STATE OF RHODE ISLAND AND PROVIDENCE PLANTATIONS

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

CITY OF WARWICK	:	
	:	
v.	:	**C.A. No. T08-0152**
	:	
MARCUS THOMAS	:	

DECISION

PER CURIAM: Before this Panel on February 11, 2009—Magistrate Cruise (Chair, presiding), and Chief Magistrate Guglietta and Magistrate Noonan sitting—is Marcus Thomas' (Appellant) appeal from a decision of Magistrate Goulart, sustaining the charged violation of G.L. 1956 § 31-27-2.1, "Refusal to submit to chemical test."[1] The Appellant was represented by counsel before this Panel. Jurisdiction is pursuant to G.L. 1956 § 31-41.1-8.

Facts and Travel

On September 13, 2008, Officer Scott Robillard (Officer Robillard) of the Warwick Police Department charged Appellant with violating the aforementioned section of the motor vehicle code. The Appellant contested the charge, and the matter proceeded to trial.

Officer Robillard began his trial testimony by describing his professional training and experience with respect to DUI-related traffic stops and the administration of standardized field sobriety tests. (Tr. 11/19/08 at 10-11, 23-24.) Then, focusing the Court's attention on the events of September 12, 2008, Officer Robillard testified that he was performing traffic control duties at the intersection of Quaker Lane and Centerville Road. (Tr. 11/19/08 at 12-13.) At approximately 11:25 p.m., Officer Robillard observed a vehicle traveling southbound on Quaker

[1] The Appellant was also charged with violating G.L. 1956 § 31-14-2, "Prima facie limits." While this violation was sustained following trial, it is not presently before this Panel on appeal.

Lane at 65 m.p.h. in a posted 45 m.p.h. zone.[2] Id. When Officer Robillard began to pursue the vehicle, he noted that its speed had increased to 75 m.p.h. (Tr. 11/19/08 at 14.)

Officer Robillard indicated that he activated his police cruiser's emergency lights and siren in an attempt to stop the vehicle and that the vehicle proceeded approximately 150 feet on Quaker Lane before turning into the parking lot of Pride Media. (Tr. 11/19/08 at 15-16.) As Officer Robillard approached the vehicle, he observed the operator—later identified at trial as Appellant—exit the vehicle and begin to unzip his pants. (Tr. 11/19/08 at 16.) Officer Robillard asked Appellant why he was unzipping his pants, and Appellant responded: "I've had too much to drink and have to [urinate]." (Tr. 11/19/08 at 17.) The Appellant added that he had just come from Smokey Bones restaurant, where he had had "a couple drinks." (Tr. 11/19/08 at 18.)

When asked to describe Appellant's physical appearance and demeanor, Officer Robillard testified that he detected a strong odor of alcohol emanating from Appellant's breath, and that Appellant's eyes appeared watery and bloodshot. (Tr. 11/19/08 at 22.) Upon making these initial observations, Officer Robillard asked Appellant to return to his vehicle while he used his police cruiser's dashboard computer to check Appellant's operator's license and vehicle registration. (Tr. 11/19/08 at 23.) While Officer Robillard was examining these documents, Officer John Choquette (Officer Choquette) arrived at the scene. Id.

On cross-examination by counsel for Appellant, Officer Robillard indicated that his report was silent as to whether Appellant's eyes appeared watery and bloodshot. (Tr. 11/19/08 at 27.) Officer Robillard also testified that Appellant was generally cooperative during the course of the traffic stop. (Tr. 11/19/08 at 28.)

[2] The parties stipulated that the radar unit used to record the speed of the vehicle had been calibrated both internally and externally. (Tr. 11/19/08 at 7-8.) Officer Robillard also set forth in his trial testimony that he was trained in the use of radar units during his time at the Rhode Island Municipal Police Training Academy in March of 1997. (Tr. 11/19/08 at 12.)

Officer Robillard further testified that upon the arrival of Officer Choquette at the scene, he informed Officer Choquette that Appellant had been operating his motor vehicle in excess of the posted speed limit and that Appellant appeared intoxicated. (Tr. 11/19/08 at 30.) At this time, Officer Robillard continued to process Appellant's speeding violation while Officer Choquette assumed primary responsibility for the DUI investigation. Id.

Officer Robillard indicated that Appellant was placed under arrest by Officer Choquette and was transported to the Warwick Police Department. (Tr. 11/19/08 at 30.) As he was not directly involved in the DUI investigation, Officer Robillard testified that he did not read Appellant his "Rights for Use at Scene" or his "Rights for Use at Station" from the pre-printed cards, and did not advise Appellant of his right to a confidential phone call pursuant to G.L. 1956 § 12-7-20.[3] (Tr. 11/19/08 at 33-34.)

Officer Robillard testified that he did not personally administer standardized field sobriety tests to Appellant, but that he observed Officer Choquette as he administered the tests to Appellant. (Tr. 11/19/08 at 34.) Officer Robillard observed that Appellant appeared "unsteady on his feet" as he performed the "walk and turn" test, and that he raised his hands to maintain his sense of balance. (Tr. 11/19/08 at 35.) In his report, Officer Robillard indicated that he "observed [Appellant] take the ['walk-and-turn'] test and it was obvious that he was under the influence [of alcohol] and unfit to operate a motor vehicle." (Tr. 11/19/08 at 38.)

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[3] Section 12-7-20 reads, in pertinent part:

> Any person arrested . . . shall be afforded, as soon after being detained as practicable, not to exceed one hour from the time of detention, the opportunity to make use of a telephone for the purpose of securing an attorney . . . ; provided, that whenever a person who has been detained for an alleged violation of the law relating to drunk driving must be immediately transported to a medical facility for treatment, he or she shall be afforded the use of a telephone as soon as practicable, which may not exceed one hour from the time of detention. The telephone calls afforded by this section shall be carried out in such a manner as to provide confidentiality between the arrestee and the recipient of the call.

Following Officer Robillard's trial testimony, Officer Choquette took the witness stand. Officer Choquette began his trial testimony by describing his own professional training and experience with respect to DUI-related traffic stops and the administration of standardized field sobriety tests. (Tr. 11/19/08 at 40-43.) Then, focusing the Court's attention on the date in question, Officer Choquette testified that he was on routine patrol when he received a request for assistance from Officer Robillard. (Tr. 11/19/08 at 44.) Officer Choquette responded to the parking lot of Pride Media and made contact with Appellant, who was sitting in the driver's seat of his vehicle. Id.

According to Officer Choquette, Appellant informed him that "he shouldn't have been driving [,] [and] [t]hat he had [had] too much to drink." Id. He also stated that he stopped in the parking lot of Pride Media to urinate. Id. During his initial conversation with Appellant, Officer Choquette detected a strong odor of an alcoholic beverage emanating from Appellant's breath. Id. He also noted that Appellant's speech was slurred and "mumbled," and that his eyes appeared "glossy" and watery. (Tr. 11/19/08 at 44-45.) When asked whether Appellant was the operator of the vehicle on the date in question, Officer Choquette answered in the affirmative. (Tr. 11/19/08 at 45.)

Based on his observations of Appellant's physical appearance and demeanor, Officer Choquette asked Appellant whether he would submit to a battery of standardized field sobriety tests. (Tr. 11/19/08 at 45-46.) The Appellant consented to the tests. (Tr. 11/19/08 at 46.) Upon observing Appellant's performance of the tests, Officer Choquette formed a belief, based on his professional training and experience conducting DUI-related traffic stops, that Appellant was under the influence of alcohol and/or drugs and was unfit to safely operate his vehicle. (Tr. 11/19/08 at 46-53.)

Once Appellant had been handcuffed and placed under arrest, he was placed in the rear seat of Officer Choquette's police cruiser. (Tr. 11/19/08 at 54.) At this time, Officer Choquette read Appellant his "Rights for Use at Scene" in their entirety from the pre-printed card. (Tr. 11/19/08 at 58.) According to Officer Choquette, Appellant indicated that he understood the rights contained therein. (Tr. 11/19/08 at 59.) The Appellant was transported to the headquarters of the Warwick Police Department and was placed in an observation room. Id. While in the observation room, Officer Choquette read Appellant his "Rights for Use at Station" in their entirety from the pre-printed card. (Tr. 11/19/08 at 60.) The Appellant indicated that he understood the rights contained on the "Rights for Use at Station" card. (Tr. 11/19/08 at 61.)

The Appellant was then asked by Officer Choquette whether he would like to avail himself of his right to a confidential phone call pursuant to § 12-7-20. (Tr. 11/19/08 at 61-62.) Officer Choquette recounted that Appellant expressed his desire to utilize the proffered telephone to call a particular telephone number. (Tr. 11/19/08 at 62.) When asked by counsel as to how he acquired knowledge of the phone number that Appellant intended to call, Officer Choquette responded that he asked Appellant and recorded his response on the "Rights for Use at Station" card.[4] Id. Officer Choquette went on to describe the location of the proffered telephone as "right in the cellblock . . . on the wall right next to the observation room. It is all an open area." Id. However, Officer Choquette explained that the telephone and cellblock are located behind a door with a glass insert and, when the door is closed, officers are able to maintain visual observation of an arrestee without overhearing his or her telephone conversations. Id. Officer Choquette made clear that he was not able to hear Appellant while he utilized the telephone. (Tr. 11/19/08 at 63.)

[4] Later in the hearing, Appellant testified that the phone number written on the "Rights for Use at Station" card was that of attorney Richard Humphrey. (Tr. at 108.) Mr. Humphrey served as Appellant's counsel before this Panel.

Once Appellant had been afforded an opportunity to place a confidential phone call, Officer Choquette escorted Appellant to the observation room and asked him whether he would submit to a chemical test. Id. The Appellant initially refused to consent to the test, but subsequently changed his mind and expressed his willingness to submit to chemical testing. (Tr. 11/19/08 at 64.) Thereupon, Officer Choquette asked Appellant to sign the "Rights for Use at Station" form to indicate his consent; Appellant refused to sign. Id. Officer Choquette once again asked Appellant whether he would submit to chemical testing, and Appellant responded that he wanted to wait for his attorney to return his phone call. Id.

Officer Choquette testified that he "went back and forth" with Appellant, asking him four additional times whether he would submit to a chemical test and re-reading the "Rights" form. Id. Finally, Officer Choquette advised Appellant that he was going to be charged with violating § 31-27-2.1 because he was unwilling to "wait there all night for [his] attorney[] to call back." (Tr. 11/19/08 at 66.)

On cross-examination by counsel for Appellant, Officer Choquette was asked whether he advised Appellant of his Miranda right to an attorney; Officer Choquette answered in the affirmative. (Tr. 11/19/08 at 82-83.) Officer Choquette was then asked whether he advised Appellant that he did not have a right to an attorney when deciding whether to submit to a chemical test of his breath, blood, or urine. (Tr. 11/19/08 at 84.) Officer Choquette responded that he advised Appellant that he had such a right and referred Appellant to the text of the "Rights" form. (Tr. 11/19/08 at 84, 86.) Officer Choquette made clear that Appellant was not "confused" as to whether he had the right to contact an attorney. (Tr. 11/19/08 at 86.)

Counsel for Appellant then set forth the following timeline, based on the contents of Officer Choquette's sworn report: Appellant was advised of his "Rights for Use at Station" at

approximately 12:12 a.m., was afforded an opportunity to use a telephone shortly thereafter, and was asked to submit to a chemical test at approximately 12:23 a.m.. (Tr. 11/19/08 at 88.) According to counsel, Appellant was afforded approximately ten minutes "to make up his mind" as to whether or not to submit to a chemical test. (Tr. 11/19/08 at 88-89.) However, Officer Choquette, based on his professional training, characterized this as a "reasonable" amount of time in which an arrested person could make the decision of whether to submit to chemical testing. (Tr. 11/19/08 at 89.)

At the conclusion of Officer Choquette's trial testimony, Appellant took the witness stand. The Appellant testified that he had been at Smokey Bones restaurant earlier in the evening of September 12th and had had "a few drinks." (Tr. 11/19/08 at 108.) Upon leaving Smokey Bones, Appellant pulled into the parking lot of Pride Media because he "had to go to the bathroom." (Tr. 11/19/08 at 109.) The Appellant recounted that he made contact with law enforcement officers in the parking lot, whereupon he was asked to perform field sobriety tests. (Tr. 11/19/08 at 110.) Once the field sobriety tests had been administered, Appellant testified that he was placed under arrest and read his "Rights for Use at Scene." Id. It was Appellant's understanding of the "Rights" form that he "had a right to an attorney." Id.

Once he was transported to the headquarters of the Warwick Police, Appellant was read his "Rights for Use at Station." (Tr. 11/19/08 at 111.) According to Appellant, he "ha[d] a right to an attorney . . . to make a phone call to contact [his] attorney," and that he availed himself of this right. (Tr. 11/19/08 at 112.) The Appellant explained that he wanted "advice on taking the Breathalyzer or refusing." Id. However, as Appellant's attempts to contact his attorney were unsuccessful, he did not have an opportunity to speak with counsel prior to deciding whether to submit to a chemical test. (Tr. 11/19/08 at 112-113.) While Appellant explained to Officer

Choquette that he wanted to wait for his attorney to return his call so as to make an informed decision, Officer Choquette waited "[a] very short period of time" before informing Appellant that he was going to be charged with a refusal. (Tr. 11/19/08 at 113.)

When asked by counsel to explain his apparent indecision as to whether to submit to a chemical test, Appellant testified that he initially agreed to submit to testing, but that he wanted to consult with his attorney prior to taking a test. (Tr. 11/19/08 at 114.) At this time, Officer Choquette informed Appellant that he "already had [his] phone call" and asked him once again whether he would submit to a chemical test. Id. The Appellant renewed his request to speak with counsel, but Officer Choquette responded that Appellant "either ha[d] to take the test or refuse it . . . ." Id. When Appellant asked Officer Choquette to re-read the "Rights for Use at Station" form, Officer Choquette refused to do so, stating, "You just refused." Id. At this point, Appellant informed Officer Choquette that he would submit to a chemical test because he "realized that [he] didn't . . . ha[ve] a right to an attorney." Id.

Following Appellant's testimony, the trial magistrate continued the trial to November 25, 2008. When the trial resumed, the trial magistrate delivered his decision from the bench. In his decision, the trial magistrate considered an argument that Appellant raised in a pre-trial motion to dismiss: namely, that Appellant never "refused" to submit to a chemical test because he told Officer Choquette "for the record" that he would take the test because an insufficient amount of time elapsed for the police to determine that Appellant's indecision constituted a refusal, and because he did not knowingly refuse because he thought that he had the right to consult with counsel. (Tr. 11/25/08 at 15.) Before reaching the merits of this argument, the trial magistrate found that the prosecution proved to a standard of clear and convincing evidence that Officer Choquette had reasonable grounds to believe that Appellant had been driving his vehicle while

under the influence of intoxicating liquor, that Appellant had been fully informed of his right to an independent medical examination pursuant to G.L. 1956 § 31-27-3, and that Appellant had been fully informed of the penalties incurred as a result of refusing to submit to a chemical test. (Tr. 11/25/08 at 16-18.) Accordingly, the sole issue for resolution was whether Appellant, while under arrest, "refused" to submit to a chemical test upon the request of Officer Choquette. (Tr. 11/25/08 at 18-19.)

The trial magistrate found that Appellant's statement to Officer Choquette that he would submit to a chemical test "for the record," when coupled with his refusal to take the test until his attorney returned his phone call, was "consistent with someone who is trying to either set up a defense or delay . . . ." (Tr. 11/25/08 at 19.) The trial magistrate found that these dilatory tactics were the functional equivalent of a refusal, as "[Appellant] essentially refused to decide and the police properly equated that with a refusal[.]" (Tr. 11/15/08 at 20-21.) With respect to the amount of time that had elapsed between Appellant's confidential phone call to his attorney and Officer Choquette's statement to Appellant that he was being charged with violating § 31-27-2.1, the trial magistrate found that a "[]sufficient period of time elapsed for the police to determine that [Appellant] refused the [chemical] test." (Tr. at 20.) As the trial magistrate explained, "the police are not required to wait and allow for potential [blood alcohol] evidence to be lost while [Appellant] tried to decide whether to take the test or not." Id. The trial magistrate was satisfied that Officer Choquette "did what [he] w[as] required to do, . . . [what] the case law requires [him] to do." Id.

With respect to the allegation of Appellant's counsel that Appellant was "confused" about whether he had a right to counsel prior to refusing to submit to a chemical test, the trial magistrate found that "[Appellant] was told . . . he had [the] right to consult with an attorney

because he was suspected of driving while under the influence of intoxicating liquor, which is a criminal charge, and certainly he had a right to speak with an attorney relating to that criminal charge." (Tr. 11/25/08 at 22.) While the trial magistrate acknowledged that Appellant may have been "somewhat confused," he felt that it was "not the State's fault that [Appellant] may have been . . . confused as to what his rights were related to the criminal charge, as to what his rights may have been relating to the civil charge." Id. The trial magistrate added that he didn't "believe that [Appellant's] confusion was [of] such a degree that it rendered his refusal" involuntary. (Tr. 11/25/08 at 23.)

Following the trial, the trial magistrate sustained the charged violation of § 31-27-2.1. Aggrieved by this decision, Appellant filed a timely appeal to the members of this Panel. Our decision is rendered forthwith.

Standard of Review

Pursuant to G.L. 1956 § 31-41.1-8, 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 as to the weight of the evidence on questions of fact. The appeals panel may affirm the decision of the judge or magistrate, or it may remand the case for further proceedings or reverse or modify the decision if the substantial rights of the appellant have been prejudicial because the 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 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.

In reviewing a hearing judge or magistrate'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 [or magistrate] 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 [or magistrate's] decision is supported by legally competent 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 [or magistrate's] conclusions on appeal. See Janes, 586 A.2d at 537.

Analysis

On appeal, Appellant argues that the trial magistrate's decision is affected by error of law and clearly erroneous in light of the reliable, probative, and substantial record evidence. Specifically, Appellant contends that the trial magistrate erred in finding that Appellant "refused" to submit to chemical testing upon the request of Officer Choquette. The Appellant maintains that his statement to Officer Choquette that he would not submit to a chemical test was not knowingly and intelligently made; rather, it was the product of "police induced confusion" regarding whether or not Appellant was entitled to the advice of counsel prior to choosing to submit to a chemical test. In the alternative, Appellant argues that even if his refusal was knowing, voluntary, and intelligent, it was subsequently "cured" by his later statement to Officer

Choquette that he would consent to a chemical breath test. The Appellant's arguments will be addressed in seriatim.

I

The Appellant's first argument on appeal is that his statement to Officer Choquette that he would refuse to submit to a chemical test was not knowingly and intelligently made, as Appellant was "confused" as to whether he had a right to speak with counsel prior to making the decision of whether to submit to testing. It is Appellant's position that, based on the language of the "Rights for Use at Scene" and "Rights for Use at Station" forms, he was entitled to the advice of counsel prior to choosing whether to submit to chemical testing. According to Appellant, once he invoked his right to counsel by placing a confidential phone call to his attorney, Officer Choquette was under an affirmative obligation to wait until Appellant's counsel had returned Appellant's phone call prior to renewing his request that Appellant submit to a chemical test.

The Appellant's "police induced confusion" argument is premised on the assumption that the "Rights" cards in general, and their mention of the arrestee's right to a confidential phone call, in particular, create an impression in the mind of the arrestee that he or she has a right to the advice of counsel prior to deciding whether to submit to a chemical test. This impression is at odds with the bright-line rule of 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." The members of this Panel believe that the language of the "Rights" cards easily can be reconciled with the holding and reasoning of Dunn.

When an individual is placed under arrest on suspicion of operating a motor vehicle under the influence of intoxicating liquor, 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" cards 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.[5]

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" cards—differs from the right to counsel discussed in Dunn in three important respects: it is not of constitutional origin, it applies equally to both civil and criminal cases, and it 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

[5] Section 12-7-20 reads, in pertinent part:

> Any person arrested . . . shall be afforded, as soon after being detained as practicable, not to exceed one hour from the time of detention, the opportunity to make use of a telephone for the purpose of securing an attorney or arranging for bail; provided, that whenever a person who has been detained for an alleged violation of the law relating to drunk driving must be immediately transported to a medical facility for treatment, he or she shall be afforded the use of a telephone as soon as practicable, which may not exceed one hour from the time of detention. The telephone calls afforded by this section shall be carried out in such a manner as to provide confidentiality between the arrestee and the recipient of the call.

telephone for the purpose of obtaining confidential legal advice or bail; it does not guarantee that such advice will be forthcoming. Simply put, § 12-7-20 allows the arrestee to use 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.

The relevant inquiry in the present case is not whether Appellant, when confronted with the decision of whether to submit to a chemical test, was aware that the right that he possessed was 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 Appellant, 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 record before this Panel reflects that Appellant was fully advised of the rights available to him in the civil context, including his statutory right under § 12-7-20 to speak privately with an attorney prior to rendering a decision on whether to submit to chemical testing. (Tr. 11/19/08 at 58, 60.) The record also reflects that Appellant indicated to Officer Choquette that he understood the rights contained on the "Rights for Use at Scene" and "Rights for Use at Station" cards. (Tr. 11/19/08 at 59, 61.) Although it is unclear from the record whether Appellant placed one phone call or more than one, it is undisputed that Appellant availed himself of his opportunity to contact counsel, even though his opportunity did not result in legal advice. (Tr. 11/19/08 at 63.) Thus, the members of this Panel are satisfied that Appellant was afforded all of the rights that he was entitled to in a civil refusal case.

In support of his "police induced confusion" argument, Appellant cites to a number of non-Rhode Island cases, all of which are factually and legally similar. The discussion of only

one of these cases will prove instructive. In Calvert v. State, 184 Colo. 214, 218, 519 P.2d 341, 343 (1974), the petitioner was arrested on suspicion of operating his motor vehicle under the influence of intoxicating liquor and was given the Miranda warnings that are contained in our own State's "Rights for Use at Scene" and "Rights for Use at Station" forms. Based on this recitation of the rights that attach in the criminal DUI context, the petitioner "manifested his desire to call his attorney before deciding whether or not to submit to the test." Id. The arresting officers responded that petitioner "had no such right." Id. The Calvert Court held that "[w]here, as here, law enforcement officers, even though inadvertently, either through an act of omission or commission, cause a suspect's misunderstanding of the state of the law, he cannot be held strictly accountable for his refusal to take implied consent tests." Id. The court reasoned that the best practice is for law enforcement to advise the motorist that "the [Miranda] right to remain silent does not include the right to refuse to submit to the test or the right to prior consultation with an attorney." Id.

However, Calvert and other cases with similar reasoning are clearly distinguishable from the case at bar. Like the petitioner in Calvert, Appellant did not, based on the bright-line rule enunciated in Dunn v. Petit, supra, have a constitutional right to consult with counsel prior to deciding whether to submit to a chemical testing. However, unlike the petitioner in Calvert, Appellant possessed an additional, more limited statutory right under § 12-7-20 "to make use of a telephone for the purpose of securing an attorney or arranging for bail . . . ." Section 12-7-20. Thus, as motorists in Rhode Island are afforded by statute with more rights than motorists in jurisdictions that follow the reasoning employed by the Calvert Court, the members of this Panel conclude that dismissal of a refusal charge is a disproportionate remedy where, as here, the

motorist is somewhat "confused" about the rights that attach in the civil and criminal contexts, but is ultimately afforded the proper rights for a refusal case.

II

The Appellant next argues that his initial refusal to submit to a chemical test upon the request of Officer Choquette was "cured" by his subsequent statement that he would, "for the record," submit to chemical testing. (Tr. 11/19/08 at 115.) In support of his "right to cure" argument, Appellant focuses this Panel's attention on the Oklahoma case of Capstick v. State, 11 P.3d 225 (Okla.Civ.App. Div. 4, 2000). In Capstick, the petitioner's license was revoked on the ground that he refused to submit to a chemical breath test upon the request of the officer who arrested petitioner for operating his vehicle under the influence of alcohol. Id. at 225-226. While the petitioner "admit[ed] that he refused the test when it was offered[,]" he nevertheless contended on appeal "that he effectively recanted his refusal under [the Supreme Court of Oklahoma's decision in] Baldwin v. State ex rel. Dept. of Public Safety, 849 P.2d 400, 406 (Okl. 1993)." Id. at 226. In Baldwin, the Supreme Court of Oklahoma, interpreting that state's implied consent law, held that the refusal of a motorist to submit to a chemical test can be "cured" by a subsequent decision to submit to chemical testing, upon a showing that the subsequent consent was (1) within a very short and reasonable time after the first prior refusal; (2) when a test administered upon the subsequent consent would still be accurate; (3) when testing equipment is still readily available; (4) when honoring the request will result in no substantial inconvenience or expense to the police; and (5) when the individual requesting the test has been in the custody of the arresting officer and under observation for the whole time since arrest. Baldwin, 849 P.2d at 406. As the implied consent statute before the court in

Baldwin did not contain an express "right to cure," the court fashioned its multi-pronged analysis by reference to the decisional law of other jurisdictions. Id.

Having considered the holding and reasoning of Capstick and Baldwin, the members of this Panel are in agreement that their approach should not guide this Panel in its consideration of Appellant's appeal. At present, there is no statutory mechanism in Rhode Island by which an initial decision to refuse a chemical test can be "cured" by a subsequent expression of consent.[6] Further, this is no controlling decisional law from our Supreme Court on this issue. Accordingly, the members of this Panel will not accept Appellant's invitation to look beyond the borders of our jurisdiction to fashion such a curative measure when our own General Assembly has not had occasion to take up this issue and our Supreme Court has not created a "right to cure" in § 31-27-2.1.

[6] Even assuming arguendo that Rhode Island adopted the multi-pronged "right to cure" analysis set forth in Baldwin v. State ex rel. Dept. of Public Safety, 849 P.2d 400, 406 (Okl. 1993), Appellant's argument would nevertheless fail because his subsequent consent to a chemical test was not "within a very short and reasonable time after the first prior refusal." The record reflects that at least ten minutes elapsed between Appellant's initial refusal to submit to a chemical test upon the request of Officer Choquette. (Tr. 11/19/08 at 63-66.)

Conclusion

This Panel has reviewed the entire record before it. Having done so, the members of this Panel are satisfied that the trial magistrate's decision is unaffected by error of law and is not clearly erroneous in view of the reliable, probative, and substantial record evidence. Substantial rights of Appellant have not been prejudiced. Accordingly, Appellant's appeal is denied, and the charged violation sustained.

ENTERED: