**STATE OF RHODE ISLAND & PROVIDENCE PLANTATIONS**

**PROVIDENCE, Sc.** **DISTRICT COURT**

**SIXTH DIVISION**

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| **Regent Nicholas** | : | |
| | : | |
| **v.** | : | **A.A. No. 10 - 0208** |
| | : | |
| **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 ofthe 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 4th day of April, 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**

| | | |
|---|---|---|
| **Regent Nicholas** | : | |
| | : | |
| **v.** | : | **A.A. No. 2010-0208** |
| | : | **(T09-0120)** |
| **State of Rhode Island** | : | **(07-302-003704)** |
| **(RITT Appellate Panel)** | : | |

## FINDINGS & RECOMMENDATIONS

**Ippolito, M.** In this case Mr. Regent Nicholas 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. Nicholas presents three reasons why the decision of the panel should be set aside: first, the panel failed to recognize that he was denied his right to a confidential phone call while in custody at the hospital; second, the panel erred when it sustained the trial magistrate's finding that the arresting officer had reasonable grounds

to believe appellant had operated while under the influence of intoxicating liquor; and third, the trial magistrate shifted the burden of showing voluntariness onto appellant Nicholas. Brief of Appellant, at 1-2. 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, September 22, 2010, at 1-11; they may be summarized here as follows.[1]

On July 4, 2009 at approximately 10:50 P.M., Officer Hanson Smith, an eight year veteran of the Newport Police Department, responded to a report of a rollover accident on Freeborn Street. (Trial Tr. I, at 5-6) When he arrived, he saw an upturned gray Mitsubishi in the middle of the roadway and members of the fire department removing appellant from the vehicle. (Trial Tr. I, at 6-7) Officer Smith checked the scene and determined that appellant was the only occupant of the Mitsubishi. Then, Officer Smith, accompanied Mr. Nicholas and several fire officers on the walk from his vehicle to the ambulance. At this juncture, Officer Patrick Walsh, a certified breathalyzer operator, arrived; (Trial Tr. I, at 11-14) he rode with appellant in the ambulance on the trip to the

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

hospital.

While in the ambulance, Officer Walsh observed appellant to have bloodshot eyes; (Trial Tr. I, at 14) Mr. Nicholas was also emitting a very strong odor of alcohol. (Trial Tr. I, at 15) As described by Officer Walsh, Mr. Nicholas was completely uncooperative with him and all the public safety officers present. (Trial Tr. I, at 15) He became so agitated when the fire officers were trying to treat him that Officer Walsh had to hold him down. (Trial Tr. I, at 16) Furthermore, because Mr. Nicholas was completely unresponsive when Officer Walsh asked him — on three occasions — to submit to an HGN test, he [Officer Walsh] did not ask him to take other field sobriety tests. (Trial Tr. I, at 16) So too, when Officer Walsh did read appellant the "Rights For Use At the Scene," Mr. Nicholas did not respond. (Trial Tr. I, at 16-18)

At the Newport Hospital emergency room, Officer Walsh observed appellant become agitated — swearing and yelling at hospital personnel; when he failed to heed Officer Walsh's request to calm down, he was handcuffed to the stretcher. (Trial Tr. I, at 19) At the hospital, the officer read Mr. Nicholas the "Rights For Use at the Station/Hospital." (Trial Tr. I, at 19-20) Once more, appellant did not respond. (Trial Tr. I, at 20)

However, when he was offered the opportunity to make a telephone call, he answered affirmatively, indicating he would like to use his own cell phone. (Trial Tr. I, at 20) Officer Walsh handed Mr. Nicholas his phone and left the room. (Id.) Officer Walsh could not say whether medical personnel were in the room when he left. (Trial Tr. I, at 12, 15) When Officer Walsh re-entered the room, he asked appellant to submit to a

chemical test but appellant did not respond. (Trial Tr. I, at 20-21) Later, he issued a summons to appellant and returned to the police station. (Trial Tr. I, at 21)

Mr. Nicholas was arraigned on July 23, 2009. The trial began on October 23, 2009 before Magistrate Alan Goulart. (Trial Tr. I, passim) It continued on November 6, 2009. (Trial Tr. II, passim) After the close of the evidence, the case was adjourned until December 3, 2009, when the trial magistrate rendered his decision. (Trial Tr. III, passim)

Magistrate Goulart found, inter alia, that:

1. The appellant was given his right to a confidential phone call;
2. The officer had reasonable grounds to believe appellant was driving under the influence.
3. The appellant's refusal was a knowing and voluntary decision;

As a result, Mr. Nicholas was found guilty of refusal and sentenced, including a ten month license suspension.

Mr. Nicholas then filed an appeal to the RITT appeals panel.

The matter was heard by an appellate panel comprised of Chief Magistrate William Guglietta (Chair), Judge Lillian Almeida, and Magistrate Domenic DiSandro on April 21, 2010. Before the panel, Mr. Nicholas asserted that the trial magistrate committed reversible error by failing to dismiss the refusal charge for the three reasons listed above plus a fourth — the length of the suspension imposed as part of his sentence. In its September 22, 2010 decision, the panel rejected each of the four assertions of error which appellant had raised.

First, the appellate panel decided that Mr. Nicholas's right to a confidential

phone call was not abridged. See Decision of Panel, at 14-17. Specifically, the panel rejected the appellant's assertion that the confidentiality of his phone call was breached because of the presence of hospital personnel. See Decision of Panel, at 16.

Regarding the second issue, the panel held that the trial magistrate's finding that the officer had reasonable grounds to believe appellant was operating under the influence was supported by substantial evidence and not clearly erroneous. See Decision of Panel, at 17-18. In particular, the panel found reasonable grounds based on certain enumerated factors. . See Decision of Panel, at 18.

On the third issue, the panel held that appellant's decision to refuse to submit to a chemical test was voluntary. See Decision of Panel, at 21-22.

Finally, the panel held that the suspension imposed as part of the sentence was legal, proper, and less than the statutory maximum.

On September 30, 2010, appellant filed an appeal in the Sixth Division District Court. Memoranda have been received from Appellant Nicholas and the Appellee State of Rhode Island.

## 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.' "[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. ... (Emphasis added).

Gen. Laws 1956 § 31-27-2.1(c).

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.[5] 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). At the same time, the officer's acquisition of "reasonable suspicion" [that the motorist was operating under the influence] becomes the first element to be proven in a refusal case. See Gen. Laws 1956 § 31-27-2.1(c). Thus, the Court has pronounced that in alcohol cases, reasonable suspicion is the standard which, if present, empowers the arresting/charging officer to take two crucial actions in alcohol cases: (1) the initial stop and (2) the request of the motorist to take a

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[5] 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).

chemical test. The Court confirmed that the reasonable-suspicion test carries this dual role in State v. Perry, 731 A.2d 720, 723 (1999).

### 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. Nicholas's conviction for refusal to submit to a chemical test?

## V. ANALYSIS

As summarized above, Mr. Nicholas's complaint raises three issues. The first is whether his right to a confidential phone call pursuant to Gen. Laws 1956 § 12-7-20 was abridged. 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 conclude 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. Nicholas's right to a confidential phone call was never breached, and finally (3) even if such a right was indeed breached, 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. Nicholas's rights to a confidential phone call were not violated, it also held — *as a matter of law* — that Mr. Nicholas and all refusal defendants are covered by the

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[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.

At the outset we must acknowledge that our Supreme Court has not yet considered whether the provisions of § 12-7-20 are applicable to refusal-first offense cases. Accordingly, since we are bereft of guidance, our task becomes one of prognostication: 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-first offense 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 undeniable 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-first offense is not a criminal charge but a civil violation; and even a brief examination of chapter 12-7 reveals that all of the sections contained therein deal strictly with criminal procedures, regarding felonies and misdemeanors. Refusal-first 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 refusal-first offense cases — no bail is necessary for no bail can be set; as to the latter, while refusal 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, 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.

Finally, while charges of drunk driving under § 31-27-2 and refusal to submit to a chemical test-first offense under § 31-27-2.1 are often factually interrelated, the

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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

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 is a criminal misdemeanor, the other a civil violation. And so, to put it simply, a motorist who is ultimately charged with refusal to submit to a chemical test-first offense may have been given a confidential phone call while detained; if so, the right to a phone call adhered to them insofar as they were under arrest for drunk driving, not in their capacity as a potential refusal 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. Nicholas's right to a confidential telephone call pursuant to § 12-7-20 was honored. For the reasons I shall now enumerate, I conclude the panel's decision to affirm the trial magistrate's decision should likewise be affirmed.

Before the RITT panel, as here, Appellant Nicholas did not question that he had been given the opportunity to make a phone call, just that the phone call was not fully confidential. Accordingly, the panel commenced its analysis of the issue by recalling § 12-7-20's directive that the calls be "carried out in such a manner as to

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the Governor (Appointed Counsel), 666 A.2d 813, 815 -18 (R.I. 1995).

provide confidentiality between the arrestee and the recipient of the call." The RITT panel went on to define a confidential phone call as being one "... made in privacy so as to ensure that the information communicated by the arrested person to his or her attorney is not widely disseminated to third parties." Decision of Panel, at 15. (Citation to Traffic Tribunal cases omitted). Thus, the panel assumed the call should be completely private. In its ruling it indicated its satisfaction was completely private.

The appellate panel marshaled the evidence supporting this finding most concisely and persuasively on page 16 of its opinion, wherein it stated:

> ... Officer Walsh testified that Appellant preferred to make the telephone call on his cell phone. (Oct. Tr. at 20.) Officer Walsh further testified that he was not physically present in the hospital room at the time Appellant utilized the telephone, although he admitted whether the nursing or medical staff remained in the room. (Oct. Tr. at 20; Nov. Tr. at 14-15.) Furthermore, Officer Walsh did not hear Appellant's conversation or the identity of the recipient. (Oct. Tr. at 20.)
>
> The State's burden is to present evidence that the law enforcement officer left the hospital room and was out of ear shot, which the State satisfied. Carcieri, 730 A.2d at 15. The Appellant failed to rebut the testimony of the Officer. He could have presented evidence that there were hospital personnel present when the Appellant made his phone call, but Appellant presented no evidence on this point whatsoever. The Court will not draw a negative inference that the room was not clear just because an officer, in this case Officer Walsh, could not recall whether the room was cleared of everybody. Accordingly, there is reliable, probative, and substantial evidence on the record evidencing that Appellant exercised his right to a confidential phone call. ...

Decision of Panel, September 22, 2010, at 12. Thus, the panel took a practical approach and held that (1) because the officer could not hear the phone calls

appellant made and (2) because the appellant failed to provide any proof that hospital personnel were present when the calls were made. I find the panel's logic unimpeachable. There was no evidence that anyone was present during the call. Thus the panel's decision is well-supported by the record and is not clearly erroneous.[10]

### 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. Nicholas 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

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[10] However, although it is not necessary to a resolution of this issue I would note that I do not share the panel's assumption that a phone call made under section 12-7-20 must be made in absolute privacy. While this legal assumption is consistent with prior RITT decisions, it has never been reflected in cases of the Rhode Island Supreme Court. To the contrary, the Supreme Court has recognized that in drunk driving cases the detainee's right to make a confidential phone call is counterbalanced against the officer's duty to continuously monitor the defendant in order to protect the integrity of the breathalyzer results. See State v. Carcieri, 730 A.2d 11, 14-15 (RI 1999).

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. Nicholas cannot show prejudice because — even if hospital personnel heard appellant's call — there was no evidence they revealed what they heard. There is also no evidence in the record that appellant spoke to his attorney during his hospital-room phoning.

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. DID THE PANEL ERR IN FINDING THE ARRESTING OFFICER HAD REASONABLE GROUNDS TO BELIEVE MR. NICHOLAS HAD BEEN OPERATING UNDER THE INFLUENCE?

Mr. Nicholas argues that the state failed to prove the first element of a refusal case because Officer Walsh did not have reasonable grounds to believe that Mr. Nicholas "... had been driving a motor vehicle within this state while under the influence of intoxicating liquor ..." See Gen. Laws 1956 § 31-27-2.1(c)(1) and Brief of Appellant, at 20-23. The Supreme Court has defined reasonable grounds as being the equivalent to the legal standard — "reasonable suspicion." State v. Bjerke, 697 A.2d 1069 (RI 1997). After a review of the record, I find appellant's argument on this issue demands serious analysis. Accordingly, in order to properly consider this question we must commence with the finding of the magistrate.

### 1. Findings of the Trial Magistrate: Element of "Reasonable Grounds."

In his oral decision, the trial magistrate identified the specific factors upon which he relied in finding Officer Walsh had reasonable grounds to believe Mr.

Nicholas had been operating under the influence of intoxicating liquor. At the end of his commentary on this element he addressed appellant's counsel, who had conceded the existence [and relevance] of several factors:

> ... Mr. Pelletier I have to tell you when you initially were arguing this matter, I listened very closely to your argument, and I like you, was initially of the belief that we only have here bloodshot and watery eyes and a strong odor of alcohol. However, after going back and listening to the testimony again, a number of times and more closely, that is not all we have here. We have more than that, we have an automobile accident, we have bloodshot and watery eyes, we have a strong odor of alcohol, we have an individual like Officer Walsh who indicates that this is one of the things that he takes into consideration somebody who loses their temper, somebody who is difficult in complying with requests. He certainly had difficulty complying with the request of the Newport Fire Department to submit to treatment. So based on all of the facts that were known to Officer Walsh at that time, I do not think I can find that he it was unreasonable for him to believe that Mr. Nicholas was under the influence of alcohol. Therefore, I find in fact that Officer Walsh did have reasonable grounds to believe that Mr. Nicholas was under the influence of alcohol while operating that motor vehicle. I am satisfied by clear and convincing evidence of that fact — of that element I should say.

Trial Transcript, December 3, 2009, at 18-19. Thus, to the three factors which Mr. Nicholas conceded were present, the trial magistrate added two more — his involvement in the accident and his lack of cooperation in the ambulance. As we shall see, appellant argued these last factors were not properly considered.

**2. Panel's Findings.**

The appellate panel began its discussion on this issue by demonstrating that the factors which can be used by an officer to form "reasonable grounds" are susceptible to categorization. For instance, some factors may be based on the motorist's techniques (such as swerving), the motorist's physical characteristics (such

as watery or bloodshot eyes, the odor of alcohol), his or her physical demeanor (such as stumbling) and finally, the motorist's mental acuity (exhibiting disorientation or confusion). Decision of Panel, at 17-18 citing State v. Perry, 731 A.2d 720 (RI 1999), State v. Pineda, 712 A.2d 858 (RI 1998), State v. Bruno, 709 A.2d 1048 (RI 1998) and State v. Bjerke, 697 A.2d 1069 (RI 1997). All these items — and more — may be given consideration on the issue of whether the motorist was driving while under the influence. As the panel noted, there is no hard and fast or bright-line rule regarding the quality or quantity of facts which must be mustered to meet the test of reasonable grounds; instead, the analysis is, on each occasion, case-specific. Decision of Panel, at 18.

The panel then turned to Mr. Nicholas's circumstances, and enumerated — as indicia that he had operated his vehicle under the influence — the same factors relied upon by the trial magistrate: to wit, he had been involved in a car accident, he emitted the strong odor of alcohol, his eyes were glassy and bloodshot, and finally, he was uncooperative with the medical personnel in the ambulance. Decision of Panel, at 18. Thus, the panel gave credence to the same five factors used by the trial magistrate.

Then, having reviewed the factors (and groups of factors) which are relevant on this question, and having acknowledged the relevant Rhode Island case precedents, and after enumerating the factors present in the instant case, the panel held that Officer Walsh did indeed have reasonable grounds to believe Mr. Nicholas had operated his vehicle under the influence. Decision of Panel, at 19.

### 3. The Positions of the Parties.

We must now consider the position of the parties.

#### (a) Appellant's Position.

In support of this general assertion, he notes specifically that (1) the officer did not observe appellant driving erratically and (2) the officer did not conduct field sobriety tests (FST's). He also argues that the five factors[11] relied upon by the appellate panel were insufficient — as a matter of law — to constitute reasonable grounds. See Brief of Appellant, at 21. He further indicates that the cases cited by the panel were distinguishable.[12] See Brief of Appellant, at 21-22.

#### (b) The State's Position.

In its response on this issue, the State relied in large part upon the Supreme Court's opinion in State v. Pineda, 712 A.2d 858 (RI 1998). Because Pineda was decided on non-substantive grounds, I feel reliance upon it is inappropriate.

### 4. Reasonable Grounds on the Element of Driving While Under the Influence.

If one were to examine every refusal case to examine the quality and quantum of the indicia of reasonable suspicion (reasonable grounds) contained therein, this

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11 To recap, the five enumerated factors were: (1) he was involved in an auto accident, (2) glassy and (3) bloodshot eyes, (4) he emitted the odor of alcohol, and (5) the defendant's lack of cooperation with the ambulance officers.

12 In reverse chronological order, the cases cited were: (a) State v. Bruno, 709 A.2d 1048 (RI 1998), (b) State v. Perry, 731 A.2d 720 (RI 1999), (c) State v. Bjerke, 697 A.2d 1069 (RI 1997), and (d) State v. Pineda, 712 A.2d 858 (RI 1998).

case would undoubtedly be rated toward the lower end of the spectrum. Nevertheless, I am more than satisfied that the State cleared that hurdle.

In considering the prior cases which have addressed the quantum and quality of evidence necessary to form reasonable grounds (the reasonable-suspicion standard), I believe we may profitably commence with State v. Bjerke, supra. In Bjerke the initial stop was justified on alternative grounds — the investigation of a criminal offense. The Court then noted the bases present in the case upon which reasonable grounds may be discerned:

> The defendant's commission of a criminal misdemeanor alone gave the officer probable cause to stop and detain him, and then from that point on, any evidence obtained pursuant to that lawful stop, such as the odor of alcohol, the slurred speech, and bloodshot eyes, would in effect be in plain view of the arresting officer and would support an arrest for suspicion of driving while under the influence. (Emphasis added).

Bjerke, supra, 697 A.2d at 1072. Accordingly, from Bjerke, we may draw that emitting the odor of alcohol and his bloodshot eyes are accepted as evidence of reasonable grounds.

Next, for the recognition of factors also present in the instant case, we may turn to State v. Bruno, supra. In Bruno, multiple indicia of the consumption of alcohol were exhibited. Among these were swerving and speeding, evidence of vomit in the vehicle, the odor of alcohol, slurred speech, and — relevant to our present inquiry — appearing confused. Bruno, supra at 1049.

Finally, in support of the sufficiency of this finding of reasonable-suspicion we may examine State v. Perry, 731 A.2d 720, 723 (R.I. 1999), in which the

operation component of the element reasonable grounds [to believe the motorist was driving under the influence] was found to have been satisfied where (1) a citizen identified Mr. Perry's car as having been involved in a hit-and-run accident and Mr. Perry made an inculpatory statement. On the issue of operation under the influence, the Court noted front-end damage, the smell of alcohol, bloodshot eyes, and stumbling. Perry, 731 A.2d at 722. On this basis, the Supreme Court upheld the trial court's finding that reasonable grounds were present. I believe in Perry the indicia of reasonable-suspicion is roughly equivalent to that found in the instant case.

At the end of the day, the State presented five indicia that Mr. Nicholas had operated[13] under the influence: (1) he was involved in an auto accident, (2) he had glassy and (3) bloodshot eyes, (4) he emitted the odor of alcohol, and (5) he exhibited a lack of cooperation with the ambulance officers. I believe these facts were sufficient — when measured against the standards established in prior Supreme Court decisions, especially the Perry case — to allow this Court to find that the appellate panel's finding that Officer Walsh possessed "reasonable grounds" to believe Mr. Nicholas had driven under the influence of liquor was not clearly erroneous and was in fact supported by substantial evidence of record.

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13 The factors enumerated are all relevant to the issue of operation under the influence. The issue of operation, which claimant has not specifically contested, was overwhelmingly proven by the fact that he was the only person helped out of his car — which was found damaged and upside-down.

## C. IS THE PANEL'S DECISION NOT TO SET ASIDE MR. NICHOLAS'S CONVICTION BECAUSE THE STATE FAILED TO PROVE HIS ACTIONS WERE VOLUNTARY CLEARLY ERRONEOUS?

As his third assignment of error Mr. Nicholas urges that the trial magistrate committed error — seconded by the panel — when he failed to make inquiry into the voluntariness *vel non* of the defendant's refusal to submit to a chemical test. Brief of Appellant, at 24-27. In particular, he indicates that in light of the evidence that the appellant was treated by medical personnel, Officer Walsh had a duty "to ascertain whether the hospital or ambulance personnel had administered medication to the defendant that would affect his ability to comprehend or understand." Brief of Appellant, at 24. Of course, Officer Walsh made no such effort. (Trial Tr. II, at 22). Citing several criminal cases from various jurisdictions alleges that the State failed to meet the burden of showing voluntariness — that he "knowingly and intelligently waived" his rights. Brief of Appellant, at 25, 27 citing State v. Smith, 601 A.2d 931, 935 (R.I. 1992).

The State responded by urging that appellant's argument was utterly unfounded. Brief of State, at 6-7. Specifically, the State asserted that there was no evidence that appellant was medicated or that any medication he might have received had affected his ability to comprehend — especially since he had responded so directly to Officer Walsh's offer to use the telephone. Id.

The RITT appellate panel agreed with the State that there was no evidence of medication. Decision of Panel, at 21. It further accepted the State's position that the officer had no duty to inquire regarding potential medication in order to satisfy its

burden of proof. Decision of Panel, at 22.

I conclude that the appellate panel's decision on this point was correct. There is no evidence in the record that medication was provided to appellant or that he was affected by it. Accordingly, I believe the issue of voluntariness was not sufficiently raised in this record to justify setting aside the conviction for refusal.[14]

Parenthetically, I would note that I concur with the appellate panel that Officer Walsh was under no duty to make inquiry that medication may have affected appellant's ability to voluntarily refuse to submit to a chemical test. The trial magistrate's finding that appellant refused to submit to a chemical test was supported by the overwhelming evidence of record. For purposes of this charge, that is sufficient.

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[14] Because I believe the absence of a proper foundation requires this assignment of error to be overruled, it shall not be necessary to examine the validity of the legal assumptions underpinning appellant's argument. The first such assumption is that the act of refusing to submit to a chemical test is subject to issues of voluntariness in the same manner as a confession. To this end appellant cited State v. Smith, 602 A.2d 931 (R.I. 1992) in which a confession was subjected to the traditional voluntariness analysis. I do not concede Mr. Nicholas's assumption that the circumstances are legally analogous and that a voluntariness inquiry, as is routinely performed regarding a confession in a criminal case, is necessary in a refusal case. It must be remembered that, under the Implied Consent Law, motorists agree to chemical tests when they receive their licenses. See Gen. Laws 1956 § 31-27-2.1(a). The issue in refusal cases is whether the motorist will refuse to fulfill his or her promise of consent.

It may also be noted that the converse situation to a refusal — i.e., consent to a breathalyzer — has not been analyzed under the voluntariness standards of a confession, but under fourth amendment terms. See State v. Locke, 418 A.2d 843, 846-49 (R.I. 1980); see also State v. Berker, 120 R.I. 849, 856-57, 351 A.2d 107, 111-12 (1978).

## 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. Gen. Laws 1956 § 31-41.1-9. Furthermore, said decision is not clearly erroneous in view of the reliable, probative and substantial evidence on the whole record. Gen. Laws 1956 § 31-41.1-9.

Accordingly, I recommend that the decision that the Traffic Tribunal appellate panel issued in this matter be AFFIRMED.

Joseph P. Ippolito
MAGISTRATE

APRIL 4, 2011