STATE OF RHODE ISLAND & PROVIDENCE PLANTATIONS

PROVIDENCE, Sc. **DISTRICT COURT**
SIXTH DIVISION

Jared Bisordi	:	
	:	
v.	:	**A.A. No. 2014 - 092**
	:	
State of Rhode Island	:	
(RITT Appeals Panel)	:	

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 and 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 and Recommendations of the Magistrate are adopted by reference as the Decision of the Court and the decision of the Appeals Panel is hereby AFFIRMED.

Entered as an Order of this Court at Providence on this 1st day of June, 2015.

By Order:

___/s/_____
Stephen C. Waluk
Chief Clerk

Enter:

___/s/_____
Jeanne E. LaFazia
Chief Judge

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

Jared Bisordi	:	
	:	
v.	:	**A.A. No. 2014-092**
	:	**(T13-0067)**
State of Rhode Island	:	**(13-001-520849)**
(RITT Appeals 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 Mr. Jared Bisordi urges that an appeals panel of the Rhode Island Traffic Tribunal (RITT) erred when it affirmed a trial magistrate's decision finding him guilty of refusal to submit to a chemical test — a civil traffic violation defined in Gen. Laws 1956 § 31-27-2.1. Jurisdiction for the instant appeal is vested in the District Court by Gen. Laws 1956 § 31-41.1-9; the applicable standard of review is found in Gen. Laws 1956 § 31-41.1-9(d). This matter has been referred to me for the making of findings and recommendations pursuant to Gen. Laws 1956 § 8-8-8.1. For the reasons stated herein, I recommend that the decision rendered by the appeals panel in Mr. Bisordi's case be AFFIRMED.

I
FACTS AND TRAVEL OF THE CASE

The facts of the incident which led to the charge of refusal to submit to a chemical test being lodged against Mr. Bisordi are comprehensively and fairly stated (with appropriate citations to the RITT Trial Transcript) in the decision of the RITT appeals panel. As a result, they need not be restated here in the same depth. While the following summary of the incident will generally be sufficient, additional facts of record shall be introduced as necessary.

A
The Incident

On July 6, 2013 at approximately 2:50 a.m., Trooper Luis Robles, a twenty-two month veteran of the Division of State Police who had been trained in making drunk-driving stops, was dispatched to the area of exit 13 on Route 95 South for a report of a multiple vehicle accident.[1] When he arrived at that location, he noticed several vehicles involved in the collision, one of which was a red Ford Ranger.[2] He approached a man standing outside the Ranger, who turned

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[1] Decision of Appeals Panel, at 6 citing Trial Transcript I, at 125-26. His experience included thirty drunk-driving stops and twenty drunk-driving arrests. Trial Transcript I, at 122.

[2] Decision of Appeals Panel, at 6-7 citing Trial Transcript I, at 126.

out to be its operator, the Appellant, Mr. Jason Bisordi.[3] Doing so, Trooper Robles noted "the smell of alcohol emanating from his breath," that his speech was "mumbled and a little slurred," and that his eyes were "bloodshot and watery."[4] Based on these observations, the Trooper asked the operator to perform a series of field sobriety tests — and he agreed to do so.[5]

And so, on a level, well-lit portion of the roadway, Mr. Bisordi performed the walk-and-turn and the one-legged-stand tests, both of which, in Trooper Robles' opinion, he failed.[6] As a result, the Trooper arrested Mr. Bisordi for suspicion of drunk driving, read him the "Rights for Use at the Scene," and transported him to the Lincoln Barracks, where he read him the "Rights for Use at the Station."[7]

After Mr. Bisordi agreed to submit to a breath-analysis test, Trooper Robles brought him to the Intoxilyzer 5000 machine, and instructed him how to blow

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[3] Decision of Appeals Panel, at 7 citing Trial Transcript I, at 132. Before approaching the operator of the Ranger, he spoke to three other persons at the scene of the collision. Trial Transcript I, at 129.

[4] Decision of Appeals Panel, at 7 citing Trial Transcript I, at 137-40.

[5] Decision of Appeals Panel, at 7 citing Trial Transcript I, at 140-41.

[6] Decision of Appeals Panel, at 7-8 citing Trial Transcript I, at 142-147.

[7] Decision of Appeals Panel, at 8 citing Trial Transcript I, at 148-152.

into it.[8] But although Appellant placed his mouth on the mouthpiece and began to blow, this action did not elicit a steady tone from the machine, which one expects if a sufficient sample is produced by the subject.[9] After second and third attempts by Appellant to blow into the machine also failed to generate a steady tone, the Trooper ended the test, concluding that Mr. Bisordi had not been blowing into the machine.[10]

Trooper Robles cited Mr. Bisordi, in summons number 13-001-520849, with (1) Refusal to Submit to a Chemical Test in violation of Gen. Laws 1956 § 31-27-2.1, (2) a Laned Roadway violation pursuant to Gen. Laws 1956 § 31-15-11, and (3) Operating Without Evidence of Insurance in violation of Gen. Laws 1956 § 31-47-9. At his arraignment, on July 17, 2013, Mr. Bisordi entered pleas of not guilty to all three counts. The Court ordered a preliminary suspension of his operator's license.[11] The matter proceeded to trial on October 7, 2013.[12]

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8 Decision of Appeals Panel, at 8 citing Trial Transcript I, at 154.

9 Decision of Appeals Panel, at 8-9 citing Trial Transcript I, at 155-56, 169.

10 Decision of Appeals Panel, at 9 citing Trial Transcript I, at 169-71, 179-82.

11 See Docket Sheet, Summons No. 13-001-520849 and "Preliminary Order of Suspension." The Court's authority to issue preliminary suspensions is found in Gen. Laws 1956 § 31-27-2.1(b).

12 Decision of Appeals Panel, at 1; see also Trial Transcript I, at 40-42.

B

The Trial

1

The Testimony

Mr. Bisordi's trial, which began on October 7, 2013 and concluded three days later, was presided over by RITT Administrative Magistrate R. David Cruise.

The State's first witness was Mr. Albert Giusti, the Supervisor of the Breath Test Division of the Rhode Island Department of Health's Forensic Laboratories.[13] He informed the Court of his general educational background and his experience regarding breath test machines.[14] Mr. Giusti testified that, as Supervisor of the Breath Test Division, he has comprehensive responsibility for (1) certifying officers as to their training and proficiency in operating breath test machines in conformity with state laws and regulations and (2) insuring the accuracy of Rhode Island's breath-test machines.[15] Overruling an objection by the defense, the Court recognized Mr. Giusti as an expert in breath analysis.[16]

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[13] Decision of Appeals Panel, at 1 citing Trial Transcript I, at 4. For brevity's sake, in this opinion, I shall sometimes refer to Mr. Giusti's agency simply as the "DOH."

[14] Decision of Appeals Panel, at 2-3 citing Trial Transcript I, at 7-8.

[15] Decision of Appeals Panel, at 2 citing Trial Transcript I, at 5-6.

[16] Decision of Appeals Panel, at 3 citing Trial Transcript I, at 7-8.

Mr. Giusti then elaborated upon his agency's involvement in insuring that breathalyzer machines used in Rhode Island are functioning properly. He indicated that, before placing the machines with the various law enforcement agencies, his Division checks the machines and notes the unique serial number of each.[17] It also creates a record for each instrument, upon which is noted — (1) where and when it was placed on-line, (2) any preventive maintenance or repairs made, and (3) any reported problems.[18] Shown a document by the prosecutor that had been marked State's Exhibit Number 2 for identification, Mr. Giusti identified it as a July 3, 2013 inspection report for the Intoxilyzer 5000 machine at the Lincoln Barracks, created by Mr. Larry Allen, one of his inspectors; it was received full.[19]

Although not included in the appeals panel's narrative, it was at this juncture that Mr. Giusti testified that the records of the Department of Health indicated that, as of July 6, 2013, Trooper Luis Robles was a certified Intoxilyzer

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[17] Decision of Appeals Panel, at 3 citing Trial Transcript I, at 14-17. The serial number is assigned at the factory. Trial Transcript I, at 15. Mr. Giusti testified that the only breath-test machine used in Rhode Island's police stations is the Intoxilyzer 5000, which is manufactured by CMI. Trial Transcript I, at 14.

[18] Decision of Appeals Panel, at 3-4 citing Trial Transcript I, at 23, 26.

[19] Decision of Appeals Panel, at 4 citing Trial Transcript I, at 37-38, 40-41. On this point, I would also cite to Trial Transcript I, at 31.

administrator.[20]

Finally, Mr. Giusti commented on the way the instruments respond to a deficient sample. He defined a "deficient sample" to be a sample provided by the motorist that does not meet the four criteria of (a) time, (b) pressure, (c) slope, and (d) volume.[21] Mr. Giusti explained that when the Intoxilyzer 5000 is receiving a sufficient sample, it emits a solid tone.[22] Conversely —

> … if the tone stops, then the sample … is not … entering into the instrument. The instrument will flash, 'please blow' on the screen to alert the policeman that the process has stopped, and the person is not providing a proper sample into it."[23]

On cross-examination, Mr. Giusti indicated that the terms "deficient" sample and "insufficient" sample are synonymous when used in connection with the Intoxilyzer 5000.[24] He also stated that it would not be protocol to tell a motorist to stop blowing into the machine while it was emitting a continuous tone; instead, the officers are trained to instruct motorists to blow into the machine until it tells

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20 Trial Transcript I, at 49-52 citing Exhibit No. 3.

21 Decision of Appeals Panel, at 4 citing Trial Transcript I, at 46-47, 58.

22 Decision of Appeals Panel, at 4 citing Trial Transcript I, at 58.

23 Decision of Appeals Panel, at 5 citing Trial Transcript I, at 58-59.

24 Decision of Appeals Panel, at 5 citing Trial Transcript I, at 80.

them to stop.[25]

Next, Trooper Robles testified in conformity to the narrative enumerated ante.[26] However, one incident occurred during the Trooper's testimony that deserves to be mentioned here: Trooper Robles was asked by the prosecutor whether he knew the serial number of the Intoxilyzer machine he used when testing (or attempting to test) Mr. Bisordi's breath for alcohol content.[27] He said he did not recall it, because it's only referenced when completing drunk-driving paperwork.[28] And so, he was shown his police report, briefly.[29] And when he was again asked the serial number, he gave as his answer "68-01427."[30] As it turned out, he left out a zero; the number is "68-014027."[31] However, the trial magistrate was clearly not impressed by this discrepancy.[32]

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25 Decision of Appeals Panel, at 5 citing Trial Transcript I, at 88.

26 See Part I-A of this opinion, ante at 2-4 and Decision of Appeals Panel, at 5-10.

27 Trial Transcript I, at 175.

28 Trial Transcript I, at 175.

29 Trial Transcript I, at 177.

30 Trial Transcript I, at 178.

31 Trial Transcript I, at 183.

32 Trial Transcript I, at 183.

At the conclusion of the Trooper's testimony, the State rested.[33]

The Defendant moved to dismiss; however, his motion was denied.[34]

Finally, the defendant, Mr. Bisordi, testified. He told the Court that he blew into the machine three times[35] —

> … [the trooper] told me to blow into the machine the first time. I blew into the machine, and he said you have to blow longer. He stopped it. And he said, try it again. And he goes, blow until it beeps. And I blew until it beeped. He says, good job; try it again, and I blew into it until it beeped. He said. Good job, and then he gets up, and he walks — he walks — and another officer comes in and says refusal and stops the test.[36]

Mr. Bisordi's testimony having been received, the testimony ended.

2

The Trial Magistrate's Decision

The trial magistrate rendered his decision on October 10, 2013. He found the trooper's testimony to be credible regarding (1) his observations of Mr. Bisordi's general appearance and demeanor (slurred speech, bloodshot and watery eyes, and the odor of alcoholic beverage on his breath)[37] and (2) Appellant's

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33 Trial Transcript I, at 241.

34 Trial Transcript I, at 241, 257.

35 Decision of Appeals Panel, at 10 citing Trial Transcript II, at 26-27.

36 Decision of Appeals Panel, at 10 citing Trial Transcript II, at 58-59.

37 Decision of Appeals Panel, at 10-11 citing Trial Transcript III, at 37.

failure to successfully perform two field sobriety tests (particularly his inability to keep his balance and to follow instructions).[38]

Regarding Mr. Bisordi's interaction with the Intoxilyzer 5000, the trial magistrate found — relying on a videotape of the procedure — that the machine never emitted a continuous tone; therefore, Mr. Bisordi did not blow into the machine as instructed.[39] The Court also made a factual finding that Mr. Bisordi "attempted to undermine the test by failing to breathe as instructed."[40] And the Court further found that "… the Defendant willingly failed to comply with the instructions given to him by Trooper Robles"[41] and, what's more, he "was attempting to fool the instrument by not properly blowing into it."[42]

He also found that the machine was in good working order; he made this finding based on a determination that the Intoxilyzer Mr. Bisordi blew into was the only one at the Lincoln Barracks, and it had been found to be in good working order a mere three days before.[43]

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38 Decision of Appeals Panel, at 11 citing Trial Transcript III, at 38.

39 Decision of Appeals Panel, at 11 citing Trial Transcript III, at 40.

40 Decision of Appeals Panel, at 11 citing Trial Transcript III, at 49.

41 Decision of Appeals Panel, at 11 citing Trial Transcript III, at 49.

42 Decision of Appeals Panel, at 11 citing Trial Transcript III, at 50-51.

43 Decision of Appeals Panel, at 11 citing Trial Transcript III, at 50-51.

And so, he sustained the charge, finding that the State had proven each and every element of the civil offense — refusal to submit to a chemical test pursuant to Gen. Laws 1956 § 31-27-2.1 — by clear and convincing evidence.[44]

C

Proceedings Before the Appeals Panel

Mr. Bisordi appealed and the matter was heard by an RITT appeals panel composed of Chief Magistrate William Guglietta (Chair), Judge Edward Parker, and Magistrate Alan Goulart, on January 15, 2014.[45]

1

Mr. Bisordi's Assertions of Error Before the Appeals Panel

Before the appeals panel, Appellant presented six assertions of error — first, that the trial magistrate's finding that he refused to submit to a chemical test was clearly erroneous since he blew into the machine several times, as requested by the trooper;[46] secondly, that finding was clearly erroneous because any deficiency of the sample he submitted was caused by injuries he had suffered, not deception on his part;[47] thirdly, the trial magistrate erred by finding that the

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[44] Decision of Appeals Panel, at 10 citing Trial Transcript III, at 51.

[45] Decision of Appeals Panel, at 1.

[46] Decision of Appeals Panel, at 13.

[47] Decision of Appeals Panel, at 13.

machine Mr. Bisordi used was certified, calibrated and functioning properly;[48] fourthly, the trial magistrate erred by finding that Trooper Robles had reasonable grounds to believe Mr. Bisordi was operating under the influence of alcohol;[49] fifthly, the affidavit created by the trooper was not sworn, a fact which Appellant urges requires the case to be dismissed;[50] and sixthly, the trial magistrate erred in various evidentiary rulings.[51]

2

The Rulings of the Appeals Panel

In its June 10, 2014 decision, the appeals panel rejected each of Mr. Bisordi's assertions of error.[52] On the basis of these determinations, the appeals panel upheld Mr. Bisordi's adjudication on the charge of refusal.[53]

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48 Decision of Appeals Panel, at 13.

49 Decision of Appeals Panel, at 13.

50 Decision of Appeals Panel, at 13.

51 Decision of Appeals Panel, at 13.

52 Owing to the number of issues raised by Appellant in this case, I shall defer the presentation the panel's analysis regarding each claim of error to Part V of this opinion, where they may be positioned alongside the parties' arguments, which shall, I hope, facilitate comparison and analysis.

53 Decision of Appeals Panel, at 27.

D

Proceedings in the District Court

Two weeks later, on June 26, 2014, Mr. Bisordi filed an appeal of this decision in the Sixth Division District Court. A conference was held before the undersigned on September 16, 2014, and a briefing schedule was set. Both parties have presented the Court with memoranda which ably relate their respective viewpoints.

II

STANDARD OF REVIEW

The standard of review which this Court must employ in this case 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 prejudiced because the appeals panel's findings, inferences, conclusions or decisions are:
>
> (1) In violation of constitutional or statutory provisions;
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> (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 of review is a mirror-image of that found in Gen. Laws 1956 § 42-35-15(g) — the State Administrative Procedures Act ("APA"). Accordingly, we are able to rely on cases interpreting the APA standard as guideposts in this 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.'"[54] And our Supreme Court has reminded us that, when handling refusal cases, reviewing courts lack "the authority to assess witness credibility or to substitute its judgment for that of the hearing judge concerning the weight of the evidence on questions of fact."[55] This Court's review, like that of the RITT appeals panel, "is confined to a reading of the record to determine whether the judge's decision is supported by legally competent evidence or is affected by an error of law."[56]

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[54] Guarino v. Department of Social Welfare, 122 R.I. 583, 584, 410 A.2d 425 (1980) citing Gen. Laws 1956 § 42-35-15(g)(5). See also Link v. State, 633 A.2d 1345, 1348 (R.I. 1993).

[55] Link v. State, 633 A.2d 1345, 1348 (R.I. 1993) citing Liberty Mutual Ins. Co. v. Janes, 586 A.2d 536, 537 (R.I. 1991).

[56] Link v. State, 633 A.2d 1345, 1348 (R.I. 1993) citing Environmental Scientific Corp. v. Durfee, 621 A.2d 200, 208 (R.I. 1993).

III
APPLICABLE LAW
A
The Refusal Statute

The civil charge of refusal[57] has its origins in the implied-consent law — which provides that, by operating motor vehicles in Rhode Island, motorists (impliedly) promise to submit to a chemical test designed to measure their blood-alcohol content, whenever a police officer has reasonable grounds to believe they have driven while under the influence of liquor.[58] And a motorist who reneges on

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[57] The charge of refusal to submit to a chemical test is stated in subsection 31-27-2.1(c):

> … 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.

[58] The implied-consent law is stated in the same statute as the charge of refusal — § 31-27-2.1 — in subsection (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

his or her promise to take such a test may be charged with the civil offense of refusal and suffer the suspension of his or her operator's license.[59] Thus, at its essence, a refusal charge punishes the failure to cooperate with (part of) Rhode Island's regulatory scheme for identifying drunk drivers.[60]

As a result, the viability of a refusal charge is not dependent on proof of intoxication.[61] Indeed, the defendant's actual intoxication vel non is immaterial in

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> 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. * * *

We see that, by its terms, the law also applies to controlled substances and the chemical toluene but these aspects of the statute are immaterial in the instant case.

[59] In State v. Locke, 418 A.2d 843, 849 (R.I. 1980), our Supreme Court called such suspensions "critical to attainment of the goal of making the highways safe by removing drivers who are under the influence." Locke, 418 A.2d at 850 citing Brown, 174 Colo. at 523, 485 P.2d at 505.

[60] In theory — though certainly not in fact — a refusal charge is akin to a charge of failing to obtain a safety inspection for one's vehicle (which is a feature of the State's effort to identify and eliminate unsafe vehicles from our roads).

[61] State v. Hart, 694 A.2d 681, 682 (R.I. 1997).

a refusal case. This was the teaching of State v. Bruno,[62] in which the trial judge acquitted Mr. Bruno because the defense presented a medical opinion that the behavior and personal attributes he exhibited during the car-stop were entirely attributable to a non-alcoholic cause.[63] Despite this evidence, the Supreme Court reinstated the charge, holding that — so long as the State proves that the motorist provided an officer with indicia of intoxication sufficient to satisfy the reasonable-grounds standard — the Court must affirm the violation.[64] In my view, it is this aspect of refusal law — that the metaphysical truth of what the motorist did or did not imbibe before driving is immaterial — that is most jarring to the uninitiated;[65] a refusal case is not a "lite" version of a drunk-driving charge.

The four statutory elements of a charge of refusal which must be proven at trial are enumerated in the statute. In plain language, they are — one, that the officer who made the sworn report had reasonable grounds to believe that the motorist had driven while intoxicated; two, that the motorist, having been placed

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62 709 A.2d 1048 (R.I. 1998).

63 Bruno, 709 A.2d at 1049. The alternate cause proffered was the ingestion of prescribed medication. Id.

64 Bruno, 709 A.2d at 1049-50.

65 Another confusing aspect of refusal cases is that we focus on an issue — the question of reasonable grounds — that in all other areas of penal law is merely a preliminary question, not the ultimate question.

in custody, refused to submit to a chemical test; three, that the motorist was advised of his rights to an independent test; and four, that the motorist was advised of the penalties that are incurred for a refusal.[66] The State must also prove that the stop was legal (i.e., supported by reasonable suspicion) and the motorist was notified of the right to make a phone call for the purposes of securing bail.[67]

Since one of the arguments Appellant has presented in this appeal relates to the first element, let us begin by setting out this element once again:

> … (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 …
> (Emphasis added)

The language of the statute is unambiguous, except for the standard of evidence that must be present — "reasonable grounds." The "reasonable grounds" standard could have been problematic, had not the Rhode Island Supreme Court

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[66] See Gen. Laws 1956 § 31-27-2.1(c), ante at 15, n. 57.

[67] See State v. Perry, 731 A.2d 720, 723 (R.I. 1999) and State v. Bruno, 709 A.2d 1048, 1050 (R.I. 1998)(legality of the stop) and State v. Quattrucci, 39 A.3d 1036, 1040-42 (R.I. 2012)(right to telephone call).

declared it to be equivalent to the "reasonable-suspicion" standard, which is well-known in fourth amendment litigation."[68]

But while we know the standard of evidence to be utilized, its application will never be perfunctory, for there is no bright-line rule regarding the quality or quantity of the evidence that must be mustered to satisfy the reasonable-grounds test; instead, a judgment must be made in each case on the basis of the totality of the circumstances present therein. We are fortunate, therefore, to have at our disposal a number of cases decided by our Supreme Court which have performed this exercise. We shall review these cases now.

I believe we may profitably commence with State v. Bjerke.[69] In Bjerke the initial stop was justified on alternative grounds — the investigation of a criminal offense. Nevertheless, the Supreme Court paused to note the factors present in the case upon which reasonable grounds may be discerned:

> The defendant's commission of a criminal misdemeanor alone gave the officer probable cause to stop and detain him, and then from that point on, any evidence obtained pursuant to that lawful stop, such as the odor of alcohol, the slurred speech, and bloodshot eyes, would in effect be in plain view of the arresting

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[68] State v. Jenkins, 673 A.2d 1094, 1097 (R.I. 1996). See also State v. Perry, 731 A.2d 720, 723 (R.I. 1999). It is the standard by which so-called "stop-and-frisks" are evaluated. See Terry v. Ohio, 392 U.S. 1 (1968).

[69] 697 A.2d at 1069 (R.I. 1997).

> officer and would support an arrest for suspicion of driving while under the influence. (Emphasis added).[70]

Accordingly, from Bjerke, we may draw that emitting the odor of alcohol, slurred speech and bloodshot eyes are accepted as indicia of intoxication.

Next, we may examine State v. Bruno, ante, in which 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.[71]

Finally, in evaluating the sufficiency of this finding of reasonable-suspicion we may consider State v. Perry (R.I. 1999).[72] On the issue of driving under the influence, the Court noted front-end damage to the car, the smell of alcohol, bloodshot eyes, and stumbling.[73] And although no field tests were administered, the Court ruled that reasonable grounds were present.[74]

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70 Bjerke, 697 A.2d at 1072.

71 Bruno, 709 A.2d at 1049.

72 731 A.2d 720, 723 (R.I. 1999).

73 Perry, 731 A.2d at 722.

74 Perry, 731 A.2d at 722-23.

IV
ISSUE

The issue before the Court is whether the decision of the appeals panel was clearly erroneous in light of the reliable, probative, and substantial evidence of record or whether it was affected by error of law. Or, did the appeals panel err when it upheld Mr. Bisordi's conviction for refusal to submit to a chemical test?

V
ANALYSIS

Before this Court, Mr. Bisordi presents the same six assertions of error that he presented to the appeals panel. We shall address each of these arguments seriatim. As we consider each topic, we shall present (1) the appeals panel's discussion of the question, (2) the arguments of Mr. Bisordi and the State, and (3) our analysis and recommended resolution of the issue.

A
The Trial Magistrate's Finding — that Mr. Bisordi Refused to Submit to a Chemical Test — Was Not Clearly Erroneous

1
"No-Proof-of-Refusal" Argument: Decision of the Appeals Panel

Mr. Bisordi's first assertion of error is quite simple and straightforward — that he never refused to submit to the chemical test.

The appeals panel began its analysis on this question from twin premises:

(a) that the question of whether Appellant refused to submit to a chemical test is a factual one and (b) a refusal need not be expressly declared, but may also consist of actions inconsistent with consent and cooperation.[75] With these principles in mind, the panel acknowledged the contradictory evidence presented in this case — i.e., Mr. Bisordi's testimony that he tried to blow into the machine[76] and the trooper's testimony that Appellant had feigned cooperation (which he knew because the machine never emitted a continuous tone and the machine produced test results indicating a deficient sample).[77]

The appeals panel noted that the trial magistrate found the trooper's testimony on this point to be credible and sufficient to prove the charge of refusal.[78] Specifically, the trial magistrate found that the machine never emitted a continuous tone.[79] In sum, he found that "… the Defendant willingly failed to

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75 Decision of Appeals Panel, at 13-14 citing New Shoreham v. Netro, No. T05-143 (RITT App. 2005)(factual refusal found from stalling actions), Warwick v. Sinapi, No. T06-081 (RITT App. 2005)(explicit verbal refusal not required), and North Providence v. Exarchos, No. T09-119 (RITT App. 2009)(silence is the equivalent of a factual [i.e., express], refusal).

76 Decision of Appeals Panel, at 14 quoting from Referee Hearing Transcript II, at 26-27. See also excerpt from Appellant's testimony, ante at 8.

77 Decision of Appeals Panel, at 14-15 citing Trial Transcript at 154-56, 169-71.

78 Decision of Appeals Panel, at 15 citing Trial Transcript III, at 49-51.

79 Decision of Appeals Panel, at 16 citing Trial Transcript III, at 40.

comply with the instructions given to him by Trooper Robles."[80]

The panel noted our Supreme Court's teaching that RITT appeals panels lack the authority to revisit credibility determinations made by the trial judge or magistrate.[81] The panel then held that the trial magistrate's conclusion was supported by competent evidence; as a result, he did not abuse his discretion by finding that Appellant's actions constituted a violation of § 31-27-2.1.[82]

2

"No-Proof-of-Refusal" Argument: The Position of the Parties

a

Mr. Bisordi's Position

In support of this assertion that the State did not prove that he refused the test, Mr. Bisordi cites his own testimony that the Trooper commented "good" and "good job" as he was blowing into the machine.[83] Appellant also asserts that in the barracks video the machine is emitting a continuous tone as he blew into it.[84]

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80 Decision of Appeals Panel, at 16 citing Trial Transcript III, at 49.

81 Decision of Appeals Panel, at 15 citing Link v. State, 633 A.2d 1345, 1348 (R.I. 1993).

82 Decision of Appeals Panel, at 15-16.

83 See Appellant's Complaint, at 4 citing Trial Transcript II, at 26, 27, and 45.

84 See Appellant's Complaint, at 4.

Finally, he urges that the senior trooper present ended the test and instructed Trooper Robles to declare the test a refusal.[85]

b

The State's Position

The State counters that "facts abound" in the record that support the trial magistrate's guilty finding.[86] It points to the Magistrate's finding that the trooper's testimony regarding Mr. Bisordi's interaction with the Intoxilyzer machine was credible; including his testimony that —

- Appellant was "a little rude" and "a little uncooperative" during the 15-minute observation period;[87]
- Appellant failed to follow his instructions regarding how to blow into the machine, so he instructed him again;[88]
- For a second time he failed to blow into the machine;[89]
- At this juncture he demonstrated how to blow into the machine and had Mr. Bisordi engage in a "practice run" on a detached mouthpiece;[90]

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85 See Appellant's Complaint, at 4 citing Trial Transcript II, at 47.

86 See Appellee's Memorandum, at 4.

87 Appellee's Memorandum, at 4 citing Trial Transcript I, at 153.

88 Appellee's Memorandum, at 4 citing Trial Transcript I, at 154, 170.

89 Appellee's Memorandum, at 4 citing Trial Transcript I, at 170.

- The trooper's comments ("good" and "good job") were made during moments when Appellant was blowing into the machine properly — and which were always followed by moments he did not, resulting in deficient samples; the trooper was not evaluating Mr. Bisordi's entire effort, but "cheerleading" during the moments he was blowing into the machine correctly;[91]
- Finally, the State also urges that the video supports its position — showing that Appellant failed to blow into the machine on numerous occasions.[92]

3

No Proof of Refusal Argument: Resolution

Whether Mr. Bisordi (by his conduct) declined Trooper Robles' request that he be tested on the Intoxilyzer machine was, as considered by the trial magistrate, a question of fact; but whether Appellant's actions constituted a refusal to submit to a chemical test (within the meaning of § 31-27-2.1) was a mixed question of fact and law. The appeals panel was bound to affirm the trial

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[90] Appellee's Memorandum, at 4 citing Trial Transcript I, at 179.

[91] Appellee's Memorandum, at 5. The State's description of the comments as "cheerleading" was taken from a comment made by the Chief Magistrate during the oral argument of the appeals panel. Appeals Panel Transcript, at 54.

[92] Appellee's Memorandum, at 4 citing the defense exhibit video.

magistrate if his decision was supported by legally competent evidence and was not affected by error of law. Here, we must apply the same test.

Now, it appears to be well-settled that the "refusal" element of § 31-27-2.1 can be satisfied by conduct as well as by an express verbalization. Over the years, the doctrine has been recognized by successive appeals panels and by members of this Court; it has also been recognized nationally. Nevertheless, we must say "appears" because our Supreme Court has not yet enunciated its approval of the theory. But, I shall proceed here in the belief that the doctrine is indeed a part of Rhode Island's highway-safety jurisprudence. And so, we shall consider the sufficiency of the evidence that the State marshalled on this element at Mr. Bisordi's trial.

First, we must keep in mind that the trial magistrate was able to see the Appellant's face-off with the Intoxilyzer machine for himself on the video. After having observed the episode, he found that Mr. Bisordi was not blowing into the machine in good faith, but was intentionally trying to cheat on the test.[93] Quite frankly, in my estimation, the video constituted, by itself, both competent and

[93] See Trial Transcript III, at 49-51.

sufficient evidence to prove of the "refusal" element of the instant charge. Nevertheless, additional competent evidence was presented on this issue.

In the absence of the video, the trial magistrate could have rested satisfaction of the "refusal" element of this charge on the highly detailed testimony of Officer Robles, which he found credible. From that testimony, a reasonable fact-finder could well infer that the officer provided Mr. Bisordi with multiple chances to provide a sufficient breath-sample, but he willfully did not.

And so, I believe the appeals panel's decision — that the trial magistrate's finding that Mr. Bisordi refused to submit to a chemical test by his failure to follow the officer's instructions — was neither clearly erroneous nor affected by error of law.

B

The Trial Magistrate's Finding — that Mr. Bisordi Was Unable to Provide a Sufficient Breath Sample Due to a Medical Condition — Was Not Clearly Erroneous

1

The "Medical Condition" Argument: Decision of the Appeals Panel

Appellant argues that it was improper to subject him to the sanctions for refusal because of injuries he had suffered to his back and head.[94]

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[94] Decision of Appeals Panel, at 16-17.

The appeals panel began its analysis of this issue by declaring that due process principles require that one may only be penalized for volitional conduct.[95] The corollary to this rule is that one may not be penalized for failing to perform an act which one does not have the physical ability to do.[96] However, it is the motorist who bears the burden of showing such a physical inability,[97] except where such inability is obvious.[98]

Applying these rules to the instant case, the appeals panel held that Appellant's injuries were not of the obvious kind; it was therefore incumbent upon Appellant to proffer competent medical evidence that he was unable to perform the breathalyzer test.[99] But, it found that the medical report he submitted was insufficient to accomplish this task.[100]

The document Appellant presented was an affidavit, dated August 22, 2013,

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95 Decision of Appeals Panel, at 16.

96 Decision of Appeals Panel, at 16-17 citing ANNOT., Sufficiency of Showing of Physical Inability to Take Tests For Driving While Intoxicated to Justify Refusal, 68 A.L.R. 4th 776 (1989).

97 Decision of Appeals Panel, at 16-17 citing Commonwealth, Department of Transportation, Bureau of Driver Licensing v. Iannitti, 100 Pa. Cmwlth. 239, 242, 514 A.2d 954, 955 (1986).

98 Decision of Appeals Panel, at 17 citing Commonwealth, Department of Trans., Bureau of Traffic Safety v. Michalec, 52 Pa. Cmwlth. 89, 415 A.2d 921 (1980).

99 Decision of Appeals Panel, at 17.

which expressed the opinion of Budio J. Thomas, D.O., that Mr. Bisordi suffered neck and back pain, persistent headaches, and spinal tenderness as the result of the collision Mr. Bisordi endured on July 6, 2013.[101] The appeals panel deemed the report inadequate because no opinion was expressed therein as to whether Appellant could perform the breathing function required by the Intoxilyzer 5000.[102] Accordingly, the panel found the trial magistrate committed no error by finding that Mr. Bisordi failed to satisfy his burden of proof on the issue of medical incapacity.[103]

2

The Medical Condition Argument: The Position of the Parties

a

Mr. Bisordi's Position

In his second claim of error Mr. Bisordi asserts that he was injured in the accident that led to his arrest.[104] He submitted an affidavit from a physician (Budio Thomas, D.O.) that concluded by stating that — "To a high degree of medical certainty, I am of the opinion that the motor vehicle accident on July 6, 2013

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100 Id.

101 Decision of Appeals Panel, at 17 citing Defendant's Exhibit No. 1.

102 Decision of Appeals Panel, at 17 citing Iannitti, ante at 28, n. 97, id.

103 Decision of Appeals Panel, at 17.

resulted in Mr. Bisordi sustaining a concussion and acute cervical lumbar strain."[105] And with affidavit in hand, Appellant asserts —

> His injuries sustained during this accident very well could have affected his ability to either (i) knowingly and voluntarily submitting to a chemical test, or (ii) perform the field tests. Mr. Bisordi's back injury and concussion could have impacted his ability to successfully complete the field tests and as a result, the field tests would be considered as a "false positive." Given that Mr. Bisordi was diagnosed with a concussion resulting from the accident, he was essentially precluded from making a so-called conscious "refusal."[106]

In this way, Appellant explains his twin failures to successfully complete the field-sobriety tests and the Intoxilyzer and relieve him of responsibility on the charge of refusal to submit to a chemical test.[107]

b

The State's Position

The State begins its argument on this point by acceding to its underlying legal premise — i.e., that he cannot be punished for refusal if he did not possess the physical ability to take the test.[108] However, the State agrees with the appeals

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104 See Appellant's Complaint, at 6.

105 See Appellant's Complaint, at 6-7 citing Defendant's Exhibit A.

106 See Appellant's Complaint, at 6.

107 See Appellant's Complaint, at 6.

108 Appellee's Memorandum, at 6 citing Decision of Appeals Panel, at 16.

panel that the motorist has the burden of proving such an inability.[109] And so, it spends the remainder of its defense on this claim of error arguing that Mr. Bisordi did not satisfy his burden of proof by providing competent medical evidence.

The State attacks the admission of Dr. Thomas's affidavit, asserting both that it should not have been received[110] and that it was without persuasive value.[111]

3

Medical Condition Argument: Resolution

In sum, the appeals panel found (and the State urges) that Ms. Bisordi did not satisfy his burden of proof on this issue. To prevail on this point, motorists must be able to link their injuries to their inability to perform the tests. Doctor Thomas's affidavit does not do this — it does not show a connection between Mr. Bisordi's injuries and his asserted inability to perform the tests. And so, I must conclude that the appeals panel's decision on this issue was not clearly erroneous.

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109 Appellee's Memorandum, at 6 citing Decision of Appeals Panel, at 17.

110 Appellee's Memorandum, at 6-7. The State argues that the affidavit should not have been admitted because it was not subject to cross-examination, does not sufficiently state its author's qualifications and experience, does not provide the basis for the doctor's opinion, and was based on an examination made five days after the incident. Id., at 7.

111 Appellee's Memorandum, at 6-7. The State argues that the affidavit gives no opinion regarding whether the injuries the doctor found affected Mr. Bisordi's ability to perform the field tests or blow into the Intoxilyzer machine. Id., at 7.

C

The Trial Magistrate's Finding — that the State Proved that the Intoxilyzer 5000 Breath Testing Machine Certified to Be in Good Working Order — Was Not Clearly Erroneous

1

The Failure to Prove Certification Argument: Decision of the Panel

Appellant argued that the State failed to prove that the Intoxilyzer 5000 that Mr. Bisordi used had been certified and calibrated.[112] In Appellant's view, this failure was caused by the trooper's inability to recall the serial number that was used.[113] In essence, he argued that the serial number was the only way to link-up the machine he used with the one that was tested by the DOH.

The trial magistrate admitted an inspection report presented by Mr. Giusti (dated July 3, 2013) as a full exhibit notwithstanding the trooper's serial number error because — according to Mr. Giusti — there was only one Intoxilyzer 5000 at the Lincoln barracks.[114] He therefore found that the State had proven that the machine Mr. Bisordi used was in good working order.[115]

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112 Decision of Appeals Panel, at 18.

113 Decision of Appeals Panel, at 18. The trooper cited the serial number to be "68-01427;" it was, however, "68-14027." See Referee Hearing Transcript, at 178 and State's Exhibit No. 2. See also Decision of Appeals Panel, at 18 n. 4.

114 Decision of Appeals Panel, at 18 citing Trial Transcript I, at 40-41, 174.

115 Decision of Appeals Panel, at 18-19 citing Trial Transcript I, at 50-51. The pertinent excerpt from the trial magistrate's finding on this point is quoted on

The appeals panel found, given its limited authority on issues of fact, that it had no cause to disturb the decision of the trial magistrate that the machine Mr. Bisordi used was certified, calibrated, and fully functional.[116]

2

The Certification Argument: The Position of the Parties

a

Mr. Bisordi's Position

Before this Court, Mr. Bisordi presents this non-certification argument under the heading "State v. Dean Martin," a reference to a 1998[117] decision of the appeals panel.[118] In it, he argues that the certification documents introduced by the prosecution were never "connected" to the machine Mr. Bisordi blew into at the barracks.[119] As a result, he argues that the State failed to prove that the machine was in good working order, which must be proven when the State alleges that a motorist intentionally gave an insufficient sample.[120]

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pages 11 and 19 of the decision of the Appeals Panel.

116 Decision of Appeals Panel, at 19-20.

117 In 1998, the panel was a part of the Administrative Adjudication Court (AAC).

118 See Appellant's Complaint, at 4-6 citing State v. Martin, C.A. No. B98-101 (AAC App. 06/24/1998).

119 See Appellant's Complaint, at 5. He particularly decries the State's failure to introduce the breath-testing cards (the results). Id.

120 See Appellant's Complaint, at 5-6 citing Martin.

b

The State's Position

The State begins its response to this argument by citing two cases — the appeals panel's decision in Martin, ante, and a 1990 decision of this Court, State v. Newman.[121] In Newman this Court held that a motorist who — after agreeing to the test — intentionally fails to follow the proper instructions of the breath-machine operator may be found guilty of refusal to submit to a chemical test.[122] And where the allegation is that the motorist provided a "deficient sample" to the breath-testing machine, the State must prove that the machine was in good working order.[123]

The State argues that it cleared this hurdle through Mr. Giusti and Trooper Robles, whose testimony proved that (1) the machine Mr. Bisordi used was the only machine at the Lincoln Barracks and (2) the machine was certified to meet all

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121 See Appellee's Memorandum, at 5 citing State v. Newman, A.A. No. 90-398 (Dist.Ct. 1990).

122 See Appellee's Memorandum, at 5 citing State v. Newman, A.A. No. 90-398, slip op. at 3. The Court called this a "factual refusal." Id.

123 See Appellee's Memorandum, at 5 citing State v. Newman, A.A. No. 90-398, slip op. at 3. This requirement does not apply if proof is presented that the defendant was unable to satisfy the test machine due to a medical condition. Id. The Court held that the State must prove the requirements of § 31-27-2(c)(5). Id.

the requirements of § 31-27-2 only three days previously.[124] Accordingly, the State asserts that this argument must be rejected.

3

Intoxilyzer Non-Certification Argument: Resolution

I believe the appeals panel's ruling on this issue is predicated on the following syllogism —

- There was only one breath test unit at the Lincoln Barracks of the State Police, an Intoxilyzer 5000;
- That machine was tested a few days before the evening in question and found to be working properly;
- Therefore, since Mr. Bisordi blew into an Intoxilyzer 5000 at the Lincoln Barracks, he blew into the machine that was examined a few days before. In my view, this reasoning is unassailable; conversely, Mr. Bisordi's position on this question is nothing more than an invitation to feast upon red herring.

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[124] See Appellee's Memorandum, at 5-6 citing § 31-27-2 and Trial Transcript I, at 14, 40, 174. The State also showed that Trooper Robles had been certified as an operator within the requisite one-year period. Appellee's Memorandum, at 6 citing Trial Transcript I, at 50-51. Mr. Giusti explained that the breath-test machines used by law enforcement in Rhode Island are all procured by the Department of Health and placed in the various police stations and state police barracks, where the DOH maintains and tests them. Trial Transcript I, at 14.

D

The Trial Magistrate's Finding — that Trooper Robles Possessed Reasonable Grounds to Believe that Mr. Bisordi Had Been Driving Under the Influence of Alcohol — Was Not Clearly Erroneous

1

The Reasonable Grounds Argument: Decision of the Panel

The appeals panel began its analysis of this issue by noting that, under Rhode Island law, an officer may not ask a motorist to submit to a chemical test for blood-alcohol content unless he or she has "… reasonable grounds to believe that the [motorist] had been driving a motor vehicle within this state while under the influence of intoxicating liquor … ."[125]

Applying this standard, the appeals panel held that the trial magistrate's decision — finding the trooper possessed reasonable grounds to believe Mr. Bisordi had been driving under the influence — was supported by the evidence of record before him, where he found creditable the trooper's testimony regarding

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[125] Decision of Appeals Panel, at 20 citing Gen. Laws 1956 § 31-27-2.1(c). The panel elaborated that the "reasonable grounds" standard is equivalent to the "reasonable suspicion" standard used in our fourth amendment jurisprudence to evaluate the constitutionality of "stop-and-frisks." Decision of Appeals Panel, at 20 citing State v. Jenkins, 673 A.2d 1094, 1097 (R.I. 1996). The "reasonable suspicion" standard, and, by extension, the "reasonable grounds" standard, may only be satisfied based on "articulable facts" in light of the "totality of the circumstances." Decision of Appeals Panel, at 20 citing State v. Keohane, 814 A.2d 327, 330 (R.I. 2003), United States v. Cortez, 449 U.S. 411, 417 (1981), and State v. Tavarez, 572 A.2d 276, 278 (R.I. 1990).

Appellant's appearance (i.e., slurred speech, bloodshot and watery eyes, and the odor of alcohol) and his failure to perform two field sobriety tests correctly.[126] It therefore rejected Mr. Bisordi's assertion of error on this point.

2

The Reasonable Grounds Argument: The Position of the Parties

a

Mr. Bisordi's Position

In his fourth assertion of error, styled "No 'Reasonable Grounds'/Lack of Operation," Mr. Bisordi highlights the fact — conceded by the trooper — that he never saw Mr. Bisordi drive.[127] With this fact in hand, he invokes our Supreme Court's decision in State v. Capuano (R.I. 1991),[128] an appeal from a conviction for drunk-driving, for the proposition that "… the defendant had not operated a motor vehicle while under the influence because the arresting officer did not witness the defendant operating the motor vehicle."[129] Relying on Capuano, Mr.

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126 Decision of Appeals Panel, at 19-20.

127 See Appellant's Complaint, at 6-7.

128 See Appellant's Complaint, at 6 citing State v. Capuano, 591 A.2d 35 (R.I. 1991).

129 See Appellant's Complaint, at 6.

Bisordi urges that since Trooper Robles did not see him drive, "… he could not have been found to have operated a motor vehicle while under the influence."[130]

b

The State's Position

In its Memorandum, the State addressed this issue in two ways.

First, it enumerated the indicia of intoxication presented in this case: that Mr. Bisordi admitted colliding with two vehicles, the odor of alcohol emanating from his breath, his slurred speech, his bloodshot and watery eyes, and his poor performance on the field sobriety tests.[131] Further, it urged that the quantity and quality of this evidence compared favorably with that which the State presented (and our Supreme Court found sufficient) in State v. Perry.[132] It stressed that the Trooper had spoken to the other drivers involved in the collision before he spoke with Mr. Bisordi.[133]

Secondly, it attacked Appellant's invocation of the Capuano decision as inapt, because Capuano considered a prosecution for the crime of drunk driving

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130 See Appellant's Complaint, at 7.

131 See Appellee's Memorandum, at 8 citing Trial Transcript III, at 36-38.

132 See Appellee's Memorandum, at 8 citing State v. Perry, 731 A.2d 720, 723 (R.I. 1999). See discussion of Perry, ante, at 18-19.

133 See Appellee's Memorandum, at 8-9 citing Perry.

under § 31-27-2, not for the civil offense of refusal to submit to a chemical test § 31-27-2.1.[134]

3

Reasonable Grounds Argument: Resolution

The State responded to Mr. Bisordi's "reasonable grounds" argument in the usual way — by marshalling all the bits of evidence pertinent to the question — most of which goes to the issue of intoxication. But Appellant is not pursuing that issue before this Court. Instead, he is simply attacking one aspect of the "reasonable grounds" test — what he describes the lack of proof that he operated his vehicle.

Citing Capuano, ante, Mr. Bisordi argues that Trooper Robles could not have "reasonable grounds" to believe he was driving because he did not see him driving. The State counters that Capuano is not controlling, because that case involved a criminal charge of drunk-driving, and the instant case is a civil violation. As it happens, our Supreme Court agrees with the State.

In State v. Perry, ante, the Court reversed a decision of an AAC appeals panel which had (relying on Capuano) set aside an adjudication for refusal because

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[134] See Appellee's Memorandum, at 8 citing State v. Capuano, 591 A.2d 35, 37 (R.I. 1991).

the officer had not seen the defendant drive.[135] The Court distinguished Capuano as being a criminal case where the case must be proven beyond a reasonable doubt.[136] And the Court specifically listed Mr. Perry's statement to the officer as part of the proof of reasonable grounds.[137]

And so, Trooper Robles undoubtedly had reasonable grounds to believe Mr. Bisordi had operated his vehicle — Mr. Bisordi told him so.

E

The Trial Magistrate's Finding — that the State Satisfied the Requirement of a Sworn Report — Was Not Clearly Erroneous

1

The Sworn Report Argument: Decision of the Panel

At the outset of its consideration of this assertion of error, the appeals panel presented some recent history on the issue of sworn reports in refusal cases.

It began with a reference to its ruling in State of Rhode Island v. Robert Samson (RITT App. 03/29/2012),[138] in which a majority of the appeals panel

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135 Perry, 731 A.2d at 722.

136 Perry, 731 A.2d at 723.

137 Perry, 731 A.2d at 723. Of course, any statements Mr. Capuano made to the officer that charged him could not have been introduced until the State separately offered evidence of operation, under the corpus delicti rule. See State v. Halstead, 414 A.2d 1138, 1143-44 (RI 1980). That rule does not apply in civil cases.

138 C.A. No. T11-039.

affirmed the trial magistrate's guilty finding, even though the State had failed to show that the officer had ever sworn to the truth of his report.[139] After the District Court affirmed,[140] Mr. Samson sought review by the Supreme Court.[141]

While the issue was pending in our highest court, the State conceded error,[142] acquiescing to the view of the dissenting RITT panel member — i.e., that while the Supreme Court in Link v. State (R.I. 1993)[143] had limited the use of the sworn report at trial, the State is nonetheless required, by Gen. Laws 1956 § 31-27-2.1(c),[144] to show that a sworn report had been made.[145]

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139 Samson, C.A. No. T11-039, at 7-9.

140 Robert Samson v. State of Rhode Island (RITT Appellate Panel), A.A. No. 12-093 (Dist.Ct. 9/21/2012).

141 Gen. Laws 1956 § 31-41.1-9(h).

142 State v. Samson, No. 12-285-M.P. (R.I. 4/18/2013)(Unpublished Order). A similar order entered the same day in State v. Sarhan, No. 12-311-M.P. (R.I. 4/18/2013)(Unpublished Order).

As noted, this Court, in an opinion authored by the undersigned, rejected the idea that the creation of a sworn report must be proven in every refusal case. See Samson, ante at n. 140. While I remain convinced of the propriety of my analysis, and while an unpublished order does not constitute binding precedent, the circumstances of this case have convinced me that, for purposes of this opinion, I should assume arguendo that Magistrate Goulart's dissent will soon be adopted as the law in this jurisdiction by our Supreme Court. I have proceeded accordingly.

143 Link v. State, 633 A.2d 1345 (R.I. 1993).

144 Gen. Laws 1956 § 31-27-2.1(c) provides in pertinent part —

(1) the law enforcement officer making the sworn report had

The appeals panel then cited two subsequent cases in which the necessity of proving the making of a sworn report had been considered by appeals panels of the RITT. In the first, Town of Smithfield v. Sleiman (2013),[146] the appeals panel vacated the motorist's conviction for refusal because the prosecution had not proven that the report that the officer had created had been sworn-to.[147] The second case cited was Town of Narragansett v. Imswiler (2014), in which the panel once again set aside a conviction for refusal because the State failed to prove that a sworn report had been created.[148] And so, because in this case there was no

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> 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 (emphasis added)[.]

145 See State v. Samson, No. 12-285-M.P. (R.I. 4/18/2013)(Unpublished Order). The ultimate resolution of the Samson case (in the Supreme Court) was explained in the Decision of the Appeals Panel, at 22, n. 5, citing Samson, CA No T11-39, at 14 (Dissent of Goulart, M.).

146 Decision of the Appeals Panel, at 21-22, citing C.A. No. T12-022 (RITT App. 08/01/2013).

147 Id., at 10-13.

148 Decision of the Appeals Panel, at 21-22, citing C.A. No. T13-012, slip op. at 7-9 (RITT App. 02/03/2014). We should note that Magistrate Goulart dissented from this decision, not because he questioned the principle of law relied upon (after all, he was the author of the Samson dissent to which the State acquiesced), but because he believed the creation of a sworn report had been proven at trial through the testimony of the officer — notwithstanding the fact

doubt that a sworn report was created — whatever its defects — the appeals panel overruled this assignment of error.[149]

2

The Sworn Report Argument: The Position of the Parties

a

Mr. Bisordi's Position

In his fifth assertion of error Mr. Bisordi described the affidavit (or sworn officer's report) created by Trooper Robles as being false, most significantly in this particular: the affidavit states Trooper Lagor asked Mr. Bisordi to submit to a chemical test, but Trooper Robles testified at trial that he (Trooper Robles) made the request.[150] He urges this error was prejudicial because it resulted in a pre-trial suspension.[151]

b

The State's Position

The State began its treatment of Appellant's sworn report argument by conceding that the appeals panel, in its June 10, 2014 decision, reaffirmed its prior rulings that the creation of a sworn report is a required element of proof in a

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that the sworn report was not admitted). Imswiler, at 10 (Goulart, M., dissent).

149 Decision of Appeals Panel, at 23-24.

150 See Appellant's Complaint, at 7 citing Trial Transcript I, at 193, 196.

refusal case.[152] But the State rejects the Appellant's attempt to expand this doctrine to hold that a report containing inaccuracies cannot satisfy this element; to the contrary, it argues (in a manner consistent with the Decision of the Appeals Panel), that the Appellant's position was rejected by our Supreme Court in Link v. State (R.I. 1993).[153] In sum, the State must only prove that a sworn report was created, not its accuracy.

Finally, the State recounts its proof on this point including an explanation of how the serial number inaccuracy occurred.

3

Sworn Report Argument: Resolution

Assuming that the State is required, as part of its proof in a refusal case, to show that the officer created a "sworn report," must the State show that the report was accurate in all significant particulars? I believe not. In fact, I believe this outcome is mandated by the Supreme Court's opinion in Link v. State, in which the Court explained that in refusal trials, conducted under § 31-27-2, the

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151 See Appellant's Complaint, at 7.

152 See Appellee's Memorandum, at 9 citing Decision of Appeals Panel, at 22-23. citing State v. Samson, No. T11-039, (RITT App. 03/29/2012) and Town of Smithfield v. Sleiman, C.A. No. T12-022 (RITT App. 08/01/2013).

153 See Appellee's Memorandum, at 9 citing Decision of Appeals Panel, at 22-23, citing Link v. State, 633 A.2d 1345, 1349 (R.I. 1993).

State is not bound by the contents of the sworn report, but may present its case anew —

> Clearly, the requisite findings may be made based upon whatever evidence is adduced at the hearing and are not dependent upon the validity of the sworn report required by subsection (a). Subsection (b), moreover, does not require a hearing judge to find that the sworn report complied with § 31–27–2.1(a).[154]

In sum, even if the State must prove that the officer created a sworn report, the trial judge or magistrate need not find that the sworn report is accurate. This is the issue raised here; frankly, it's a non-issue in light of Link.

F

The Trial Magistrate's Evidentiary Rulings Were Not Erroneous

1

The Arguments Based on Evidentiary Rulings: Decision of the Panel

Finally, Mr. Bisordi raised issues regarding the trial magistrate's evidentiary rulings, particularly regarding the inspection report prepared by the DOH with regard to the Intoxilyzer 5000 used at the Lincoln Barracks of the State Police.[155]

The appeals panel began its analysis on this issue by recalling that our Supreme Court has declared that —

"It is well established that 'the admissibility of evidence is within the

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154 Link, 633 A.2d at 1349.

155 Decision of Appeals Panel, at 24-26.

> sound discretion of the trial justice, and this Court will not interfere with the trial justice's decision unless a clear abuse of discretion is apparent.' " Bourdon's, Inc. v. Ecin Industries, Inc., 704 A.2d 747, 758 (R.I. 1997)(Internal citation omitted).[156]

And this limitation on appellate review of evidentiary rulings applies not only to issues regarding the relevancy of material proffered as evidence but also to issues regarding the adequacy of the foundation laid for the admission of particular items of evidence.[157]

Here, the appeals panel found that the trial magistrate did not abuse his sound discretion in reserving his ruling on the admission of the inspection report.[158] Furthermore, the panel found the trial magistrate committed no abuse of discretion in finding that there was only one Intoxilyzer machine at the State Police Barracks in Lincoln.[159] As a result, the appeals panel decided the trial magistrate did not commit error by admitting the inspection report and finding

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156 Decision of Appeals Panel, at 24.

157 Decision of Appeals Panel, at 24-25 citing ADP Marchall, Inc. v. Brown University, 784 A.2d 309, 314-15 (R.I. 2001)(citing Bourdon, ante at 44, 704 A.2d at 758).

158 Decision of Appeals Panel, at 24-25 citing ADP Marchall, Inc. v. Brown University, 784 A.2d 309, 314-15 (R.I. 2001)(citing Bourdon, ante at 44, 704 A.2d at 758) and Rhode Island Rules of Evidence 104 and 401.

159 Decision of Appeals Panel, at 25-26.

that the machine had been certified to be in good working order.[160]

a

Mr. Bisordi's Position

Mr. Bisordi argues that the admission of certain Department of Health documents was improper because of a lack of foundation.[161] He states that the records lacked materiality because they related to a machine with a different serial number than that given by the Trooper when he testified.[162] In support of its position it cites a ruling of our Superior Court — State v. Paul Miller (2010).[163]

The facts of the case are these: Mr. Paul Miller had been charged with driving under the influence. He filed a motion to suppress the results of a chemical breath test to which he had submitted at the request of a member of the Tiverton Police Department, arguing that the precondition to admission stated in 31-27-2(c)(5) had not been fulfilled — i.e., that the machine (an Intoxilyzer 5000) had not had its accuracy certified within the thirty days preceding the administration of the test to Mr. Miller.[164] The problem was that the serial number

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160 Decision of Appeals Panel, at 26 citing Link, ante, 633 A.2d at 1348.

161 See Appellant's Complaint, at 8.

162 See Appellant's Complaint, at 8 citing Trial Transcript I, at 178.

163 State v. Miller, N3-2009-0223A, 2010 WL 390915, at * 1 (R.I. Super. 01/29/10).

164 Miller, ante, slip op. at 1.

on the test machine was 68-013382 and the serial number on the pertinent certification document was 68-010642 — and referred to "a health department loaner instrument."[165] The inaccuracy was compounded on the five certification reports created just prior to Mr. Miller's arrest.[166] Finding that "the spectre of unreliability" had been raised, the Court granted the Motion to Suppress.[167]

b

The State's Position

The State began by asserting that it could not surpass the appeals panel's exposition on this topic.[168] Nevertheless, it set out two comments.

First, Appellant's argument rests on an error made by Trooper Robles during his testimony — he gave the serial number of the Intoxilyzer machine he used to administer the chemical test to Mr. Bisordi as 68-1427 instead of its true serial number, 68-14027.[169] The trial magistrate did not believe the discrepancy to be particularly momentous.[170]

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165 Miller, ante, slip op. at 1.

166 Miller, ante, slip op. at 2.

167 Miller, ante, slip op. at 2.

168 See Appellee's Memorandum, at 10 citing Decision of Appeals Panel, at 24-26.

169 See Appellee's Memorandum, at 10 citing Trial Transcript I, at 183.

170 Id.

Second, the Trooper's error did not foment any ambiguity; it did not suggest any other machine was used. To the contrary, Trooper Robles testified that there was only one Intoxilyzer machine assigned to the Lincoln Barracks by the Department of Health and that is the one he used with Mr. Bisordi.[171] And Mr. Giusti's testimony established that the Lincoln Barracks machine had been certified properly within the prescribed period.[172] On this basis, Magistrate Cruise found there was a sufficient foundation to admit the documents into evidence.[173]

3

Evidentiary Rulings: Resolution

In my view the appeals panel's ruling on this question was not error, as the Miller case is distinguishable. Beyond the obvious differences in the types of cases (criminal versus civil) involved, there is simply no specter of unreliability here. The Officer made one error in reciting the serial number of the machine during his testimony. Unlike the situation in Miller, no ambiguity concerning what machine was utilized by Mr. Bisordi was created. When all the evidence and testimony taken in this case is run through the sifter, we must come to the ineluctable

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171 See Appellee's Memorandum, at 10 citing Trial Transcript I, at 153, 174.

172 See Appellee's Memorandum, at 10 citing Trial Transcript I, at 40.

173 See Appellee's Memorandum, at 10-11.

conclusion that there was one (and only one) Intoxilyzer machine involved in this case. And that machine was tested for accuracy within the prescribed period. Therefore, I must conclude that Appellant has failed to substantiate this final assertion of error.

VI
CONCLUSION

Upon careful review of the evidence, I recommend that this Court find that the decision of the appeals panel was made upon lawful procedure and was not affected by error of law.[174] Furthermore, said decision is not clearly erroneous in view of the reliable, probative and substantial evidence on the whole record.[175] Accordingly, I recommend that the decision that the Traffic Tribunal appeals panel issued in this matter be AFFIRMED.

/s/
Joseph P. Ippolito
MAGISTRATE

JUNE 1, 2015

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174 See Gen. Laws 1956 § 31-41.1-9.

175 Id.