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

Stephen Beauregard	:	
	:	
v.	:	**A.A. No. 11 - 0104**
	:	
State of Rhode Island	:	

O R D E R

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 18th day of October, 2011.

By Order:

/s/
Melvin Enright
Acting Chief Clerk

Enter:

/s/
Jeanne E. LaFazia
Chief Judge

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

Stephen Beauregard	:	
	:	
v.	:	**A.A. No. 2011-104**
	:	**(T11-0014)**
State of Rhode Island	:	**(07-411-021429)**
(RITT Appellate Panel)	:	

F I N D I N G S & R E C O M M E N D A T I O N S

Ippolito, M. Mr. Stephen Beauregard urges that an appeals panel of the Rhode Island Traffic Tribunal (RITT) erred when it reinstated a charge of refusal to submit to a chemical test, a civil violation, which had previously been dismissed by an RITT trial magistrate. This matter has been referred to me for the making of findings and recommendations pursuant to Gen. 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. Beauregard argues that the decision of the panel should be set aside because the panel failed to recognize that his right to a confidential phone call while he was detained at the Smithfield Police Station was not honored. He also asserts that his right to an independent medical examination was also abrogated. 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, June 10, 2011, at 1-4; they may be summarized here as follows.[1]

At the trial held in this matter, Patrol Officer Kyle A. Phillips — a 16-month veteran of the Smithfield Police Department with "approximately a dozen or so" alcohol-related investigations — testified that on December 30, 2010 at about 1:00 a.m. he was on patrol on Cedar Swamp Road when he observed ahead of him a large sport-utility vehicle (SUV) swerving from side to side in the northbound lane. (Trial Transcript, at 6). The vehicle then took a wide right turn onto Pleasant View Avenue and after proceeding southbound briefly, turned into the parking lot for DePetrillo's Pizza and the ice rink. (Trial Transcript, at 7).

The officer approached the driver whom, at trial, he identified to be Mr. Beauregard; the officer asked for the operator's license and registration but was refused. (Trial Transcript, at 9). In response to further questioning, the driver said his name was

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

"Stephen A. Smith" and gave a date of birth that later proved incorrect. Id. The officer noticed the driver's eyes were bloodshot and glossy, he perceived a moderate odor of alcohol, and he found his speech to be thick-tongued and slurred. (Trial Transcript, at 10-11). The motorist admitted he had consumed "a couple of beers." (Trial Transcript, at 11).

Mr. Beauregard then took and failed three field sobriety tests — the HGN, one-legged stand, and the walk-and-turn. (Trial Transcript, at 13). The officer arrested Mr. Beauregard for suspicion of drunk driving, placed him in the cruiser, and read him his "Rights For Use at Scene." (Trial Transcript, at 14, 28). He indicated he understood these rights. (Trial Transcript, at 14). During this process Officer Phillips was joined and assisted by two other officers. (Trial Transcript, at 24).

After being transported to the Smithfield police station, the motorist admitted his true identity. (Trial Transcript, at 18). He was read his "Rights For Use at Station," which he acknowledged understanding. (Trial Transcript, at 15-17). He then made a phone call, after which he signed the form indicating he refused to submit to a chemical test. (Trial Transcript, at 18). Mr. Beauregard was cited for refusal to submit to a chemical test in summons number 07-411-021429. In a second citation (07-411-021430) he was charged with two lesser moving violations — (1) "laned roadway violation" and (2) "left of center."

According to Officer Phillips', Mr. Beauregard was detained overnight until his District Court arraignment on the charges of drunk driving and driving on a suspended license. (Trial Transcript, at 18-19, 32, 37). No justice of the peace was called to the

station to arraign Mr. Beauregard. (Trial Transcript, at 34). Finally, Officer Phillips conceded that he did not specifically offer to transport Mr. Beauregard to a local hospital for a blood test. (Trial Transcript, at 37).

Mr. Beauregard indicated that during the incident he was very tired from working many hours during the prior three days excavating snow. (Trial Transcript, at 50). He testified that his phone call was made on a landline, while an officer was standing five feet away and another stood at the doorway. (Trial Transcript, at 52). The call resulted in him leaving a voicemail message for his attorney. (Trial Transcript, at 53). He further testified that he was denied a second call. (Trial Transcript, at 54, 60). He stated that he asked to be released, and had called a friend before he was placed under arrest to arrange bail money. (Trial Transcript, at 46-47, 61). Finally, he claimed that if he had been released earlier, he would have gone to Fatima Hospital for a blood test. (Trial Transcript, at 56). On cross-examination, he conceded that he did not ask the officers to leave him while he was using the phone. (Trial Transcript, at 63).

Mr. Beauregard was arraigned before the Traffic Tribunal on February 14, 2011. He entered a plea of not guilty. The case proceeded to trial on February 28, 2011 before Chief Magistrate Guglietta. At the close of the evidence, the Chief Magistrate dismissed the refusal charge against Mr. Beauregard, finding that he had not received a confidential phone call as required by Gen. Laws 1956 § 12-7-20. (Trial Transcript, at 87). The trial magistrate specifically found prejudice, because the phone call was to his attorney. (Trial

Transcript, at 88).[2] The trial magistrate declined to find a violation of the right to an independent medical examination. Gen. Laws 1956 § 31-27-3. (Trial Transcript, at 78-80).

The State filed an appeal to the RITT appeals panel. The matter was heard by the panel, comprised of Magistrate Alan Goulart (Chair), Judge Edward Parker and Magistrate Domenic DiSandro on April 27, 2011. In its June 10, 2011 written opinion the panel stipulated — based on the findings of the trial magistrate — that the phone call made by Mr. Beauregard was not confidential. Decision of Panel, at 8. The panel then engaged in an extensive discussion of whether prejudice resulted from this violation of section 12-7-20. Decision of Panel, at 8-11. It found there was not, and reversed the decision of the trial magistrate dismissing the refusal charge against Mr. Beauregard. Decision of Panel, at 11-12. On remand, the trial magistrate sustained the charge and imposed penalties, including a 13-month suspension of driving privileges.

On June 20, 2011, appellant filed an appeal in the Sixth Division District Court. At a conference held by the undersigned on October 4, 2011, counsel for appellant and the State agreed to submit the case for review by this Court on the record below and without the necessity of further memoranda.

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:

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[2] The trial magistrate sustained the laned roadway charge but dismissed the count of left of center.

> (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.' "[3] 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.[4] Stated differently, the findings of the panel will be upheld even though a reasonable mind might have reached a contrary result.[5]

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[3] 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)).

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

[5] 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 vacated the dismissal of the charge of refusal to submit to a chemical test that had been lodged against Mr. Beauregard?

V. ANALYSIS

A.

IS THE PANEL'S DECISION REVERSING THE TRIAL MAGISTRATE'S DECISION TO DISMISS THE REFUSAL CHARGE DUE TO 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 — First Offense" as defined in Gen. Laws 1956 § 31-27-2.1(b)(1), and (2) assuming arguendo section 12-7-20 does apply in refusal cases and the right was 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. Beauregard was not prejudiced when his right to a confidential phone call was violated, it also held (or at least assumed) that Mr. Beauregard and all refusal-first offense defendants are covered by the 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 are applicable to refusal-first

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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.

offense 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-first offense 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-first offense defendant was given a confidential telephone 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 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)

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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.

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-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 first offense refusal cases — no bail is necessary for no bail can be set; as to the latter, while refusal-first 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.

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,

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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

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-first offense 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. 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. Beauregard cannot demonstrate prejudice. See State's Memorandum of Law, at 6-7. The panel cited 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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Governor (Appointed Counsel), 666 A.2d 813, 815 -18 (R.I. 1995).

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. Beauregard cannot show prejudice for several reasons.

Firstly, there can be no showing of prejudice because Mr. Beauregard was not talking to his attorney or — for that matter — any human being. He was leaving a voice mail message. Therefore, under Carcieri, prejudice cannot be shown from the fact that an officer was nearby. The same point can also be made from a statutory viewpoint. Let us begin by reviewing the last sentence of § 12-7-20, which contains mandates confidentiality for phone calls:

> * * *. 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.

The recipient of the call was apparently a machine or a computer. There could not have been a free exchange of information, of ideas, or advice. The statutory provision was simply inapplicable.

Secondly, there is no evidence the officers revealed what they heard. Neither was any incriminating information obtained by the officers. It is speculative to consider what Mr. Beauregard would have said to the voice mail system if the officers were not there.

Thirdly, the call, as made, was just as useful for contacting the attorney as a perfectly private call would have been. The attorney, for reasons unknown, simply did not respond in time to affect the outcome here.

In sum, because I do not believe Mr. Beauregard can demonstrate prejudice, 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. BEAUREGARD'S CONVICTION BECAUSE HIS RIGHT TO AN INDEPENDENT MEDICAL EXAMINATION WAS ABRIDGED CLEARLY ERRONEOUS?

Mr. Beauregard also asserts that his extended detention at the Smithfield Police Station abridged his right to an independent medical examination as provided in § 31-27-3. See Appellant's Amended Complaint, at 1-2. The panel addressed this issue briefly. Decision of Panel, at 6-7. The panel assumed § 31-27-3 is applicable to refusal cases, but held no violation occurred, because appellant never expressed a desire to have an independent medical examination. Decision of Panel, at 7. At this juncture I shall evaluate appellant's claim, from its premise to its application, in the instant case.

1. Section 31-27-3 and the Right to An Independent Examination.

Section 31-27-3 provides in its entirety:

> A person arrested and charged with operating a motor vehicle while under the influence of narcotic drugs or intoxicating liquor, whatever its alcoholic content, shall have the right to be examined at his or her own expense immediately after the person's arrest by a physician selected by the person, and the officer so arresting or so charging the person shall immediately inform the person of this right and afford the person a reasonable opportunity to exercise the right, and at the trial of the person the prosecution must prove that he or she was so informed and was afforded that opportunity. (Emphasis added)

See Gen. Laws 1956 § 31-27-3. Thus, by its plain language, § 31-27-3 requires that (1) a defendant arrested for a drunk driving charge (2) be notified that he or she has a right to an independent medical examination and (3) be given a reasonable opportunity to exercise that right. For purposes of this discussion, I shall call the second requirement the "notice" provision and the third the "substantive" or "opportunity" requirement. To reiterate, the application of § 31-27-3 is limited to drunk driving case detainees.

2. Is Section 31-27-3 Applicable To Refusal Charges?

But, if § 31-27-3 is limited by its plain language to drunk driving cases, how can appellant assert that his alleged failure to receive an opportunity for an independent medical examination should cause his refusal charge to be dismissed? He does so on the basis of a single provision of the refusal statute, which makes the third element of a refusal case proof that:

> (3) the person had been informed of his or her rights in accordance with § 31-27-3;

Gen. Laws 1956 § 31-27-2.1(c)(3). It would seem that, viewed in tandem, §§ 31-27-2.1(c)(3) and 31-27-3, require only that the State, in a prosecution for refusal to submit to a chemical test, prove only that the motorist was informed that he or she had a right to be examined by a physician of his own choosing and at his own expense. The synthesis of these statutes does not appear to require — in a refusal case — that the State prove that the police afforded the defendant a "reasonable opportunity" to exercise these rights.

But appellant urges that pursuant to § 31-27-3 a motorist has the right to be examined immediately after his or her arrest and that the police bear the burden of affording the person a reasonable opportunity to exercise this right. Implicitly, he is urging that the refusal statute incorporates § 31-27-3. See Appellant's Amended Complaint, at 1-2. By this logic, the Smithfield Police had a duty to afford him an opportunity to obtain an independent medical examination. So, we must inquire, are the full mandates of § 31-27-3 — beyond mere notice — applicable in refusal cases? I have concluded this question must be answered in the negative for two reasons: one legal, one logical.

First, by their plain language, §§ 31-27-2.1(c)(3) and 31-27-3 do not support such a construction, as stated above: they merely require notice to be given, not the opportunity to obtain such an examination. Moreover, in no case of which I am aware has our Supreme Court held that the reference to § 31-27-3 in § 31-27-2.1(c)(3) makes the former fully applicable — regarding all its commands — in refusal cases. Such a holding would mean that § 31-27-3 has been subsumed or poured into § 31-27-2.1(c)(3).[10]

Second, making the opportunity to take an independent medical examination an element in a refusal prosecution would be highly illogical. The results of an independent medical examination — potentially highly probative and persuasive in a

[10] To the contrary, in State v. Langella, 650 A.2d 478, 479 (R.I. 1994), the Supreme Court would not hold that § 31-27-3 was subsumed into § 31-27-2(c)(6), a part of the drunk driving statute. It would be a longer stretch to find that it had been subsumed into the refusal statute, which is not referenced in §31-27-2.

drunk driving case — are, as a matter of law, immaterial in a refusal case. The purpose of an independent examination is to enable the defendant to challenge the results of a scientific test which has been offered to demonstrate that defendant had been operating under the influence. In a refusal prosecution, whether the defendant was truly under the influence is never at issue: it is only necessary for the State to show that the officer had reasonable grounds to believe the motorist had been driving under the influence — and that, upon request, the defendant refused the test. That the indicia which supported the officer's suspicions of drunkenness were later revealed to be caused by totally innocent factors is no defense in a refusal prosecution.

In support of this conclusion we may cite State v. Bruno, 709 A.2d 1048, 1049-50 (R.I. 1998), in which our Supreme Court found that the Administrative Adjudication Court (AAC) trial judge and the AAC appellate panel erred in dismissing a refusal charge that had been lodged against the defendant, Peter Bruno, based on evidence tending to show his erratic driving and other conduct was caused by non-alcoholic factors. Accordingly, the results of an independent medical examination would not be deemed relevant in a refusal prosecution. For this reason, it would be an absurd result to find that the State must prove compliance with a provision whose product would be inadmissible.

So, what is the purpose of the notice requirement? Is it worthless? Or vestigial? No, I believe it carries an important purpose. Like the provision in § 31-27-2.1 requiring that the motorist be informed of the penalties that result from a refusal,

this provision provides information that assists the motorist to make an informed decision on whether to take the breathalyzer test. See Appellee's (State's) Memorandum, at 4-5.

Thus, I find the State need not demonstrate that the police complied with § 31-27-3's opportunity mandate in a refusal prosecution, just the notice provision. This duty Officer Phillips clearly fulfilled. For these reasons I conclude that the State had no duty to afford Mr. Beauregard an opportunity to arrange an independent medical examination. Accordingly, I find appellant possessed no substantive rights under § 31-27-3.

3. Assuming Section 31-27-3 Is Fully Applicable To Refusal Cases, Was There Compliance In the Instant Case?

Given that there is no definitive precedent on this issue, I believe it incumbent upon me to consider the legal alternative — that the State must prove it provided Mr. Beauregard with a "reasonable opportunity" to obtain an independent medical examination. The State argues that — even assuming it is fully applicable in refusal cases — § 31-27-3 was not violated by the Smithfield Police during Mr. Beauregard's detention. In this, I believe the State is very much correct.

Firstly, in denying Mr. Beauregard's claim that his right to an examination had been abridged, the appellate panel focused on the fact that appellant — having been advised of his right to an independent medical examination — never expressed a desire for such an examination to be arranged. Decision of Panel, at 9-10. Thus, the panel took the position that it is the duty of the motorist to request an examination.

Decision of Panel, at 9. The panel reasoned that a contrary position — that the police must demonstrate compliance without a request — would render the refusal statute a nullity. Every person charged with drunk driving could sit back and allow time to pass, delaying release, and then claim a § 31-27-3 violation. Decision of Panel, Id.

Secondly, assuming § 31-27-3 imposes a substantive duty in a refusal case, it may also be argued that such a duty was satisfied by Smithfield Police when its officers allowed appellant to make a single phone call. This position is supported by a Rhode Island Supreme Court decision rendered in 1994. In State v. Langella, 650 A.2d 478 (R.I. 1994), a drunk driving case, the Rhode Island Supreme Court held that a single telephone call made by the defendant, Christopher Langella, just after he received his Rights For Use at the Scene satisfied the duty of the East Greenwich Police Department to provide him with a reasonable opportunity to have an independent medical examination. Langella, 650 A.2d at 479. There was no indication from our Court that multiple calls must be made available to the motorist in order to satisfy the mandates of § 31-27-3.

In sum, I believe both of these arguments have merit; accordingly, even if § 31-27-3 applies in cases of refusal to submit to a chemical test-first offense, I am satisfied that Mr. Beauregard's rights were not violated and the appellate panel did not err in overruling his appeal on this ground.

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.

/s/
Joseph P. Ippolito
MAGISTRATE

OCTOBER 18, 2011