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

Patricia Sargent	:	
	:	
v.	:	**A.A. No. 11 - 0013**
	:	
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 9th day of November, 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

Patricia Sargent	:	
	:	
v.	:	**A.A. No. 2011-0013**
	:	**(T10-0056)**
State of Rhode Island	:	**(09-001-532339)**
(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. In this case Ms. Patricia Sargent urges that an appeals panel of the Rhode Island Traffic Tribunal erred when it affirmed a trial magistrate's verdict 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 may be found in Gen. Laws 1956 § 31-41.1-9(d).

In her appeal Ms. Sargent presents a number of reasons why the decision of

the panel should be set aside: first, the panel committed error when it failed to dismiss the refusal charge even though she had refused a portable breath test (PBT); 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 notwithstanding evidence that the officer had doubts concerning whether he possessed probable cause to arrest Ms. Sargent; third, the panel failed to recognize that the arresting officer did not have reasonable grounds to believe appellant had operated while under the influence of intoxicating liquor independent of the field sobriety test results; fourth, the panel erred when it failed to dismiss the refusal charge even though the State failed to prove the accompanying laned roadway violation; and fifth and finally, the panel failed to recognize that the trial judge improperly relied on his recollection of the Portsmouth Barracks when he determined Ms. Sargent was not denied her right to a confidential phone call while in custody of the Division of State Police. Brief of Appellant, at 1-2.

After a review of the entire record, and for the reasons stated below, I have concluded that each of these assertions of error is without merit, that the decision of the panel in this case is supported by reliable, probative and substantial evidence of record and that it is not clearly erroneous; I therefore recommend that the decision of the appellate panel be affirmed.

I. FACTS & TRAVEL OF THE CASE

The facts which led to the charge of refusal against appellant are fully and fairly stated (with appropriate citations to the trial transcript) in the decision of the panel. See Decision of RITT Appellate Panel, February 2, 2011, at 1-5; they may be summarized here as follows.

At approximately 10:30 p.m. during the evening of November 8, 2009, Trooper John J. Gadrow, a nine-year veteran of the Division of State Police with extensive experience in drunk driving cases, was operating east on Route 138 in Jamestown when a vehicle entered the highway from the Conanicus Avenue on-ramp, crossed the chatter strip and entered his lane, forcing him to swerve to the left to avoid a collision. (Trial Tr. I, at 6-12, 13; Trial Tr. II, at 9-10, 13[1]). According to the trooper, the vehicle — a silver KIA sport-utility vehicle (SUV) — had failed to negotiate the on-ramp's 180 degree turn and had joined Route 138 before the designated merge area. (Trial Tr. I, at 13-14). Trooper Gadrow stopped the vehicle just past the Newport Bridge toll plaza. (Trial Tr. I, at 14-16).

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[1] The record of the trial in this case is comprised of seven volumes of transcripts. "Trial Tr. I" refers to the commencement of the trial on February 25, 2010; "Trial Tr. II" refers to the continuation of the trial on March 16, 2010; "Trial Tr. III" refers to the proceedings on April 16, 2010; "Trial Tr. IV" designates the proceedings on April 29, 2010; "Trial. Tr. V" refers to the proceedings on May 28, 2010; "Trial Tr. VI" refers to the proceedings on June 21, 2010. Also in the record is a transcript of the deposition of Dr. William O'Connor, taken on April 26, 2010.

When he approached the SUV, Trooper Gadrow noticed Ms. Sargent's speech to be slurred, her eyes to be bloodshot and watery, and her breath to contain a strong odor of alcohol. (Trial Tr. I, at 16). When asked for her license and registration, she fumbled through her purse and the vehicle's glove compartment. (Trial Tr. I, at 17). Exiting the vehicle, she lost her balance and slightly staggered. (Trial Tr. I, at 18; Tr. II, at 62-66). The trooper asked Ms. Sargent if she had any physical problems that would prevent her from performing field sobriety tests (FST's). (Trial Tr. I, at 19; Tr. II, at 82). She said no.[2] (Id). During this process, she was cooperative and neither rude nor belligerent. (Trial Tr. II, at 80).

He then formally asked her to perform standardized field sobriety tests (Trial Tr. I, at 18-19); during the instruction phase of the FST testing process, Ms. Sargent responded coherently. (Trial Tr. II, at 32). She did two and failed both — the walk-and-turn and the one-legged stand tests. (Trial Tr. I, at 18-26). At that point the trooper concluded the motorist was under the influence. (Trial Tr. I, at 26; Trial Tr. II, at 87). The trooper then asked Ms. Sargent if she would submit to a preliminary breath test (PBT). (Trial Tr. I, at 27). She declined to do so. (Id.)

Trooper Gadrow then placed Ms. Sargent under arrest, read her the "Rights

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[2] At one point in her testimony appellant said she responded "I hope not." (Trial Tr. II, at 138). But on the next day of hearing she insisted that she answered that she had a back issue. (Trial Tr. III, at 7-9).

For Use at Scene," and transported her to the Portsmouth State Police barracks. (Trial Tr. I, at 27-29; Trial Tr. II, at 48). Once there, he read her the "Rights For Use At Station," which she said she understood. (Trial Tr. I, at 30-31). Appellant stated that she wished to make a phone call, and to accommodate that request she was led into the "NCO" room. (Trial Tr. I, at 31-32). The trooper, who waited outside the NCO room, testified that although he could see her through a glass window he could not hear the calls he saw her making.[3] (Trial Tr. I, at 32; Trial Tr. II, at 51-56). At the end of twenty minutes, her attempts to place a call ended; she refused to submit to a chemical test — and signed the "Rights For Use At Station" form accordingly. (Trial Tr. I, at 33).[4]

While at the barracks, at a time that was never specified at trial, Ms. Sargent told the trooper she had "a problem" with her back. (Trial Tr. II, at 24-25).[5]

In her testimony Ms. Sargent, a registered nurse active in charitable causes in the community, testified that she was receiving Temporary Disability Insurance

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[3] Ms. Sargent said that while in the NCO room she could hear State Police Troopers speaking on the radio. (Trial Tr. III, at 12, 14, 28).

[4] Ms. Sargent maintained she was asked to take a breathalyzer only at the police car — not at the barracks. (Trial Tr. III, at 26). She also denied the trooper read her the rights form. (Trial Tr. III, at 27).

[5] This revelation was apparently prompted by the trooper's discovery, when inventorying her possessions, of a medicine bottle containing, inter alia, a prescription pain killer. (Trial Tr. II, at 84). It seems that, at first, Ms. Sargent misled the trooper regarding the nature of this substance. (Trial Tr. III, at 23).

(TDI) due to herniated discs in her neck, a longstanding problem for her. (Trial Tr. II, at 115, 127-29). She told the trial magistrate that she had consumed three beers with her dinner at the Narragansett Café in Jamestown. (Trial Tr. II, at 55). She said she was "wobbly" due to her back issues. (Trial Tr. III, at 6).

A friend who had accompanied appellant to dinner that evening — Ms. Mary Brawn — and the bartender at the restaurant — Ms. Lori Campbell — also testified for the defense, supporting her claim that she had only three drinks. (Trial Tr. III, at 44-60). Neither detected any signs of intoxication in Ms. Sargent that evening. (Id.). Finally, the defense submitted for the court's consideration the deposition of a Dr. Connor, who testified that appellant's back injuries may have affected her performance on the field sobriety tests. (Trial Tr. IV, at 3-22) and Transcript of Deposition, April 26, 2010, passim.

At her arraignment at the Traffic Tribunal on November 19, 2009, Ms. Sargent entered a not guilty plea. The trial began on February 25, 2010 before Traffic Tribunal Magistrate Alan Goulart. It continued over several days over the course of several months. At the close of the state's case, the trial magistrate dismissed the PBT charge, because — according to the trooper — he already had probable cause to arrest her after the FST's were completed. (Trial Tr. II, at 111; Trial Tr. IV, at 58). After the close of all the evidence, the case was adjourned until June 4, 2010, when the trial magistrate rendered his decision — finding, to a

standard of clear and convincing evidence, that Trooper Gadrow had reasonable grounds to believe that Ms. Sargent had been operating under the influence and that, after being informed of her rights, she refused to submit to a chemical test. (Trial Tr. V, at 20). As a result, Ms. Sargent was found guilty of refusal and sentenced, including a nine-month license suspension. (Trial Tr. VI, at 16).

The trial magistrate also found the lesser charge of "laned roadway" violation had not been proven to a standard of clear and convincing evidence. (Trial Tr. V, at 15).

Ms. Sargent then filed an appeal to the RITT appeals panel.

The matter was heard by an appellate panel comprised of Magistrate Domenic DiSandro (Chair), Chief Magistrate William Guglietta, and Magistrate David Cruise on September 22, 2010. In its February 2, 2011 decision, the panel rejected each of the five assertions of error that appellant had raised. The panel's reasoning on each topic shall be noted in the "Analysis" section of this opinion, Part V, infra.

On February 9, 2011, appellant filed an appeal in the Sixth Division District Court. A conference was held before the undersigned on March 29, 2011 and a briefing schedule was set. Memoranda have been received from Appellant Sargent 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.' "[6] The Court will not substitute its judgment for that of the agency (here, the panel) as to the weight of the evidence on

[6] 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)).

questions of fact.[7] Stated differently, the findings of the panel will be upheld even though a reasonable mind might have reached a contrary result.[8]

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. * * *

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

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

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

> 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 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).

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.[9] 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: (1) the initial stop and (2) the request of the motorist to take 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. THE PRELIMINARY BREATH TEST STATUTE

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

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[9] 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).

> **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.

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

A third 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 Ms. Sargent's conviction for refusal to submit to a chemical test?

V. ANALYSIS

As summarized above at page 2, Ms. Sargent's memorandum raises five issues. They shall now be considered seriatim.

A. DID THE PANEL ERR IN FINDING THE TROOPER HAD REASONABLE GROUNDS TO BELIEVE MS. SARGENT HAD BEEN OPERATING UNDER THE INFLUENCE?

Two of the five issues raised by appellant arise from the State's duty to prove that the officer requesting the chemical test possessed reasonable grounds to believe the motorist "… 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 22-29. The first is that the trooper had "doubts" about whether he possessed probable cause to arrest Ms. Sargent; the second is that appellant's failure to pass the field sobriety tests given to her was without probative value, given her back condition, and that, absent these tests, the trooper did not have probable cause. Because I believe them to be inextricably interwoven, these assertions of error shall be considered together.

Briefly, the panel decided that Trooper Gadrow possessed sufficient reasonable suspicion that Ms. Sargent was driving under the influence. Decision of Panel, at 7-8. Citing State v. Jenkins, 673 A.2d 1094, 1097 (R.I. 1996), State v. Bruno, 709 A.2d 1048, 1050 (R.I. 1998), and State v. Perry, 731 A.2d 720, 721 (R.I. 1999), the panel enumerated the indicia of intoxication previously identified by the Supreme Court, and asserted that it is bound to follow a "totality of the circumstances" methodology in determining reasonable suspicion. Decision of Panel, at 8. As a result, the analysis is, on each occasion, case-specific. Decision

of Panel, at 7-8.

And so, in order to determine whether the State proved Trooper Gadrow had reasonable grounds to believe Ms. Sargent had been driving under the influence, I have employed the following methodology: (1) I have reviewed the refusal cases previously decided by the Rhode Island Supreme Court in order to examine the quality and quantum of the indicia of reasonable suspicion (reasonable grounds) contained therein; (2) because the panel did not consider the results of the field sobriety tests (FST's) in considering this question, I have done likewise; and (3) I have compared the indicia of reasonable grounds in the precedents to the indicia — minus the FST results — present here. And, after doing so, I am more than satisfied that the State cleared this hurdle with room to spare. I shall now elaborate on the steps of this analysis.

1. Reasonable Grounds to Believe the Operator Was Driving While Under the Influence — Rhode Island Precedents.

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 ultimately justified on alternative grounds — the investigation of a criminal offense. The Court then noted the

several bases present in the case before it 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, slurred speech and bloodshot eyes are accepted as indicia of intoxication.

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 appearing confused. Bruno, supra at 1049.

Finally, in support of the sufficiency of this finding of reasonable-suspicion we may learn from State v. Perry, 731 A.2d 720, 723 (R.I. 1999), in which the element of reasonable grounds [to believe the motorist was driving under the influence] was found to have been satisfied where 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.

2. Non-reliance on FST results.

Although the panel refused to strike the field sobriety tests from its consideration of whether the trooper had "reasonable grounds" [or "reasonable-suspicion"] to believe Ms. Sargent had been driving under the influence, it did not cite the FST results in its evaluation of reasonable-suspicion. See Decision of Panel, at 7-8. Apparently, it implicitly disregarded them because questions arose later as to the significance of the FST's.

But there is no indication the Trooper knew of her back issue at the time when he requested her to submit to a chemical test at the barracks. Therefore, his "reasonable-suspicion" could not be vitiated. I therefore believe that not considering the field sobriety tests against Ms. Sargent was an act of grace not required by law.

3. Comparing the Indicia of Intoxication Present in the Case at Bar to the Indicia Found in the Rhode Island Precedents.

Not counting the field test results, the State presented five indicia that Ms. Sargent had operated under the influence: (1) she nearly precipitated an auto accident with the cruiser operated by Trooper Gadrow, (2) she had watery and (3) bloodshot eyes, (4) she emitted the odor of alcohol, and (5) she exhibited a lack of steadiness in her gait. 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 Trooper Gadrow possessed "reasonable grounds" to believe Ms. Sargent had driven under the influence of liquor was not clearly erroneous and was in fact supported by substantial evidence of record. Thus, even without the FST results, the "reasonable-suspicion" standard was satisfied. Including them, the evidence is overwhelming.

4. Additional Comment — Trooper's "Admission."

Appellant makes much of the a comment that Trooper Gadrow made in his testimony, which he proffers as an "admission" that the Trooper was not comfortable in the belief that he had reasonable grounds to believe Ms. Sargent had operated under the influence of intoxicating liquor. See Appellant's Memorandum, at 22-25. He stated that he sometimes requests a preliminary breath test if he has a "second doubt" as to the appellant's condition. Decision of Panel, at 9-10. Appellant urges that this admission undercut the Trooper's testimony on this issue. In response, the State urges the Trooper was speaking generally. See State's Memorandum, at 4.

The panel concluded the trooper was speaking generally and not with regard to Ms. Sargent. Decision of Panel, at 9. The panel specifically found any such doubts on the part of the Trooper could not be ascribed to her medical

condition, since he did not learn about that until sometime after they arrived at the barracks — long after he requested the PBT. Decision of Panel, at 10 citing Trial Tr. III, at 25.

I reject this argument for two reasons. First, like the appellate panel, I believe appellant is overstating the meaning of the comment. I agree with the panel that the comment constituted his effort was trying to explain the circumstances in which he might ask the motorist to take a PBT. It was not, at least primarily, a comment on Ms. Sargent's condition.

Second, even if the comment accurately reflected grave doubts on the part of the Trooper as to the sufficiency vel non of the indicia he had of her intoxication, it would have no probative value. Neither the trial magistrate, nor the appellate panel, nor the District Court, are bound by the Trooper's understanding of the quantum of indicia necessary to form reasonable grounds. Instead, we are bound by the language of the statute and the Rhode Island Supreme Court precedents construing it. See State's Memorandum, at 4. The Trooper's understanding of the law was utterly irrelevant.

5. Additional Comment — Medical Evidence.

Appellant Sargent expended much energy during this trial attempting to demonstrate that her actions and demeanor on the evening in question — which the State views as indicia of intoxication — had an innocent explanation: her back

injury. Not only did she testify at length on this subject but she called two witnesses and presented a deposition from her physician. However, it is well-settled in Rhode Island's refusal case law that such testimony was completely immaterial.

In State v. Bruno, discussed supra, multiple indicia of intoxication were exhibited by the motorist. Accordingly, the officer requested Mr. Bruno to submit to a chemical test. At his trial on the charge of refusal Mr. Bruno satisfied the Administrative Adjudication Court (AAC) trial judge that his conduct was attributable not to liquor intoxication but to the effects of prescription medication he was taking. Bruno, 709 A.2d at 1049. Relying on this evidence, the trial magistrate dismissed the refusal charge. After the AAC appellate panel affirmed the dismissal, the State took a further appeal to the Rhode Island Supreme Court.

The Supreme Court reversed, holding that evidence that the motorist had not been driving under the influence " * * * is not, as the hearing judge and the appeals panel erroneously surmised, dispositive of whether reasonable suspicion existed to support a finding of a violation of § 31-27-2.1." Bruno, supra, 709 A.2d at 1050. To put it simply, because the officer had reasonable-suspicion, he was authorized under the implied consent law to request the motorist to submit to a chemical test; the motorist's refusal triggered the statutory sanction. That Mr. Bruno was not truly drunk was immaterial to the refusal case — even though it

might well have been highly probative to a drunk-driving case arising out of the same incident. Accordingly, the evidence presented by the defense attempting to show Ms. Sargent was not truly drunk was legally immaterial in the refusal case.

B. LANED ROADWAY VIOLATION.

Appellant argues the refusal charges should have been dismissed because the trial magistrate dismissed the "laned roadway" violation. Appellant's Memorandum, at 29-30 citing Trial Tr. V at 15. On the third issue, the panel held that the fact that the trial magistrate acquitted appellant on the "laned roadway" violation did not require dismissal of the refusal charge. Based on the trooper's testimony concerning the actions of her vehicle, the panel found the trooper had reasonable suspicion to make the stop. See Decision of Panel, at 10-11. It is irrelevant that the separate count was dismissed. In my view the testimony of the officer more than provided a basis for the stop — for any number of violations.

C. REFUSAL OF THE PBT.

Ms. Sargent urges that the panel committed error when it found that her refusal to take the PBT at the scene did not preclude the Trooper from asking her to submit to a breathalyzer test at the barracks. After a review of the pertinent portion of the appellate panel, I shall explain why I believe each of appellant's arguments on this point are unpersuasive.

1. Decision of the Panel.

The appellate panel rejected appellant's theory — that because she refused a preliminary breath test (PBT) she could not be asked to take a breath test at the barracks. Decision of Panel, at 11-13. In discussing this issue, the panel began by noting that § 31-27-2.1 [chemical tests] and § 31-27-2.3 [preliminary breath tests] should be read together and harmonized — to the extent possible — to give life to their policies and purposes. Decision of Panel, at 11-13. Then, it found that the phrase in § 31-27-2.1 indicating that if a motorist refuses tests, "none shall be given," refers only to full breath tests given at a police station, not a PBT. The panel explained:

> … this Panel does not agree with an interpretation of the relevant statutes that a request to submit to a breath test is a violation of a motorist's rights simply because a person has refused a PBT. The "none shall be given" language of § 31-27-2.1 is clearly in contemplation of an actual breath test. The entire section is dedicated to regulations concerning an actual, "station" refusal; the independent medical exam, refusing upon religious grounds. There is nothing in the statute to indicate that the legislature contemplated a preliminary breath test. See Almeida v. United States Rubber Co., 82 R.I. 264, 268, 107 A.2d 330, 332 (1954).

Decision of Panel, at 12-13. Thus, the panel rejected the idea that the provisions of § 31-27-2.1 apply to preliminary breath tests.

The panel also noted that § 31-27-2.3 specifically permits full tests to be given after a PBT has been administered. Decision of Panel, at 13. In other words, a person who has taken a PBT on the highway may later, at the station, be asked

to take a further chemical test. From this the appellate panel concluded that the chemical test given at the station is the "official" test. The panel also opined that it would be incongruous if a person who performed the PBT could be asked to take the full test, but a person who refused the PBT could not — and only be subjected to the lighter PBT refusal penalties. Accordingly, the panel declined to give the refusal of a PBT the same prophylactic effect accorded to the refusal of a full chemical test. This, in brief, is the decision of the panel. We shall now review the positions of the parties.

2. Analysis.

(a) § 31-27-2.1(a).

In support of her position that she could not be asked to submit to a chemical test after she had refused the PBT, appellant first proffers that sentence in § 31-27-2.1(a) which states: "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 * * *." (Emphasis added.). See Appellant's Memorandum, at 18.[10]

[10] The State did not respond directly to this claim but did present the Appellant with the following conundrum — if appellant is correct and a PBT refusal implies a chemical test refusal, then by refusing the PBT she refused the chemical test and is guilty as a matter of law of a § 31-27-2.1 violation. State's Memorandum, at 2-3.

By its terms, this provision provides no support to appellant. While it may well limit the number of chemical tests that can be taken, it clearly does not purport to limit the number of tests that a motorist may be solicited to take. And we must bear in mind that none were taken by Ms. Sargent.

(b) § 31-27-2.1(b).

Appellant next draws our attention to § 31-27-2.1(b) which provides the administrative procedures by which the operator's license of a motorist who has refused a chemical test in violation of the Implied Consent law may be suspended. In particular, she quotes the following sentence: "If a person having been placed under arrest refuses upon the request of a law enforcement officer to submit to the tests, as provided in § 31-27-2,[11] none shall be given, but a judge of the traffic tribunal or district court judge, upon receipt of a report of a law enforcement officer * * * shall promptly order that the person's operator's license or privilege to operate a motor vehicle in this state be immediately suspended * * *." (Emphasis added.). This provision also does not aid Ms. Sargent. To put it simply, when she was at the barracks, appellant refused to submit to a chemical test and none were given: the statutory mandate was fully honored!

[11] The reference to § 31-27-2 — the drunk driving statute — is further indication that the tests referred to in § 31-27-2.1(b) is to the full breathalyzer since a reference to preliminary tests would be unnecessary: under § 31-27-2.3 PBT's are never admissible in a drunk driving case.

But appellant urges that under § 31-27-2.1(b) a refusal bars only the PBT but the full test as well and immunizes the motorist who has refused a PBT from prosecution under § 31-27-2.1(c). I believe this proposed extension is inorganic and without support in the text of the statute and Rhode Island case law.[12]

Appellant relies upon State v. DiStefano, 764 A.2d 1156 (R.I. 2000), a case in which the Supreme Court answered several questions that had been certified by the Superior Court. In DiStefano a blood test for drugs was administered to a motorist — pursuant to a search warrant — after the motorist had refused to submit to such a test voluntarily. DiStefano, 764 A.2d at 1157-58. The Rhode Island Supreme Court gave the phrase "none shall be given" in § 31-27-2.1(b) its plain meaning and found that the search warrant-authorized test to be illegal. DiStefano, 764 A.2d at 1166.

Appellant urges us to extend the holding in DiStefano to the refusal of a PBT. For the sake of analysis, let us assume arguendo that the same rule would apply.[13] But, even if the holding in DiStefano is applied to PBT's, compliance

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[12] Because I believe the mandate of § 31-27-2.1 — even if extended to PBT's — only requires that no further PBT's be given, I must decline to follow the Superior Court decision in the drunk driving case, State v. Cote, C.A. No. N3-2008-120A (Super.Ct.1/27/09)(Thunberg, J.). In Cote, the Court suppressed breathalyzer test results because the test was taken after the defendant had refused a preliminary breath test. Cote, slip op at 2.

[13] There is dicta in DiStefano indicating it might be applicable to PBT's. See DiStefano, 764 A.2d at 1160-61.

would be achieved by not performing a PBT involuntarily on a motorist who has refused — and nothing more.

But appellant asks this Court to stretch the holding in DiStefano. She urges that because she refused the PBT, she could not even be asked to take the full chemical test. This in a gross extension of DiStefano, one beyond my powers of divination to anticipate. The law does not specifically forbid asking the motorist to take successive tests. See 31-27-2.3. We must also remember that the entire thrust of DiStefano is that the Supreme Court issued its ruling with regret regarding its outcome, indicating that it was bound by the plain meaning of the statute.

(c) Haley v. State.

In support of this claim of error, appellant also cites Haley v. State of Rhode Island, A.A. No. 10-132 (Dist.Ct.2/18/2011)(Slip op. at 12), in which this Court held that the taking of a PBT by a motorist after arrest may satisfy the implied consent law and preclude a conviction for refusal to submit to a chemical test, if certain technical requirements — not pertinent here — are met. This holding was based on a reading of subsections 31-27-2.1(c) and 31-27-2.1(d). The State urges that Haley is inapposite. State's Memorandum, at 2. I must agree.

This Court found Ms. Haley could not be found guilty of refusal because, having been placed under arrest, she agreed to take a PBT. Haley, slip op at 10-2

relying on § 31-27-2.1(c).[14] By contrast, Ms. Sargent did not. Therefore, Ms. Sargent does not fall within the ambit of this Court's ruling in Haley.

But, beyond the fact that Ms. Haley took the PBT and she did not, Ms. Sargent faces an even greater obstacle to her efforts to cloak herself within the ambit of the Haley decision — there is simply no evidence in the record that she was under arrest when she was asked to take the PBT.[15] 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

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[14] That the *refuser* of the PBT must be under arrest in order for it to have preclusive effect may also be seen in the sentence from § 31-27-2.1(b) upon which appellant relies, which we may quote once more:

> If a person having been placed under arrest refuses upon the request of a law enforcement officer to submit to the tests, as provided in § 31-27-2, none shall be given, but a judge of the traffic tribunal or district court judge, upon receipt of a report of a law enforcement officer * * * shall promptly order that the person's operator's license or privilege to operate a motor vehicle in this state be immediately suspended * * *.

(Emphasis added).

[15] I note that there is no indication in the Court's opinion that the defendant in State v. Cote, supra at 25, n. 12, Ms. Kathryn Cote, was under arrest when she refused the PBT. Because I believe a motorist must be under arrest when he or she submits to a PBT in order for that test to preclude a further chemical test, I must decline to follow Cote for this second reason as well.

found to be "under arrest" when "placed under arrest" by officer; Court finds insufficient evidence of impairment at that moment).

There was a comment made by the trial magistrate in the course of posing a question to the effect that Ms. Sargent was under arrest after the FST's were completed. See Trial Tr. II at 87-89. But a question or comment by the Court does not constitute evidence. The trooper did testify that after the field sobriety tests he had concluded he had reasonable suspicion. However, he never said he had placed Ms. Sargent under arrest. Moreover, Ms. Sargent never testified she had been arrested at that juncture.

D. DID THE TRIAL MAGISTRATE'S REFUSAL TO TAKE A VIEW OF THE PORTSMOUTH BARRACKS, RELYING INSTEAD ON HIS PREVIOUS FAMILIARITY WITH ITS SET-UP TAINT HIS RULING ON APPELLANT'S CLAIM THAT HER RIGHT TO A CONFIDENTIAL TELEPHONE CALL PURSUANT TO SECTION 12-7-20 WAS VIOLATED?

Appellant urges that the trial magistrate's determination on the confidential phone call issue was tainted by his knowledge of the Portsmouth barracks and its NCO room. The State urges no error was committed — that he denied the request for a view simply because he had been there and a view was unnecessary. State's Memorandum, at 6. It must be said he did not take judicial notice of the set-up of the Portsmouth Barracks, he just declined to take a view because he had familiarity with the barracks. The defendant did not move for a mistrial upon hearing this revelation.

The appellate panel found that Ms. Sargent's right to make a confidential call pursuant to § 12-7-20 was not abridged. Decision of Panel, at 13-15. The panel found that the trial magistrate did not improperly rely on his knowledge of the so-called "NCO" room at the Portsmouth barracks but instead relied on the Trooper's testimony regarding physical set-up of the room. Decision of Panel, at 14 citing Trial Tr. V, at 16.

But even if the trial magistrate acted upon an improper procedure, I believe appellant is without remedy for such a miscue. After all, a judge's error does not require reversal unless prejudice can be shown. I believe appellant cannot show prejudice, as a matter of law, because, in my view, she — as defendant in a civil refusal case[16] — had no right to a phone call under § 12-7-20. Thus, any error in procedure was harmless because the issue being considered was itself immaterial.

Although the RITT Panel held — based on the particular facts of the case — that Ms. Sargent's rights to a confidential phone call were not violated, it also assumed — as a matter of law — that Ms. Sargent and all refusal

[16] 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.

defendants are covered by the 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,[17] 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

[17] 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).

proven in refusal cases.[18] 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-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

[18] 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.

consult with an attorney[19] 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 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

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

the Supreme Court of Rhode Island will be inclined to transfer a procedural prerequisite from one type of prosecution to another.[20]

In sum, I conclude the panel's decision finding the trial magistrate's refusal to take a view of the Portsmouth barracks did not constitute an improper procedure as he considered the issue she raised under § 12-7-20, her purported right to a confidential phone call, is not clearly erroneous.

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[20] Although we need not reach the issue, we can state that there was substantial evidence supporting the panel's decision that appellant was given a fully confidential phone call. Quite simply, the trial magistrate believed the Trooper's testimony — that he could hear nothing — and did not believe Ms. Sargent's version of the circumstances.

It also seems that, even if appellant's rights under § 12-7-20 were violated, dismissal would have been an excessive and unwarranted remedy because Ms. Sargent cannot demonstrate prejudice. See State's Memorandum of Law, at 6-7. The State cites State v. Carcieri, 730 A.2d 11 (RI 1999), for the principle that prosecutorial misconduct will not require dismissal unless there is demonstrable proof of prejudice or a substantial threat thereof. Carcieri, 730 A.2d at 16 citing United States v. Morrison, 449 U.S. 361, 365 (1981). See also State v. Veltri, 764 A.2d 163, 167-68 (RI 2001). In Carcieri, the Court found a lack of prejudice where the police did not obtain incriminating information and the attorney-client relationship was not invaded — because Mr. Carcieri was not speaking to his attorney. Carcieri, 730 A.2d at 16-17. Applying the Carcieri decision to the facts of the instant case, we are led to the inescapable conclusion that Ms. Sargent cannot show prejudice because there was no evidence they revealed what they heard. There is also no evidence in the record that appellant spoke to her attorney during her calls from the barracks.

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.

/s/
Joseph P. Ippolito
MAGISTRATE

NOVEMBER 9, 2011