STATE OF RHODE ISLAND AND PROVIDENCE PLANTATIONS

PROVIDENCE, S.C. **RHODE ISLAND TRAFFIC TRIBUNAL**

TOWN OF WARREN	:	
	:	
v.	:	**C.A. No. T08-0057**
	:	
LEWIS QUATTRUCCI	:	

DECISION

GUGLIETTA, C.M., ALMEIDA, J.: Before this Panel on September 17, 2008—Chief Magistrate Guglietta (Chair, presiding) and Judge Almeida and Magistrate Goulart sitting—is the State of Rhode Island's (State) appeal from Magistrate DiSandro's decision, dismissing the charged violation of G.L. 1956 § 31-27-2.1, "Refusal to submit to chemical test." The Appellee, Lewis Quattrucci (Appellee), was represented by counsel before this Panel. Jurisdiction is pursuant to G.L. 1956 § 31-41.1-8. Magistrate Goulart has filed a separate dissenting opinion.

Facts and Travel

On February 29, 2008, Appellee was charged with violating the aforementioned motor vehicle offense by Warren Patrol Officer Randy Bryant (Officer Bryant).[1] The Appellee contested the charge, and the matter proceeded to trial.

At trial, the parties stipulated as to Officer Bryant's qualifications and training with regard to DUI investigations and the administration of standard field sobriety tests. (Tr. at 3.) Having thus stipulated, Officer Bryant testified that on February 29, 2008, he

[1] The Appellee was also charged with violating G.L. 1956 § 31-15-1, "Right half of road," and G.L. 1956 § 31-27-2.3, "Revocation of license upon refusal to submit to preliminary breath test."

was conducting a radar post at the intersection of Village Road and Main Street.[2] At approximately 1:00 a.m., Officer Bryant observed a red Saturn traveling northbound on Main Street at a high rate of speed. (Tr. at 5.) As the vehicle passed Officer Bryant's radar post, he recorded the vehicle's speed as 50 m.p.h. in a posted 30 m.p.h. zone. (Tr. at 6.) Officer Bryant pulled out onto Main Street to pursue the vehicle. Id.

Officer Bryant testified that he observed the vehicle's front and rear driver's side tires cross the solid yellow dividing line on two occasions. Id. At this point, he activated his emergency lights, siren, and air horn in an attempt to stop the vehicle. Id. The vehicle traveled approximately 100 feet before coming to a stop in the breakdown lane. (Tr. at 7.) Officer Bryant identified Appellee in court as the operator of the speeding vehicle. (Tr. at 8.)

On direct examination by the State, Officer Bryant testified that he detected an odor of alcohol on Appellee's breath and that Appellee admitted that he had just come from Gilleries, a local bar. Id. When Officer Bryant requested Appellee's driver's license and passenger registration, Appellee experienced some difficult retrieving the requested documentation. (Tr. at 9.) During his initial exchange with Appellee, Officer Bryant observed that Appellee's eyes were watery and bloodshot. (Tr. at 10.)

Officer Bryant testified that, upon request, Appellee consented to field sobriety tests. (Tr. at 10-11.) Officer Bryant administered the "walk and turn" and "one-leg stand" tests, both of which Appellee failed. (Tr. at 11.) At the conclusion of the field sobriety tests, Officer Bryant asked Appellee whether he would submit to a preliminary breath test. Id. Appellee refused to submit to the test and was placed under arrest. Id.

[2] Officer Bryant testified that Main Street is also referred to as Route 114. (Tr. at 4.)

The parties stipulated that Appellee was read his "Rights for Use at Scene" and "Rights for Use at Station" in their entirety from the pre-printed forms. (Tr. at 12.)

Once Appellee arrived at the Warren Police Department, he was placed in the "Breathalyzer room" for a fifteen minute observation period.[3] (Tr. at 13.) At the conclusion of the observation period, Officer Bryant said something to the effect of, "I'm gonna ask [you] whether [you] want[] to take a chemical test or not. Before you answer that, I'm gonna let you use the telephone. You can call an attorney or whoever you want to call." (Tr. at 14.) According to Officer Bryant, Appellee responded that he wanted to use the phone. Id. When Officer Bryant inquired as to whether Appellee wanted to make a *confidential* phone call, Appellee responded that he "didn't care" whether or not the call was made in confidence. Id. The Appellee then proceeded to make several non-confidential phone calls with both Officer Bryant and Sergeant Edward Borges in the room.[4] (Tr. at 15-16.) After Appellee made his phone calls, Officer Bryant asked him whether he would submit to a chemical test. (Tr. at 18.) The Appellee refused. (Tr. at 19.)

Following the trial, the trial magistrate dismissed the charged violation of § 31-27-2.1. With regard to the issue of Appellee's phone calls, the trial magistrate found that Appellee was prejudiced by the lack of confidentiality caused by the presence of Officer

[3] Officer Bryant explained that once arrestees are placed in the Warren Police Department's "Breathalyzer room," they are instructed to state their name, address, and date of birth into a camera. The arrestees are then required to empty out their pockets in preparation of booking. (Tr. at 13.)

[4] Officer Bryant testified that he and Sergeant Borges were in the "Breathalyzer room" with Appellee as he made his phone calls; Officer Bryant was seated at a computer approximately five feet away, and Sergeant Borges was located approximately nine feet away. (Tr. at 22, 26.)

Bryant and Sergeant Borges in the "Breathalyzer room."[5] (Tr. at 34-35.) It is from this decision that the State now appeals. Forthwith is this Panel's decision.

Standard of Review

Pursuant to G.L. 1956 § 31-41.1-8(f), the Appeals Panel of the Rhode Island Traffic Tribunal possesses appellate jurisdiction to review an order of a judge or magistrate of the Rhode Island Traffic Tribunal. Section 31-41.1-8(f) provides in pertinent part:

> "The appeals panel shall not substitute its judgment for that of the judge or magistrate on questions of fact. The appeals panel may affirm the decision of the judge or magistrate, may remand the case for further proceedings, or may reverse or modify the decision if the substantial rights of the Appellee have been prejudiced because the judge's findings, inferences, conclusions, or decisions are:
>
> (1) In violation of constitutional or statutory provisions;
> (2) In excess of the statutory authority of the judge or magistrate;
> (3) Made following unlawful procedure;
> (4) Affected by another error of law;
> (5) Clearly erroneous in view of the reliable, probative, and substantial evidence on the whole record; or
> (6) Arbitrary, capricious, or characterized by abuse of discretion or clearly unwarranted exercise of discretion."

In reviewing a hearing judge's decision pursuant to § 31-41.1-8, this Panel "lacks 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." Link v. State, 633 A.2d 1345, 1348 (R.I. 1993) (citing Liberty Mutual Insurance Co. v. Janes, 586 A.2d 536, 537 (R.I. 1991)). "The review of the Appeals Panel is confined to a reading of the record to determine whether the judge's decision is supported by legally competent

[5] From the trial magistrate's discussion of "prejudice" resulting from the lack of confidentiality, this Panel notes that the trial magistrate was applying the legal standard first articulated in State v. Carcieri, 730 A.2d 11, 15 (R.I. 1999), and further refined in State v. Veltri, 764 A.2d 163, 167 (R.I. 2001).

evidence or is affected by an error of law." Link, 633 A.2d at 1348 (citing Environmental Scientific Corp. v. Durfee, 621 A.2d 200, 208 (R.I. 1993)). "In circumstances in which the Appeals Panel determines that the decision is clearly erroneous in view of the reliable, probative, and substantial evidence on the whole record or is affected by error of law, it may remand, reverse, or modify the decision." Link, 633 A.2d at 1348. Otherwise, it must affirm the hearing judge's conclusions on appeal. See Janes, 586 A.2d at 537.This Panel lacks 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. Link v. State, 633 A.2d 1345 (R.I. 1993). The Appeals Panel is "limited to a determination of whether the hearing justice's decision is supported by legally competent evidence." Marran v. State, 672 A.2d 875, 876 (R.I. 1996) (citing Link, 633 A.2d at 1348). The Panel may reverse a decision of a hearing judge where the decision is "clearly erroneous in view of the reliable, probative, and substantial evidence contained in the whole record." Costa v. Registry of Motor Vehicles, 543 A.2d 1307, 1309 (R.I. 1988).

Analysis

On appeal, the State argues that the trial magistrate's decision is affected by error of law and warrants reversal. Specifically, the State asserts that the trial judge erred in finding that the mere presence of Officer Bryant and Sergeant Borges in the "Breathalyzer room" had a "chilling effect" on Appellee's exercise of his right to a confidential phone call under G.L. 1956 § 12-7-20, thereby warranting the extreme sanction of dismissal. The State contends that the trial magistrate's decision is contrary to our Supreme Court's recent decisions in State v. Carcieri, 730 A.2d 11, 15 (R.I. 1999),

and State v. Veltri, 764 A.2d 163, 167 (R.I. 2001). Based on the holdings of Carcieri and Veltri, the State posits that the mere presence of Officer Bryant and Sergeant Borges in the room while Appellee made his calls was not a *per se* violation of § 12-7-20. Further, the failure of Officer Bryant and Sergeant Borges to ensure that Appellee's calls were confidential by leaving the room did not, according to the State, rise to the level of substantial prejudice, as required by Carcieri and its progeny.

The applicability of § 12-7-20, a criminal statute, to the context of civil chemical test refusal cases is one of first impression. Although the Supreme Court's decisions in Carcieri and Veltri—decisions that were rendered in the criminal context—are illuminating and provide this Panel with much guidance, they do not dictate the path that this Panel must follow in resolving the issues raised by Appellant's appeal. Before evaluating whether the reasoning of Carcieri and Veltri is applicable here, we must employ the tools of statutory construction in order to determine the precise meaning of § 12-7-20 and its relationship to our State's civil refusal statute, § 31-27-2.1. Only then can this Panel conclude with any degree of certainty whether the trial magistrate's decision to dismiss Appellee's violation of § 31-27-2.1 was affected by error of law.

I
"Confidentiality" Defined

Section 12-7-20 provides that "[t]he telephone calls afforded by this section shall be carried out in such a manner as to provide confidentiality between the arrestee and the recipient of the call." The language of the statute, however, does not define the "confidentiality" that must be afforded to arrested persons, and the parties have attached widely divergent meanings to the term. Therefore, at the outset, this Panel must determine whether the statutory term "confidentiality" is clear and unambiguous or, as

the parties seem to indicate, open to multiple interpretations. Based on well-settled principles of statutory construction, if the language employed by the General Assembly in drafting § 12-7-20 is clear and unambiguous on its face, this Panel must give the term "confidentiality" its plain and ordinary meaning. See Gilbane Co. v. Poulas, 576 A.2d 1195 (R.I. 1990).

In determining whether an ambiguity exists in the statutory language, we turn to the familiar Black's Law Dictionary for guidance. Black's defines the term "confidentiality" to mean "[s]ecrecy[,] [or] the state of having the dissemination of certain information restricted." Black's Law Dictionary 318 (8th Ed. 2004) As it applies to protected relationships—including the relationship between an attorney and his or her client—the term means a relationship characterized by "the trust that is placed in the one by the other." Id. Although § 12-7-20 speaks only of "confidentiality," the definition of "confidential" is instructive. Black's defines "confidential" to mean information "meant to be kept secret," or, as it applies to relationships, one that has as its centerpiece "trust and a willingness to confide in the other." Id.

Based on the foregoing, this Panel is satisfied that the language utilized in § 12-7-20 does not require statutory construction as it is clear and unambiguous on its face. In the context of the "right to use [a] telephone for [a] call to [an] attorney," the term "confidentiality" can only be interpreted to mean a call made in complete privacy so as to ensure that the information communicated by the arrested person to his or her attorney is not widely disseminated to third parties, including law enforcement. Based on the plain and ordinary meaning of "confidentiality" and "confidential" supplied by Black's Law Dictionary, the flaws in the State's conception of "confidentiality" become readily

apparent. Indeed, it is impossible to reconcile the legislative intent to maintain the integrity of attorney-client communications with a conception of "confidentiality" that allows a law enforcement officer to remain in the booking room and within earshot while an arrested person utilizes the telephone to contact his or her attorney.[6] Such a construction of the statutory language would frustrate, rather than further, the intent of the General Assembly in drafting the statute, as it would make it more—and not less—difficult to build a relationship based on trust and a willingness to confide sensitive information.

II
Construction of Section 12-7-20

This Panel's "responsibility in interpreting [§ 12-7-20] is to determine and effectuate the Legislature's intent and to attribute to the enactment the meaning most consistent with its policies or obvious purposes." Brennan v. Kirby, 529 A.2d 633, 637 (R.I. 1987) (citing Gryguc v. Bendick, 510 A.2d 937, 939 (R.I. 1986)). We are bound to "effectuate that intent whenever it is lawful and within legislative competence." Vaudreuil v. Nelson Engineering and Const. Co., Inc., 121 R.I. 418, 420, 399 A.2d 1220, 1222 (1979) (citing Narragansett Racing Assoc. v. Norberg, 112 R.I. 791, 793-94, 316 A.2d 334, 335 (1974)). If we conclude that the language of § 12-7-20 "is plain and unambiguous and expresses a single, definite, and sensible meaning, that meaning [will be] presumed to be the Legislature's intended meaning and the statute [will be] interpreted literally." Rhode Island Chamber of Commerce v. Hackett, 122 R.I. 686, 411

[6] This Panel also notes that § 12-7-20 requires that the person arrested be afforded the opportunity to contact an attorney, but also contemplates the confidentiality of such a call to a "recipient" who may not be an attorney. While we are mindful that the privileged conversation between an attorney and his or her client may require greater confidentiality than a conversation with a non-attorney recipient, the statute is silent on any distinction to be made.

A.2d 300 (1980). In such a case, "there is no room for statutory construction or extension." O'Neil v. Code Com'n for Occupational Safety and Health, 534 A.2d 606, 608 (1987). In ascertaining and giving effect to the intention of the General Assembly with respect to § 12-7-20, this Panel must "consider the entire statute as a whole," Sorenson v. Colibri Corp., 650 A.2d 125, 128 (R.I. 1994), and "view[] it in light of circumstances and purposes that motivated its passage." Brennan, 529 A.2d at 637 (citing Shulton, Inc. v. Apex, Inc., 103 R.I. 131, 134, 235 A.2d 88, 90 (1967)).

The statute before us does not require a search for the discernment of legislative intent as we believe the language is clear and unambiguous. Considering § 12-7-20 as a whole, this Panel is satisfied that the statute, when reduced to its essentials, has at its core a single purpose: to allow for a meaningful exchange between the arrestee and his or her attorney or recipient. The statute's title, see Orthopedic Specialists, Inc. v. Great Atlantic & Pac. Tea Co., Inc., 120 R.I. 378, 388 A.2d 352 (1978) (stating that title of statute may be consulted as guide where there is doubt as to meaning of statutory language), mandatory character, see State v. Suero, 721 A.2d 426 (R.I. 1996) (stating that intention of the legislature controls court's consideration of mandatory or directory character of statutory provisions), and specific one-hour time limitation, see Providence Journal Co. v. Mason, 116 R.I. 614, 359 A.2d 682 (1976) (stating that every word, sentence or provision of statute is presumptively intended for some useful purpose and has some force and effect), are consistent with the General Assembly's intent. That intent is to foster an environment of openness and honesty in which arrestees can speak freely to an attorney or recipient of the call, in confidence, about the important, time-sensitive, and oftentimes life-altering decisions that confront them following an arrest.

Further, the statute's specific use of the term "confidentiality" in describing the telephone call between the arrestee and the attorney-recipient can, as has been previously discussed, have only one definite and sensible meaning: the arrestee should have an objectively reasonable expectation that the conversation is not being overheard or recorded by the police. As the attorney-client relationship is built upon a foundation of mutual trust and a willingness to confide sensitive information, we conclude that the General Assembly's intention to promote full and open discussion of the facts and strategies surrounding individual legal matters can be realized only when the arrestee's phone call is made in complete privacy.

III
Relationship between Section 12-7-20 and Section 31-27-2.1

Having examined the meaning of § 12-7-20 as it applies to criminal proceedings, we must next consider whether § 12-7-20 harmonizes with § 31-27-2.1, our *civil* refusal statute. See State v. Pineda, 712 A.2d 858, 864 (R.I. 1998) (characterizing breathalyzer refusal cases as "civil proceedings"). It is Appellant's contention that the confidential phone call afforded to those charged with violating our State's criminal laws should likewise be afforded to those who are faced with the decision of whether to submit to a chemical test because the underlying policy considerations are the same.

In light of the foregoing analysis, this Panel views § 12-7-20 as a "remedial" statute because it "affords a remedy, or improves or facilitates remedies already existing for the enforcement or rights of redress of wrongs" that occur as a result of police intimidation, coercion, and overreaching during the booking process. Esposito v. O'Hair, 886 A.2d 1197, 1203 (R.I. 2005); see State v. Carter, 827 A.2d 636, 643 (R.I. 2003) (To effectuate the salutary purpose of a remedial statute, statute should be liberally construed

in its broad and general sense; however, when statute under review is penal in nature, same language liberally construed in remedial legislation must be read narrowly and defendant must be given the benefit of any reasonable doubt as to whether act charged is within the statute). Accordingly, § 12-7-20 should be liberally construed in order to advance the General Assembly's chosen remedy: the confidential phone call to an attorney or other recipient of the arrestee's choosing. In applying the well-established rule that remedial statutes such as § 12-7-20 should be liberally construed in order to effectuate the remedial purpose for which they were enacted by the General Assembly, this Panel is mindful that the confidential phone call rule and its animating principles of privacy and fairness may be read so as to "apply to more things or more situations than would be the case under a strict construction." 3 Sutherland Statutory Construction § 60:1 at 188.

As the ambit of § 12-7-20 is indeterminate, it should be construed to meet the needs of civil refusal cases—cases which "are clearly within the spirit or reason of [§ 12-7-20], [and] within the evil it was designed to remedy." Id. at 189. Construing § 12-7-20 broadly to apply to civil chemical test refusal cases is not only reasonable, logical, consistent with common sense, and "in furtherance of the simple and convenient administration of justice" in refusal cases, Thrift v. Thrift, 75 A. 484, 485 (1910), but is also consistent with the well-established principle of statutory construction that statutes relating to the same or similar subject matter should be construed such that they will harmonize with each other and be consistent with their general objective scope. See Blanchette v. Stone, 591 A.2d 785 (R.I. 1996). Even though § 12-7-20 and § 31-27-2.1 "contain no reference to each other and [we]re passed at different times," Kaya v.

Partington, 681 A.2d 256, 261 (R.I. 1996), the linkage between the statutes is clear: § 31-27-2.1, undoubtedly a civil statute, has as its object the "arrested person"—the same "arrestee" that is entitled to a confidential phone call to the attorney of his or her choosing in the criminal context under § 12-7-20. Simply put, a person charged with a violation of § 31-27-2.1 must be an "arrested" person pursuant to § 31-27-2.1(B). Thus, this Panel concludes that § 12-7-20 is entitled to a generous construction that reaches civil refusal cases under § 31-27-2.1, as this result is consistent with § 12-7-20's reformative mission. See generally Hogar Agua y Vida en el Desierto, Inc. v. Suarez-Medina, 36 F.3d 177 (1st Cir. 1994).[7]

[7] Based on our holding in this case that the right to a confidential phone call attaches in civil chemical test refusal cases, the members of this Panel can envision a situation in which a person arrested on suspicion of driving while under the influence of intoxicating liquor would assume that the "Rights" forms in general, and their mention of the arrestee's right to a confidential phone call in particular, confer upon the arrestee a right to the advice of counsel prior to deciding whether to submit to a chemical test—an impression that is at odds with the bright-line rule announced by our Supreme Court in Dunn v. Petit, 120 R.I. 486, 490, 388 A.2d 809, 811 (1978), that "no constitutional right to counsel adheres at the moment of decision as to whether or not to submit to [a] [chemical] test." While the members of this Panel are mindful that the "Rights" forms are not models of clarity, we believe that their language easily can be reconciled with the holding and reasoning of Dunn.

When an individual is placed under arrest on suspicion of DUI, he or she may be subject to both civil and criminal proceedings and penalties. For example, the arrestee may be charged criminally under § 31-27-2 for "driving under the influence of liquor" and separately charged under the civil chemical test refusal statute, § 31-27-2.1. Since the arresting officer is unsure at the time of arrest how the arrestee will ultimately be charged, the officer must necessarily advise the arrestee of the rights that attach in both civil and criminal proceedings. The ubiquitous "Rights for Use at Scene" and "Rights for Use at Station" forms were specifically designed with this dual purpose in mind, advising the arrestee of his or her Sixth Amendment right to "the assistance of counsel at all 'critical stages' of the [criminal] prosecution," State v. Oliveira, 961 A.2d 299, 308-309 (R.I. 2008) (citing Iowa v. Tovar, 541 U.S. 77, 80-81, 124 S.Ct. 1379 (2004)), as well as his or her right to a confidential phone call pursuant to § 12-7-20.

The right of an arrested person to place a phone call to an attorney of his or her choosing within one hour of arrest—a right that is specifically enumerated on the "Rights" forms—differs from the right to counsel discussed in Dunn in three important respects: it is not of constitutional origin, applies equally to both civil and criminal cases, and is far narrower in scope. Unlike the sweeping Sixth Amendment right to counsel, the narrowly-tailored statutory right of an arrestee to a confidential phone call exists only within one hour of arrest, and is exercised when the arrestee makes a phone call; it is not necessary that the arrestee actually make contact with an attorney. Section 12-7-20 affords an arrestee—including an arrestee facing the decision of whether or not to submit to a chemical test—with an opportunity to make limited use of a telephone for the purpose of obtaining confidential legal advice; it does not guarantee that such advice will be forthcoming. Simply put, § 12-7-20 allows the arrestee to pick up a phone; it does not guarantee that an attorney will be on the receiving end to take the call and provide timely, helpful legal advice.

IV
Applicability of Carcieri and Veltri to Refusal Cases

Even though this Panel has concluded that the right to a confidential phone call established by § 12-7-20 is applicable in the context of civil refusal cases under § 31-27-2.1, we must still consider the scope of the right and the appropriate remedy for violations by the police in refusal cases. We look for guidance to our Supreme Court's recent reflections on the issue of the confidential phone call in the criminal context, State v. Carcieri, 730 A.2d 11, 15 (R.I. 1999), and State v. Veltri, 764 A.2d 163, 167 (R.I. 2001).

A
Scope of the Right to a Confidential Phone Call

In Carcieri, our Supreme Court concluded that § 12-7-20 requires that a defendant must be given a "reasonable opportunity" to make a confidential phone call following his or her arrest. Carcieri, 730 A.2d at 15. Although the Court did not define the term "reasonable opportunity" with any degree of precision, the Court indicated that § 12-7-20 is not violated "by the mere presence of the police officer during a telephone conversation . . . that [is] at best . . . one-sided." Id. All that § 12-7-20 requires is that the arrestee be afforded "a telephone call free of charge on an unrecorded line, provided that the call is for the purpose of securing an attorney . . . ." Id. (Internal quotations omitted.) The Carcieri Court went on to state that "a suspect must be informed of his or her right to a confidential telephone call," and that this notice requirement, while not contained on

---

The relevant inquiry in the refusal case is not whether the arrestee, when confronted with the decision of whether to submit to a chemical test, was aware that the right that he or she possesses is the narrow statutory right to place a confidential phone call to an attorney and not the more sweeping constitutional right to have the assistance of counsel at all "critical stages" of the criminal DUI investigation. Rather, the relevant inquiry is whether the arrestee, when fully apprised of the rights that attach in both the civil and criminal contexts, had a meaningful opportunity to exercise those rights at the appropriate juncture.

the face of § 12-7-20, is nonetheless "mandatory." Id. at 15. The Court was satisfied that the "Rights for Use at Station Form"—universally employed by police agencies throughout the State of Rhode Island—provided arrestees with adequate notice of their rights under § 12-7-20. Id. at 16.

In applying our Supreme Court's analysis in Carcieri to civil chemical test refusal cases, we feel that the balance between the arrestee's right to privacy and the need of police for timely and accurate breathalyzer evidence must be re-evaluated when applying § 12-7-20 to civil refusal cases.

This Panel is satisfied that an arrestee cannot have a "reasonable opportunity" to exercise his or her right to a confidential phone call prior to a request to submit to a chemical test when the phone call is made in the immediate presence of police. Allowing the arrestee to make his or her phone call on an unrecorded line is simply not sufficient to safeguard the arrestee's right to privacy, particularly if the phone call is made within earshot of police and/or in a room under constant audio surveillance by closed-circuit camera. Accordingly, we hold that when an arrested person is advised of his or her right to a confidential phone call pursuant to the "Rights for Use at Station" form[8] before choosing whether to take a chemical test, he or she must be given the opportunity to make the call out of police earshot, and the police must later establish that such an opportunity was furnished.

B
Scope of Remedy for Violations of § 12-7-20

[8] This Panel proceeds on the assumption that the "Rights for Use at Station" form adequately advises arrestees of their right to make a *confidential* phone call, despite the fact that the form does not expressly provide for confidentiality. See State v. Carcieri, 730 A.2d 11, 16 (R.I. 1999).

On the issue of whether a violation of § 12-7-20 requires dismissal of the charges pending against the arrestee, the Carcieri Court concluded that "each alleged violation of § 12-7-20 must be considered on a case-by-case basis to determine the appropriate remedy."[9] Id. With respect to the issue of whether dismissal is an appropriate remedy, the Court adopted the "harmless error" analysis of the Supreme Court of the United States in U.S. v. Morrison, 449 U.S. 361 (1981): if "the prosecution has improperly obtained incriminating information from the defendant in [violation of his constitutional or statutory rights] . . . the remedy characteristically imposed is not to dismiss the indictment but to suppress the evidence or to order a new trial if the evidence has been wrongfully admitted and the defendant convicted." Morrison, 449 U.S. at 365. The Court stated that dismissal is not an appropriate remedy for police or prosecutorial misconduct unless "the defendant has made a showing of demonstrable prejudice, or a substantial threat thereof." Carcieri, 730 A.2d at 16. Further, the Court made clear that "dismissal . . . is employed only as a last resort, and is limited to cases of extreme and substantial prejudice." Id. (citing State v. Musumeci, 717 A.2d 56, 63 (R.I. 1998)).

The Court reiterated that dismissal is an extreme and disfavored remedy for violations of § 12-7-20 in Veltri, wherein the Court held that the defendant was not entitled to have his DUI conviction vacated because he "made no showing of having suffered any substantial prejudice after the police had failed to provide him with a free telephone call . . . ." Veltri, 764 A.2d at 168. As the Court explained,

> all the evidence used to convict the defendant had been obtained lawfully before the defendant even arrived at the

[9] In State v. Veltri, 764 A.2d 163 (R.I. 2001), the Supreme Court indicated that the defendant waives any right to challenge the failure of the arresting officer to provide him or her with access to a free telephone call by failing to do so before or during the trial, either by a pretrial motion to dismiss or a motion to suppress evidence. Veltri, 764 A.2d at 167.

> police barracks, where he was directed to the pay telephone. Thus, the failure of the police to have provided the defendant with a free telephone call at this late juncture in the evidence-gathering process constituted only harmless error. Certainly, the defendant failed to establish that he suffered any substantial and irremediable prejudice as a result of the arresting officers' failure to provide him with a free telephone call. Moreover, the mere possibility that the defendant may have been able to telephone a lawyer, who in turn may have helped him to arrange for his own breath-analysis test, which, if it were to have generated results that were favorable to the defendant, may have provided him with some exculpatory evidence to counter the prosecution's case, provided a much too attenuated, hypothetical, and speculative scenario to constitute a showing of substantial prejudice.

In the context of chemical test refusal cases, the members of this Panel conclude that the "substantial prejudice" and "harmless error" analyses employed in Carcieri and Veltri are unworkable. Our cases make clear that violations of § 31-27-2.1 are civil in nature. See State v. Pineda, 712 A.2d 858, 863 (R.I. 1998) (civil standard of clear and convincing evidence used in administrative violation hearings in cases of alleged breathalyzer refusals). Our cases also make clear that, as a general rule, the Fourth Amendment exclusionary rule does not apply to civil hearings. See State v. Campbell, 833 A.2d 1228, 1232 (R.I. 2003) (citing State v. Spratt, 120 R.I. 192, 194, 386 A.2d 1094, 1095-96 (1978) (declining to apply exclusionary rule to civil probation-violation hearings)); see also I.N.S. v. Lopez-Mendoza, 468 U.S. 1032, 1050 (1984) (holding that exclusionary rule does not apply to civil deportation hearings). "Consequently, the defendant is not entitled to 'the full panoply of rights' inherent in a criminal trial," including the suppression of evidence under the exclusionary rule. Campbell, 833 A.2d at 1233 (quoting State v. Mendez, 788 A.2d 1145, 1147-1148 (R.I. 2002)).

The Carcieri and Veltri Court's reliance on the "harmless error" rule does not fit squarely in the context of civil refusal cases. As the Court explained in State v. von Bulow, 475 A.2d 995 (R.I. 1984), the "determination of whether error is harmless must turn upon whether there is a reasonable possibility that the error complained of contributed to the conviction." von Bulow, 475 A.2d at 1013 (quoting State v. Robalewski, 418 A.2d 817, 824 (1980)) (emphasis added). There can be no "conviction" under the refusal statute, however, as the statute is wholly civil in nature and does not give rise to criminal liability. The violation of § 31-27-2.1 is complete upon the refusal of the arrested person, upon the request of law enforcement, to submit to a chemical test; liability under the statute does not depend, in whole or in part, upon a determination by a court of competent jurisdiction that the arrested person is "guilty" of refusing. Indeed, it would be absurd to find that the failure of law enforcement to provide the arrested person with a fully confidential phone call was a harmless error, as it did not contribute to the individual's "conviction" for a chemical test refusal.

When an individual is faced with the decision of whether or not to submit to a chemical test, the initial phone call to an attorney is highly significant because many times the motorist is seeking advice as to whether to submit to a chemical test. This is a critical factual distinction that this Panel has weighed in its analysis of the applicability of the holdings of Carcieri and Veltri to civil refusal cases. The prejudice to be suffered is the inability of the motorist to receive confidential advice and make an informed decision about whether to submit to the test. In the criminal context, any prejudice suffered by the arrestee easily can be remedied by excluding the evidence that is prejudicial to the arrestee. However, there is no comparable exclusionary remedy in the civil context to

limit the prejudice that results when an arrestee is prevented from having a meaningful initial exchange with his or her attorney.[10] Accordingly, while dismissal of refusal charges may be, as the Supreme Court implies in Carcieri and Veltri, a disproportionate response to the accidental or inadvertent failure of police to utter the magic word "confidentiality" during recitation of the "Rights for Use at Station" form or to leave the "booking room" while the arrestee exercises his or her rights under § 12-7-20, this Panel is satisfied that no other available discretionary measures in civil chemical test refusal cases can possibly neutralize the harmful effect of the failure of law enforcement to provide arrestees with a fully confidential phone call to an attorney of their choosing within the one-hour period prescribed by § 12-7-20. Section 12-7-20 does not place the burden on arrestees to choose whether or not to speak with an attorney in confidence; rather, the statute places an affirmative duty on law enforcement to provide a confidential

[10] Other jurisdictions support this Panel's review of the confidential phone call. In Gildroy v. Motor Vehicle Div., 102 Or.App. 138, 141, 793 P.2d 332, 333 (1990), the Court of Appeals of Oregon reaffirmed that "an arrested driver has a right under Article I, section 11 [of the Oregon constitution], to a reasonable opportunity to obtain legal advice before deciding whether to submit to a breath test." Gildroy, 102 Or.App. at 141, 793 P.2d at 333 (citing Moore v. Motor Vehicles Div., 293 Or. 715, 723-24, 652 P.2d 794 (1982)). The Court of Appeals made clear that "[i]f an administratively imposed penalty is based on an unlawful procedure that results from a denial of the opportunity to speak with counsel, the penalty is invalid." Id. In Pfeil v. Rutland Dist. Ct., 147 Vt. 305, 309, 515 A.2d 1052, 1055 (1986), the Supreme Court of Vermont held that suspension of a motorist's license to operate a motor vehicle for refusal to submit to alcohol testing is not authorized where coercive or restrictive police practices deprive the motorist of a meaningful opportunity to consult with counsel. The Pfeil Court stated that "[t]he statutory right to counsel that attaches prior to testing includes the right to communicate freely with an attorney in private." Id. (citing State v. Lombard, 146 Vt. 411, 415, 505 A.2d 1182, 1184-1185 (1985)). In Jones v. Comm'r of Pub. Safety, 364 N.W.2d 854, 856 (Minn.Ct.App.1985), the Court of Appeals of Minnesota concluded that the failure of arresting officers to vindicate the limited right to counsel for drivers who must decide whether to submit to chemical testing for blood alcohol content is a reasonable ground for refusing to take a chemical test. The Court of Appeals reiterated that the right to counsel is effectuated "if the person is provided with a telephone prior to testing and given a reasonable time to contact and talk with counsel." Jones, 364 N.W.2d at 857 (quoting Prideaux v. Dept. of Pub. Safety, 310 Minn. 405, 421, 247 N.W. 2d 385, 394 (1976)). Finally, in Wetzel v. N.D. Dept. of Transp., 622 N.W.2d 180, 183 (N.D. 2001), the Supreme Court of North Dakota stated that "[i]f a person arrested for driving under the influence is asked to submit to a chemical test and responds with any affirmative mention of a need for an attorney, the failure to allow the arrested person a reasonable opportunity to contact an attorney prevents the revocation of his or her license for refusal to take the test." Id. at 183 (citing Baillie v. Moore, 522 N.W.2d 748, 750 (N.D. 1994)). The Wetzel Court made clear that "[t]he reasonableness of the opportunity to consult with counsel is tested objectively, focusing on the totality of the circumstances." Id. at 184 (citing City of Mandan v. Jewett, 517 N.W.2d 640, 642 (N.D. 1994)).

phone call within one hour of arrest. Thus, this Panel holds that a chemical test refusal charge must be dismissed upon the failure of police to provide a fully confidential phone call, out of police earshot, within one hour of arrest.[11]

IV
Analysis of Appellee's Appeal

Applying the foregoing analysis to the present case, this Panel concludes that the trial magistrate's decision to dismiss Appellee's violation of § 31-27-2.1 was unaffected by error of law. Officer Bryant testified that he apprised Appellee of his right to use a telephone in accordance with the "Rights for Use at Station" form. Officer Bryant also testified that he asked whether Appellee wanted to make a confidential phone call, and that Appellee responded that he "didn't care" whether or not the call was made in confidence. While this Panel concludes that the trial magistrate erred in placing the burden on Appellee to choose whether or not to exercise his right to make a phone call in confidence, we nevertheless affirm his decision because he reached the correct result.

As the foregoing discussion makes clear, the unambiguous language of § 12-7-20 does not place the onus on the arrestee to opt into the protections afforded by the statute. An arrestee certainly can choose to waive his or her right to make a phone call in the first instance; however, once the decision has been made to make a phone call, the confidentiality provisions of § 12-7-20 become fully operative and the police have an affirmative obligation to leave the booking room and to discontinue all audio surveillance for the duration of the confidential call. As there is reliable, probative, and substantial evidence in the record that Officer Bryant did not provide Appellee with a confidential

[11] This Panel recognizes that exigent circumstances may make it difficult, if not impossible, to provide the arrestee with a phone call within the statutorily prescribed one-hour period. Accordingly, this Panel agrees with the Carcieri Court that " each alleged violation of § 12-7-20 must be considered on a case-by-case basis. . . ." State v. Carcieri, 730 A.2d 11, 16 (R.I. 1999).

phone call to an attorney of his choosing, this Panel concludes that the trial magistrate did not err in dismissing the charged violation of § 31-27-2.1.

Conclusion

It is well-settled that "[i]f the trial court's decision is correct, it is not germane to our purposes that the conclusion was reached through faulty reasoning or a mistake of law." Souza v. O'Hara, 121 R.I. 88, 90, 395 A.2d 1060, 1061 (1978) (citing Russo v. Rhode Island Co., 38 R.I. 323, 327, 95 A. 666, 667 (1915)). Accordingly, this Panel will sustain the trial magistrate's correct judgment in this case, "notwithstanding the erroneous reasoning upon which it rests." Id. (citing DiRaimo v. DiRaimo, 117 R.I. 703, 708, 370 A.2d 1284, 1287 (1977)). As we are satisfied that substantial rights of the State have not been prejudiced, the State's appeal is hereby denied.

ENTERED:

GOULART, M., DISSENTING: I write separately to express my dissent from the holding of the majority Decision that a lack of a "truly confidential phone call" must result in dismissal of a charge brought pursuant to §31-27-2.1. The chemical test refusal

statute does not specifically grant a motorist the right to make a confidential telephone call prior to making the decision as to whether he or she wishes to submit to a chemical test. However, this Court has found that this right essentially exists by implication. In its Decision, the majority concludes that §12-7-20 is entitled to a "generous construction that reaches civil refusal cases under §31-27-2.1."[12] The majority further holds that a violation of this statutory right to a confidential telephone call must result in dismissal of the refusal charge without regard to any showing of prejudice by the motorist. I respectfully disagree.

By its very terms, §12-7-20 was enacted to provide any person arrested with a right to make a telephone call for the purposes of arranging bail or to secure an attorney. This statute requires that the telephone call afforded to an arrestee must be "carried out in such a manner as to provide confidentiality between the arrestee and the recipient of the call." In State v. Carcieri, our Supreme Court concluded that §12-7-20 is not violated, however, by the "mere presence of the police officer during a telephone conversation." State v. Carcieri, 730 A.2d 11 (R.I. 1999). In its Decision, the majority rejects the reasoning set forth in Carcieri finding that the failure of the police to provide a fully confidential phone call i.e. a police officer within earshot of the motorist must result in the dismissal of the charge.

I believe that the reasoning and analysis set forth by our Supreme Court in Carcieri is both workable and reasonable and the formalistic approach adopted by the majority creates great unfairness. Under the approach adopted by the majority, any telephone call not carried out in complete confidence would result in dismissal of the

[12] For purposes of this decision I do not reach the issue of whether a motorist is entitled to the right of a confidential telephone call in the context of a civil refusal charge.

refusal charge. Presumably unanswered calls, calls to friends or family for advice and calls seeking transportation all would result in dismissal of the refusal charge if those calls were not carried out in complete confidence. Additionally, the majority overlooks the clear language of the §12-7-20 which was enacted to allow a defendant the opportunity to arrange for bail or secure the services of an attorney. As bail is inapplicable in the context of civil refusal charges, the only potential applicability of the statute in civil refusal charges would be in those situations where the defendant contacted and communicated with an attorney seeking advice as to whether to submit to the chemical test. (Emphasis added.)

Accordingly, I am of the opinion that unless a defendant establishes substantial prejudice as a result of the failure of law enforcement to provide a fully confidential telephone call, the remedy of dismissal is excessive, extreme and fails to achieve justice. This holding is consistent with my belief that it is always preferable, absent constitutional violations, for cases to be decided on the merits. In cases where the defendant is able to establish that an attorney was contacted and that attorney-client communication occurred, I would find, however, that prejudice is presumed and the burden shifts to the prosecution to establish by clear and convincing evidence that the motorist was not prejudiced by the action of the police.

DATE: 9/8/09