

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

DISTRICT COURT

Dennis Lonardo

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v.

A.A. No. 12-47

**State of Rhode Island
(RITT Appellate Panel)**

AMENDED ORDER

This matter is before the Court pursuant to § 8-8-16.2 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 5th day of September, 2012.

By Order:

/s/
Stephen C. Waluk
Chief Clerk

Enter:

/s/
Jeanne E. LaFazia
Chief Judge

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AMENDED FINDINGS & RECOMMENDATIONS

Montalbano, M. In this case Mr. Dennis Lonardo urges that an appeals panel of the Rhode Island Traffic Tribunal [hereinafter “RITT”] erred when it affirmed a trial magistrate’s decision finding him guilty of refusal to submit to a preliminary breath test, a civil violation, in violation of Gen. Laws 1956 § 31-27-2.3. This matter has been referred to me for the making of findings and recommendations pursuant to Gen. Laws 1956 § 8-8-16.2. Jurisdiction for the instant appeal is vested in the District Court by Gen. Laws 1956 § 31-41.1-9; the applicable standard of review is found in Gen. Laws 1956 § 31-41.1-9(d). After a review of the entire record I find – for the reasons explained below – that the decision of the panel is supported by reliable, probative, and substantial evidence of record and is not clearly erroneous and should be affirmed; I so recommend.

I. FACTS AND TRAVEL OF THE CASE

The facts which led to the charge of refusal against appellant are fully and fairly stated in the decision of the Rhode Island Traffic Tribunal appeals panel [hereinafter “Decision of Panel”]. See Decision of Panel, at 1-4. For our purposes, the following briefer summary will suffice:

On July 31, 2011, Officer Ryan Vose [hereinafter “Officer Vose”] – a veteran of the East Providence Police Department with seven years of experience and more than sixty suspected D.U.I. arrests – was on patrol in the Warren Avenue and Lyon Avenue area of East Providence. (Trial Transcript, at 3). While on patrol, Officer Vose observed the appellant, Dennis Lonardo [hereinafter “Mr. Lonardo”] walking down Warren Avenue; Officer Vose’s attention was originally drawn to Mr. Lonardo because he was “stumbling while walking.” (Trial Transcript, at 3). As Officer Vose watched, he observed Mr. Lonardo “stop in place for a moment” and “sway” from side to side. (Trial Transcript, at 3). Officer Vose observed Mr. Lonardo for about thirty seconds before he saw Mr. Lonardo walk into the liquor store at the corner of Warren Avenue and Lyon Avenue. (Trial Transcript, at 3, 8).

As Officer Vose drove by, he continued to observe Mr. Lonardo, who exited the liquor store, walked to his pickup truck parked on Lyon Avenue, and proceeded to drive away. (Trial Transcript, at 4). As Mr. Lonardo drove past him, Officer Vose proceeded to pursue and subsequently stop Mr. Lonardo’s vehicle. (Trial Transcript, at 4). Officer Vose approached Mr. Lonardo’s vehicle and asked Mr. Lonardo for his license and registration, and Mr. Lonardo produced a valid driver’s license. (Trial Transcript, at 4).

While speaking with Mr. Lonardo, Officer Vose smelled an odor of alcohol coming from Mr. Lonardo's "facial area" and also noticed that his eyes were bloodshot and watery. (Trial Transcript, at 4). When Officer Vose asked Mr. Lonardo where he was coming from and if he had consumed any alcohol, Mr. Lonardo stated that he had been helping a friend paint and admitted that he had consumed "a couple of beers" while painting. (Trial Transcript, at 4-5).

Based upon his observations and conversation with Mr. Lonardo, Officer Vose administered three standard field sobriety tests: the horizontal gaze nystagmus test, the walk and turn test, and the one-leg stand test. (Trial Transcript, at 5). Officer Vose concluded that Mr. Lonardo "showed impairment" in all three tests, but did not further explain his findings. (Trial Transcript, at 5-6). Thereafter, Officer Vose contacted a fellow traffic officer who was on duty that evening to respond to the scene with a portable breath test machine, and that officer responded to the scene. (Trial Transcript, at 5-6). While the responding officer was readying the portable breath test machine, Officer Vose explained to Mr. Lonardo that he would be asked to submit to a preliminary breath test, but Mr. Lonardo refused to blow into the portable breath test machine. (Trial Transcript, at 6). Officer Vose then placed Mr. Lonardo under arrest on suspicion of D.U.I., charging him with refusal to submit to a preliminary breath test. (Trial Transcript, at 6).

At the conclusion of the trial, the trial judge sustained the refusal charge against Mr. Lonardo. (Trial Transcript, at 29-30). The trial judge based his decision largely on Officer Vose's observations and reasoned that the "totality of the circumstances" favored

the prosecution. (Trial Transcript, at 29-30). Mr. Lonardo then filed an appeal with the appeals panel of the RITT.

The matter was heard by an appeals panel comprised of Judge Almeida (Chair), Magistrate Noonan, and Magistrate Goulart on January 11, 2012. Decision of Panel, at 1. In its written decision, the appeals panel upheld the refusal charge against Mr. Lonardo, affirming the trial judge's decision on the following issues:

First, the appeals panel rejected the assertion that the trial judge erred in finding that Officer Vose possessed the requisite reasonable suspicion under United States and Rhode Island constitutional law to effectuate the initial traffic stop. See U.S. v. Cortez, 449 U.S. 411 (1981); Terry v. Ohio, 392 U.S. 1 (1968); State v. Jenkins, 673 A.2d 1094 (R.I. 1996); Decision of Panel, at 7. The appeals panel rejected Mr. Lonardo's argument that Officer Vose's basis for the initial traffic stop – namely Officer Vose's observations of Mr. Lonardo stumbling and swaying on the street – failed to meet the reasonableness standard, noting that the reasonableness inquiry is highly fact-specific and must be evaluated through the eyes of a trained police officer. See U.S. v. Zapata, 18 F.3d 971, 975 (1st Cir. 1994); Cortez, 449 U.S. at 419; Decision of Panel, at 6-7.

Second, the appeals panel rejected the argument that the trial judge erred in finding that Officer Vose possessed the requisite reasonable grounds under Gen. Laws 1956 § 31-27-2.3 to administer a preliminary breath test. Decision of Panel, at 8. The appeals panel stated that the basis for the request for a preliminary breath test – namely Officer Vose's observations of the smell of alcohol coming from Mr. Lonardo's facial area, Mr. Lonardo's bloodshot and watery eyes, and Mr. Lonardo's admission that he had

consumed alcohol earlier that day – satisfied the statutory requirement. See Gen. Laws 1956 § 31-27-2.3 (a); Decision of Panel, at 8-9. For these reasons, the verdict of the trial judge was upheld; the instant timely appeal to the District Court followed.

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).

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.’ ” Guarino v. Dept. of Social Welfare, 122 R.I. 583, 588, 410 A.2d 425, 428 (1980) (citing R.I. Gen. Laws § 42-35-15(g)(5)). Thus, the Court will not substitute its judgment for that of the panel as to the weight of the evidence on questions of fact. Cahoone v. Board of Review of the Dept. of Emp. Security, 104 R.I. 503, 506,

246 A.2d 213, 214-15 (1968). Stated differently, the findings of the panel will be upheld even though a reasonable mind might have reached a contrary result. Id., at 506, 246 A.2d at 215.

III. APPLICABLE LAW

A. REASONABLE SUSPICION

The Fourth Amendment dictates that any and all searches and seizures must not be “unreasonable,” but must be supported by “probable cause.” U.S. Const. amend. IV; R.I. Const. art. I, § 6; see Terry v. Ohio, 392 U.S. 1, 8 (1968). Though brief and limited, the temporary detention of persons during a traffic stop constitutes a “seizure” for Fourth Amendment purposes and thus must not be unreasonable. See, e.g., Whren v. U.S., 517 U.S. 806, 809-10 (1996); U.S. v. Brignoni-Ponce, 422 U.S. 873, 878 (1975). Moreover, both federal and state case law have emphasized that an “investigatory” traffic stop, in order to be lawful and within the scope of Fourth Amendment provisions, must be “justified by some objective manifestation that the person stopped is, or is about to be, engaged in criminal activity.” See, e.g., U.S. v. Cortez, 449 U.S. 411, 417 (1981); State v. Casas, 900 A.2d 1120, 1131 (R.I. 2006).

The standard for evaluating such investigatory stops is that of reasonable suspicion: that is, the officer making the traffic stop must have a reasonable suspicion that the suspect is involved in criminal activity. See Terry, 392 U.S. at 21; Casas, 900 A.2d at 1131. As the United States Supreme Court held in Terry, in order to establish a reasonable suspicion, “the police officer must be able to point to specific and articulable

facts which, taken together with rational inferences from those facts, reasonably warrant” the stop. 392 U.S. at 21.

In determining whether the suspicions of an officer meet the reasonableness standard as set forth in Terry and subsequent case law, the Court must take into account the “totality of the circumstances” and examine all “facts and circumstances available to the officer at the time of the search.” Cortez, 449 U.S. at 417; State v. Milette, 727 A.2d 1236, 1240 (R.I. 1999); see also State v. Keohane, 814 A.2d 327, 330 (R.I. 2003). As such, a reasonableness inquiry of an officer’s actions and decisions is highly fact-specific. See U.S. v. Zapata, 18 F.3d 971, 975 (1st Cir. 1994). The R.I. Supreme Court delineated in Keohane certain factors that may support the reasonableness of an officer’s suspicion, including “the location in which the conduct occurred, the time at which the incident occurred, the suspicious conduct or unusual appearance of the suspect, and the personal knowledge and experience of the police officer.” 814 A.2d at 330. Further, the R.I. Supreme Court in State v. Holdsworth reiterated that “a police officer may initiate ‘an investigatory stop of an individual whom a police officer reasonably suspects...has engaged in wrongdoing.’” 798 A.2d 917, 921 (R.I. 2002) (citing Terry, 392 U.S. at 30).

B. THE PRELIMINARY BREATH TEST STATUTE

This case involves a charge of refusal to submit to a preliminary breath test. See Gen. Laws 1956 § 31-27-2.3, which governs preliminary breath tests:

31-27-2.3. Revocation of license upon refusal to submit to preliminary breath test. – (a) When a law enforcement officer has reason to believe that a person is driving or in actual physical control of any motor vehicle in this state while under the influence of alcohol, the law enforcement officer may require the person to submit to a preliminary breath analysis for the

purpose of determining the person's blood alcohol content. The breath analysis must be administered immediately upon the law enforcement officer's formulation of a reasonable belief that the person is driving or in actual control of a motor vehicle while under the influence of alcohol, or immediately upon the stop of the person, whichever is later in time. Any chemical breath analysis required under this section must be administered with a device and in a manner approved by the director of the department of health for that purpose. The result of a preliminary chemical breath analysis may be used for the purpose of guiding the officer in deciding whether an arrest should be made. *** (Emphasis added)

Thus if the police officer has a reasonable belief that a motorist is operating a motor vehicle while under the influence of alcohol, he or she can require the person to submit to a preliminary breath test, which can assist the officer in deciding whether the motorist should be arrested.

IV. ISSUE

The issue before this Court is whether the decision of the appeals panel was supported by reliable, probative, and substantial evidence in the record, or whether it was clearly erroneous or affected by error of law. More specifically, did the appeals panel err in finding that Officer Vose possessed reasonable suspicion to make the initial traffic stop and to administer a preliminary breath test pursuant to Gen. Laws 1956 § 37-27-2.3?

V. ANALYSIS

A. DID OFFICER VOSE POSSESS THE REQUISITE REASONABLE SUSPICION TO PERFORM THE INITIAL TRAFFIC STOP, AS REQUIRED BY THE UNITED STATES CONSTITUTION AND THE RHODE ISLAND CONSTITUTION?

The first issue to be addressed is whether the RITT appeals panel erred in affirming the trial judge's decision that Officer Vose had reasonable suspicion to make the initial traffic stop. In this appeal, Mr. Lonardo argues that Officer Vose did not

possess the requisite reasonable grounds necessary to stop Mr. Lonardo's vehicle and thus failed to comport with constitutional provisions. See Brief of Appellant, at 1-2; see also Terry, 392 U.S. at 21; Cortez, 449 U.S. at 417-18; Casas, 900 A.2d at 1131. Mr. Lonardo's argument requires this Court to consider the following critical question: whether Officer Vose's observations of Mr. Lonardo "stumbling while walking" and "sway[ing] from side to side" constituted "articulable facts" under Terry to make the initial traffic stop. Trial Transcript, at 3; see 392 U.S. at 21. A reasonable suspicion is to be evaluated by the "totality of the circumstances," and an officer's knowledge and experience is one of multiple factors to be considered when evaluating the reasonableness of a traffic stop. See Keohane, 814 A.2d at 330; see also Milette, 727 A.2d at 1240.

At trial, Officer Vose testified that on the night of the stop, he observed Mr. Lonardo "stumbling while walking" on Warren Avenue. (Trial Transcript, at 3). Further, Officer Vose also observed Mr. Lonardo "stop in place for a moment" and "sway from side to side." (Trial Transcript, at 3). Thereafter, Officer Vose observed Mr. Lonardo walk into a liquor store and subsequently get into his pickup truck. (Trial Transcript, at 3-4). After getting into his truck, Mr. Lonardo then passed by Officer Vose's location. (Trial Transcript, at 4). Officer Vose did not observe Mr. Lonardo commit any traffic violations or infractions while driving the pickup truck, however, Officer Vose testified at trial that "after observing [Mr. Lonardo] for a short period of time, it appeared as if he ... may be under the influence of alcohol or narcotics." (Trial Transcript, at 3-4).

Thus, under the totality of the circumstances set forth above, it seems to this Court that Officer Vose's initial traffic stop was lawful and permissible under the Constitutions

of the United States and the State of Rhode Island. See Cortez, 449 U.S. at 417; Terry, 392 U.S. at 21; see also Keohane, 814 A.2d at 330; Jenkins, 673 A.2d at 1097. As required by Terry, Officer Vose articulated specific facts to support his reasonable suspicion that Mr. Lonardo was involved in (or was about to be involved in) criminal activity. See Terry, 392 U.S. at 21; see also Cortez, 449 U.S. at 417. Additionally, Officer Vose's years of experience as a police officer and his history of over sixty arrests for suspected D.U.I. charges support the reasonableness of his suspicion in the present case. See Keohane, 814 A.2d at 330; Trial Transcript, at 15. In conclusion, this Court agrees with the appeals panel in upholding the trial judge's decision that Officer Vose possessed reasonable suspicion to make the initial traffic stop.

B. DID OFFICER VOSE POSSESS THE REQUISITE REASONABLE GROUNDS AS REQUIRED BY GEN. LAWS 1956 § 31-27-2.3 TO JUSTIFY HIS REQUEST OF MR. LONARDO TO SUBMIT TO A PRELIMINARY BREATH TEST?

The second issue to be addressed is whether the appeals panel erred in affirming the trial judge's decision that Officer Vose's request of Mr. Lonardo to submit to a preliminary breath test was supported by his reasonable belief that Mr. Lonardo was driving a motor vehicle in this state while under the influence of alcohol as required by Gen. Laws 1956 § 31-27-2.3. In this appeal, Mr. Lonardo argues that Officer Vose's testimony, specifically his lack of definitive testimony that Mr. Lonardo failed the field sobriety tests administered, fails to satisfy the reasonableness standard set forth in Gen. Laws 1956 § 31-27-2.3. Brief of Appellant, at 7-8. Mr. Lonardo's argument requires this Court to consider the following question: whether Officer Vose's testimony and observations on the date in question – including the smell of alcohol coming from Mr.

Lonardo's facial area, Mr. Lonardo's bloodshot and watery eyes, and Mr. Lonardo's admission that he consumed alcohol earlier in the day – met the reasonable grounds element of Gen. Laws 1956 § 31-27-2.3, justifying Officer Vose's request that Mr. Lonardo submit to a preliminary breath test. Trial Transcript, at 4-5.

Officer Vose testified at trial that once he began speaking to Mr. Lonardo after stopping his vehicle, he “smelled the odor of alcoholic beverage coming from [Mr. Lonardo's] facial area” and noticed that “his eyes were bloodshot and watery.” (Trial Transcript, at 4). Further, when asked by Officer Vose, Mr. Lonardo reported that he had “a couple beers” while helping a friend paint that evening. (Trial Transcript, at 5). Officer Vose also reported that after administering three standard field sobriety tests, “Mr. Lonardo showed impairment” in each test. (Trial Transcript, at 5). Taking into account these observations, together with Officer Vose's experience and training, it was reasonable for Officer Vose to suspect that Mr. Lonardo was driving while under the influence and to subsequently request that Mr. Lonardo submit to a preliminary breath test.

This Court is of the opinion that the observations made by Officer Vose at the time of the stop – mainly the smell of alcohol, Mr. Lonardo's bloodshot and watery eyes, and Mr. Lonardo's own admission that he had been drinking earlier that day, in addition to Officer Vose's conclusion that Mr. Lonardo had shown indications of impairment on the field sobriety tests administered to Mr. Lonardo – are sufficient under the relevant statute to form a basis for Officer Vose's reasonable belief that Mr. Lonardo was operating his vehicle while under the influence. Gen. Laws 1956 § 31-27-2.3; Trial Transcript, at 4-5;

see State v. Owens, 418 N.W.2d 340, 343 (Iowa 1988) (holding that an officer detecting the smell of alcohol possesses sufficient reason to ask the motorist to submit to a preliminary breath test). Mr. Lonardo suggests that testimony as to the specific results and/or outcomes of the field sobriety tests is required in order to establish the basis for Officer Vose's reasonable belief that Mr. Lonardo was operating his vehicle while under the influence of alcohol. Brief of Appellant, at 7-8. No such requirement is found in Gen. Laws 1956 § 31-27-2.3. In conclusion, this Court agrees with the appeals panel, upholding the trial judge's decision that Officer Vose possessed the requisite reasonable grounds to request that Mr. Lonardo submit to a preliminary breath test.

VI. 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 of the RITT appeals panel be
AFFIRMED.

_____/s/
Joseph A. Montalbano
MAGISTRATE

September 5, 2012