STATE OF RHODE ISLAND AND PROVIDENCE PLANTATIONS

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

CITY OF WARWICK	:	
	:	
v.	:	**C.A. No. T09-0031**
	:	
RICHARD PORTER	:	

DECISION

PER CURIAM: Before this Panel on May 13, 2009—Magistrate Cruise (Chair, presiding) and Judge Ciullo and Magistrate DiSandro sitting—is Richard Porter's (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." The Appellant was represented by counsel before this Panel. Jurisdiction is pursuant to G.L. 1956 § 31-41.1-8.

Facts and Travel

On January 12, 2007, Sergeant Andrew Tainsh (Sergeant Tainsh) of the Warwick Police Department charged Appellant with the aforementioned violation of the motor vehicle code. The Appellant contested the charge, and the matter proceeded to trial.

Sergeant Tainsh 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. at 8-17.) Then, focusing the Court's attention on the date in question, Sergeant Tainsh testified that at approximately 1:20 a.m., he was supervising Officer Meyer and Officer Choquette as they performed a DUI arrest in the vicinity of 2323 Warwick Avenue. (Tr. at 18.) At this time, he observed a "dark-colored" Jeep operating southbound on Old Warwick Avenue at a "high rate of speed." (Tr. at 19.) Sergeant Tainsh visually estimated the speed of

the vehicle as more than 40 m.p.h. in a posted 25 m.p.h. zone. Id. As the vehicle approached the stop sign located at the intersection of Old Warwick Avenue and Sandy Lane, Sergeant Tainsh observed it "brake[] very abruptly." Id. According to Sergeant Tainsh, "[t]he nose of the Jeep came down and then came up as the operator let off on the brakes, then came down again sharply [when] the vehicle stopped for the stop sign." Id.

Sergeant Tainsh then observed the vehicle turn left onto Sandy Lane, "accelerating at a high rate of speed." (Tr. at 20-21.) As the vehicle traveled on Sandy Lane, Sergeant Tainsh observed it travel over the center dividing line of the roadway on two occasions. (Tr. at 21.) Sergeant Tainsh made clear that he had a clear and unobstructed view of the Jeep, as he was standing "a couple hundred yards" away from Sandy Lane. Id.

Upon making these observations, Sergeant Tainsh began to pursue the suspect vehicle. (Tr. at 22.) While Sergeant Tainsh indicated that he "briefly" lost visual contact with the Jeep due to a curve in Sandy Lane, he stressed that this period of time lasted "seconds." (Tr. at 23.) As Sergeant Tainsh and the vehicle approached the traffic control device at the intersection of Sandy Lane and West Shore Road, Sergeant Tainsh observed the vehicle "take a right-hand turn [on West Shore Road] against the red light without stopping." (Tr. at 23-24.) When the vehicle began to turn left onto Crystal Drive, Sergeant Tainsh activated his cruiser's emergency lights and siren and initiated a traffic stop of the vehicle. (Tr. at 24.)

Sergeant Tainsh made contact with the operator—identified at trial as Appellant—whereupon he detected a "strong odor of an alcoholic beverage upon [Appellant's] breath." (Tr. at 26.) He also noted that Appellant's eyes were "bloodshot and watery" and that his speech was slurred. Id. When Sergeant Tainsh asked Appellant where he had been earlier in the evening, Appellant responded that he had just left the Village Corner Tavern. (Tr. at 27.) The Appellant

informed Sergeant Tainsh that "the reason he was driving so fast was [that] he was attempting to get away from a [woman] [whom] he had met at the bar [and] who was chasing him." Id. When Sergeant Tainsh inquired as to whether Appellant had consumed alcohol, he responded that he had had two beers. (Tr. at 27-28.)

Sergeant Tainsh asked Appellant whether he would submit to a battery of standardized field sobriety tests; Appellant consented to the tests. (Tr. at 28.) As Appellant exited his vehicle, Sergeant Tainsh noted that Appellant appeared "unsteady on his feet." (Tr. at 30.) Sergeant Tainsh administered the field sobriety tests and, based on his professional training and experience, concluded that Appellant had failed the tests. (Tr. at 30-39.) Upon concluding that Appellant was possibly under the influence and was unable to safely operate a motor vehicle, Sergeant Tainsh advised Appellant that he was under arrest, handcuffed him, and placed him in the rear of his cruiser. (Tr. at 39.) Sergeant Tainsh then read Appellant his "Rights for Use at Scene" in their entirety from the pre-printed card, but "[didn't] recall asking" Appellant whether he understood the rights. (Tr. at 39, 41.)

Once Sergeant Tainsh had transported Appellant to the headquarters of the Warwick Police Department, he "escorted [Appellant] into the cellblock area near the Breathalyzer [equipment] . . . [and] [asked] [Appellant] to stand with his chest against the wall . . . so [that] [he] [could] un-handcuff him." (Tr. at 42.) According to Sergeant Tainsh, Appellant "put his back against the wall and leaned against [it]. He was having a hard time comprehending [Sergeant Tainsh's] instructions." Id.

As Appellant and the individual arrested on Warwick Avenue on suspicion of DUI had been arrested within a very short time of one another, Sergeant Tainsh read the "Rights for Use at Station" form to both arrestees at the same time so as to "keep from duplicating the effort . . .

." (Tr. at 43.) Sergeant Tainsh then advised both arrestees of their right to use a telephone; Appellant responded that he was going to refuse the proffered chemical test and that the phone call was unnecessary. (Tr. at 46.) The Appellant then signed the "Rights" form to indicate his refusal to submit to a chemical test. Id.

On cross-examination by counsel for Appellant, Sergeant Tainsh reiterated that Appellant was advised of his "Rights for Use at Scene" and "Rights for Use at Station" in their entirety, but he was not asked whether he understood the rights as read to him. (Tr. at 52, 62.) As Sergeant Tainsh explained, "the purpose of the phone call when we get to the police station" is for the arrestee to seek clarification of his or her rights, and that Appellant "[could] [have] call[ed] an attorney for legal advice." (Tr. at 52-53.)

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

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:
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> (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 in violation of constitutional provisions. Specifically, Appellant contends that the trial magistrate's decision to sustain the charge is in violation of his Fourth Amendment "right to be secure against unreasonable searches and seizures." State v. Foster, 842 A.2d 1047, 1050 (R.I. 2004). The Appellant primarily relies on our Supreme Court's decision in State v. Berker, 120 R.I. 849, 856, 391 A.2d 107, 111 (1978), wherein the Court held that "the administration of [a] [chemical breath] examination constitute[s] a search within the meaning of the fourth amendment."

Accordingly, Appellant asserts that as the State "has the burden of demonstrating that the consent [to a chemical test] was freely and knowingly given, un-induced by not only actual but implied duress," so too does the State have the burden of demonstrating that the refusal to consent to a "search" of one's breath has been "freely and voluntarily given . . . ." Id. at 857, 391 A.2d at 112 (internal citations and quotations omitted).

In Berker, our Supreme Court reaffirmed that "[t]he function of the fourth amendment is 'to protect personal privacy and dignity against unwarranted intrusion by the State.'" Id. at 856, 391 A.2d at 111 (quoting Schmerber v. California, 384 U.S. 757, 767, 86 S.Ct. 1826, 1834 (1966)). The Berker Court recognized that the act of "taking . . . a breath sample [may] constitute[] an unwarranted intrusion[,]" unless that search is "conducted incident to a lawful arrest, pursuant to a valid consent, or in circumstances falling within a well-recognized exception to the warrant requirements." Id. at 857, 391 A.2d at 112 (citing Schneckloth v. Bustamonte, 412 U.S. 218, 219, 93 S.Ct. 2041, 2043-44 (1973)).

The Appellant's reliance on Berker is misplaced, as Berker is clearly distinguishable from the case at bar. The court in Berker was confronted with a defendant who had, upon the request of law enforcement, submitted to two chemical tests of his breath; the issue before the Court was "whether the taking of [the] breath sample[s] constituted an unwarranted intrusion in the circumstances of this case," or whether the searches were valid under one of the exceptions to the warrant requirement. Id. at 856-857, 391 A.2d at 111-112. As the State was "seek[ing] to rely upon [the defendant's] consent to justify the lawfulness of a search[es]" of his breath, the Berker Court had to determine whether the defendant's consent to the chemical tests was knowing and voluntary and not the product of actual or implied coercion by law enforcement. Id. at 857, 391 A.2d at 112. Here, however, there was no "intrusion" by the State of

constitutional significance, as Appellant did not submit to a "search" of his breath upon the request of law enforcement. As there was no "search" within the meaning of the Fourth Amendment, it would be illogical to require the State to bear the burden of proving that Appellant's decision to refuse an "intrusion" by the State was knowing, voluntary, and unaffected by police coercion, as Appellant, by refusing, effectively prevented the State from invading his personal privacy and dignity.

Further, even assuming arguendo that the State was required to prove that Appellant's refusal to submit to chemical testing was the product of his own free will, the members of this Panel would nevertheless find that the trial magistrate's decision was not in violation of Appellant's constitutional rights. The trial magistrate found, based on the "credible" testimony of Sergeant Tainsh, that Appellant was fully apprised of the rights and penalties associated with the decision of whether to submit to a chemical test. (Dec. Tr. at 21.) The trial magistrate was satisfied that Appellant refused to submit to a chemical test upon the request of Sergeant Tainsh, and that the "words utilized [by Appellant] [evidenced] an understanding of the rights to show that there was a knowing and voluntary refusal." (Dec. Tr. at 22.) The trial magistrate indicated that he was "not at all troubled by the fact that [Sergeant] Tainsh read the rights to two motorists at the same time." Id. As the trial magistrate explained, "[t]here [was] not evidence before [him] that [Sergeant Tainsh] didn't read the actual rights to [Appellant][,] [and] no evidence before [him] that there was any confusion on the part of [Appellant] . . . ." (Dec. Tr. at 22-23.) As evidence of Appellant's understanding of the rights, the trial magistrate focused on the fact that "[Appellant] specifically indicated that he did not wish to make a phone call, and one of the things . . . on the ["Rights"] form . . . is 'You may now use the phone.'" (Dec. Tr. at 23.) The trial magistrate further explained, "It's clear to me that when [Appellant] verbally communicated

to [Sergeant] Tainsh that he did not wish to take the test, that he understood that he had a right to either take the test or not take the test." Id. Accordingly, as we cannot substitute our judgment for that of the trial magistrate on questions of fact, see Link, 633 A.2d at 1348, we will not disturb the trial magistrate's determination that Appellant's decision to refuse was knowing and intelligent.

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 not in violation of constitutional provisions. Substantial rights of Appellant have not been prejudiced. Accordingly, Appellant's appeal is denied, and the charged violation sustained.

ENTERED: