STATE OF RHODE ISLAND AND PROVIDENCE PLANTATIONS

PROVIDENCE, S.C. RHODE ISLAND TRAFFIC TRIBUNAL

STATE OF RHODE ISLAND :
:
v. : C.A. No. T09-0061
:
SETH BETTEZ :

DECISION

PER CURIAM: Before this Panel on September 16, 2009—Judge Almeida (Chair, presiding) and Magistrate Cruise and Magistrate Noonan, sitting—is Seth Bettez's (Appellant) appeal from a decision of Magistrate Goulart, sustaining the charged violations of G.L. 1956 §§ 31-27-2.1, "Refusal to submit to chemical test," and 31-27-2.3, "Refusal to submit to a preliminary breath 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 November 29, 2008, Patrol Officer Adam Arico (Officer Arico) of the Foster Police Department saw Appellant driving a motor vehicle at a high rate of speed. The Officer signaled for Appellant to pull over and, after Defendant failed the field sobriety tests, charged him with the aforementioned violations of the motor vehicle code. Appellant contested the charges, and the matter continued to trial. The trial magistrate sustained the charged violations, and Appellant timely filed this appeal.

At trial, the parties stipulated to the fact that Officer Arico had the requisite experience and training necessary to make and investigate DUI stops and investigations. (Tr. at 3.) The trial

[1] The Appellant was also charged with violating G.L. 1956 §§ 31-14-2, "Prima facie limits"; 31-15-11, "Laned roadways"; and 31-38-3, "Owners and drivers to comply with inspection laws." However, these three charged violations were dismissed at trial and are not presently before this Panel.

commenced with Officer Arico's testimony that he has been an officer with the Foster Police Department for two and one-half years. (Tr. at 2.) The Officer testified on November 29, 2008, at approximately 10:25 p.m., he was in a marked police cruiser patrolling Route 94 South when he observed a Jeep Grand Cherokee operating in front of him at a speed greater than the forty (40) miles per hour (mph) posted speed limit. Officer Arico caught up to Appellant's vehicle and clocked it traveling sixty (60) mph. Officer Arico continued to follow Appellant for one mile, when he observed the subject vehicle "cross and drift over the yellow divider line into the oncoming lane of traffic and then slowly drift back across." (Tr. at 4-5.) At this point, Officer Arico activated his cruiser's emergency lights and executed a traffic stop.

Officer Arico continued to explain that he made contact with the driver of the vehicle, later identified as Appellant, and asked him for his license, registration, and proof of insurance. (Tr. at 6-7.) Appellant presented the Officer his Rhode Island commercial driver's license (CDL). (Tr. at 36.) Officer Arico observed Appellant and testified that "he had a slurred speech, kind of a thick tongue, [the Officer] had to lean in . . . [so he] could understand [Appellant] but it was difficult to completely understand what he was saying[.] [H]is eyes had a glossed over appearance, they were very shiny and . . . very bloodshot in the corners." (Tr. at 8.) Furthermore, Officer Arico stated that as Appellant "spoke [Officer Arico] could detect the odor of a[n] alcoholic beverage on his breath." Id.

Upon making these initial observations, Officer Arico asked Appellant to exit his vehicle to perform the standardized field sobriety tests. Officer Arico observed that as Appellant exited his vehicle, he appeared unsteady on his feet "swaying in a circular motion and shuff[ling] his feet as he walked to the rear" of his car. (Tr. at 9.) Next, Officer Arico explained and demonstrated for Appellant the field sobriety tests, including the Horizontal Gaze Nystagmus

(HGN), the one-leg stand, and the walk-and-turn tests. (Tr. at 11-17.) Appellant told the Officer that he did not have any physical limitations that would prevent him from physically completing the field sobriety tests. (Tr. at 13.) Thereafter, based on Officer Arico's experience, his training in DUI related traffic stops, and his personal observations of Appellant performing the tests, he concluded that Appellant failed all three of the field sobriety tests. Accordingly, Officer Arico concluded that Appellant was under the influence of alcohol and incapable of safely operating a motor vehicle. (Tr. at 17-18.)

At this point, Officer Arico asked Appellant to submit to a preliminary breath test, which he refused to take. (Tr. at 18.) Appellant was then handcuffed, placed in the rear of the Officer's police cruiser, and read his "Rights for Use at Scene." After Appellant was read his rights, he was transported back to the station. (Tr. at 20.) Once at the station, Office Arico read Appellant his "Rights for Use at Station." (Tr. at 20.) Appellant refused to sign either of the "Rights" forms. (Tr. at 24.)

Next, Officer Arico testified that Appellant was given the opportunity to make a confidential phone call. The Officer left Appellant in a cell with a telephone and closed the door. The Officer then walked into the dispatch area, closed the door and monitored Appellant via close-circuit television. (Tr. at 22.) Officer Arico testified that he was not able to hear Appellant talking on the phone. Id. After Appellant made his confidential phone call, Officer Arico asked Appellant if he would submit to a chemical test. Appellant declined to take "any" test and said he was "not refusing" any of the tests. (Tr. at 23.)

On cross-examination by counsel for Appellant, Officer Arico testified that "it [was] fair to say that [he] knew [Appellant] had a commercial driver's license." (Tr. at 36.) As a result of counsel's questioning, Officer Arico testified that he did not inform Appellant of the automatic

one year suspension of his CDL, resulting from his refusal of the chemical test. The Officer explained that the "Rights" forms do not address this mandatory one year suspension of an individual's commercial driver's license. (Tr. at 41-42.)

At the conclusion of trial, the magistrate took the matter under advisement. Subsequently, the trial magistrate rendered a bench decision, finding that the State proved to a standard of clear and convincing evidence that Officer Arico had reasonable grounds to believe that Appellant was driving a motor vehicle within the State while he was under the influence of alcohol. The trial magistrate also found that while Appellant was under arrest, he was properly informed of his rights and the penalties resulting from a refusal to take a chemical test. Regardless of these warnings, the Appellant refused to submit to the chemical test. (Dec. Tr. at 15-16.) Additionally, the trial magistrate found that neither the State nor the police are required to inform the motorist of all collateral consequences resulting from an individual's refusal to take the chemical test. (Dec. Tr. at 20.) Appellant was properly informed when he refused to submit to the chemical test; thus the trial magistrate sustained the charged violation of § 31-27-2.1.

As to § 31-27-2.3, the trial magistrate found that the Officer had sufficient evidence to request the motorist to submit to a preliminary breath test. (Dec. Tr. at 14.) There was no objection from Appellant as to the testimony by Officer Arico regarding his qualifications or any suggestion made by Appellant that the speedometer used was not a proper speed calculating device. Additionally, the Appellant did not present evidence that the Officer failed to adhere to proper procedure while Appellant performed the field sobriety tests. The trial magistrate found that the Officer had reason to believe that Appellant was driving under the influence of alcohol and thus the right to require Appellant to submit to a preliminary breath analysis, pursuant to § 31-27-2.3. Therefore, the trial magistrate sustained the charged violation of § 31-27-2.3.

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 the statutory provisions set forth in §§ 31-27-2.1 and 31-27-2.3. Appellant contends that he was not properly apprised of the penalties incurred as a result of refusing to take the breathalyzer tests. Specifically, Appellant argues that he was not informed that his commercial driver's license (CDL) would be suspended for one year upon his refusal of the tests.

I

Section 31-27-2.1

Appellant argues that the suspension of his CDL is a penalty about which he should have been informed prior to being asked to submit to the chemical test. It is undisputed that Appellant was not specifically informed that his CDL would be suspended as a result of his refusal. (Tr. at 41-42.)[2]

Ultimately, the members of this Panel are bound by the language of § 31-27-2.1 and the conclusion of our Supreme Court in Link: "[s]ection 31-27-2.1 is clear and unambiguous and should therefore be applied literally." 633 A.2d at 1348; see also Town of Little Compton v. Voelker, C.A. No. T06-0131 (R.I. Traffic Trib.) (filed November 15, 2006). Additionally, when interpreting a statute, our Supreme Court has explained, "if the language is clear on its face, then

[2] The mandatory one year suspension of a motorist's commercial driver's license, as a result of the motorist's refusing to submit to a chemical test, is an administrative action taken by the Division of Motor Vehicles pursuant to § 31-10.3-8.

the plain meaning of the statute must be given effect and this Court should not look elsewhere to discern the legislative intent." Henderson v. Henderson, 818 A.2d 669, 673 (R.I. 2003) (quoting Fleet National Bank v. Clark, 714 A.2d 1172, 1177 (R.I. 1998)). Our Supreme Court noted: "It is a canon of statutory construction that [i]n interpreting an unambiguous statute, we presume that each word was expressly intended by the Legislature, and we are under a duty to 'give effect to every word, clause or sentence.'" Voelker, C.A. No. T06-0131 at 8 (quoting First Bank and Trust Co. v. City of Providence, 827 A.2d 606, 613 (R.I. 2003)) (quoting in part State v. Bryant, 670 A.2d 776, 779 (R.I. 1996)).

Specifically, section 31-27-2.1 requires motor vehicle operators who are suspected of driving under the influence of alcohol to submit to a breath, blood, or urine analysis. Before being asked to undergo such a test, a suspected drunk driver must be informed of the penalties he or she could incur "as a result of noncompliance with [the] section." § 31-27-2.1(a). The statute directs the court to then impose the enumerated penalties after finding "that the person ha[s] been informed." Id. The Appeals Panel noted in Voelker that "[t]he clear legislative intent behind § 31-27-2.1 was to limit our discretion with regard to [the imposition of] penalties under this section." C.A. No. T06-0131 at 8.

A

Rhode Island Commercial Driver's License Act

Appellant argues that he was not informed that his CDL would be suspended as a result of his refusal, thus he was not properly apprised of all penalties pursuant to § 31-27-2.1 This Panel is satisfied that his argument fails because Officer Arico testified that he informed Appellant of all the enumerated penalties listed on the "Rights for Use at Scene" and "Rights for Use at Station" forms. (Tr. at 20.) Included on the "Rights" forms was the warning that

Appellant's driver's license would be suspended for a period of six months to one year if he refused to take the chemical test. (Tr. at 41-42.) Although the penalty of CDL suspension was not specifically listed within the "Rights" forms, the members of this Panel conclude that Appellant was properly informed of all penalties prior to his refusal to take the chemical test.

An individual holding a CDL does not have a separate license in addition to his or her driver's license, but rather an endorsement attached to their driver's license. See R.I. General Laws Sec. 31, Chap. 10.3, "R.I. Uniform Commercial Driver's License Act." The CDL endorsement is affixed to the motorist's underlying driver's license and allows the individual to validly operate commercial vehicles. Section 31-10.3-2 provides: "It is the intent of this chapter to have an operator's license serve as the base license to which classifications, endorsements, and restrictions can be added which may change the classification to a commercial or chauffer license."

Specifically, as set forth in § 31-10.3-2(c), "[i]f an offense is committed which, causes a license or privilege withdrawal of a base license, it shall be cause for removing the commercial or chauffeur classification(s), restriction(s), and endorsement(s) or privilege(s) to operate a commercial vehicle for the time specified in this title." Officer Arico informed Appellant that his operator's license would be suspended upon his refusal to take the chemical test. Thus Appellant was adequately warned that all of the rights, privileges and endorsements accompanying this license would be similarly suspended. Accordingly, this Panel is in agreement that the stated penalty within the "Rights" forms, pertaining to the suspension of Appellant's base operator's license, was a sufficient warning that Appellant's attached CDL endorsement would be suspended upon his refusal. See R.I. General Laws Sec. 31, Chap. 10.3, "R.I. Uniform

Commercial Driver's License Act." Accordingly, this Panel upholds the decision of the trial magistrate to sustain the charged violation of § 31-27-2.1.

B

Mandatory CDL Suspension

Appellant in arguing that he was not properly informed prior to his refusal to submit to the chemical test relies on the language found in Levesque v. Rhode Island Department of Transportation. 626 A.2d 1286 (1993). The Supreme Court in Levesque explained that § 31-27-2.1(a) "does not limit a motorist's right to be informed of possible penalties only to those mentioned in [the statute's] text." 626 A.2d 1286 (1993). The Supreme Court in Levesque found that the police were required to inform the motorist of all the penalties he could incur if he refused to submit to a breathalyzer test, specifically of the possibility that the motorist's registration "could" be suspended if he refused. 626 A.2d at 1289, 1290. This argument differs from the issue at hand because the suspension of a motorist's registration is a discretionary penalty that may be enforced, whereas the CDL suspension is a mandatory penalty automatically imposed as a result of the refusal of a chemical test. Id.

This Panel in Town of Little Compton v. Voelker further dealt with the Levesque distinction between mandatory and discretionary penalties, while resolving an issue of a deficiency in the "Rights for Use at Station" form. In Voelker, the "Rights" form read to appellees by law enforcement did not include a recently enacted penalty for refusing to submit to chemical testing. C.A. No. T06-0131 at 2. The form failed to include a two hundred dollar mandatory fee to support the Department of Health's chemical testing programs. In Voelker, the Panel concluded that because the two hundred dollar mandatory fee was missing from the "Rights" form, the appellees were not informed of the fine prior to refusing to submit to the

chemical test. Thus the Panel in Voelker held that the failure to inform the appellees of the additional fee repudiated the validity of the motorists' refusal. Id. at 9.

Similarly to Voelker, the suspension of an individual's CDL endorsement is mandatory upon the suspension of the motorist's operator's license. However, in this case unlike Voelker, the penalty of license suspension was enumerated on the "Rights" form and explained to Appellant prior to his refusal. Therefore, the members of this Panel conclude that Appellant was properly informed that his driver's license would be suspended upon his refusal, and as a result Appellant was properly notified that his CDL endorsement would also be suspended. For that reason, the members of this Panel are satisfied that Appellant knowingly refused to take the chemical test within the meaning of § 31-27-2.1.

Additionally, this Panel determines that the trial magistrate's finding that Appellant was "the one who obtained the endorsement on [his] license, allowing [him] to drive commercial vehicles and it was up to [Appellant], not up to the State, . . . to understand the ramifications" of refusing to take the test, is not affected by error of law. (Dec. Tr. at 21.) Our Supreme Court has held that "[t]here is . . . no fundamental constitutional right to drive on the highways; it is a right subject to reasonable control and regulation rationally related to legitimate state interest." State v. Locke, 418 A.2d 842, 850 (1980); see McGue v. Sillas, 82 Cal.App.3d 799, 805, 147 Cal.Rptr. 354, 357 (1978). When enacting statutes such as § 31-27-2.1, the goal of the legislature is "to reduce 'the carnage occurring on our highways which is attributable to the persons who imbibe alcohol and then drive." Locke, 418 A.2d at 850 (quoting DiSalvo v. Williamson, 106 R.I. 303, 305-306, 259 A.2d 671, 673 (1969)). The members of this Panel understand that in order "[t]o accomplish this objective the state seeks to remove from the highway drivers who in drinking become a menace to themselves and to the public." Id.; see Campbell v. Superior Court, 106

Ariz. 542, 546, 476 P.2d 685, 689 (1971). Furthermore, § 31-10.3-2 describes the statute as a "remedial law which shall be liberally construed to promote the public health, safety and welfare." See R.I. General Laws Sec. 31, Chap. 10.3, "R.I. Uniform Commercial Driver's License Act." Thus the state's compelling interest in highway safety justifies the procedure of imposing license suspension on those who refuse to consent to breathalyzer tests and consequently, suspending the CDL endorsement of those who choose this type of license. Locke, 418 A.2d at 850; see Mackey v. Montrym, 443 U.S. 1 (1979).

II

Section 31-27-2.3

Appellant further argues that he was not fully informed of all penalties prior to refusing to take the breathalyzer test. Section 31-27-2.3(a) provides that "[w]hen a law enforcement officer has reason to believe that a person is driving or in actual physical control of any motor vehicle in this state while under the influence of alcohol, the law enforcement officer may require the person to submit to a preliminary breath analysis. . . ." The statute continues to explain that the "breath analysis must be administered immediately upon the . . . officer's formulation of a reasonable belief that the person is driving or in actual control of a motor vehicle while under the influence of alcohol or immediately upon the stop of the person, whichever is later in time." Id.

The members of this Panel find the trial magistrate's determination that Officer Arico had reason to believe that Appellant was driving his motor vehicle under the influence of alcohol was supported by the reliable, probative and substantial evidence of record. Officer Arico observed Appellant operate his vehicle twenty (20) mph above the posted speed limit and "cross and drift" over the yellow divider line into the oncoming lane of traffic. (Tr. at 4-5.) Additionally, upon

making contact with Appellant the evidence—of his slurred speech, bloodshot eyes, smell of alcohol emanating from his breath, and his failure of all three of the field sobriety tests—led Officer Arico to formulate a reasonable belief that Appellant was driving under the influence of alcohol.

Immediately upon Officer Arico's "formulation of reasonable belief that [Appellant was] driving under the influence of alcohol," he asked Appellant to submit to a preliminary breath test pursuant to § 31-27-2.3(a). Subsequently, Appellant refused to take the test. As explained in § 31-27-2.3(b), "[i]f a person refuses, upon a lawful request of a law enforcement officer, to submit to a test under (a) of this section, that person shall be guilty of an infraction and shall be subject to the penalty provided in § 31-41.1-4." Unlike § 31-27-2.1, the statutory language of § 31-27-2.3 does not require law enforcement officers to inform motorists of the penalties incurred from their refusal to take a preliminary breath test. Therefore, Officer Arico was not required to inform Appellant of the penalties resulting from his refusal to take the preliminary breath test.

The members of this Panel find the trial magistrate's decision that Appellant's refusal to submit to a preliminary breath test constituted a violation of § 31-27-2.3 is supported by the reliable, probative and substantial evidence of record. Furthermore, the members of this Panel are satisfied that the decision of the trial magistrate sustaining the charged violation of § 31-27-2.1 is not in violation of any statutory provision and is not affected by error of law.

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 any statutory provisions is not affected by error of law and is supported by the reliable, probative and substantial evidence of record. Substantial rights of Appellant have not been prejudiced. Accordingly, Appellant's appeal is denied, and the charged violations of §§ 31-27-2.1 and 31-27-2.3 are sustained.