

STATE OF RHODE ISLAND AND PROVIDENCE PLANTATIONS

CRANSTON, RITT

RHODE ISLAND TRAFFIC TRIBUNAL

TOWN OF NORTH KINGSTOWN

v.

JOAN DIORIO

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**C.A. No. T12-0078
12502503217; 12502503218**

DECISION

PER CURIAM: Before this Panel on March 20, 2013—Magistrate Goulart (Chair, presiding), Judge Almeida, and Magistrate Noonan sitting—is the appeal of Joan DiOrio (“Appellant”) from a decision of Magistrate DiSandro (trial judge), sustaining the charged violations of G.L. 1956 § 31-27-2.1, “Refusal to submit to chemical test,” and § 31-15-11, “Laned roadway.” The Appellant was represented by counsel before this Panel. Jurisdiction is pursuant to § 31-41.1-8.

Facts and Travel

On September 14, 2012, Officer Thomas Menec (“Officer Menec” or “Officer”) of the North Kingstown Police Department charged the Appellant with violations of § 31-27-2.1, “Refusal to submit to chemical test,” and § 31-15-11, “Laned roadway.” The Appellant contested the charges, and the matter proceeded to trial on November 16, 2012.

On September 14, 2012, at approximately 11:32 p.m., Officer Menec received a dispatch advising him of an erratic operator in a dark colored vehicle driving southbound on Route 4 with the hazard lights engaged. (11/16/12, Tr. at 18.) After locating the vehicle, Officer Menec followed the vehicle and testified that he observed the vehicle cross the dotted white lines and then drift into the breakdown lane. (11/16/12, Tr. at 20.)

Subsequently, Officer Menec initiated a traffic stop and identified the vehicle's operator as Joan DiOrio. (11/16/12, Tr. at 22-23.) Before approaching the Appellant's vehicle, Officer Menec approached a second vehicle that stopped behind his police car. (11/16/12, Tr. at 43.) The operator of the second vehicle informed the officer that he/she was the person who placed the 911 call to report Appellant's erratic driving. (11/16/12, Tr. at 47.) Officer Menec then excused the second vehicle and continued on to Appellant's vehicle. Id. Upon approaching Appellant's vehicle, Officer Menec detected an odor of alcohol emanating from the vehicle and noted Appellant's bloodshot watery eyes. (11/16/12, Tr. at 24-25.) When asked by Officer Menec whether she had consumed alcohol, Appellant responded that she had had one or two glasses of wine earlier in the evening. (11/16/12, Tr. at 25.)

After Officer Menec entered Appellant's information into his computer, he then summoned Officer Todd Duchala ("Officer Duchala") to the scene for assistance. (11/16/12, Tr. at 26.) As soon as Officer Duchala arrived to the scene, both officers approached Appellant's vehicle. Id. Officer Menec requested that the Appellant submit to a field sobriety test, to which the Appellant consented. Id. At trial, Officer Menec testified that he was properly trained in field sobriety tests and has professional experience in DUI investigations, having participated in about a dozen DUI investigations and DUI arrests per year. (11/16/12, Tr. at 15-17.)

As the Appellant exited her vehicle, Officer Menec observed that she swayed and leaned on her car for balance. (11/16/12, Tr. at 27.) As Officer Menec began to explain the standard field sobriety tests to Appellant, she refused to take the test. Id. Subsequently, Officer Menec arrested the Appellant for suspicion of operating under the influence and advised her of her rights by reading the "Rights For Use at the Scene" card. (11/16/12, Tr. at 28.) The Appellant was then transported to police headquarters. (11/16/12, Tr. at 33.)

At the station's processing room, Officer Menec advised the Appellant of her rights by reading the "Rights For Use at the Station" form and offered Appellant the opportunity to make a confidential phone call. (11/16/12, Tr. at 33.) Officer Menec testified that Appellant made a number of confidential phone calls. Id. Officer Menec then requested that the Appellant submit to a chemical breath test, but the Appellant refused. (11/16/12, Tr. at 34.) Officer Menec further testified that he had difficulty processing the Appellant because she refused to be processed at all. (11/16/12, Tr. at 40.) Appellant communicated to the officer that she would rather remain in the jail cell than to be processed. (11/16/12, Tr. at 41.)

After Officer Menec's detailed and extensive testimony, assisting Officer Todd Duchala also gave extensive testimony regarding the night Appellant was stopped. Officer Duchala testified that he reported to the scene of Appellant's stop after he received a dispatch call that his partner, Officer Menec, had stopped a vehicle with a suspected intoxicated operator. (11/16/12, Tr. at 233.) At the scene, Officer Duchala observed Appellant use the door of her vehicle for balance upon exiting the vehicle. (11/16/12, Tr. at 235.) Officer Duchala also testified that he detected an odor of alcohol emanating from the Appellant's breath and he observed her to have bloodshot and watery eyes. (11/16/12, Tr. at 236.)

The trial judge sustained the charges of §§ 31-27-2.1 and 31-15-11, and concluded that given the totality of the circumstances, Officer Menec properly requested Appellant to submit to a chemical breath test. (11/21/12, Tr. at 27, 29-30.) The trial judge 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. (11/21/12, Tr. at 28.) In coming to this conclusion, the trial judge considered the following: Officer Menec's observation that the Appellant drifted back and forth between lanes and eventually into the breakdown lane, the

strong odor of alcohol on her person, her bloodshot watery eyes, the Appellant's admission to consuming one or two alcoholic drinks prior to operating the vehicle, her swaying and being unstable on her feet when exiting her vehicle, and her using her vehicle for balance when exiting the vehicle. Id. The trial judge also held that the Appellant was afforded a confidential phone call, despite the call being placed on the police department's telephone. (11/21/12, Tr. at 29.) Aggrieved by the trial judge's decision, the Appellant timely filed an appeal.

Standard of Review

Pursuant to § 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

On appeal, the Appellant contends that the trial judge’s decision was affected by error of law and was clearly erroneous based on the reliable, probative and substantial evidence when he sustained the charged violations. First, she argues that the State failed to prove by clear and convincing evidence that Appellant was the operator of the vehicle in question. Second, the Appellant argues that Officer Menec did not have probable cause to believe that Appellant was operating her vehicle while under the influence. Finally, Appellant argues that Officer Menec lacked probable cause to arrest Appellant at the time of the stop.

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. Tavaréz, 572 A.2d 276, 278 (R.I. 1990)).

In this case, the trial judge found by clear and convincing evidence that the Officer had reasonable suspicion to stop the Appellant’s vehicle. (11/21/12, Tr. at 27.) He reasoned that Officer Menec considered the totality of the circumstances, including the Officer’s observation that the Appellant drifted back and forth between lanes and eventually into the breakdown lane, the strong odor of alcohol on her person, her bloodshot watery eyes, and the Appellant’s admission to consuming one or two alcoholic drinks prior to operating her vehicle. (11/21/12, Tr. at 28.) The trial magistrate also noted the Officer’s observation that the Appellant was swaying and was unstable on her feet when exiting her vehicle and that she used her vehicle for balance upon exiting. Id.

Next, Appellant contends that the identity of the violator was at issue since the officer did not immediately make contact with Appellant, but walked about one-hundred yards to first converse with the operator of the second vehicle at the time of the stop. In essence, Appellant argues that the time between the officer approaching the second vehicle and the first vehicle gives rise to an identity issue. However, since Appellant was the only person in the vehicle at the time of the stop and could not possibly switch seats with anyone this Panel does not agree with the Appellant that identity is in issue. At trial, Officer Menec identified Appellant as the operator of the vehicle. (Tr. at 22-23.) After being asked, “[d]o you see the operator of that vehicle in the courtroom today?[,]” Officer Menec responded, “I do, yes, sir.” (Tr. at 23.)

Officer Menec then proceeded to describe Appellant's clothing to identify her as the operator of the vehicle. Id. There was sufficient evidence for the law enforcement officer to have reasonably believed that the Appellant was the person who was under the influence of alcohol when she operated her vehicle. See Keohane, 814 A.2d at 330; State v. Lusi, 625 A.2d 1350, 1356 (R.I. 1993).

In addition, not only did the Appellant admit that she had had one or two alcoholic beverages, but she also refused both the field sobriety and chemical breath tests. (11/16/12, Tr. at 25, 27, 34.) While Appellant was parked on the side of the road and seated in the driver's seat of the vehicle, the law enforcement Officers also observed that the Appellant had bloodshot watery eyes, an odor of alcohol on her breath, and a strong odor of alcohol emanating from her person. (11/21/12, Tr. at 28.) Based on this testimony, the trial judge's making the reasonable inference that the Appellant was the operator of the vehicle in question was not affected by error of law. See Lusi, 625 A.2d at 1356.

This Panel finds no abuse of discretion made by the trial judge in his findings. The trial judge's decision was supported by Officer Menec's testimony and the exhibits entered into evidence at trial. See Link, 633 A.2d at 1348.

Conclusion

This Panel has reviewed the entire record before it. Having done so, the members of this Panel are satisfied that the trial judge's decision was not affected by error of law and was supported by the reliable, probative, and substantial evidence of record. Substantial rights of Appellant have not been prejudiced. Accordingly, Appellant's appeal is denied, and the charged violation is sustained.

ENTERED:

Magistrate Alan R. Goulart (Chair)

Judge Lillian M. Almeida

Magistrate William T. Noonan

DATE: _____