. Inserting this definition into the core question, we may now resolve the legal issue with the following legal principle: *a motorist who takes a PBT' after being arrested for drunk driving satisfies her duty to take a chemical test under §31 -27-2.1 so long as the PBT is one which is based on the principle of infrared light absorption.*

C. Did Appellant Satisfy the Mandates of § 31-27-2.1 by Taking the PBT?

Applying the principle to the instant case we must resolve two factual issues:

> *First, was defendant under arrest when she took the preliminary breath test?*
>
> *Second, does the PBT test she took meet the statutory standard?*

I shall address these questions seriatim.

1. Was Ms. Haley Under Arrest When She Took the Breath Test?

The answer to this question is clearly yes. The panel found that Ms. Haley consented to the PBT after she was placed under arrest and placed in the rear seat of the cruiser. Decision of Panel, at 2, citing Trial Transcript, at 38. This finding is fully supported by the record. Officer Bulis testified appellant was under arrest in the back of the cruiser. See Trial Transcript, at 53, 63. And Ms. Haley testified she was aware she was under arrest. See Trial Transcript, at 65.

It is also consistent with prior case law. See State v. Bailey, 417 A.2d 915, 917-18 (R.I. 1980)(enumerating factors to determine whether defendant was under arrest, including extent to which defendant's movement was curtailed, degree of force used, belief of reasonable person in the same circumstances, whether defendant had choice of not going with police). See also Patricia King v. Department of Transportation, A.A. No. 90-203 (Dist.Ct.)(Pirraglia, J.)(Defendant found to be "under arrest" when "placed under arrest" by officer; Court finds insufficient of impairment at that moment). I conclude that Ms. Haley's movement was totally curtailed as she sat in the back of the cruiser and that a reasonable person would have concluded that she was under arrest in these circumstances.

2. Does the Preliminary Breath Test Taken By Ms. Haley Meet the Statutory Standard?

In order to satisfy the implied-consent law [and preclude a conviction for refusal] a test which a motorist has taken must meet the technical specification found in subsection (d). See § 31-27-2.1 (d), quoted supra, at 11. By the words of the statute, the test must be based on the principle of infrared light absorption. Unfortunately, a review of this record provides us with no basis to determine whether the PBT given to Ms. Haley met this technical standard. The only discussion of the PBT was in general terms: Officer Bulis testified that the PBT unit "does the same job as the Intoxilyer 5000, yet it's a field unit." See Trial Transcript, at 56. The nature of its workings was never discussed.

In an effort to eliminate the necessity for a remand, I have reviewed the PBT regulations promulgated by the Department of Health. See Rules and

Regulations Pertaining to Preliminary Breath Testing and Standards for the Determination of the Amount of Alcohol and/or Drugs in a Person's Blood By Chemical Analysis of the Breath, Blood and/or Urine or Other Bodily Substances (As amended, May, 2006). They do not categorize PBT instruments as being based on any particular technology. Moreover, this court is not empowered to enlarge the record. Therefore, I must regretfully recommend that this matter be remanded to the Traffic Tribunal for a further hearing on the issue of whether the PBT instrument used to test Ms. Haley was operated on "the principle of infrared light absorption." If it did, I find that by consenting to the PBT after her arrest she satisfied her obligation under the implied-consent law and she did not commit the civil offense of Refusal to Submit to a Chemical Test as established in § 31-27-2.1(c); if not, I find that the PBT she took was a nullity.

D. Policy Implications.

Before moving on to appellant's three other assertions of error, I should like to offer a few comments about the policy implications of the outcome I recommend on this question.

First, I am very aware of our Supreme Court's repeated rejection of technical defenses in the area of drunk driving enforcement. I believe my recommendation is not based on technicalities but a straightforward evaluation of whether this motorist's conduct met the elements of the civil violation enunciated in § 31-27-2.1(c). For the reasons I have enumerated, I believe it may not — depending only on the determination which will be made upon remand regarding the scientific basis of the PBT machine which was used in this case.

Second, I believe that arrest has eternally been deemed a key event in the relations between a law enforcement officer and a citizen. Arrest is an action of constitutional dimension. See United States Constitution, amendment 4. The rights of the arrestee and the duties of the officer are known to change when this threshold is passed. It is therefore not at all unusual that the propriety of DUI investigative techniques would change rights would be dependent on whether the person was arrested or not.

Third, this holding need not have a widespread effect on drunk-driving prosecution. Even if it the PBT devices used in Rhode Island meet the statutory standard — which is yet to be determined — the problem becomes one of training: law enforcement officers need to be educated that once a motorist is arrested, any PBT given will preclude a further chemical test. This problem is not insuperable.

D. The Other Issues Raised By Appellant.

The remainder of the arguments put forward by appellant require little discussion.

1. Absence of Evidence Officer Bulis Prepared the Sworn Report. bv

The panel found that the Officer Bulis's testimony that he prepared an "affidavit" was direct and sufficient evidence that he prepared the "sworn report." See Decision of Panel, at 8, citing Trial Transcript, at 44. Given that the terms are interchangeable, I completely agree.

2. Lack of Warning Regarding Penalties.

Appellant urges that, contrary to the mandate of section 31-27-2.1(c)(4), she

was not warned of all penalties that would result from a refusal. Proof that she was properly warned is an element to the charge of refusal. In its treatment of this issue on pages 8 through 11, the panel does not describe the omission, but merely indicates it relates to the fee associated with the reinstatement of her operator's license. Decision of Panel, at 8-11. In her memorandum, appellant reveals the problem not to be one of omission but of discrepancy – the reinstatement fee had been initially changed from $75.00 to $76.50 – and then to $350.00.

The trial magistrate overruled this exception based on his decision that the appellant was not prejudiced by this inaccuracy. Decision of Panel, at 9. On appeal, the panel found that the reinstatement fee is not mandatory fee but caused by a choice, since a suspended motorist need not ever seek reinstatement of her license. Decision of Panel, at 10-11. Thus it is not a necessary result of her refusal. However, while the panel's simple syllogism is very tempting to embrace, I believe this rationale may well lead us to a questionable result.

The linchpin to the panel's conclusion is its assumption that the reinstatement fee does not inevitably result from a motorist's refusal, because he or she may never seek reinstatement. This is certainly true, as far as it goes. However, upon adjudication for a refusal a motorist faces a "suspension" of his or her license, not a revocation; the former is a temporary penalty, the latter a permanent one. It is implied that the motorist's license will be reinstated. So, must the penalty be an inevitable or inescapable one?

There seem no cases directly on point.[6] Nevertheless, I believe a leading case regarding the recitation of refusal penalties offers some guidance on the approach that our Supreme Court might take in addressing this question.

In Levesque v. Rhode Island Department of Transportation, 626 A.2d 1286 (R.I. 1993) the Court determined that a motorist adjudicated to have refused a chemical test could not have his automobile registrations suspended without being first afforded the opportunity for a hearing. The Court also found in Levesque 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. Thus, in my view it is at least doubtful that the court would agree that the reinstatement fee, which is only collected when the motorist seeks reinstatement, is insufficiently certain to require enumeration among the other refusal penalties.

Accordingly, I would rely on a separate different rationale to deny Ms. Haley relief on this assertion of error.

The Court in Levesque, after finding the failure to notify Mr. Levesque that his registrations would be subject to suspension if he refused contrary to law and his due

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[6] This is essentially the same question which was presented to the Rhode Island Supreme Court in Claire I. Link v. State, 633 A.2d 1345 (R.I. 1993). Ms. Link had been warned that if she refused a breath test she would pay a $115 fee; however, the fee had been raised to $147. Link, 633 A.2d at 1347. Unfortunately, the Supreme Court could not reach the issue of whether the fee could be imposed in whole or in part due to infirmities in the trial court procedure. Link, 633 A.2d at 1349.

process rights, did not vacate the conviction, but merely struck the suspension of his registrations. The Supreme Court reiterated this point in Brown v. Rhode Island Department of Transportation, 638 A.2d 1052 (R.I. 1994), a follow-up case to Levesque, wherein Chief Justice Weisberger, writing for the Court, noted that the remedy of vacating the refusal conviction was "too broad." 638 A.2d at 1053.

Assuming the Court found the discrepancy in the reinstatement fee to be material and not de minimis, I must conclude that it is highly unlikely, based on its holdings in Levesque and Brown, that our Court would vacate Ms. Haley's adjudication for refusal on that basis; to the contrary, even if it found her argument about the inadequacy of the rights form to have merit, I believe the court would, at best, vacate the reinstatement fee for Ms. Haley or, more likely still, limit the fee charged her to $75.00 — the amount of which she was warned.

3. Collateral estoppel.

Appellant argues that because in the trial of the ancillary counts the state failed to prove her identity – resulting in an acquittal – the state was estopped from doing so in the refusal proceeding. This argument was rejected by the trial magistrate (See Trial Transcript, at 6-7) and the panel (See Decision of Panel, at 12-13). With these decisions I concur.

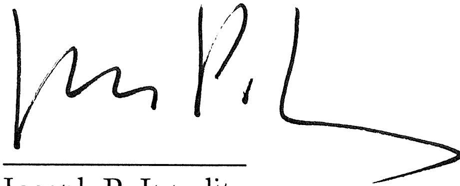
I also believe the doctrine of collateral estoppel does not avail appellant Haley. In this proceeding, she was identified by Officer Bulis. See Trial Transcript, at 29. And Ms Haley, during her testimony, admitted she was the motorist. See Trial Transcript, at 69.

Furthermore, the issues in the case (*i.e.*, the charges) were different, the refusal charge being much more serious than the others previously tried. Moreover, at the RITT the officers appear in non-refusal cases without counsel. The application of collateral estoppel in this case would be unfair and contrary to the interests of justice.

CONCLUSION

Upon careful review of the evidence, I recommend that this Court find that the decision of the appellate panel was — on the issue of the preliminary breath test — clearly erroneous in light of the substantial evidence of record. Gen. Laws 1956 § 31-41.1-9. But, on all other issues, said decision was not clearly erroneous in view of the reliable, probative and substantial evidence on the whole record. General Laws 1956 § 31-41.1-9.

Accordingly, I recommend that the decision rendered by the appellate panel of the RITT be REVERSED in part and AFFIRMED in part and the matter be REMANDED for further proceedings consistent with this opinion.



Joseph P. Ippolito
MAGISTRATE

FEBRUARY 18, 2011