STATE OF RHODE ISLAND AND PROVIDENCE PLANTATIONS

PROVIDENCE, S.C.		**RHODE ISLAND TRAFFIC TRIBUNAL**
CITY OF NEWPORT	:	
	:	
v.	:	**C.A. No. T09-0120**
	:	
REGENT NICHOLAS	:	

DECISION

PER CURIAM: Before this Panel on April 21, 2010—Chief Magistrate Guglietta (Chair, presiding), Judge Almeida, and Magistrate DiSandro, sitting—is Regent Nicholas' (Appellant) appeal from Magistrate Goulart's decision, sustaining the charged violations of G.L. 1956 §§ 31-27-2.1, "Refusal to submit to chemical test," and 31-14-1, "Reasonable and prudent speeds."[1] The Appellant was represented by counsel before this Panel. Jurisdiction is pursuant to § 31-41.1-8.

Facts and Travel

On July 4, 2009, Officer Hanson Bail Smith, Jr. (Officer Smith) and Officer Patrick Walsh (Officer Walsh) of the Newport Police Department were dispatched to the scene of a rollover accident on Freeborn[2] Street in Newport. After finding Appellant laying atop his flipped over vehicle and observing several indicia of someone under the influence of alcohol, Office Walsh charged Appellant with violating the aforementioned motor vehicle offenses. The Appellant contested the charges, and the matter proceeded to trial.

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[1] Officer Walsh charged Appellant with the aforementioned motor vehicle offenses. However, only the violation of § 31-27-2.1 is at issue before this Panel.

[2] There was some confusion on the part of Officer Smith as to whether the accident was on Freeborn or Freebody Street. On cross-examination, Officer Smith indicated it was Freeborn Street. (Oct. Tr. at 9.)

At the start of the trial, counsel for Appellant made a motion asking Magistrate Goulart to recuse himself from this case because there were attempts to continue the case before Magistrate Goulart. Counsel for Appellant felt there was "a perception, regardless of the actual nature, a perception . . . that [Appellant] may not receive a fair trial. . . ." (Oct. Tr. at 1.) However, Magistrate Goulart denied Appellant's motion to recuse explaining that he was satisfied that he could hear the case and there was no doubt that he would "be fair and impartial." (Oct. Tr. at 2.) Additionally, counsel for Appellant made a motion to suppress the results of the horizontal gaze nystagmus (HGN) test. Appellant argues that the results of the HGN are inadmissible and should not be discussed during the trial because the HGN does not pass the Daubert test[3] and moreover, expert testimony is required due to the nature of the HGN. The trial magistrate denied the motion, and explained that "if the state can lay what they believe to be a proper foundation, to admit [the] HGN test" then the trial magistrate would allow the evidence to be presented. Id. Furthermore, the trial magistrate stated that in the present case it appeared that there was no HGN test even administered to the Appellant. Thus, he denied the Appellant's motion.

As the trial commenced, Officer Smith testified that he has been a patrol officer with the Newport Police Department for about eight years. He currently works the three to eleven o'clock p.m. shift. (Oct. Tr. at 5.) On the night in question, at approximately 10:50 p.m., Officer Smith was in a marked police cruiser when he was "dispatched to a call for a rollover accident." (Oct. Tr. at 6.) Additionally, Officer Patrick Boswell

[3] Rhode Island Rule of Evidence 702 states, "[i]f scientific, technical, or other specialized knowledge will assist the trier of fact to understand the evidence or to determine a fact in issue, a witness qualified as an expert by knowledge, skill, experience, training, or education, may testify thereto in the form of fact or opinion." R.I. Rule of Evid. 702.

(Officer Boswell) was the second officer dispatched to the scene of the accident. The motor vehicle accident took place on Freeborn Street.

When Officer Smith arrived at the scene of the accident, there was a gray Mitsubishi that had rolled over in the middle of the roadway, and several other cars had also been hit in the midst of the accident. (Oct. Tr. at 6.) The driver of the Mitsubishi, later identified at the trial as Appellant, was still in the vehicle at the time Officer Smith arrived at the scene of the accident. As the Officer arrived on the scene, members of the Newport Fire Department rescue squad were removing Appellant from the vehicle. Id.

At this point, Officer Smith testified that, upon his arrival at the scene of the accident, his main concern was of the injuries of the persons in the vehicle. He watched as Appellant was removed from the cabin of the car. According to Officer Smith, the subject vehicle

> "was upside down and almost completely destroyed. [Appellant] was on the driver's side, but, at that point, the condition of the car was in such disarray . . . it was upside down so there was no way to be anywhere except up on the roof." (Oct. Tr. at 7.)

As the Newport Fire Department was removing Appellant from the vehicle, another officer arrived at the scene of the accident. Officer Smith directed the other officer to tend to Appellant and the Fire Department while he went to make sure that "no one else was inside the vehicle." Id. Once Officer Smith had checked out the accident scene, he realized that Appellant was the only passenger in the silver Mitsubishi at the time of the accident.

During cross-examination, Officer Smith testified that he did not write a report explaining what took place on the night in question. However, Officer Smith admitted

that he has a vivid memory of the events that occurred that night, even though the accident took place three and one-half months ago. (Oct. Tr. at 8.) Counsel for Appellant questioned Officer Smith as to the location of the Appellant when he arrived at the scene of the accident. Officer Smith explained that Appellant "was in the interior portion of the car, with the car on the roof, which means when he was inside the vehicle, and had fallen out of the seat, he was laying on the interior roof, inside of the vehicle." (Oct. Tr. at 8.) However, Officer Smith admitted that he did not personally observe Appellant driving the vehicle. Id.

Next, Officer Patrick Walsh (Officer Walsh) testified before the trial court that he has been an employed by the Newport Police Department for two and one-half years. He is also assigned the shift of patrolling the city from 3 to 11 p.m. at night. (Oct. Tr. at 10.) Officer Walsh attended the Rhode Island Municipal Police Academy and graduated in May 2007. While at the Police Academy, Officer Walsh was trained in "breathalyzer certification"; he also received "extensive training in standardized field sobriety tests"; and was skilled in "observing vehicles prior to a stop that would generally give [the officer] evidence that someone is under the influence." (Oct. Tr. at 11.) During his training at the Academy, Officer Walsh became a certified breathalyzer operator, and he learned how to administer the HGN, walk-and-turn and the one-leg stand tests. Id.

On the night in question, Officer Walsh explained that he was on duty, in a marked police cruiser, when the already "very heavy" traffic conditions became "completely backed up throughout the city." Around 11 p.m., Officer Walsh was asked by dispatch to respond to a rollover accident on Freeborn Street. (Oct. Tr. at 13.) As he drove to Freeborn Street, Officer Walsh observed a vehicle that had rolled over in the

roadway. As Officer Walsh arrived at the scene, Appellant was walking away from the vehicle toward the ambulance with Officer Smith and various members of the fire department who were present on the scene. Officer Walsh followed Appellant into the ambulance. (Oct. Tr. at 14.)

Once in the ambulance, Officer Walsh testified that he observed Appellant's bloodshot eyes and smelled the odor of alcohol emanating from Appellant that "fill[ed] up the inside of the ambulance." (Oct. Tr. at 15.) Officer Walsh described the conversation between himself and Appellant while in the ambulance: the Officer explained that on three separate occasions, he asked Appellant to submit to a HGN test and he "did not respond." (Oct. Tr. at 16.) Moreover, Officer Walsh explained that Appellant became agitated while the fire department was attempting to give him treatment. Officer Walsh had to hold Appellant "down on the stretcher while they were treating him." Id. Furthermore, Officer Walsh explained to the trial magistrate that because Appellant refused to submit to the HGN test, and would not speak to him at all, the Officer did not ask if he would like to take the remaining field sobriety tests. Id. While in the ambulance, Officer Walsh read Appellant his "Rights for Use at Scene." However, Appellant never indicated that he understood these rights because he would not speak to the Officer.

The ambulance brought Appellant to the emergency room of Newport Hospital. While in the hospital, Officer Walsh observed as Appellant became very agitated, and began swearing and yelling at the hospital personnel. Officer Walsh asked Appellant "to calm down, [but] he was not calming down, [he] continued the behavior, and [thus the Officer] handcuffed him to the stretcher." (Oct. Tr. at 19.) While at the hospital, the

Officer read Appellant the "Rights for Use at Station" form in its entirety. (Oct. Tr. at 19-20.) Similarly, after he read Appellant the Rights form, Appellant neither responded nor signed the form. Regardless, Officer Walsh offered Appellant an opportunity to make a confidential telephone call. Appellant responded that he would like to use his cell phone. Officer Walsh handed it to Appellant and then left the room. (Oct. Tr. at 20.) Officer Walsh could not recall whether the hospital staff continued to treat Appellant during this time. (Nov. Tr. at 14-15.)

Once Officer Walsh re-entered the room, he asked Appellant to submit to a chemical test. Again, Appellant did not respond. Officer Walsh confirmed that he informed Appellant of the penalties involved with refusing to submit to the chemical test. (Oct. Tr. at 21.) At this point, Officer Walsh explained that he sat with Appellant until he "was told to issue [Appellant] a summons" for the above mentioned motor vehicle offenses. Id. After issuing Appellant the summons, Officer Walsh left Appellant at the hospital and returned to the police station. (Oct. Tr. at 21-22.) Once Officer Walsh arrived at the police station, he prepared a signed and notarized affidavit in connection with this incident. Id.

During cross examination, Officer Walsh testified that he was not a doctor and that he could not "give an opinion to a reasonable degree of scientific or medical certainty as to why someone's eyes are red." (Nov. Tr. at 3.) Further, upon questioning by counsel for Appellant as to whether the Officer knew if anyone had spilled beer on the Appellant, the Officer explained that the odor of alcohol he smelled on Appellant was stronger than "when it is spilled on somebody unless somebody's shirt is absolutely soaked with it." (Nov. Tr. at 6.) Officer Walsh also admitted that he never saw Appellant

driving the vehicle on the night in question. Furthermore, Officer Walsh testified that Appellant did not refuse to take the standardized field sobriety tests; instead, the Officer decided not to administer the tests because Appellant refused to submit to the HGN test. (Nov. Tr. at 9-10.)

In response to a series of questions from Appellant's counsel, Officer Walsh explained that he did not know what the hospital staff was doing while they were treating Appellant and he did not know whether Appellant refused treatment or not; Officer Walsh did "not recall anything to do with the hospital staff, that's their business that has nothing to do with" him. (Nov. Tr. at 15.) Next, Counsel for Appellant began to question Officer Walsh about the sworn report that he wrote regarding the accident on the night in question. The Officer did not include the fact that Appellant refused to submit to the chemical test in his written report. He also incorrectly recorded on the report that the accident occurred on July 5th instead of the actual date of July 4th. (Nov. Tr. at 20-21.)

Following Officer Walsh's testimony, the State rested and Appellant moved to dismiss the three traffic charges. (Nov. Tr. at 27-28.) The trial magistrate granted the motion to dismiss the failure to maintain proper speed and failure to maintain control of a motor vehicle charges since both sides agreed that no testimony was presented by either witness that they saw Appellant driving. (Nov. Tr. at 29-30.) Therefore, the trial court found that there was no evidence that Appellant was either speeding or that he was not operating the vehicle safely based on the conditions at the time. (Nov. Tr. at 29.)

With regard to the refusal charge, Appellant raised five issues at trial. First, Appellant argued the State failed to meet its burden of demonstrating that Appellant knowingly refused to submit to a chemical test. (Nov. Tr. at 35-37.) Specifically,

Appellant argued that an accident of unknown origin involving a driver with bloodshot eyes and an odor of an alcoholic beverage did not meet the requirement of clear and convincing evidence pursuant to § 31-27-2.1. (Nov. Tr. at 45, 50.) The State responded that there was evidence in the record that the "Rights for Use at Station" and "Rights for Use at Scene" forms were read to Appellant. The State further added that there was not any evidence presented to rebut Appellant's knowing refusal to submit to a chemical. (Nov. Tr. at 40-41.)

Second, Appellant challenged the refusal charge by arguing there was an issue of consent to the refusal of the chemical test. Appellant contends § 11-27-3 should be interpreted to mean that Appellant has the right to an alternative test, such as a blood test instead of a chemical test. (Nov. Tr. at 31-32.) The State argued it was irrelevant to their case whether blood was drawn from Appellant or not. The State explained that an officer determines which test to conduct, and in this case, Officer Walsh asked Appellant to submit to a chemical test. (Nov. Tr. at 40.)

Third, Appellant challenged the refusal by raising the issue of voluntariness. Specifically, Appellant argued there was no testimony presented during trial as to whether Appellant was medicated when read his "Rights for Use at Station" and "Rights for Use at Scene." As such, Appellant contends that the burden lies with the State to show if and what medication was potentially affecting an individual's ability to operate a motor vehicle. (Nov. Tr. at 33, 35.) The State contends it is not their burden to prove Appellant was medicated at the time his rights were read causing him to not understand those rights. Further, the State explained that there was no evidence in the record that

would tend to contradict Officer Walsh's testimony that Appellant did not understand his rights. (Nov. Tr. at 41.)

Next, Appellant argued there was not evidence presented to show adequate reasonable suspicion to ask Appellant to submit to take a chemical test because his arrest was based on the odor of an alcoholic beverage and his glassy, bloodshot eyes. (Nov. Tr. at 37, 50.) The State argued there were more factors to consider, including the belligerent behavior, agitation, and uncooperativeness of Appellant with the rescue personnel and police, along with Appellant's actions at the hospital. (Nov. Tr. at 51.)

Finally, Appellant argued that the State failed to demonstrate that Appellant received a confidential telephone call pursuant to § 12-7-20. (Nov. Tr. at 37-39, 42.) Specifically, Appellant argued that the testimony suggests nursing staff were in the room when Appellant was given his opportunity to make a confidential phone call. (Nov. Tr. at 38.) As a result of denying Appellant the right to a confidential phone call, Appellant contends that any statements made after the telephone call should be suppressed as fruit of the poisonous tree. (Nov. Tr. at 38.) The State argued that the refusal should not be dismissed since Officer Walsh could not remember whether or not nursing staff were treating Appellant when he was given the opportunity to make the confidential phone call. (Nov. Tr. at 42.) The trial court took this matter under advisement.

On December 3, 2009, the trial reconvened. The trial magistrate began by explaining he disregarded Officer Walsh's testimony regarding the "vulgar term" used by Appellant while at the hospital since Appellant was already under arrest at that time. (Dec. Tr. at 7-8.) The only matter that the trial court could consider was whether the officer explained to Appellant what the penalties would be if he refused to take the

chemical test and also his right to be examined by a physician of his choice. (Dec. Tr. at 8-9.) The trial court then discussed whether the State proved that Officer Walsh had reasonable grounds to believe Appellant was operating the vehicle that night since Appellant was the only person in the vehicle and all the facts known to the Officer reasonably led him to believe Appellant was operating the vehicle. (Dec. Tr. at 10.) The trial court discussed the other issues raised at the close of the November trial.

The trial court concluded that Appellant's refusal to take the chemical test was a knowing and voluntary decision. (Dec. Tr. at 13.) The trial court also held that the blood test was irrelevant because there is no evidence of the hospital drawing Appellant's blood. (Dec. Tr. at 12.) As to the issue of voluntariness, the trial court held there was no evidence that Appellant was medicated, and thus, there was no basis to argue that Appellant lacked the ability to make a voluntary and knowing decision. (Dec. Tr. at 13.)

The trial court went on to discuss the issue of the confidential telephone call. The trial court found there was no evidence in the record to support that nursing staff remained in the room when Appellant was given his opportunity to make a confidential telephone call. Further, the trial court looked to Quattrucci, which states that a matter does not have to be dismissed absent a truly confidential phone call. Town of Warren v. Quattrucci, T-08-0057 at 14 (R.I. Traffic Trib. 2009). Rather, Carcieri stands for the proposition that the right to a confidential phone call is not violated by the mere presence of police officers during a telephone conversation, and in this case, there were no police officers present. Carcieri, 730 A.2d at 15. The trial court held that it would be an "unattainable burden when somebody is injured and treated by medical staff to suggest

that everybody has to leave the room when the individual is given his right to a phone call." (Dec. Tr. at 14-16.)

Finally, the trial court discussed whether the police officer "had reasonable grounds to believe that [Appellant] was under the influence of alcohol or any controlled substance." (Dec. Tr. at 16.) The trial court listed the factors used in considering whether the Officer had reasonable grounds, including the automobile accident, Appellant's bloodshot and glassy eyes, the strong odor of alcohol, and Appellant's lost temper and difficulty in complying with simple requests. (Dec. Tr. at 18-19.) Based on all of these facts, the trial court found that it was reasonable for Officer Walsh to believe Appellant was under the influence of alcohol. (Dec. Tr. at 19.) The trial court then imposed a ten month loss of license with minimum fines and community service. (Dec. Tr. at 22.) Appellant filed a timely appeal to this panel.

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 other 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 magistrate's decision is affected by error of law; clearly erroneous based on the reliable, probative, and substantial record evidence; characterized by abuse of discretion; and in violation of constitutional and statutory provisions. First, Appellant argues he was not given a reasonable opportunity to make a confidential phone call in accordance with § 12-7-20 because the State did not prove the hospital room was cleared of hospital staff during Appellant's opportunity to make a confidential phone call. Next, Appellant asserts that the prosecution failed to prove to a standard of clear and convincing evidence that the arresting officers—prior to

requesting that he submit to a chemical test—had "reasonable grounds" to believe that Appellant had been operating his motor vehicle within the State while under the influence of intoxicating liquor. Additionally, Appellant maintains that the State failed to prove to a standard of clear and convincing evidence Appellant's voluntariness in refusing to submit to the chemical test and that because there was evidence of medication given to Appellant, the trial court had a duty to inquire into Appellant's mental capacity. Finally, Appellant argues that the plain and clear language of § 31-27-2.1 does not permit the imposition of a ten-month license suspension, and the trial magistrate's decision to impose such a penalty was an error of law.

This Panel also notes that although Appellant raised additional issues when filing the Appeals Form, he did not raise these issues during oral arguments before this Panel. In Rhode Island, it is well established that a passing reference to an argument is insufficient to merit appellate review. "Simply stating an issue for appellate review, without a meaningful discussion thereof or legal briefing of the issues, does not assist the Court in focusing on the legal questions raised, and therefore constitutes a waiver of that issue." Wilkinson v. State Crime Laboratory Commission, 788 A.2d 1129, 1131 n.1 (R.I. 2002). For purposes of discussion, this Panel will briefly comment on these issues. Specifically, Appellant argued in the Appeals Form that the trial court erred in finding the State demonstrated Appellant was the operator of the vehicle that rolled over and that he consented to a chemical test under §§ 31-22-2.1 and 31-27-3. As to the issue of operation of the vehicle, this Panel finds that the State proved by clear and convincing evidence that Officer Walsh had reasonable grounds to believe Appellant was operating the vehicle that night based on all of the facts which were known to the Officer. When the Officer arrived

on the scene, Appellant was the only person in the vehicle, and the Officer saw Appellant walking from the scene of the accident. Furthermore, Officer Smith testified before the trial court that when he arrived at the scene of the accident the Appellant was inside the vehicle. Specifically the Officer stated, "he was in the interior portion of the car, on the roof, which means when he was inside the vehicle, and had fallen out of the seat, he was laying on the interior roof, inside the vehicle." (Oct. Tr. at 8.)

On the issue of consent, this Panel finds the State proved that Appellant refused to take the chemical test, so that whether the hospital drew blood, or not, which it is important to note, there was no evidence presented, is irrelevant. This Panel reasons that while an operator of a vehicle within the State is deemed to have consented to a chemical test or breath, blood and/or urine test, the law enforcement officer determines which tests are to be given.[4] In this case, Officer Walsh requested that Appellant submit to a chemical test, which Appellant refused by his unwillingness to answer questions. Appellant's other four arguments on appeal will be addressed in seriatim.

A

Confidential Telephone Call

Appellant contends that he was not given a reasonable opportunity to make a confidential phone call in accordance with § 12-7-20. Despite the fact that Appellant was afforded a telephone call in a hospital room and that Officer Walsh was not present in the hospital room at the time Appellant's phone call was made, Appellant maintains that he was denied his right to a confidential phone call because the could have been nurses or hospital staff in the room with Appellant when making the phone call. Appellant contends that the telephone call afforded by § 12-7-20 must be carried out in absolute

[4] § 31-27-3 provides persons charged with right to be examined by a physician of his or her own choosing.

privacy so as to protect confidential communications between the arrestee and the attorney-recipient. When the confidentiality of the attorney-client communication is compromised, Appellant asserts that it is impossible for the arrestee to make an informed decision as to whether to submit to a chemical test. Appellant argues that dismissal of the charged violation of § 31-27-2.1 is the appropriate remedy when the police fail to scrupulously observe the confidentiality requirement of § 12-7-20.

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."[5] "Confidentiality" has been interpreted to mean a call made in 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. Town of Warren v. Quatrucci, C.A. No. T08-0057 (R.I. Traffic Trib.) (filed September 8, 2009); Town of Warren v. Dolan, C.A. No. T08-0075 (R.I. Traffic Trib.) (filed September 9, 2009). There is an "affirmative duty on law enforcement to provide a confidential phone call within one hour of arrest." Id. at 18. The State has the burden to establish that the police furnish the defendant with a confidential telephone call. Town of Warren v. Lewis Quattrucci, T-08-0057 at 14 (R.I. Traffic Trib. 2009).

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[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.

In this case, Officer Walsh testified that he read the "Rights for Use at Station" form to Appellant in its entirety and that Appellant indicated he understood the rights contained therein. (Oct. Tr. at 19-20.) As evidence of Appellant's comprehension of his rights, Officer Walsh testified that Appellant preferred to make the telephone call on his cell phone. (Oct. Tr. at 20.) Officer Walsh further testified that he was not physically present in the hospital room at the time Appellant utilized the telephone, although he admitted that he did not know whether the nursing or medical staff remained in the room. (Oct. Tr. at 20; Nov. Tr. at 14-15.) Furthermore, Officer Walsh did not hear Appellant's conversation or the identity of the recipient. (Oct. Tr. at 20.)

The State's burden is to present evidence that the law enforcement officer left the hospital room and was out of ear shot, which the State satisfied. Carcieri, 730 A.2d at 15. The Appellant failed to rebut the testimony of the Officer. He could have presented evidence that there were hospital personnel present when the Appellant made his phone call, but Appellant presented no evidence on this point whatsoever. The Court will not draw a negative inference that the room was not clear just because an officer, in this case Officer Walsh, could not recall whether the room was cleared of everybody. Accordingly, there is reliable, probative, and substantial evidence on the record evidencing that Appellant exercised his right to a confidential phone call consistent with the requirements found in Carcieri, Quatrucci, and Dolan. On the facts of this case, dismissal of the refusal charge is not warranted. The members of this Panel are satisfied that the integrity of Appellant's communications was not compromised in any way. Therefore, we conclude that Appellant's right to a fully confidential phone call under § 12-7-20 was not violated by Officer Walsh's presence outside the hospital room. The

decision of the trial court to sustain that the charged violation was not in violation of constitutional provisions or affected by error of law.

B

Reasonable Grounds

Appellant further argues that the trial magistrate's decision to sustain the charged violation of § 31-27-2.1 is affected by error of law and clearly erroneous in light of the reliable, probative, and substantial record evidence. Specifically, Appellant contends that the prosecution failed to prove to a standard of clear and convincing evidence that Officer Walsh had sufficient evidence to furnish him with probable cause to arrest Appellant on suspicion of driving under the influence. As the arrest of Appellant was unlawful, Appellant asserts that the charged violation of § 31-27-2.1 must be dismissed.

Our Supreme Court has made clear that "reasonable suspicion is the proper standard for evaluating the lawfulness of a stop." State v. Jenkins, 673 A.2d 1094, 1097 (R.I. 1996). In the context of chemical test refusal cases, the Court has listed various specific and articulable facts upon which a law enforcement officer can properly conclude that "reasonable suspicion" exists to initiate an investigatory stop. For example, reasonable suspicion can be based on the officer's observation of the motorist's vehicle, such as swerving from lane to lane, State v. Bruno, 709 A.2d 1048, 1050 (R.I. 1998), or physical damage to the motorist's vehicle, State v. Pineda, 712 A.2d 858 (R.I. 1998). Reasonable suspicion can also be based on the officer's observations of the motorist's physical appearance and demeanor. The Court has also concluded that an investigatory stop of a motorist is supported by reasonable suspicion in instances when the motorist appears confused or disoriented; where the motorist exhibits slurred speech, watery or

bloodshot eyes, and/or an odor of alcohol emanating from his or her vehicle and/or person; or when the motorist stumbles and falls against the vehicle upon exiting. See State v. Perry, 731 A.2d 720, 721 (R.I. 1999); Bruno, 709 A.2d at 1050; Pineda, 712 A.2d at 858; State v. Bjerke, 697 A.2d 1069, 1069 (R.I. 1997). Our Supreme Court has not enumerated all of the facts that must exist in order for a law enforcement officer to determine that "reasonable grounds" exist. Instead, the cases illustrate the "reasonable grounds" analysis is fluid and case-specific. See supra.

In the case at bar, Officer Walsh had reasonable suspicion to stop and briefly detain Appellant for investigative purposes. See Jenkins, 673 A.2d at 1097 ("A police officer can stop and briefly detain a person for investigative purposes absent probable cause if the officer had reasonable suspicion based upon specific and articulable facts, and reasonable inferences can be drawn therefrom."). Here, Officer Walsh arrived at the scene of a rollover accident. The Officer indicated that there was damage to Appellant's vehicle and that emergency services had to be contacted. During his interaction with Appellant, Officer Walsh smelled a strong odor of alcohol emanating from Appellant, observed that Appellant's eyes were glassy and bloodshot, and noted that Appellant lacked cooperation while in the ambulance. Based on his experience as a law enforcement officer, Officer Walsh testified that Appellant "had [the] same characteristics that [he has] seen before when [somebody is] intoxicated." (Oct. Tr. at 14.); see Pineda, 712 A.2d 858 (R.I. 1998) (listing factors of intoxication, including detection of an odor of alcohol on the motorist's breath of person, bloodshot eyes, physical damage to motorist's vehicle); Bruno, 709 A.2d at 1050 (listing factors including appearance of confusion on the part of the motorist). Appellant did not offer

evidence to challenge Officer Walsh's testimony. Consequently, the Panel is satisfied that the trial magistrate had reliable, probative, and substantial evidence upon which to determine that the officers, prior to requesting that Appellant submit to a chemical test, had "reasonable grounds" to believe that he had operated his motor vehicle while under the influence of intoxicating liquor.

Further, the record reflects that Officer Walsh's arrest of Appellant was based upon his belief that Appellant had operated his motor vehicle under the influence of intoxicating liquor. The test to determine whether probable cause to arrest without a warrant exists involves an objective assessment of "whether, under the totality of the circumstances, the arresting officer possesses sufficient trustworthy facts and information to warrant a prudent officer in believing that the suspect has committed or was committing an offense." State v. Guzman, 752 A.2d 1, 4 (R.I. 2000). "[P]robable cause is a fluid concept—turning on the assessment of probabilities in particular factual context—not readily, or even usefully, reduced to a neat set of legal rules." Flores, 996 A.2d at 161 (internal quotations omitted). Our Supreme Court has said that "the mosaic of facts and circumstances [available to the arresting officer] must be viewed cumulatively as through the eyes of a reasonable and cautious police officer on the scene, guided by his or her experience and training." In re Armand, 454 A.3d 1216, 1218 (R.I. 1983) (internal quotations omitted). "[T]he evidence thus collected must be seen and weighed not in terms of library analysis by scholars, but as understood by those versed in the field of law enforcement." Flores, 996 A.2d at 162 (internal quotations omitted). Specifically, "[t]he experience and expertise of the officer involved in the investigation and arrest may be considered in determining probable cause." Flores, 996 A.2d at 161

(citing United States v. Hoyos, 892 F.2d 1387, 1392 (9th Cir. 1989). The police officer's knowledge is evaluated "first on the basis of the objective observations of the officer 'and consideration of the modes or patterns of operation of certain kinds of lawbreakers.'" Flores, 996 A.2d at 161 (citing United States v. Cortez, 449 U.S. 411, 418 (1981)). A "critical component" of the analysis is that "an experienced police officer 'draws inferences and makes deductions' from these facts based on his or her training and practice." Id. (citing to Cortez, 449 U.S. at 418). In addition to the police officer's training and experience, a finding of probable cause can be buttressed "by evidence of defendant's demeanor and the location of the stop." Id. (finding probable cause by taking into account the defendant's nervousness and the hundreds of drug arrests made by the officer in that particular area, even though the area was not known for criminal activity).

Here, Appellant argues there was no probable cause since Officer Walsh did not observe Appellant operate his vehicle, speed, swerve, stumble, or become ill. While the factors listed by Appellant are useful to determine whether an individual is under the influence of alcohol, probable cause is based on a totality of the circumstances and does not require the presence of all the factors that suggest intoxication. In re Armand, 454 A.3d at 1218. In light of the totality of the factors that are present, Officer Walsh had sufficient trustworthy information to believe that Appellate had committed the crime of operating a motor vehicle under the influence of intoxicating liquor. Flores, 996 A.2d at 162 (holding that a critical component of the probable cause analysis is that the experienced police officer "draws inferences and makes deductions" from the facts based on the officer's training and practice) (internal quotations omitted). Based on Officer Walsh's personal observations of Appellant's physical appearance and combative

demeanor, coupled with his professional experience and training with respect to the investigation of DUI-related traffic stops, the "facts and circumstances known to [Officer Walsh] [were] sufficient to cause a person of reasonable caution to believe that a crime ha[d] been committed and [Appellant] ha[d] committed [it]." Perry, 731 A.2d at 723; see Flores, 996 A.2d at 164 (where the defendant's demeanor and location of the stop can buttress the finding of probable cause). Accordingly, the decision of the trial magistrate to sustain the charged violation is neither affected by error of law nor clearly erroneous.

C

Voluntary and Reasonableness

Appellant additionally argues that the trial court's decision finding Appellant's actions were voluntary is affected by error of law in light of the reliable, probative, and substantial record evidence. Specifically, Appellant contends that the State failed to prove Appellant's voluntariness to a standard of clear and convincing evidence. Appellant argues the State had the duty of inquiry as to an individual's voluntariness once the record contained evidence that Appellant was medicated. Specifically, Appellant cites to the United States Court of Appeals for the First Circuit, which held that once there is evidence of medication, a reviewing court has a duty to inquire into that individual's mental capacity. Cody v. United States, 249 F.3d 47, 52 (1st Cir. 2001).

The members of this Panel agree that, in this case, there was not any evidence presented that Appellant was given medication. Cody provides a potential defense against voluntariness and reasonableness if there is evidence of medication. 249 F.3d 47. However, Cody does not apply to the case at bar since there was no evidence that Appellant took medicine. (Tr. at 16-19.) The State met its burden by showing Appellant

was coherent, including that he was read his rights and that he used his own cell phone to make his confidential phone call. If evidence is not presented during the trial, the Panel cannot consider it. It is in the hands of Appellant to refute the testimony presented by the State. Contrary to Appellant's suggestion, the State does not have a duty to ask whether an individual is on medication, such an inquiry and would require the State to prove a negative inference. Accordingly, the trial court's decision that Appellant's actions were voluntary was not affected by error of law.

D

Excessive Sentence

Finally, Appellant maintains that the sentence imposed by the trial court was of a degree and type in excess of the penalties contemplated by the refusal statute, §31-27-2.1. Other than a one sentence reference on the appeal form, Appellant has failed to make any arguments, either written or oral, to support his contention that the trial judge abused his discretion. "It is well established that a mere passing reference to an argument is insufficient to merit appellate review." Tondreault v. Tondreault, 966 A.2d 654, 664 (2008) (quoting DeAngelis v. DeAngelis, 923 A.2d 1274, 1282 n.11 (R.I. 2007)). Appellant's failure to address this issue results in its being waived. However, this Panel will briefly address Appellant's contention for the purposes of discussion.

The trial judge's sentence consisted of the following: a 10 month license suspension, 10 hours of community service, mandatory attendance at DWI school, a $500 highway assessment fee, a $200 Department of Health fee, and another $235 dollars in court fines and fees. (Nov. Tr. at 22.) This Panel notes that Appellant has failed to indicate with any specificity which portion of the sentence he deems excessive and the

fact that the entire disposition is congruent with the guidelines of §31-27-2.1.[6] See Little v. State, 676 So. 2d 959, 964 (Ala. Crim. App. 1996) (imposition of the maximum sentence for a drunk driver, which was "within the sentencing structure contemplated under the statutory scheme[,]"deemed not to be excessive). The sentence imposed by the trial magistrate was clearly within the statutory requirements of §31-27-2.1. Accordingly, this Panel cannot determine that said sentence constituted an abuse of discretion. The order of the trial judge shall remain in full force and effect.

Conclusion

This Panel has reviewed the entire record before it. Having done so, this Panel is satisfied that the trial magistrate'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.

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