

STATE OF RHODE ISLAND AND PROVIDENCE PLANTATIONS

PROVIDENCE, S.C.

RHODE ISLAND TRAFFIC TRIBUNAL

TOWN OF SMITHFIELD

v.

STEPHEN BEAUREGARD

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C.A. No. T11-0014

DECISION

PER CURIAM: Before this Panel on April 27, 2011—Magistrate Goulart (Chairman presiding), Judge Parker, and Magistrate DiSandro, sitting—is the State of Rhode Island’s (Appellant) appeal from Chief Magistrate Guglietta’s decision, dismissing the charged violation of G.L. 1956 § 31-27-2.1, “Refusal to submit to a chemical test” brought against Stephen Beauregard (Appellee). Both parties were represented by counsel before this Panel. Jurisdiction is pursuant to § 31-41.1-8.

Facts and Travel

On December 30, 2010, after observing Appellee operate his vehicle in an erratic manner, an officer of the Smithfield Police Department, (Officer Phillips) conducted a traffic stop. After observing Appellee fail a series of sobriety tests, Officer Phillips charged him with violating the aforementioned motor vehicle offense. Appellee contested the charge, and the matter proceeded to trial.

The trial began with Officer Phillips’ testimony regarding his background and experience as a police officer, in particular with DUI stops. (Tr. at 2.) He testified that in his sixteen months as a police officer, he had investigated “approximately a dozen or so

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intoxicated operators, as well as people being under the influence[.]. . .” (Tr. at 3.) Further, Officer Phillips testified that he had received formal training at the Municipal Police Academy in 2009, where he learned to administer the customary field sobriety tests. (Tr. at 4.)

Turning to the events of December 13, 2010, Officer Phillips testified that at about 1:00 a.m., he “observed a large SUV directly in front of [his] location swerving from side to side in the northbound lane of travel on Cedar Swamp Road [in Smithfield, Rhode Island].” (Tr. at 6.) The vehicle, which belonged to the Appellee, proceeded to make a “wide right hand turn to the southbound lane of travel on Pleasant View Avenue. . . .[.] shortly thereafter it abruptly turned into a parking lot of DePetrillo’s Pizza and the Smithfield Ice Rink.” (Tr. at 7.) Officer Phillips testified that he then approached the vehicle and asked Appellee to provide him with a license and registration, a request Appellee refused. (Tr. at 9.) Appellee informed the officer that his name was Stephen A. Smith, and further provided the officer false information about his birth. Id. The officer also noted that he “noticed a moderate odor of alcohol. . . . [Appellee] was also thick-tongued and slurred at times. His eyes were moderately bloodshot and glossy. (Tr. at 10.) He additionally testified that Appellee admitted that he had consumed “a couple of beers.” Id.

Officer Phillips determined Appellee’s real identity through the vehicle’s registration. The officer continued his DUI investigation by requesting Appellee to perform a battery of field sobriety tests. Appellee performed and failed the HGN test, the one-legged stand test, and the walk and turn test. (Tr. at 13.) Subsequently, Officer Phillips placed Appellee under arrest for suspicion of DUI. (Tr. at 14.) He read Appellee

14.) He read Appellee the "Rights for Use at Scene," placed him under arrest, and transported him to the Smithfield Police Department. (Tr. at 15.) The officer testified that at the police station, Appellant was read his "Rights for Use at Station," and per those rights, elected to make a phone call. (Tr. at 17.) According to the officer, "[a]fter his confidential phone call, he signed the form stating he refused to submit to a chemical test at [the officer's] request. . . ." (Tr. at 18.)

On cross-examination, the officer testified that he had asked the Appellee if he had "any medical conditions that would prevent him from performing [the tests]," but he admitted that he never asked Appellant about how long he had been awake prior to the traffic stop or if he had any allergies. (Tr. at 26.) He admitted that he did not attempt to contact any bail commissioners on behalf of the Appellee, and that Appellee was not released until the next morning after he was arraigned at the District Court. When asked, Officer Phillips claimed that he never verbally offered to take Appellee to the hospital for any independent exam. (Tr. at 37.)

Next Appellee took the stand to testify on his own behalf. He testified he had worked almost 50 hours in the three days leading up to the incident, and so fatigue certainly could have played a part in his demeanor and driving ability. (Tr. at 51.) Appellee testified that he informed police that he "wished to exercise the rights" read to him by the arresting officer. (Tr. at 52.) However, he claimed that he did not truly receive his right to a confidential phone call. According to the testimony of the Appellee, his call was made on a phone provided by the police department, a landline as he described it. Id. While he made his call, which resulted in a voice message to his attorney, a police officer stood within five feet of him, and another stood in the doorway

of the room in which he made the call Id. The presence of police during the call, Appellee claimed, made him “nervous, [he] didn’t wanna [sic] say somethin[g] [he] shouldn’t [be]cause [he] didn’t feel [he] had done anything wrong.” (Tr. at 53.) As a result, he left a very generic message with his lawyer, something to the affect of “I’m in the Smithfield Police station. . . .” Id. Appellee claims that he asked for another phone call but was denied that opportunity. (Tr. at 54.) Lastly, Appellee informed the Court that he was held in the station until his arraignment at about 10:00 a.m. the next morning. (Tr. at 56.) He claims that had he been released earlier in the night, he would have gone “to Fatima Hospital and have a blood test.” (Tr. at 56.)

On cross-examination Appellee stated that at no time did he ask any of the police officers present in the room at the time he made his phone call to exit the room. (Tr. at 63.) Appellee also reiterated that he asked for another phone call but was denied any further opportunity to use the phone.

At the close of the evidence, the trial magistrate dismissed the charges against the Appellee. He held that the testimony demonstrated that Appellee never received a confidential phone call. (Tr. at 87.) Further, because Appellee told police that he would be calling his attorney, the trial magistrate found that Appellee’s rights were prejudiced by the police presence in the room as he made his phone call. (Tr. at 88.) The charge was dismissed. The State 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 as to the weight of the evidence on questions of fact. The appeals panel may affirm the decision of the judge or magistrate, or it may remand the case for further proceedings or reverse or modify the decision if the substantial rights of the appellant have been prejudicial because the judge's findings, inferences, conclusions or decisions are:

- (1) In violation of constitutional or statutory provisions;
- (2) In excess of the statutory authority of the judge or magistrate;
- (3) Made upon unlawful procedure;
- (4) Affected by other error of law;
- (5) Clearly erroneous in view of the reliable, probative, and substantial evidence on the whole record; or
- (6) Arbitrary or capricious or characterized by abuse of discretion or clearly unwarranted exercise of discretion.

In reviewing a hearing judge or magistrate's decision pursuant to § 31-41.1-8, this Panel "lacks the authority to assess witness credibility or to substitute its judgment for that of the hearing judge [or magistrate] concerning the weight of the evidence on questions of fact." Link v. State, 633 A.2d 1345, 1348 (R.I. 1993) (citing Liberty Mutual Insurance Co. v. Janes, 586 A.2d 536, 537 (R.I. 1991)). "The review of the Appeals Panel is confined to a reading of the record to determine whether the judge's [or magistrate's] decision is supported by legally competent evidence or is affected by an error of law." Link, 633 A.2d at 1348 (citing Environmental Scientific Corp. v. Durfee, 621 A.2d 200,

208 (R.I. 1993)). “In circumstances in which the Appeals Panel determines that the decision is clearly erroneous in view of the reliable, probative, and substantial evidence on the whole record or is affected by error of law, it may remand, reverse, or modify the decision.” Link, 633 A.2d at 1348. Otherwise, it must affirm the hearing judge’s [or magistrate’s] conclusions on appeal. See Janes, 586 A.2d at 537.

### **Analysis**

On appeal, the State argues that the trial magistrate’s decision is affected by error of law and warrants reversal. Specifically, the State asserts that it was error to dismiss the charge simply because officers were present in the room as Appellee left a voice message on the answering machine of his attorney. In opposition to the State’s appeal, Appellee maintains that the trial magistrate was correct in finding prejudice by the police presence as the phone call was made. Further, the Appellee asserts that the dismissal should also be upheld in light of the fact that he was not released until the next morning, thereby thwarting his right to a independent medical exam guaranteed by law.

### **Independent Medical Exam**

Before delving into the State’s issue on appeal, this Panel shall briefly discuss the secondary issue raised by the Appellee regarding the supposed denial of his right to an independent medical exam. Section 31-27-3 holds that police “shall inform the person of this right [to an independent examination] and afford that person a reasonable opportunity to do so[.]” This Panel finds no binding case law or any statute that supports Appellee’s contention that prejudice results when an arrestee, who at no time makes a request for an independent medical exam, is lawfully kept in custody until such time for his

arraignment. See generally State v. Langella, 650 A.2d 478, 479 (R.I. 1994) (“the obvious intent of the statute is to guarantee that a defendant is informed[]”).

The “Rights for Use at Station” form, along with the standard operating procedure of police departments, is designed to meet the requirements of statutory law, such as §§ 12-7-20, 31-27-2, and 31-27-3, and to avoid situations in which an arrested motorist is deprived of his or her rights. The form clearly informs the arrestee that he or she has a right to seek an independent chemical test, regardless of whether he or she chooses to submit to one administered by police. The flaw in Appellee’s assertion on appeal is that nowhere in the record can this Panel find where he informed any member of the North Smithfield Police Department that he desired to exercise that right. While he testified on direct examination that had he been released earlier in the night, he would have “[g]o[ne] to Fatima Hospital and ha[d] a blood test,” he never made this desire known to police. (Tr. at 56.)<sup>1</sup> It is the duty of the arrestee to invoke his or her right to be examined, not the officer’s. Commonwealth v. Lidner, 478 N.E. 2d 1267, 1268 (Mass. 1985) (holding that the primary responsibility in obtaining an independent chemical test does not lie with law enforcement).

As this Panel has noted previously, if a court were to hold otherwise, one can imagine the resulting consequence of essentially nullifying § 31-27-2.1 altogether. An arrested motorist could simply refuse the test, not request an independent exam, and then purposely delay a few hours before arranging for his release. At trial, he could escape the consequences by simply pointing out that he was deprived of his right under § 31-27-3, because he was in custody at a time when he could have been independently examined.

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<sup>1</sup> Appellee did testify that he was denied a request for a second phone call, but according to Appellee that call would have been to secure bail money from his girlfriend and not to make arrangements for an independent exam. (Tr. at 55.)

### Confidential Phone Call

The State argues that it was error of law for the trial magistrate to dismiss the case due to his finding that the motorist was not afforded a confidential phone call and was prejudiced by the lack of confidentiality. The real issue is not whether the phone call was confidential or not, as the testimony of Appellee which was accepted as credible by the trial magistrate, clearly demonstrated that the phone call was not confidential at all. Rather, the issue is whether or not Appellee was prejudiced by the officer or officers' presence in the room as he called and left a message on his attorney's answering machine.

Prejudice is the operative word in these matters in light of our Supreme Court's ruling in State v. Carcieri 730 A.2d 11, 15, (R.I.1999). Faced with similar facts as it pertained to a criminal DUI charge, the Court declared that "in order to enjoy the benefit mandated by [the legislature], a suspect must be informed of his or her right to a confidential phone call." Id. In regards to instances where a phone call has been denied or its confidentiality jeopardized, the court stated that dismissal is not the appropriate remedy unless "the defendant has made a showing of demonstrable prejudice, or a substantial threat thereof." Id. at 16. Thus, our task is to judge whether or not the trial magistrate erred when he found that Appellee was prejudiced by the presence of police officers when he left a voice message on his lawyer's answering machine.

Black's Law Dictionary defines prejudice as "[d]amage or detriment to one's legal rights or claims." Blacks Law Dictionary, 300 (6<sup>th</sup> ed. 1990). First, as this Panel has previously noted, Appellee at the time he was deciding to submit to a chemical test,

did not possess nor was he entitled to any “legal right” to counsel. As our Supreme Court held in Dunn v. Petit, 120 R.I. 486, 490 388 A.2d 809, 811 (1978) (collecting cases),

“[d]espite the possibility that civil and criminal results might flow from the refusal to submit to a chemical test under an implied-consent statute, courts have been unanimous in their perception that no constitutional right to counsel adheres at the moment of decision as to whether or not to submit to the test.” See also Schmerber v. California, 384 U.S. 757, 765 (1966).

We cannot then say that his “legal right” to counsel was infringed upon, when no such right existed.

However, we understand that prejudice can exist without the violation of a constitutional right. Even though Appellee had no right to an attorney, he could still have been prejudiced by police presence which could destroy confidentiality with his attorney and frustrate the very purpose of the safeguards implemented by the General Assembly. According to the trial magistrate, that is what happened. Because there were police present in the room at the time the phone call was made, the trial magistrate held that “[Appellee] could not get proper advice from his attorney in this matter.” (Tr. at 87.) This Panel’s review of the record fails to find support of that conclusion.

“We believe that our responsibility on review is to make sure that suspicion, speculation, or conjecture are not substituted for probative evidence. . . .” State v. Gazerro, 420 A.2d 816, 829 (R.I. 1980). When claims of prejudice are only based on speculation, such claims will be held invalid. Cooks v. Spalding, 660 F.2d 738, 739, (9<sup>th</sup> Cir. 1981). After a careful review, this Panel is firm in its belief that only speculation and a series of “what ifs” could lead one to conclude that Appellee was prejudiced and unable

to receive proper advice from his attorney. For that reason, we find that the trial magistrate erred when he dismissed the refusal charge on that basis.

In attempting to justify the trial magistrate's decision before this Panel, Appellee's argument in support of his finding of prejudice came only in the form of a hypothetical scenario that never actually occurred. Instead of the more "generic" voicemail he chose to leave with his attorney, Appellee claims that had been alone in the room, he would have left a far more candid and detailed message, one that would have been transmitted with a greater sense of urgency. He goes on to compound that hypothetical scenario with another, alleging that had the hypothetical voicemail been received immediately by his attorney, it would have prompted the attorney to respond quickly and provided the Appellee with much needed legal advice intended by the legislature when it guaranteed a phone call for those arrested.

The reason courts are dissuaded from making legal determinations, such as a finding of prejudice, based upon hypothetical scenarios and other forms of conjecture is that it is just as easy for an opposing party to hypothetically determine the opposite. Even in Appellee's posited hypothetical, there are questions left unanswered. Remaining unanswered are how long it would have taken the attorney to return the call, how long after the call the police would have waited before offering a chemical test, or whether the police would have waited for a return call at all. Moreover, from the facts contained in the record, it could just as easily be assumed that had Appellee made his phone call in a sound proof room, far out of the earshot of any officer, Appellee's attorney would have been sound asleep at that late hour and would never have heard the phone ring. Thus

even the most detailed and urgent message would not have been received at the desired time and therefore not resulted in Appellee obtaining any legal advice.

The fact that there are a litany of hypothetical situations that could both validate and invalidate a claim of prejudice demonstrates the glaring fact that there is no substantial and probative evidence in the record that any such prejudice exists. Recognizing that in order “[t]o establish actual prejudice a defendant cannot rely upon vague, speculative, or conclusory allegations[,]” Commonwealth v. Scher, 803 A.2d 1204, 1238 (Pa. 2002) (citing United States v. Crouch, 84 F.3d 1497, 1515 (5th Cir.1996)), we are unable to agree with the trial magistrate’s determination and his subsequent decision to dismiss the refusal charge. Based upon our Supreme Court’s holding in Carcieri, we fail to find the any demonstrable prejudice resulted from the presence of police in the room as Appellee left a voicemail for his attorney. Therefore, the members of this Panel conclude that the decision of the trial magistrate to dismiss the charged violation of § 31-27-2.1 was affected by error of law and not supported by the reliable, probative and substantial evidence of record.

#### **Conclusion**

This Panel has reviewed the entire record before it. Having done so, the members of this Panel conclude that the trial judge’s decision to dismiss the charged violation of § 31-27-2.1 was clearly erroneous in light of the reliable, probative, and substantial record evidence and affected by error of law.

Substantial rights of the State have been prejudiced. Accordingly, the State's appeal is granted. The matter is remanded to the trial judge for further proceedings consistent with this opinion.

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