STATE OF RHODE ISLAND AND PROVIDENCE PLANTATIONS

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

TOWN OF NORTH PROVIDENCE	:	
	:	
v.	:	**C.A. No. T09-0119**
	:	
PETER EXARCHOS	:	

DECISION

PER CURIAM: Before this Panel on June 30, 2010—Magistrate DiSandro (Chair, presiding) Judge Almeida and Judge Ciullo sitting—is Peter Exarchos'(Appellant) appeal from a decision of Magistrate Cruise, sustaining the charged following violations of G.L. 1956 §§ 31-27-2.1, "Refusal to submit to chemical test."; 31-3-18, "Display of plates".; and 31-47-9, "Penalties – verification of proof of financial security."[1] The Appellant was represented by counsel before this Panel. Jurisdiction is pursuant to § 31-41.1-8.

Facts and Travel

On July 25 2009, Officer Nardolillo of the North Providence Police Department observed Appellant operating his vehicle exiting the Pawtucket Credit Union on Mineral Spring Avenue in the Town of North Providence. (Tr. at 7.) Noticing Appellant's vehicle, which had no front license plate displayed, sideswipe a telephone pole while exiting the credit union, Officer Nardolillo activated his emergency lights and conducted a traffic stop. (Tr. at 8.) After observing Appellant fail the field sobriety tests, the Officer

[1] The charge under § 31-47-9 was dismissed by the trial judge, while the charge under § 31-3-18 was sustained. However, Appellant's appeal concerns only the refusal charge under § 31-27-2.1.

charged him with the aforementioned violation of the motor vehicle code. The Appellant contested the charge, and the matter proceeded to trial.

Officer Nardolillo 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. He testified that he had been a patrol officer with the North Providence Police Department for four years, following his graduation from the Rhode Island Municipal Police Academy. (Tr. at 5-6.) While at the Police Academy, the officer testified that he had been trained to administer field sobriety tests, including the horizontal gaze nystgamus (HGN), the walk-and-turn, and the one-leg stand test. (Tr. at 8-9.)

Then, focusing the Court's attention on the date in question, Officer Nardolillo testified that he was on uniformed patrol in a marked cruiser on Mineral Spring Avenue in North Providence at approximately 2:50 in the morning on July 25, 2009. (Tr. at 7) There he observed a vehicle with Rhode Island license plate EX-700, driving over the curb and sideswipe a utility pole while exiting Pawtucket Credit Union. Officer Nardolillo also took note that the vehicle had no front license plate displayed. Id. Observing this, the officer activated his emergency lights and initiated a motor vehicle stop.

The officer testified that when he asked the Appellant to provide identification, the Appellant first furnished a credit card rather than a license. (Tr. at 9.) Officer testified that he immediately noticed a strong smell of alcohol emanating from the Appellant and that he observed Appellant to have bloodshot and watery eyes. (Tr. at 10.) When the officer asked the Appellant if he had been drinking, the Appellant replied that

he had consumed a "few drinks." Id. Officer Nardolillo then asked Appellant to exit the vehicle, at which point the officer noticed that Appellant's gait was unsteady to the point where Appellant had to balance himself on the patrol car. (Tr. at 11.) Officer Nardolillo then administered the field sobriety tests in accordance with his professional training and experience, ultimately concluding that Appellant had failed the one-leg stand and the walk-and-turn tests. (Tr. at 12-14.)

Officer Nardolillo then notified Appellant that he was under arrest and placed him into the rear of his police cruiser. Once he secured the Appellant in the cruiser, the Officer read him the "Rights for Use at Scene" card and then transferred him to the North Providence Police Station. (Tr. at 14-15.) At the station, Officer Nardolillo apprised Appellant of his "Rights for Use at Station." (Tr. at 15.) The officer testified that when he asked Appellant if he understood the language of the "Rights for Use at Station" form, the Appellant did not respond. (Tr. at 16.) Officer Nardolillo described Appellant's behavior at the station as "uncooperative," and indicated that Appellant refused to sign any forms or respond to any questions. (Tr. at 17.) After affording Appellant the opportunity to use the telephone, Officer Nardolillo once again asked Appellant to submit to a Breathalyzer test, and again Appellant sat silent.

On cross examination by Appellant's counsel, Officer Nardolillo was questioned about his administration of field sobriety tests. (Tr. at 19-29.) The officer indicated that the Appellant could not comply with his requests during either the "walk and turn" test or the "one legged stand test."[2] He also told the court that Appellant's attitude went from

[2] On cross examination, the officer testified that when he asked Appellant to walk a designated amount of steps, keeping one foot in front of the other, the Appellant failed. (Tr. at 23) The Appellant could not keep his balance during the "one legged stand" test, so that Officer Nardolillo suspended the test in the interest of the Appellant's safety. (Tr. at 27.)

compliant and congenial at the traffic stop, to silent and uncooperative during processing at the police station. (Tr. at 44-46.) He further testified on cross examination that he asked the Appellant to submit to a breath test, "a couple of times," and each time he asked, Appellant failed to respond. (Tr. at 47-48.)

Next, the court heard from the Appellant, Peter Excarchos, through direct examination by his counsel. He testified that on July 25, 2009, he and a friend, Deborah Lawton, were on their way to Appellant's home when Officer Nardolillo conducted his traffic stop. (Tr. at 51.) The pair had left the home of Ms. Lawton a few minutes before the stop took place. Id. Appellant testified that he had awoken from a nap at 2:00 a.m. when he and Ms. Lawton decided to head to Appellant's home to pack for an upcoming trip to Greece.[3] On direct examination, Appellant refuted the testimony of Officer Nardolillo, claiming that the Officer never apprised him of his rights and never requested that he submit to a Breathalyzer. (Tr. at 56.)

At the conclusion of testimony, the trial judge issued a ruling from the bench. The trial judge found Officer Nardolillo to be a credible witness, while the testimony of the Appellant was, in his opinion, "difficult to believe." The judge believed that all of the elements of § 31-27-2.1 were met by clear and convincing evidence. In his opinion the actions of the Appellant as described by Officer Nardolillo constituted a refusal under the statute. The trial judge ruled, "I don't think it, [the] [refusal] needs to be verbal. I think his actions certainly indicated to this officer that he's refusing a test." (Tr. at 70.) The trial magistrate sustained the charged violation of § 31-27-2.1. It is from this decision that Appellant now appeals. Forthwith is this Panel's decision.

[3] On cross examination, Appellant testified his trip to Greece was scheduled on August 7, 2009, some ten days from the date in question.

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 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 appellant have been prejudiced 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 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 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.

Analysis

On appeal, Appellant argues that the trial judge's decision to sustain the charges against him is affected by error of law, thus warranting reversal. Specifically, Appellant argues that his silence at the North Providence Police Station did not constitute a refusal. We disagree.

In support of his contention, Appellant cites DiSalvo v. Williamson, 106 R.I. 303, 259 A.2d 671 (1969). This Panel finds no language in DiSalvo to support Appellant's contention. The DiSalvo Court dealt with the timing and semantics of an actual enunciated refusal when it held that refusals do not need to immediately follow an "actual attempt by authorities to administer a Breathalyzer test . . . ." Id. at 307, 259 A.2d at 673. In other words, in order for a refusal to be valid, it does not need to immediately proceed the actual administering of the breath test. Again, this Panel finds nothing pertinent to the case before us in its reading of DiSalvo.

Appellant also cites our own decision, City of Warwick v. Marcus Thomas, C.A. Number T08-0152 (R.I.T.T. 2009) in support of his contention that there was no valid refusal. In Appellant's view, this Panel upheld the refusal in Thomas because there the officer, after two separate requests, rendered a final warning that failure to take the test would result in a refusal charge. Id. Again, Appellant's reading of case law is misguided. First the facts of the case, especially the events surrounding the crucial moments at the police station, are materially different. In Thomas, the detainee, after

conferring with his attorney, agreed to submit to the Breathalyzer, only to recant his agreement to submit moments later by refusing to act accordingly or sign the required form. Id. at. 6. Secondly, the decision of this Panel to uphold the refusal charge did not turn on the fact that there was a "so-called ultimatum" given. Id. In that case we were called to determine the constitutionality of the refusal—specifically the role of the Sixth Amendment—as well as the issue of recanting a refusal. Id.

In a addition to Thomas, there are other decisions from this Panel holding that refusals need not be in the form of words. For example, in New Shoreham v. Netro, T05-0143 (R.I. Traffic Trib. 2005), we held that a motorist "conditionally refused" when he attempted to stall the administration of the breathalyzer exam. In fact, in Netro the record indicated that the motorist actually informed police at the station that he was not refusing the test. Nevertheless his actions were determined to constitute a refusal under the statute. Id. at 10.

In addition to out decisions regarding conditional, or constructive refusals, we feel that a review of appellate decisions of other jurisdictions provides more authoritative clarity. For instance, in Lucas v. Dept. of Transp., Bureau of Motor Vehicles, 854 A.2d 639, 641 (Pa. Cmwlth. 2004), a Pennsylvania appellate court—in attempting to decipher whether or not a motorist's stalling tactics constituted a refusal—held that "[a] refusal need not be in words, but can be implied from a motorists' actions." In that case the Appellant, who initially agreed to submit to a breath test, attempted to interfere with the results of the Breathalyzer by repeatedly blowing enough air needed to give an accurate reading. Id. The court found that such behavior constituted a refusal. Id.

More factually similar to the case before us is Poe v. Department of Revenue, State Motor Vehicle Division, 859 P.2d 906 (Colo. Ct. App. 1993). In Poe, the accused motorist exhibited the same behavior patterns as those of Appellant: congenial and cooperative, up until the point authorities informed him of his arrest, at which point he became silent. Id. at 907. The argument raised in Poe was also identical to that of Appellant: that his silence and uncooperativeness did not constitute a refusal. Id. The court disagreed and held that it was proper for the officer, after apprising the motorist of his rights and requesting him to submit to a breathalyzer test, to interpret the motorist's silence and uncooperativeness as a refusal. Id. at 908.

Looking on the record before us, we find clear indicia of a refusal. Officer Nardililo testified that he read the "Rights for Use at Station" form to Appellant. (Tr. at 16.) That form, which is used by police departments across the State of Rhode Island, clearly informs a detainee that arresting authorities are requesting him or her to submit to a Breathalyzer test.[4] After reading the form, Officer Nardolillo then asked Appellant if he understood his rights and to sign the "Rights" form, in response to which Appellant sat silent. (Tr. at 17.) The Officer then afforded Appellant the opportunity to make a telephone call, after which he requested again that Appellant submit to a Breathalyzer exam, and once again, the Appellant did not respond. (Tr. at 18.) This silence is a constructive, or conditional refusal, which we have held to have the same legal effect of

[4] The very first line of this form reads as follows: "You are suspected of driving a motor vehicle while under the influence of intoxicating liquor and or drugs. I request you to submit to a chemical test." ("Rights for Use at Station" form.) After informing the person of his or her Miranda rights, the form then goes on to state, "You do not have to submit to a chemical test at my request. If you refuse none shall be given."

an actual refusal.[5] See Netro supra at 10, See also Warwick v. Sinapi, T06-0081 (Traffic Trib. 2005) (holding that evidence of explicit, verbal refusals are not required for the State to meets its burden in proving all of the elements of § 31-27-2.1).

Conclusion

This Panel has reviewed the entire record before it. Having done so, this Panel is satisfied that the trial judge's decision sustaining the charged violation of § 31-27-2.1 was not affected by error of law, clearly erroneous based on the reliable, probative, and substantial record evidence, characterized by abuse of discretion, or in violation of constitutional provisions. Finding that substantial rights of Appellant have not been prejudiced, we hereby deny his appeal and sustain the violation charged against him.

[5] As we have noted before, this Panel understands the "time sensitive" nature of drunk driving arrests. With each passing moment, the alcohol in one's blood dissipates. The arresting officer, while being mindful of the person's rights, must administer the Breathalyzer in a timely fashion to get the most accurate depiction of the motorist's blood alcohol content at the time he or she was actually operating the vehicle. Thus requiring police to obtain a verbal response could result in numerous calamitous consequences, including a loss of valuable evidence See U.S. v. Reid, 929 F.2d 990, 993 (1991) (citing Skinner v Railway Labor Executives' Ass'n., 489 U.S. 602, 623 (1989)).