STATE OF RHODE ISLAND AND PROVIDENCE PLANTATIONS

CRANSTON, RITT **RHODE ISLAND TRAFFIC TRIBUNAL**

TOWN OF SMITHFIELD	:	
	:	
v.	:	**C.A. No. T12-0022**
	:	**11411500622**
BADOUI SLEIMAN	:	

DECISION

PER CURIAM: Before this Panel on May 16, 2012—Judge Almeida (Chair, presiding), Chief Magistrate Guglietta, and Administrative Magistrate Cruise, sitting—is the appeal of Badoui Sleiman's ("Appellant") from a decision of Magistrate DiSandro (trial magistrate), 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 § 31-41.1-8.

Facts and Travel

On October 22, 2011, Officer Coleman ("Officer Coleman" or "Officer") of the Smithfield Police Department charged the Appellant with violation of § 31-27-2.1, "Refusal to submit to a chemical test;" § 31-27-2.3, "Revocation of license upon refusal to submit to preliminary breath test;" and § 31-15-3, "Passing of vehicles proceeding in opposite directions." The Appellant contested the charge, and the matter proceeded to trial on April 5, 2012. The trial magistrate sustained the charged violations, and the Appellant filed this appeal solely on the refusal to submit to a chemical test charge.

The facts are as follows. On October 22, 2011, at approximately 10:30 p.m., Officer Coleman received a dispatch advising him of an erratic operator in a black BMW driving

southbound on Route 116. (Trial Tr. at 49-51.) After locating the vehicle, he followed it and testified that he saw the vehicle cross the center double yellow line and nearly strike a northbound vehicle.[1] (Trial Tr. at 53-55.) Subsequently, Officer Coleman initiated a traffic stop and identified the vehicle's operator as Badoui Sleiman. (Trial Tr. at 56.) Upon approaching the vehicle, he detected a strong odor of alcohol on the Appellant and described his speech as thick tongued and slurred. (Trial Tr. at 57-58.) In his testimony, however, Officer Coleman also acknowledged that English was not the Appellant's first language. (Trial Tr. at 98.)

The Officer requested that the Appellant submit to a field sobriety test, to which the Appellant consented. (Trial Tr. at 61.) At trial, Officer Coleman testified that he was properly trained in field sobriety tests and has professional experience in DUI investigations, having participated in more than 100 DUI investigations and more than 100 DUI arrests.[2] (Trial Tr. at 40-42.) As the Appellant exited the vehicle, Officer Coleman testified that he observed that the Appellant had poor coordination, used his hands on his vehicle for support, and displayed bloodshot, watery eyes. (Tr. at 59-60.) At the time, the Appellant was on prescription medication for cholesterol and blood pressure. (Trial Tr. at 60-61.)

After administering the sobriety tests and concluding that the Appellant was intoxicated, Officer Coleman asked the Appellant to submit to a preliminary breath test.[3] (Trial Tr. at 70-71.) The Appellant refused the request. (Trial Tr. at 71.) Subsequently, the Officer arrested the

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[1] Officer Coleman described Route 116 as a two-lane highway with one lane designated for north travel and one lane designated for south travel. Each lane is separated by a center double yellow line. (Trial Tr. at 81.)

[2] Specifically, Officer Coleman testified that he received his training from the Rhode Island Municipal Police Academy, graduating in 2005. (Trial Tr. at 40.) He also received training in the Advance Impairment Recognition Program and graduated in 2010. Moreover, Officer Coleman is a Drug Recognition Expert and Drug Recognition Instructor. (Trial Tr. at 41.)

[3] This Court considered the Defendant's motion to suppress the results of the standardized field sobriety test. (Decision Tr. at 13.) The Defendant claimed that the test was not administered under proper conditions and obtained in violation of the Appellant's privilege against self incrimination. Id. This Court found the test to be non-testimonial and not protected under the privilege against self incrimination. Id. Consequently, Defense's motion to suppress was denied. Id.

Appellant and advised him of his rights by reading the "Rights For Use at the Scene" card. (Trial Tr. at 73.) He asked the Appellant if he understood those rights, but the Appellant did not respond. (Trial Tr. at 74.) The Appellant was then transported to police headquarters. Id.

At the station's processing room, Officer Coleman advised the Appellant of his rights by reading the "Rights For Use at the Station" form. (Trial Tr. at 75.) Although this document informed the Appellant of his right to a phone call, it did not include the word "confidential." (Trial Tr. 104.) The Appellant declined the offer. (Trial Tr. at 103.) Thereafter, Officer Coleman asked again if the Defendant would like to make a phone call, this time using the word "confidential." (Trial Tr. 104, 106.) Allegedly, the police department has a policy of allowing arrestees a second opportunity to make a phone call. (Trial Tr. at 103.) Officer Coleman also requested that the Appellant submit to a chemical breath test, but the Appellant refused. (Trial Tr. at 77-78.) Although the Officer did not ask the Appellant whether he understood his rights, the Defendant signed the "Rights For Use at the Station" form, acknowledging that the Officer read him his rights and that he refused to take the chemical test. (Trial Tr. at 77-78.) Following this exchange, the Officer prepared an affidavit for initial suspension and signed it. (Trial Tr. at 79-80.) Although the affidavit was notarized before trial, it was not done so in Officer Coleman's presence.[4] (Trial Tr. at 85.) In his testimony, the Officer conceded that he did not swear to the veracity of the affidavit in the presence of a notary public. (Trial Tr. at 84-85.)

At trial, the Appellant's counsel moved to dismiss for lack of a sworn report and insufficient notice to the Appellant to make a confidential phone call. (Trial Tr. at 109.) The trial magistrate, however, denied the motion. (Trial Tr. at 110.) He explained that a sworn report was not an element of § 37-21-2.1. The trial magistrate was satisfied that the police

[4] In his testimony, Officer Coleman explained that the police department has a policy where the arresting officer completes a prosecution package, signs the forms, and submits them to a sergeant for review. (Trial Tr. at 85-86.) The sergeants are notaries who will affix their seal after reviewing and accepting the documents. (Trial Tr. at 85.)

officer prepared an affidavit and signed it, albeit not in the presence of a notary. In support of his conclusion, he pointed to Link v. State as standing for the proposition that once the preliminary order was either entered or not entered, the role of the sworn affidavit is of no further consequence. The magistrate further explained that the reading of the "Rights for Use at the Station" constituted sufficient notice and went beyond the Officer's required duties. (Trial Tr. at 111-12). According to the trial magistrate, the Officer also went beyond his normal duties by offering the Defendant a second time to make a phone call. (Trial Tr. at 112.)

The trial magistrate sustained the charge of § 31-27-2.1 and concluded that the sworn report complied with the requirements of this provision. (Decision Tr. at 28.) Namely, Officer Coleman signed an affidavit in support of his arrest of the Appellant and swore to it. (Decision Tr. at 28.) The affidavit was also signed by a notary. (Decision Tr. at 28.) The trial magistrate further found, by clear and convincing evidence, that the Officer had reasonable suspicion to stop the Appellant's vehicle and believe that the Appellant was intoxicated. (Decision Tr. at 24-25.) In coming to this conclusion, the trial magistrate considered the totality of the circumstances, including Officer Coleman's observation that the Appellant crossed the double yellow center dividing line, his odor of alcohol, his bloodshot watery eyes, the Appellant's admission to consuming two alcoholic drinks at a party prior to operating the vehicle, his lack of coordination, and the failed field sobriety tests. (Decision Tr. at 25-26.) The trial magistrate also held that the Appellant was afforded a confidential phone call but declined the offer. (Decision Tr. at 27.)

The Appellant filed a timely appeal. On appeal, the Appellant contends that the magistrate committed reversible errors of law when he sustained the charge of refusal to submit to a chemical test in violation of § 31-27-2.1. First, he argues that the State did not prove by clear and convincing evidence that the Smithfield Police offered the Appellant an opportunity to

make confidential phone call. Second, the Appellant argues that Officer Coleman did not have reasonable grounds for asking the Appellant to submit to a chemical test. Finally, he claims that when Officer Coleman completed his Report of Law Enforcement, he did not swear to the veracity of the report before a notary in violation of § 31-27-2.1.

In response, the State argues that the Appellant was given an opportunity to make a confidential phone call because Officer Coleman informed the Appellant of his rights, including the right to a phone call. Second, the State claims that there were reasonable grounds to ask the Appellant to submit to a chemical test. Namely, the State points to Officer Coleman's testimony that he observed the Appellant crossing the center double yellow line and noticed that the Appellant had bloodshot, watery eyes, poor coordination, slurred and thick tongued speech, and an odor of alcohol. Finally, the State argues that that the requisite findings at the hearing do not depend on the validity of the sworn report. The State also claims that the sworn report complied with § 31-27-2.1 because Officer Coleman signed the affidavit in support of the Appellant's arrest.

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 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 [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 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 [or magistrate's] conclusions on appeal. See Janes, 586 A.2d at 537.

Analysis

Refusal charges, which occur when an individual refuses a breathalyzer test, divide into "two distinct [procedural] parts." Link v. State, 633 A.2d 1345, 1349 (R.I. 1993). The first such part is a "pre-hearing procedure initiated by an arrested driver's refusal to submit to a chemical test." Id. Such procedure, under § 31-27-2.1, is automatic suspension of the individual's driver's license provided there exist the requisite criteria. The second procedural part is a Rhode

Island Traffic Tribunal ("RITT") hearing to determine whether the automatic driver's license suspension should be sustained or dismissed. For the Court to sustain the license suspension, § 31-27-2.1 requires four conditions: 1) a sworn report stating that a law enforcement officer possessed reasonable grounds to suspect the arrestee of driving under the influence; 2) the refusal of the arrestee to submit to a chemical test upon a law enforcement officer's request; 3) the reading of rights to the arrestee in accordance with § 31-27-3; and 4) the notification of the arrestee regarding penalties that will be incurred as result of noncompliance.

A. Confidential Phone Call

Persons arrested for driving under the influence must be informed of their right to a confidential phone call and subsequently provided the opportunity to make such call for the purpose of "securing an attorney or arranging for bail." State v. Carcieri, 730 A.2d 11, 14 (R.I. 1999). This right is provided by § 12-7-20, which states, in pertinent part, that

> [a]ny 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 . . . . 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.

§ 12-7-20.

Our Supreme Court has held that this provision applies to the civil charge of refusal to submit to a chemical test. See State v. Quattrucci, 39 A.3d 1036, 1042 (R.I. 2012) (concluding that the defendant, who was charged with refusing to submit to a chemical test, was entitled to the use of a telephone call under § 12-7-20). The arresting officer may satisfy the obligation to notify the arrestee of his right to a confidential phone call by reading the "Rights for Use at the Station" form. Carcieri, 730 A.2d at 16. Moreover, an officer's failure to notify a suspect of his

right to a telephone call is not procedurally fatal unless prejudice results. Id. at 15 (finding that prejudice rarely occurs when an arrestee has been read his rights and provided fair opportunity to make a confidential phone call).

Furthermore, the arrestee's phone call must be carried out in a manner affording confidentiality between the arrestee and the call recipient. Quattrucci, 39 A.3d at 1042; Carcieri, 730 A.2d at 15. The confidentiality requirement under § 12-7-20, however, "only attaches when the purpose of the call is to speak to an attorney or to arrange for bail." Quattrucci, 39 A.3d at 1043. The mere presence of an officer at the location where the arrestee makes a phone call does not necessarily destroy confidentiality. Farrell v. Municipality of Anchorage, 682 P.2d 1128, 1130 (Alaska App. 1984). For example, an out-of-earshot consultation between an arrestee and his lawyer may prove adequate to protect both the confidentiality of an attorney-client consultation and the integrity of chemical tests. Bickler v. North Dakota State Highway Comm'r, 423 N.W.2d 146, 148 (N.D. 1988).

In this case, the record does not evidence substantial prejudice regarding the lack of an opportunity to make a confidential phone call. Officer Coleman testified that he read the Appellant his rights both at the location of the arrest and at the police station. (Trial Tr. at 73, 75.) Such an action qualifies as providing Appellant adequate legal notice of his right to a confidential phone call. See Carcieri, 730 A.2d at 16 (explaining that the language in a "Rights for Use at Station" form, such as "A telephone is available for you to contact an attorney," provides adequate notice to a suspect of his or her rights under the statute). Additionally, the testimony by the officer indicated that the Appellant was told he had a right to a confidential phone call. (Trial Tr. at 104, 106.) Although the Appellant was provided two opportunities to make a confidential phone call, he declined to do so. (Trial Tr. at 75, 103-104, 106.) Therefore,

the trial magistrate's finding that the Appellant was afforded a confidential phone call was not affected by law or clearly erroneous.

B. Reasonable Suspicion

The Appellant also argues that Officer Coleman 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 [must have] 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."). "[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. Tavarez, 572 A.2d 276, 278 (R.I. 1990)).

In this case, the trial magistrate found by clear and convincing evidence that the Officer had reasonable suspicion to stop the Appellant's car. (Decision Tr. at 25.) He reasoned that Officer Coleman considered the totality of the circumstances, including the Officer's observation that the Appellant's vehicle had crossed the double yellow line on five occasions, the Appellant's odor of alcohol, his thick tongued speech, and his blood shot, watery eyes. (Decision Tr. at 25-26.) The trial magistrate also noted the Officer's observation that the Appellant lacked coordination and used the vehicle for support when standing. (Decision Tr. at 26.)

This Panel finds no abuse of discretion made by the trial Magistrate in his findings. The trial magistrate's decision was supported by Officer Coleman's testimony and the exhibits entered into evidence at trial. See Link, 633 A.2d at 1348. Therefore, we hold that substantial rights of the Appellant have not been prejudiced. The magistrate's decision was supported by reliable, probative, and substantial evidence on the whole record before him.

C. Sworn Report

Finally, the Appellant argues that when Officer Coleman completed his Report of Law Enforcement, he did not swear to the veracity of the report before a notary in violation of § 31-27-2.1. The Rhode Island Supreme Court has made clear that when interpreting a statute, if the language of a statute is clear and unambiguous, the Court must interpret the statute literally and must give the words of the statute their plain and ordinary meaning. State v. Clarke, 974 A.2d 558, 571-72 (R.I. 2009); State v. Santos, 870 A.2d 1029, 1032 (R.I. 2005). Our Supreme Court has opined:

> [I]f a law is plain and within the legislative power, it declares itself, and nothing is left for interpretation . . . it is axiomatic that [the] Court will not broaden statutory provisions by judicial interpretation unless such interpretation is necessary and appropriate in carrying out the clear intent of defining the terms of the statute.

Santos, 870 A.2d at 1032 (citations and internal quotations omitted).

In regards to the statute before us, § 31-27-2.1, the Supreme Court has already determined that the statute "is clear and unambiguous and should therefore be applied literally." Link, 633 A.2d at 1348. Section 31-27-2.1(c)(1) requires that the Officer making the sworn report have reasonable grounds to believe the arrested person had been driving under the influence of intoxicating liquor. See § 31-27-2.1(c)(1).

Link established that the State has an opportunity at trial to establish the facts necessary to sustain the defendant's breathalyzer refusal charge notwithstanding any defect in the officer's sworn report. See Link, 633 A.2d at 1349. However, it is clear from that reasoning that there must be, at a minimum, a showing that a sworn report was indeed made. Id. (explaining that a sworn report is a necessary element in determining whether to sustain or dismiss a refusal charge). Since Link was decided, the issue of whether a sworn report is, in fact, required has been addressed by the courts. See Commonwealth v. Williams, 833 S.W.2d 385, 387 (Ky. App.1992) (stating that although the swearing does not need to be a formal procedure, "the affiant [must] appear[s] before the notary and [sign] the document or [acknowledge] the signature in the presence of a notary while being aware that the affidavit is to be accepted and processed as a sworn document"); City of Newport v. Cohen, A.A. No. 09-084 (filed November 19, 2009) (determining that Link was distinguishable and that the plain language of the statute demanded that a sworn report be made).

The statute's language also establishes clear legislative intent that these elements may only be proven through a law enforcement officer who has produced a sworn report. Expressly stated in the first element are the words "the law enforcement officer making the sworn report." See § 31-27-2.1. Clearly, the Legislature did not include these words arbitrarily. See Tanner v. Town Council, 880 A.2d 784, 796 (R.I. 2005) (citing Accent Store Design, Inc. v. Marathon House, Inc., 674 A.2d 1223, 1226 (R.I. 1996) (stating that "[i]t is well settled that when the language of a statute is clear and unambiguous, this Court must interpret the statute literally and give the words of the statute their plain and ordinary meanings").

Since Link was decided, the General Assembly has amended § 31-27-2.1 four times. See P.L. 1994, ch. 70, art. 35, § 7; P.L. 2006, ch. 232, § 1; P.L. 2006, ch. 235, § 1; P.L. 2006, ch.

246, art. 10, § 1. In each amendment, the General Assembly had the opportunity to strike the words "sworn report." They chose, however, not to take such action. Therefore, we conclude that the General Assembly wished to keep the use of the sworn report in refusal cases, which in turn effectively limits the holding of Link. See Narragansett Food Services, Inc. v. Rhode Island Dept. of Labor, 420 A.2d 805, 808 (R.I. 1980) ("The Legislature is presumed to know the state of existing relevant law when it enacts or amends a statute."); see also First Fed. Sav. & Loan Ass'n of Providence v. Langdon, 105 R.I. 236, 245, 251 A.2d 170, 176 (1969) ("the legislature presumed also to know the effect of judicial interpretation of its prior legislation"). Absent a sworn report, the State—as unequivocally stated—is unable to establish reasonable grounds that the arrestee was operating under the influence of alcohol or other substance and therefore can not prove an element required, and the charge must be dismissed. Ignoring this language renders the element of a sworn report a nullity. See Santos, 870 A.2d at 1032.

In this case, Officer Coleman conceded that he did not swear to the veracity of the report before a notary. (Trial Tr. 84-85.) Unlike Link, where our Supreme Court addressed a typographical error in a sworn report, in this case, there is no sworn report at all. See Link, 633 A.2d at 1349. The State, therefore, cannot establish the first element of § 31-27-2.1 requiring *a sworn* report stating that a law enforcement officer possessed reasonable grounds to suspect the arrestee of driving under the influence. See generally Id.; Williams, 833 S.W.2d at 387. Overlooking this omission would, for all practical purposes, invalidate the plain language of § 31-27-2.1. Such an action, according to our Supreme Court, is judicially inappropriate and beyond this Panel's powers.

Consequently, we conclude that the trial magistrate's findings regarding the sworn report were clearly erroneous in view or the reliable, probative, and substantial evidence on the whole record. For these reasons, this Court cannot sustain the trial magistrate's license suspension.[5]

[5] The Rhode Island Supreme Court has recently accepted the state's confession of error, via an Order, which concedes that in a breathalyzer refusal trial, a sworn report stating that a law enforcement officer possessed reasonable grounds to suspect the arrestee of driving under the influence is required and cannot be cured by the law enforcement officer's testimony. State v. Samson, No. 12-285-M.P. (R.I., filed Apr. 18, 2013) (Order); State v. Sarhan, No. 12-311-M.P. (R.I., filed Apr. 18, 2013) (Order).

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 findings regarding the confidential phone call and the Officer's reasonable suspicion were not clearly erroneous and were supported by the competent evidence of record. The finding regarding the sworn report, however, is in violation of statutory provisions and affected by error of law. Substantial rights of Appellant have been prejudiced. Accordingly, Appellant's appeal is granted.

ENTERED:

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Judge Lillian M. Almeida (Chair)

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Chief Magistrate William R. Guglietta

_____
Administrative Magistrate R. David Cruise

DATE: _____