STATE OF RHODE ISLAND AND PROVIDENCE PLANTATIONS

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

STATE OF RHODE ISLAND	:	
	:	
v.	:	**C.A. No. T10-0056**
	:	
PATRICIA SARGENT	:	

DECISION

PER CURIAM: Before this Panel on September 22, 2010—Magistrate DiSandro (Chair, presiding), Chief Magistrate Guglietta, and Magistrate Cruise, sitting—is Patricia Sargent's (Appellant) appeal from Magistrate Goulart's decision, sustaining the charged violation of G.L. 1956 § 31-27-2.1, "Refusal to submit to a chemical test." The Appellant was represented by counsel before this Panel. Jurisdiction is pursuant to § 31-41.1-8.

Facts and Travel

During the evening hours of November 8, 2009, a trooper from the Rhode Island State Police (Trooper Gadrow), while operating his police vehicle on Route 138 in Jamestown observed the Appellant driving in an erratic manner. After witnessing Appellant fail a series of field sobriety tests, the Trooper charged her with the aforementioned violation of the motor vehicle code. The Appellant contested the charges, and the matter proceeded to trial.

The lengthy trial began with Trooper Gadrow offering testimony describing his background in law enforcement and his familiarity with drunk driving related traffic

stops; noting specifically that he had conducted or assisted in a vast number of drunk driving stops and arrests since becoming a member of the State Police in 2000. (Feb. 25 Tr. at 6-12.) Turning to the events of November 8, 2009, the trooper testified that while heading to the State Police Barracks in Portsmouth, he observed Appellant's vehicle—coming from a nearby off-ramp—dart into his lane of traffic, almost making contact with his police cruiser. (Feb. 25 Tr. at 13.) Thereafter, Trooper Gadrow conducted a traffic stop of Appellant's vehicle at a point just past the toll plaza on Route 138. (Feb. 25 Tr. at 14-16.)

While conducting the traffic stop, Trooper Gadrow noticed Appellant to have slurred speech, bloodshot watery eyes, and a strong smell of alcohol emanating from his breath. (Feb. 25 Tr. at 16.) Upon making these initial observations, Trooper Gadrow asked Appellant to exit the vehicle to perform the standardized field sobriety tests. Id. At the trooper's request, Appellant attempted and subsequently failed the walk and turn test, and the one legged stand test. (Feb. 25 Tr. at 18-26.) Based upon these observations, Trooper Gadrow "asked [Appellant] if she would submit to a preliminary breath test." (Feb. 25 Tr. at 27.) Appellant refused, and the trooper then read to her the "Rights for Use at Scene" form, placed her into custody, and transported her to the Rhode Island State Police Barracks in Portsmouth. Id.

Trooper Gadrow testified that once at the barracks, he read the "Rights for Use at Station" form to Appellant. (Feb. 25 Tr. at 31.) After Appellant informed the trooper that she understood her rights, she indicated that she wished to make a confidential phone call. Id. Trooper Gadrow testified that to make her phone call, Appellant was led into a room known as the "NCO" room, which he described as a separate room with "thick

walls and a heavy oak door and a large glass window." (Feb. 25 Tr. at 32.) "[W]e place them in the office and we shut the door and we watch them through the glass door as they make their phone call to keep observation." Id. Trooper Gadrow admitted that through the glass portion of the door, he kept watch on Appellant as she made her calls, but when asked specifically if he could hear any portion of Appellant's phone call, he indicated that he could not. Id. After finishing her phone call session, which lasted approximately twenty minutes, the Trooper testified that Appellant refused to submit to the breath test and signed the "Rights for Use at Station" form indicating such. (Feb. 25 Tr. at 33.)

Appellant's counsel began cross examination of Trooper Gadrow on March 16, 2010. On cross, the trooper once again testified that Appellant's vehicle almost collided with his police cruiser as she barreled down the on ramp and crossed over the rumble strip on Router 138. (Mar. 16 Tr. at 10.) Further on cross examination, the trooper testified that Appellant informed him that she had a "problem with her back." (Mar. 16 Tr. at 25.) However, he was not provided with that information prior to the Appellant's performing and failing the field sobriety tests. Id. On redirect examination, however, Trooper Gadrow, utilizing his police report to refresh his memory, testified that he did indeed ask Appellant if she "had any medical conditions [that] would prevent her from performing as simple walking tests," to which Appellant replied in the negative. (Mar. 16 Tr. at 82.)

Later, on cross-examination, counsel for the Appellant played the recorded video of the traffic stop made from the trooper's mounted dashboard camera. The video, according to the trooper's testimony, clearly showed Appellant stumble and actually "bounce into the car" as she exited her own vehicle. (Mar. 16 Tr. at 63.) The trooper

also indicated that the tape showed Appellant moving about with an "awkward gate.[sic]" (Mar. 16 Tr. at 65.) After Trooper Gadrow finished his testimony, the State rested.

Following the trial magistrate's refusal to grant Appellant's motion to dismiss the refusal charge, testimony continued with the Appellant, Patricia Sargent, taking the stand on her own behalf. (Mar. 16 Tr. at 115.) Appellant, a 52 year old Middletown woman, informed the court that she was employed as a registered nurse since 1979. (Mar. 16 Tr. at 115.) However, Appellant testified that she was currently out of work on TDI due to three herniated discs in her neck. (Mar. 16 Tr. at 128.) Appellant testified that she had been hampered by back and neck injuries for a number of years, telling the court that she is "out of work at least once or twice a year due to that[] [injury]." (Mar. 16 Tr. at 129.)

Specific to the night of November 8, 2009, Appellant testified that she had been out to dinner at the Narragansett Café in Jamestown. (Mar. 16 Tr. at 131.) There, Appellant testified she consumed three beers along with her dinner. (Mar. 16 Tr. at 133.) After leaving the Narragansett Café, Appellant testified that she proceeded home and upon approaching the Newport Bridge, and negotiating what she described as a "tight corner," she was pulled over by Trooper Gadrow. (Mar.16 Tr. at 136.) Testifying in regards to her performance during the field sobriety tests, Appellant stated that the reason for her "wobbly gait" was due to the aforementioned issues with her lower back.[1] In regards to the portable or preliminary breath test, Appellant testified that she refused to submit to that test because she "had just finished consuming my last beverage five minutes prior to that, and I really, in all honesty, didn't know whether that would [affect] it or not [affect] it. (Apr. 16 Tr. at 10.)

[1] The record indicates that Appellant performed an in court demonstration or reenactment of the sobriety tests she performed for Trooper Gadrow on November 8, 2009. (Apr. 20th Tr. at 5.)

Appellant went on to testify that she was transported to the barracks, at which point she was afforded the opportunity to make a phone call. (Apr. 16 Tr. at 11.) She noted that during the time that she was making her phone call, she was able to overhear transmissions from the police radios located in the general precinct area. Id. According to Appellant, she was unable to reach anyone on the telephone. (Apr. 16 Tr. at 13.)

After Appellant's testimony was complete, two witnesses took the stand on her behalf. The first was a friend, Mary Brawn, who accompanied Appellant to the Narragansett Café that night. (Apr. 16 Tr. at 44.) The second was Lori Campbell, both an acquaintance and a member of the wait-staff at the Narragansett Café, who was on duty as a bartender the evening of November 8, 2010. (Apr 16. Tr. at 55.) Both witnesses claimed that Appellant consumed no more than three beers while at the Narragansett Café and neither witness detected any sign that Appellant was intoxicated. (Apr. 16 Tr. at 44-60.)[2] After the testimony of Brawn and Campbell, the Appellant rested her case.

On June 4, 2010, the trial reconvened as the judge was prepared to render a decision. He sustained the charge under § 31-27-2.1. (Dec. Tr. at 20.) In the trial judge's view, there was "clear and convincing evidence that the trooper had reasonable grounds to believe that Ms. Sargent was operating a motor vehicle while under the influence." Id. He was satisfied that "she was informed of her right to be examined by a physician of her choice...and that she failed to take the test." Id. Aggrieved by that decision, Appellant filed a timely appeal to this Panel. Forthwith is this Panel's decision.

[2] The last evidence offered in support of Appellant's claim was the deposition of a Dr. Connor. The doctor's testimony concerned Appellant's chronic back injuries and the effect those injuries may have had in her performing the field sobriety tests. (Apr 29th Tr. at 3-22.)

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:
>
> (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 Mut. Ins. 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 Envtl. 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 characterized by abuse of discretion, affected by error of law, and clearly erroneous in light of the reliable, probative, and substantial record evidence. The Appellant has advanced five arguments in support of her appeal, each of which will be addressed in turn.

I.

Appellant's Medical Condition

Appellant argues that the trial court erred when it held that there was adequate reasonable suspicion for Trooper Gadrow to suspect her of driving under the influence of alcohol, despite Trooper Gadrow's knowledge of her medical condition. Although Appellant stipulates that Trooper Gadrow was only made aware of Appellant's alleged back condition after she had failed the field sobriety tests, she argues that that information should have entered into his calculus in asking Appellant to submit to a breath test. Further, because of her back condition and its alleged effect on Appellant's ability to perform field sobriety tests, she argues that the reasonable suspicion claimed by Trooper Gadrow was somehow tainted or faulty, and that accordingly we should reverse the decision of the trial judge.

According to § 31-27-2.1, an officer is to have reasonable grounds to believe that a person has operated a motor vehicle under the influence before he or she requests a person to submit to a chemical test. In the context of drunk driving stops, our Supreme Court has listed various specific and articulable facts upon which a law enforcement

officer can properly conclude that there are reasonable grounds to initiate an investigatory stop. For example, reasonable suspicion can be based on the officer's observation of the motorist's vehicle while in operation; such as swerving from lane to lane or other "erratic movements of [the] vehicle." State v. Jenkins, 673 A.2d 1094, 1097 (R.I 1996); State v. Bruno, 709 A.2d 1048, 1050 (R.I. 1998). The Court has also concluded that reasonable grounds exist 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).

On appeal however, Appellant wishes for us to ignore this totality approach and invalidate the refusal charge because Appellant may or may not have been affected by a nagging back injury when she performed the field sobriety tests. Appellant maintains this argument despite the fact that the record indicates that the failed sobriety tests were just one factor used by Trooper Gadrow to make his determination that she was intoxicated. His testimony clearly indicates that his request for a breathalyzer exam was based on numerous indicators—the bloodshot eyes, the smell of alcohol, the erratic driving as well as her unsteady gait. Therefore, we are satisfied that the State has demonstrated by clear and convincing evidence that Trooper Gadrow's request for Appellant to submit to a breath test was based upon adequate reasonable suspicion that she had operated her vehicle under the influence.

II.
Trooper's Admission

According to Appellant, Trooper Gadrow testified that he had a "second doubt" regarding the level of Appellant's impairment during his arrest. Accordingly, she argues that this Panel should vacate the trial judge's finding and dismiss the refusal charge. In making this argument, counsel for Appellant has taken Trooper Gadrow's testimony concerning his "second doubt" completely out of context. When asked by the trial judge why he decided to request Appellant to submit to a portable, preliminary breath test, the Trooper replied:

> "My goal is to make the fairest, most just arrest possible, so two things happen. I want to add to my probable cause for arrest and I want to make sure that it's a good arrest. That there's no outside lingering issues that we might be dealing with. Counsel has brought up health related issues, hay fever, things of that nature that could possibly affect her appearance and performance of the test. Maybe I have a little bit of second doubt in, you know, maybe at that time I just want to make sure that I'm giving all the benefit to the driver, you know, giving all the courtesy to the driver as possible for her to disprove my beliefs at that time." (Mar. 16th Tr. at 88-89.) [3]

It is clear Trooper Gadrow was speaking in general terms as to why there are times he finds it necessary to request a preliminary breath test. Never did he mention that Appellant's medical condition gave him pause or doubts concerning her level of intoxication.[4]

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[3] The charge under § 31-27-3, "Revocation of license upon refusal to submit to a preliminary breath test," was dismissed by the trial judge.

[4] As the Trooper explained to the court, each portion of such traffic encounters—the initial observations, the field sobriety tests—are all apart of a police officer's attempt to build a case, or in the alternative, to exonerate the motorist from his original suspicions. (Mar. 16th Tr. at 88-89.)

Furthermore, it is important to highlight the fact that the preliminary breath test was offered at the scene. We fail to see how, under any reading of the facts, one could create an argument that the trooper had second doubts concerning Appellant's health related issues while making assessments at the scene—when Trooper Gadrow specifically testified that he was not made aware of Appellant's medical condition until after she was transported to the barracks. (Mar. 22nd Tr. at 25.) We therefore find no factual support for Appellant's contention that her medical condition gave Trooper Gadrow second doubts as to her level of intoxication.

III.
Laned Roadway Violation

As noted above, in addition to the refusal charge, Appellant was also cited for violating § 31-15-11, "Laned roadways violation." That charge, however, was dismissed by the trial judge. (Dec. Tr. at 15.) In Appellant's view, since the trial judge found that the State had failed to prove the moving violation by clear and convincing evidence, he subsequently erred in sustaining the refusal charge. Thus, Appellant argues that since the basis for the traffic stop was not upheld, the refusal charge which stemmed from the traffic stop should also be suppressed.

Contrary to Appellant's contention, the dismissal of the moving violation does not necessitate suppressing the evidence of a refusal. Despite the fact that the Appellant was cited for both violations simultaneously, the fate of the refusal charged is not dependent upon the outcome of the moving violation. See Kimery v. State, 973 S.W. 2d 836, 839 (Ark. App. 1998.) ("The question of a whether an officer has probable cause to make a traffic stop does not depend on whether the defendant is actually guilty of the violation

that was the basis for the stop."); see also generally Whren v. United States, 517 U.S. 806 (1996). Rather, the validity of a traffic stop, including those evaluated in a refusal context, depends upon whether or not the officer had reasonable suspicion to believe a motorist was operating his or her vehicle in violation of some portion of the motor vehicle code. Whren, 517 U.S at 813; State v. Jenkins supra; State v.Bjerke, 697 A.2d 1069, 102 (1997).

A review of the record indicates that the trooper's decision to stop Appellant's vehicle was based on the his own observation that a violation had indeed occurred. Testifying as to why he initiated the traffic stop, Trooper Gadrow informed the court:

> "At the intersection [with] the onramp from Conanicus Avenue, I was abruptly met by a silver Kia SUV [Appellant's vehicle]; that actually crossed the rumble strip, into my lane of travel. I was, as a result of that contact, I was required to conduct an evasive maneuver to the left to avoid contact between the two vehicles." (Mar. 2nd Tr. at 13.)

Based upon this testimony, it is clear that Trooper Gadrow had more than a reasonable suspicion that Appellant had violated § 31-15-11. He had seen, with his own eyes, the violation occur. The fact that the trial judge later determined that the State had failed to prove all the elements of § 31-15-11 by clear and convincing evidence does not diminish the fact that, in the first place, the stop was valid. Therefore, substantial rights of the Appellant are not violated by the retention of the refusal charge.

IV.

Refusal of the Preliminary Breath Test

Appellant next argues that because she refused to take the preliminary breath test (PBT), it was an improper violation of her statutory rights for Trooper Gadrow to request

that she submit to a breath test at the barracks. In support of this contention, Appellant points to an isolated sentence of § 31-27-2.1, as well as the Rhode Island Supreme Court case, State v. DiStefano, 764 A.2d 1156 (R.I. 2000).

The statutory language relied upon by Appellant reads: "[i]f a person having been placed under arrest refuses upon the request of a law enforcement officer to submit to the tests as provided in § 31-27-2, none shall be given. . . ." Appellant contends that a PBT is, in fact, a "test" for these purposes, and since there was a refusal of a PBT, she should not have been offered another test. In further support of this contention Appellant maintains that DiStefano—which held, in part, that law enforcement officials could not, with or without a warrant, seize a motorist's blood, when that motorist had earlier refused a chemical test—is applicable in the context of preliminary breath tests and the breath tests given after the person is brought to a police station.[5] Id. at 1174.

This Panel's "responsibility in interpreting [§ 31-27.2.1 and § 31-27.2.3] is to determine and effectuate the Legislature's intent and to attribute to the enactment the meaning most consistent with its policies or obvious purposes." Brendan v. Kirby, 529 A.2d 633, 637 (1987) (citing Gryguc v. Bendick, 510 A.2d 937, 939 (1986)). With that in mind, this Panel does not agree with an interpretation of the relevant statutes that a request to submit to a breath test is a violation of a motorists' rights simply because a person has refused a PBT. The "none shall be given" language of § 31-27.2.1 is clearly in contemplation of a refusal of an actual breath test. The entire section is dedicated to regulations concerning an actual, "station" refusal; the independent medical exam, refusing upon religious grounds. There is nothing in the statute to indicate that the

[5] To support of her contention, Appellant also relies on Superior Court decision, State v. Cote, N3 -2008-120A. Such a decision is not binding on this Panel. See Impulse Packing Inc. v. Sicajan, 862 A.2d 593, 600 n.14 (R.I. 2005).

legislature contemplated a preliminary breath test. See Almeida v. United States Rubber Co., 82 R.I. 264, 268, 107 A.2d 330, 332 (1954).

Furthermore, § 31-27.2.3 states "[w]hen a driver is arrested following a preliminary breath analysis, tests may be taken pursuant to § 31-27.2.1." Reading that statute in light of Kirby, we glean the following: (1) it is clear that the only test pondered by the legislature in drafting § 31-27.2.1 is the "official" breath test conducted at a police station, (2) if the legislature deems it appropriate for police to administer a test at the station after one has been administered at the scene, it would make little sense to hold that police cannot request for a motorist to submit to that test, simply because he or she refused a PBT. Furthermore, we find DiStefano to be dispositive. In that case, the exams deemed improper by the Court—the blood tests, and urinalyses— all came after a refusal pursuant to § 31-27.2.1. Based upon our reading of the relevant statute, this Panel fails to make such a leap to apply DiStefano to preliminary breath tests. Therefore, we find that the substantial rights of Appellant were not prejudiced by Trooper Gadrow's request to submit to a breath test, despite her refusing a PBT.

V.
The NCO Room/Confidentiality

Lastly, Appellant argues that the trial judge made an improper determination concerning Appellant's confidential phone call at the Portsmouth Barracks. As noted above, Appellant's testimony called into question the confidential nature of her phone call. (Apr. 20th Tr. at 11.) In Appellant's view, the trial judge's remark that he was familiar with the NCO room at the Portsmouth Barracks, was, in effect, an instance of

improper judicial notice of a critical issue in the case.[6] In other words, Appellant argues that the trial judge deemed the phone call "truly confidential," based upon his own experiences, and not on credibility determinations.

Once again there appears to be a lack of support in the record for Appellant's argument. While the trial judge did —in response to Appellant's request for a view— indicate that he, as a former member of the Rhode Island Department of the Attorney General, was familiar with the NCO room in the Portsmouth State Police Barracks, he did not "supply evidence of an essential element. . . ." Contra State v. Welch, 117 R.I. 107, 110, 363 A.2d 1356, 1358 (1976) (holding that trial judge erred when he used his own personal knowledge and experiences to categorize and identify a particular narcotic as a hallucinogen). The record clearly indicates otherwise. Specifically addressing Trooper Gadrow's testimony regarding the confidential nature of the phone call, the trial judge held the following:

> "I'm satisfied the State has certainly proved by clear and convincing evidence that Ms. Sargent was afforded and received a confidential phone call. I accepted the testimony of the Trooper, which [sic] as credible; where he said that Ms. Sargent was placed in a room, the door was closed, and he was unable to hear any conversation by the [Appellant]. I believe the Trooper." (Dec. Tr. at 16.)

We also note that in addition to deeming the trooper's testimony credible, the trial judge held that Appellant's version of the circumstances surrounding the phone call was "unconvincing." (Dec. Tr. at 16.) He went on to state that: "I find it hard to believe that the trooper could not hear anything, yet she was able to hear quite easily. . . ." Id. "I

[6] Rule 201 of the Rhode Island Rules of Evidence states: "A judicially noticed fact must be one not subject to reasonable dispute in that it is either (1) generally known or (2) capable of accurate and ready determination by resort to sources whose accuracy cannot reasonably be questioned."

found her testimony, quite frankly to be forced and almost as if it was scripted in some way to follow some of the concerns which have been addressed by this court as it relates to the confidential phone call." (Dec. Tr. at 17.)

Based on the record before us, we fail to find support for Appellant's argument that the trial judge took judicial notice improperly. His determination in regards to the confidential nature of the phone call was based upon his credibility determinations of the testimony before him. Therefore his finding shall remain undisturbed. See State v. Medeiros, 996 A.2d 115 (R.I. 2010).

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 her.

ENTERED:

DATE 2-2-11