STATE OF RHODE ISLAND AND PROVIDENCE PLANTATIONS

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

TOWN OF SOUTH KINGSTOWN	:	
	:	
v.	:	**C.A. No. T11-0011**
	:	
MARK KEMP	:	

DECISION

PER CURIAM: Before this Panel on April 13, 2011— Judge Almeida (chair), Judge Parker, and Magistrate Noonan, sitting—is Mark Kemp's (Appellant) appeal from Magistrate Goulart's decision, sustaining the charged violation of G.L. 1956 § 31-27-2.1, "Refusal to submit to chemical test." The Appellant was represented by counsel before this Panel. Jurisdiction is pursuant to § 31.41.1-1-8.

Facts and Travel

On October 6, 2010, while on duty at the Ocean Mist Bar on Matunuck Beach Road in South Kingstown, Rhode Island, Officer David Marler of the South Kingstown Police Department ("Office Marler" or "the officer") acting upon information received from a citizen's tip, stopped Appellant's vehicle as he was driving on Matunuck Beach Road. Subsequently Appellant was arrested and cited for the aforementioned violation of the motor vehicle code. The charge was contested, and the matter proceeded to trial.

The trial commenced on December 6, 2010 with the testimony of Officer Marler. He began by informing the court that he had been a police officer since 2002 and had received training in drunk driving stops at the police academy that same year. (Tr. at 7.) Since joining the South Kingstown Police Department, he testified that he had been

involved with approximately 500 stops relating to alcohol, of which 100 resulted in arrests for suspicion of DUI. (Tr. at 8.)

Officer Marler then informed the court that on October 6, 2010 at around 1:00 a.m., he was on duty "standing outside of the [Ocean Mist] at the bottom steps from the entrance. . . ." (Tr. at 12.) While observing the foot traffic exiting the establishment, a concerned man approached the officer and informed him that "he had just observed a truck strike another vehicle and he told [the officer] that he knew the operator was drunk and he was concerned about his driving." (Tr. at 13.) Simultaneously, the Appellant's vehicle came driving by the officer's position, which the man informing the officer identified as the one being involved in the accident. Id. Thereafter, the officer "walked into the street and stopped the vehicle using [his] flashlight." Id.

Upon making contact with the operator, Officer Marler testified that he could "smell an odor of an alcoholic beverage coming from within the vehicle." Id. He asked the Appellant if he "had struck another vehicle and, [the Appellant] said yeah." Id. Appellant also "had a hard time getting his wallet out" when asked to produce identification. Id. He also informed the court that Appellant's "face was reddish in color, his eyes were red and bloodshot, his speech was slurred[]. . . ." (Tr. at 17.) Appellant informed the officer that he had consumed three beers. Id.

The officer then asked Appellant to perform a series of field sobriety tests which Appellant refused to perform. (Tr. at 19.) Next, Officer Marler testified that Appellant "turned in an attempt to walk away and [was grabbed by the officer], at which time [Appellant] began to resist, pushing and turning towards [the officer] [when the officer] then pinned him against the hood of [Appellant's] vehicle." (Tr. at 20.) Appellant

continued to resist Officer Marler along with another officer who joined the scene. (Tr. at 21.) The officers were finally able to restrain and handcuff the Appellant by "administer[ing] two bursts of OC spray to his facial area." (Tr. at 21.) Appellant was placed under arrest, secured in the back of his police car, and was read his "Rights for Use at Scene" card and then transported to the South Kingstown Police Station. (Tr. at 26.) There, Appellant was read his "Rights for Use at Station" and was offered the opportunity to make a confidential phone call. (Tr. at 29.) According to Officer Marler, Appellant sat silent throughout and refused to offer even a yes or no answer to any questions posed to him. (Tr. at 31.) Finally, Officer Marler testified that Appellant was charged with refusal, and released on bail. (Tr. at 32.)

The trial continued on December 9, 2010 when counsel for the Appellant took an opportunity to cross-examine Officer Marler. On cross-examination, Officer Marler testified that he had no previous or subsequent contact with the unidentified man who informed him of the accident that he had witnessed. (Tr. at 40.) He testified that "he did not have time" to secure this man as a witness, although he did try to look for him after the stop took place, but he could no longer locate him. (Tr. at 42.) He also testified that he found no damage on Appellant's vehicle, nor did he search for any other vehicles that may have been damaged in the accident. (Tr. at 43.) Later, he testified that he asked Appellant to get out of the car because "[a]t that point, [he] had smelled alcohol from the vehicle and on [Appellant's] breath when he spoke." (Tr. at 45.)

Regarding the field sobriety tests, he testified that the Appellant informed him that he would not take the one legged stand or the walk and turn tests because he did not feel comfortable performing them in the boots he was wearing that night. (Tr. at 55.)

The officer also informed the court that he the Appellant did express a willingness to perform other field sobriety tests, but no others were offered to him. (Tr. at 52.) Later in his testimony, he testified that his initial stop of the Appellant's vehicle was to investigate a hit and run accident which is why the first question he posed to Appellant asked whether or not he had been in an accident. (Tr. at 65.)

At the conclusion of the testimony, the trial magistrate sustained the charge against the Appellant. The only real point of contention between the State and the Appellant was whether or not the initial stop of Appellant's vehicle was justified. The trial magistrate held that it was. He felt that that the Officer was acting properly in stopping the vehicle. (Tr. at 117.) He noted that the citizen informant stated to the officer that he had witnessed an accident. The informant then pointed to the car that he had just seen involved in said accident. The trial magistrate noted that "it was necessary for him to stop the vehicle at that point because had the vehicle passed, he would have no opportunity to, in fact, follow the vehicle because of the crowd at the scene." Id. He also noted that the informant's story was corroborated by the Appellant's admission that he had been involved in a car accident. This admission took place prior to any DUI related question being asked. (Tr. at 118.) The trial magistrate subsequently found that the DUI investigation stemmed from the officer's observations concerning the Appellant's appearance and exhibited behavior. (Tr. at 126.) Finding that the State met its burden in proving all the elements of the offense, he then imposed penalties. (Tr. at 127.) Appellant appealed.

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 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. Appellant's argument on appeal is that the trial magistrate erred in finding that Officer Marler had reasonable suspicion to conduct a traffic stop of Appellant's vehicle. That argument is twofold. His first point is that Officer Marler stopped him only because he believed Appellant to be drunk. This point, Appellant argues, is illustrated by the officer's lack of diligence in investigating the accident, either before or after the traffic stop. Second, he argues that the citizen informant's "tip" was only corroborated after the stop and the State failed to offer the requisite corroborating evidence that could have justified Officer Marler's decision to detain the vehicle.

Reasoning behind the Stop

Our Supreme Court has held that stopping a vehicle based solely on a citizen tip that the motorist is operating under the influence is unconstitutional. In State v. Bjerke, 697 A.2d 1069, 1072 (R.I. 1997), in the same context of a refusal charge, the court agreed with the proposition that an anonymous tip alone was not enough to establish probable

cause to conduct a traffic stop. Some corroboration was needed. Id. (citing Alabama v. White, 496 U.S 325, 329-330 (1990).[1]

During trial, and at oral argument before this Panel, much of Appellant's argument surrounded upon a questioning of the officer's motives behind the stop. Since the informant indicated that the man had been involved in an accident and was possibly driving while intoxicated, the focal question was whether or not the impetus for the stop was to investigate a hit and run or to investigate a drunk driver. Indeed, there is some conflicting testimony from Officer Marler on his reasons for stopping Appellant's vehicle. On direct examination, he testified that he "initially. . . [was] going to the car to investigate a possible hit and run." (Tr. at 64.) Later, when asked by the trial magistrate, he indicated that his decision to stop the vehicle stemmed from a combination of both "an alleg[ed] intoxicated driver and to investigate the possible accident." (Tr. at 74.) This Panel recognizes that it would have been impossible for Officer Marler, while acting upon the report of a hit and run accident to completely disregard the information as to Appellant's potential intoxication.

What is clear and uncontested is Officer Marler's first words inquired of the Appellant whether or not he was involved in an accident. The suspicion of intoxication leading to the DUI arrest and refusal charge, Officer Marler testified, was based on the outward signs indicating intoxication displayed by Appellant. We are convinced on the record before us that given the circumstances, Officer Marler's intent was to investigate a hit and run accident which may have been precipitated by a drunk driver.

[1] Other jurisdictions permit law enforcement officers to conduct traffic stops based upon tips from citizen informants without any independent corroboration. See People v. Wells, 136 P.23d 810 (Cal. 2006); Bloomingdale v. State, 842 A.2d 1212 (Del. 2004).

Citizen Informant

First and foremost, we do not consider this unnamed informant in this matter to be anonymous. Our analysis of the information provided by the informant and its ability to furnish reasonable suspicion in the mind of Officer Marler must take that fact into account. Courts have held that the information of private citizens with no apparent stake in the outcome of the matter and "with no known criminal contacts, who come forward on [their] own, may be more easily accepted" than criminal informants or those who decide to telephone their information to the police. United States v. Scalia, 993 F.2d 984, 987 (1st Cir. 1993). Little is known of this unnamed private citizen who informed Officer Marler of what he had seen, but the record indicates that he approached the police on his own volition, and there is nothing to suggest that he was a criminal or sought any kind of revenge on the Appellant.

Specific to automobile stops, the Supreme Court of the United States held that a live, face to face citizen informant's tip may provide sufficient justification for an officer to take action on information received. Adams v. Williams, 407 U.S. 143, 145 (1972). Although Adams was a criminal matter in which defendant sought the suppression of narcotics and an unregistered firearm, its reasoning concerning the validity of the traffic stop is highly relevant to the facts before us. There a Connecticut police officer approached a parked vehicle after an informant came forward and told the officer that "an individual seated in a nearby vehicle was carrying narcotics and had a gun in his waistband." Id. Upon approaching the defendant, the officer saw a gun sticking out of his waistband. Id. Subsequently, the officer detained the man and conducted a search

which resulted in obtaining incriminating evidence. Id. Against arguments by the defendant that the uncorroborated tip did not provide the officer with enough reasonable suspicion to approach the vehicle and conduct, what amounted to an investigatory stop, the Court held that in light of the circumstances, the officer's actions were justified. Id. As the First Circuit would later hold in Scalia, the Adams Court noted that information provided by a real time, face to face, witness informant is "stronger. . . than in the case of anonymous telephone tip." Id. For one thing, the Court noted that "under Connecticut law, the informant might have been subject to immediate arrest for making a false complaint." Id. at 146. Also, the veracity of the tip was bolstered by events and circumstances "just witnessed" by the informant. Id. This Panel understands that the lesson from Adams is not that every citizen informant's tip justifies immediate police action. In fact, the Court noted that in these situations, "[i]nformants' tips, like all other clues and evidence coming to a policeman on the scene, may vary greatly in their value and reliability. One simple rule will not cover every situation." Id. at 147.

Recognizing this ad hoc approach, we look to the specific facts before us in an effort to determine the propriety of the officer's actions in light of the information provided to him from the informant, coupled with a potential need for swift action. First, like the informant in Adams, here the man approached the officer and provided the information to him face to face.[2] Like in Connecticut, Rhode Island General Law 1956 § 11-32-2, "False report of crime," subjected the man to possible fines and imprisonment for providing false information and allegations to Officer Marler. We also recognize that Officer Marler understood that the man claiming to have witnessed the accident was

[2] In Adams the informant was said to have been "known to the [the officer]." Adams 407 U.S. at 144. What degree of familiarity is unknown from the facts.

more than likely in the area where he claimed it had happened. Moreover, he provided more than a detailed description but actually pointed out Appellant's vehicle to Officer Marler as it passed by their position on Matunuck Beach Road. See United States v. Zayas-Dias 95 F.3d 105, 111 (1st. Cir. 1996) (noting that an informant's tip can be bolstered with detail and specificity of facts alleged); see also Commonweatlh v. Allen, 549 N.E. 2d 430, 433 (Mass. 1990) (more credence is given to the basis of knowledge of an informant if he himself is an eyewitness).

Lastly, we would be remiss if we did not note the exigency of the circumstances required Officer Marler to act with urgency. As the Court held in Adams, "the Fourth Amendment does not require a policeman. . . to simply shrug his shoulders and allow a crime to occur or a criminal to escape." Adams 407 U.S. at 145. As Officer Marler testified, a possible dangerous driver fleeing the scene of an accident could have disappeared into the night had he not sought to act on the informant's tip. We conclude that it was "a legitimate investigative function [Officer Marler] was discharging when he decided to approach [Appellant's vehicle]" and conduct the investigatory traffic stop." Terry v. Ohio, 392 U.S. 1, 23 (1968).

Upon conducting the stop, Officer Marler very quickly realized two things. Firstly, Appellant was involved in an accident as alleged by the informant and corroborated by Appellant. Secondly, through various clues—bloodshot eyes, slurred speech, an odor of alcohol, and a fumbling to obtain his personal identification—the officer realized that he may have been operating his vehicle while intoxicated. Determining that his actions in conducting the traffic stop were proper, and then basing his subsequent DUI investigation on articulable facts, Officer Marler's lack of an

investigation into the alleged accident is irrelevant in determining the propriety of the refusal charge. We conclude that Officer Marler's swift action was proper in light of the reliable tip and the fear of person operating a vehicle while intoxicated fleeing the scene of an accident .

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.

ENTERED: