

STATE OF RHODE ISLAND AND PROVIDENCE PLANTATIONS

CRANSTON, RITT

RHODE ISLAND TRAFFIC TRIBUNAL

CITY OF WOONSOCKET

v.

LAMPHONE VORAVONGSA

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C.A. No. T11-0065

STATE OF RHODE ISLAND  
TRAFFIC TRIBUNAL  
FILED  
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DECISION

PER CURIAM: Before this Panel on November 2, 2011—Magistrate Goulart (Chair, presiding), Judge Parker, and Judge Ciullo, sitting—is Lamphone Voravongsa’s (Appellant) appeal from a decision of Chief Magistrate Guglietta (“trial magistrate”), sustaining the charged violation of G.L. 1956 § 31-27-2.1 “Refusal to submit to a chemical test.”<sup>1</sup> Appellant was represented by counsel before this Panel. Jurisdiction is pursuant to G.L. 1956 § 31-41.1-8.

Facts and Travel

On September 3, 2011, Officer Michael Velino (Officer Velino) of the Woonsocket Police Department charged Appellant with the aforementioned violations of the motor vehicle code. Appellant contested the charges, and the matter proceeded to trial on September 29, 2011.

On the morning of the arrest, Officer Velino was in the Woonsocket Police Department’s headquarters. (Tr. at 10.) Officer Velino was dispatched to respond to Park Avenue for a report of a motor vehicle accident. Id. Officer Velino responded to the location of the reported accident and observed a Jeep Compass lying on its side in the roadway. Id. Officer Velino identified the operator of the disabled vehicle through an eyewitness on scene as the Appellant. (Tr. at 11.)

<sup>1</sup> Appellant was also cited for violations of G.L. 1956 § 31-15-1, “Right half of the road,” and G.L. 1956 § 31-14-1, “Reasonable and prudent speeds.” After trial, these violations were dismissed and are not presently before this Panel on appeal.

Officer Velino approached the Appellant to conduct an interview regarding the accident. Upon speaking with the Appellant, Officer Velino described the Appellant's speech as mumbled and slurred. (Tr. at 11.) The Appellant explained to Officer Velino that another vehicle swerved in his direction causing him to crash. (Tr. at 12.) During the conversation, Officer Velino also detected a faint odor of alcohol on the Appellant's breath, as well as bloodshot eyes. Id. Based on these observations, Officer Velino asked the Appellant to submit to a series of field sobriety tests. Id.

Officer Velino conducted the horizontal gaze nystagmus test. (Tr. at 13.) Next, Officer Velino had the Appellant perform the walk and turn test. (Tr. at 14.) During Appellant's performance of the walk and turn test, Officer Velino observed Appellant exhibit five out of eight clues for intoxication.<sup>2</sup> (Tr. at 15.) Officer Velino stated that exhibiting two clues would be considered failing the test. (Tr. at 16.) Appellant then performed the one-legged stand test. (Tr. at 17.) According to Officer Velino, Appellant exhibited only one clue for intoxication during the test. (Tr. at 18.)

At this point, Officer Velino placed Appellant under arrest for suspicion of driving while impaired. Officer Velino read the Appellant his "Rights for Use at the Scene." (Tr. at 19.) Appellant was transported back to the police station where he was read his "Rights for Use at the Station." (Tr. at 21.) Then, Officer Velino asked Appellant to submit to a chemical test, which Appellant refused. (Tr. at 23.)

Also at the station, Appellant was afforded the right to use the phone. (Tr. at 31.) Appellant indicated to Officer Velino that he would call his wife. However, the phone typically used by arrested individuals was inoperable that morning. Id. Instead, Officer Velino attempted

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<sup>2</sup> Officer Velino stated that those clues were "[h]e used his arms for balance, made an improper turn, stepped off the line, broke heel to toe and stopped walking as he did the test." (Tr. at 16.)

to bring another phone into the room. Unfortunately, the phone cord was not long enough to reach the room where confidential phone calls normally took place. As a result, the phone call was to take place in a separate room where Officer Velino was present. (Tr. at 37.) Appellant informed Officer Velino that he would be speaking Laotian during the phone call. (Tr. at 31.) Officer Velino determined that he could remain in the room with Appellant during the phone call because he would not understand the Appellant's conversation. Officer Velino remained in the room, approximately ten feet from the Appellant, while Appellant made his phone call. (Tr. at 37.)

At the close of evidence, Appellant argued that the charged violations should be dismissed. Appellant argued that Officer Velino's presence during his phone call required the violation of § 31-27-2.1 to be dismissed. Additionally, Appellant argued that Officer Velino did not have reasonable grounds to ask Appellant to submit to a chemical test. Finally, Appellant argued that the violations of §§ 31-15-1 and 31-14-1 were not supported by the reliable, probative, and substantial evidence on the whole record.

The trial magistrate determined that the prosecution had failed to carry its burden for the violations of §§ 31-15-1 and 31-14-1. As a result, the trial magistrate dismissed these violations. (Tr. at 57.) For the remaining violation of § 31-27-2.1, the trial magistrate determined that Officer Velino was a credible witness. (Tr. at 60.) The trial magistrate also determined that Officer Velino had reasonable grounds to ask Appellant to submit to a chemical test based on Officer Velino's observations of the Appellant. (Tr. at 63.) Finally, the trial magistrate held that Appellant's right to a confidential phone call was not violated because while Officer Velino was present, he did not understand what the Appellant was communicating in Laotian. (Tr. at 69.)

As such, the trial magistrate sustained the violation of § 31-27-2.1. Appellant timely filed this appeal.

### **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, Appellant contends that the trial magistrate’s decision to sustain the violation of § 31-27-2.1 was characterized by an abuse of discretion, not supported by the reliable, probative, and substantial evidence on the whole record, and in violation of statutory provisions. Specifically, Appellant contends that Officer Velino did not have reasonable grounds to ask Appellant to submit to a chemical test. Appellant further contends that his right to a confidential phone call was violated and the violation of § 31-27-2.1 should have been dismissed as a result.<sup>3</sup>

#### **A. Reasonable Grounds**

On appeal, Appellant argues that Officer Velino did not have reasonable grounds to ask Appellant to submit to a chemical test. Section 31-27-2.1 of Rhode Island General laws states, in pertinent part, that a: “law enforcement officer making [a] sworn report had reasonable grounds to believe that the arrested person had been driving a motor vehicle within this state while under the influence of intoxicating liquor. . . .” (Emphasis added.) Our Supreme Court has stated the reasonable grounds standard is the same as the reasonable suspicion standard. See State v. Jenkins, 673 A.2d 1094, 1097 (R.I. 1996) (“Under the language of the statute it is clear that reasonable suspicion is the proper standard for evaluating the lawfulness of a stop.”)

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<sup>3</sup> At oral argument, Appellant argued that his right to be free from unequal treatment as guaranteed by the Equal Protection Clause of the Fourteenth Amendment was violated. Appellant did not raise this argument at trial. As a result, it was not properly preserved for this appeal. See State v. Hazard, 785 A.2d 111, 116 (R.I.2001) (“Under our well-settled raise-or-waive rule, failure to make an argument to a trial justice waives the right to raise that argument on appeal.”).

“[R]easonable suspicion [is] based on articulable facts that the person is engaged in criminal activity.” State v. Keohane, 814 A.2d 327, 330 (R.I. 2003). To determine whether an officer’s suspicions are sufficiently reasonable, the Court must take into account the totality of the circumstances.” Id. (citing United States v. Cortez, 449 U.S. 411, 417 (1981) and State v. Tavares, 572 A.2d 276, 278 (R.I. 1990)).

In sustaining the violation, the trial magistrate held that the Appellant’s “mumbled speech, the slurred speech,” the faint odor of alcohol, bloodshot eyes, and Appellant’s performance on the walk and turn test gave Officer Velino reasonable grounds to believe that Appellant was operating a vehicle while under the influence of alcohol. (Tr. at 63-64.) Additionally, the trial magistrate noted that Officer Velino was trained in DUI detection and had performed eight to ten DUI stops in his career as a police officer. (Tr. at 7-8.)

This Panel sees no abuse of discretion made by the trial magistrate’s findings. The trial magistrate’s decision was supported by Officer Velino’s testimony and the exhibits entered into evidence at trial. Furthermore, the trial magistrate’s decision was supported by the reliable, probative, and substantial evidence on the whole record before him. Therefore, substantial rights of the Appellant have not been prejudiced.

#### **B. Confidential Phone**

Appellant next contends that the trial magistrate abused his discretion and acted in violation of statutory provisions by not dismissing the violation of § 31-27-2.1 after it was determined Officer Velino was present during the Appellant’s phone call. Instead, the trial magistrate held “that the minimum level of confidentiality took place. . . .” (Tr. at 69.) The trial magistrate based his decision on the fact that Officer Velino did not understand Laotian, and as a result, Officer Velino did not understand the Appellant.

Appellant directs this Panel to Section 12-7-20 of the Rhode Island General Laws, which states:

Any person arrested under the provisions of this chapter 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 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. G.L. 1956 § 12-7-20.<sup>4</sup>

Our Supreme Court, on two separate occasions, has had the opportunity to address confidential phone calls in the driving while under the influence setting. In both instances, the Court determined that a defendant must make a showing of prejudice when his or her right to a confidential phone call has been breached. State v. Carcieri, 730 A.2d 11, 16 (R.I. 1999) (The Court will not dismiss a charge for lack of a confidential phone call unless the defendant can make a showing of prejudice or a substantial threat of prejudice.). Our Supreme Court also cautioned that dismissal of a criminal charge for failing to comply with the confidential phone call requirement was a drastic remedy. Furthermore the Carcieri Court noted that dismissal should only be employed as a last resort and is “limited to cases of extreme and substantial prejudice.” See id.

Applying these principles in the context of § 31-27-2.1, this Panel does not find that Officer Velino’s presence during Appellant’s phone call warrants a dismissal of the charged violation. State v. Veltri, 764 A.2d 163, 167 (R.I. 2001) (Section 12-7-20 is not violated simply

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<sup>4</sup> Appellant’s argument is based solely on the issue of whether the trial magistrate abused his discretion in not dismissing the charged violation. Appellant does not raise the greater issue of whether a confidential phone call applies to violations of § 31-27-2.1. Thus, this Panel will address only the issue before it.

by the presence of a police officer during the confidential phone call.). Appellant has not made a showing of any prejudice suffered by Officer Velino's presence. The trial magistrate determined that Officer Velino was ten feet away and did not understand Appellant's conversation. Thus, the trial magistrate concluded that Appellant's right to a confidential phone call was not violated, and Appellant was not prejudiced by Officer Velino's presence.

### Conclusion

This Panel has reviewed the entire record before it. Having done so, the members of this Panel are satisfied that the trial magistrate's decision was not an abuse of discretion, was supported by the reliable, probative, and substantial evidence on the whole record, and not made in violation of statutory provisions. Substantial rights of Appellant have not been prejudiced. Accordingly, Appellant's appeal is denied, and the charged violation is sustained.