STATE OF RHODE ISLAND AND PROVIDENCE PLANTATIONS

CRANSTON, RITT **RHODE ISLAND TRAFFIC TRIBUNAL**

TOWN OF BARRINGTON	:	
	:	
	:	
v.	:	**C.A. No. T13-0011**
	:	**12101501278**
STEPHEN DAY	:	

DECISION

PER CURIAM: Before this Panel on May 8, 2013—Administrative Magistrate Cruise (Chair, presiding), Judge Almeida, and Judge Parker, sitting—is Stephen Day's (Appellant) appeal from a decision of Magistrate Goulart (trial judge), 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 August 23, 2012, Patrolman Joshua Melo (Officer Melo) of the Barrington Police Department charged the Appellant with violations of § 31-27-2.1, "Refusal to submit to a chemical test"; § 31-16-5, "Turn signal required"; § 31-15-11, "Laned roadways"; § 31-10-27, "License to be carried and exhibited on demand"; and § 31-21-4 "Places where parking or stopping is prohibited." Appellant contested the charge of "Refusal to submit to a chemical test," and the matter proceeded to trial on February 6, 2013.

Officer Melo began his testimony by describing his professional training and experience as a patrol officer on the Barrington Police Department. (Tr. at 19-21.) Officer Melo then testified that on the night of August 22, 2012, into the morning of August 23, 2012, he was traveling down Wampanoag Trail in Barrington when he noticed a four-door Audi driving

erratically. (Tr. at 29.) Officer Melo testified that he observed that the vehicle had difficulty maneuvering a number of "swerving turns" and "kept braking." Id. Officer Melo also observed the vehicle cross over the fog line. Id. Officer Melo testified that he continued to follow the vehicle in an effort to obtain probable cause to stop the vehicle, at which point he observed the vehicle cross over the center divide, into the opposite lane of travel, and then swerve back into the correct lane. (Tr. at 31.) Officer Melo then testified that the vehicle proceeded to an intersection, where the traffic light was green, but the vehicle came to a complete stop, "as if the light was red." (Tr. at 32.) Appellant then took a hard left, without utilizing a turn signal. Id. At this point, Officer Melo testified that he activated his lights and pulled the vehicle over.[1] Id.

Officer Melo approached the vehicle and asked Appellant to produce his license and registration, but Appellant was not in possession of his license. (Tr. at 33-34.) Officer Melo testified that when he first came in contact with Appellant, he observed that Appellant had "bloodshot watery eyes," "a pale face," and "was sweating profusely." (Tr. at 34.) Officer Melo also testified that Appellant "had a strong odor of alcoholic beverage coming from his breath." Id. Officer Melo then asked Appellant where he was coming from, to which Appellant replied that he had been at a meeting for the Providence Police and Fire Department. (Tr. at 35.) Officer Melo then testified that Appellant began to become agitated and started to raise his voice. Id.

While Officer Melo ran Appellant's information through dispatch, Patrolman DeCristofaro, the backup officer, arrived on the scene. (Tr. at 35-36.) Upon returning to Appellant's vehicle, Officer Melo asked Appellant to step out of the vehicle. (Tr. at 35.) As Appellant was walking to the rear of the vehicle, he stumbled and used his vehicle for balance.

[1] At trial, Officer Melo identified the Appellant as the operator of the vehicle. (Tr. at 33.)

Id. Officer Melo then asked Appellant if he would submit to a series of standardized sobriety tests, to which Appellant responded that he had recently undergone an operation on his knee, but assured Officer Melo that he would be able to perform the tests with "no problem." (Tr. at 36.) At this point in his testimony, Officer Melo noted that Appellant's speech was slurred. (Tr. at 37.)

Officer Melo testified that he administered the horizontal gaze nystagmus test and the walk and turn test. (Tr. at 38.) Officer Melo testified that after he gave the Appellant the instructions for the walk and turn test, Appellant reminded him that he had undergone a knee operation, but once again declared that he could perform the test. Id. However, Appellant was unable to maintain his balance during the instructional phase and started the test before he was instructed to begin. (Tr. at 39-40.) Officer Melo testified that these clues—coupled with the other observations made of the Appellant that night—led him to conclude that the Appellant was operating a motor vehicle under the influence of alcohol. Id.

Officer Melo testified that after he placed Appellant under arrest, "he became belligerent again" and refused to put his leg inside the police cruiser. (Tr. at 40.) Officer Melo then explained that he read Appellant his "Rights for Use at the Scene." (Tr. at 40-41.) Appellant requested a rescue to assist him, but Officer Melo determined that a rescue was not needed, and then proceeded to assist Appellant into the police cruiser to transport him back to the police station. (Tr. at 41.) Upon arrival at the police station, Officer Melo had a difficult time extracting Appellant from the police cruiser. Once inside, Officer Melo testified that he read Appellant his "Rights for Use at the Station." (Tr. at 43.)

Appellant was permitted to make a private phone call to his attorney, and when he returned, Officer Melo testified that he asked Appellant if he would submit to a chemical breath

test. (Tr. at 44.) Appellant responded that he would not submit to a chemical breath test without first consulting his attorney. Id. Officer Melo testified that he waited a "reasonable" time for Appellant's attorney to call back, but the attorney never did call back. (Tr. at 45.) Officer Melo then again asked Appellant to submit to a chemical breath test, but Appellant refused. Id. Officer Melo then testified that Appellant was uncooperative in being processed, as he declined to provide his date of birth or marital status, and refused to be fingerprinted. (Tr. at 46.)

At the close of evidence, Appellant moved to dismiss the charged violation. (Tr. at 61.) Appellant maintained that as the prosecution failed to introduce into evidence a document indicating what rights were read to Appellant at the scene once he was placed under arrest, and as Officer Melo was not questioned as to what rights he read to Appellant at the scene, the refusal charge should be dismissed. (Tr. at 68-71.) The trial judge denied Appellant's Motion to Dismiss. (Decision Tr. at 3.)

The trial judge, found that—based on Officer Melo's observations of Appellant at the scene—Officer Melo did have reasonable grounds to believe Appellant had been operating a motor vehicle while under the influence. (Decision Tr. at 15-18.) As such, the trial judge sustained the violation of § 31-27-2.1.[2] (Decision Tr. at 18.) 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

[2] The trial judge dismissed the violation of § 31-21-4, "Places where parking or stopping is prohibited" for lack of proper notice. The trial judge also dismissed the violation of § 31-10-27, "License to be carried and exhibited on demand. The trial judge did, however, sustain the violations of § 31-16-5, "Turn signal required," and § 31-15-11, "Laned roadways." (Decision Tr. at 4-5, 14.)

> 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 Appellant contends that the trial judge's decision was affected by error of law, and in violation of constitutional provisions, and was clearly erroneous based on the reliable, probative, and substantial evidence when he sustained the charged violations. First, the Appellant argues that he was denied a trial by jury as required by Article 1 Section 15 of the Rhode Island Constitution. Second, he argues that the Town failed to prove by clear and convincing evidence that the Appellant was read his "Rights for Use at Scene," as required by § 31-27-3.

A. Right to Jury Trial

Appellant first argues that he was deprived of his right to a trial by jury. Appellant maintains that Article 1 Section 15 to the Constitution of Rhode Island guarantees a jury trial for civil penalties that are penal in nature. In support of his contention, Appellant cites to Bendick v. Cambio, 558 A.2d 941, 944 (R.I. 1989). However, our Supreme Court stated in Bendick that a right to a jury trial applies in a civil action only if the action was tried before a jury at the time our Constitution was adopted in 1842. See Bendick, 558 A.2d at 944 (the right to a jury trial "applies to all cases that were triable by jury at the time of the adoption of the Rhode Island Constitution in 1842 without any restrictions or conditions that would materially hamper or burden that right") (citing Mathewson v. Ham, 21 R.I. 311, 43 A. 848 (1899)).

Later, our Supreme Court addressed whether a motorist has the right to a jury trial for a motor vehicle weight limit restriction in Calore Freight Systems, Inc. v. Dept. of Trans., 576 A.2d 1214 (1990). In applying the Bendick framework, the Calore Court acknowledged that there was no motor vehicle code in effect at the time our Constitution was adopted in 1842, making a jury trial inappropriate under the circumstances. Id. at 1215. However, the Calore

Court went on to analyze whether the "'offense was of the character requiring a jury trial rather than simply [disposing] of the matter in cursory fashion." Id. (quoting Aptt v. City of Warwick Bldg. Dept., 463 A.2d 1377, 1379 (R.I. 1983). In so determining, the Court analyzed whether there was a comparable offense at the time our Constitution was adopted, which it determined there was not. Id. at 1215-1216. The Court then held that there was no right to a jury trial for a motor vehicle code infraction. Id. at 1217. The Calore Court distinguished Bendick, involving a property owner's request for a jury trial in response to several citations issued by the Department of Environmental Management (DEM), by determining that there was a right to a jury trial in an administrative proceeding because the civil and statutory fines imposed were not for a fixed sum and were enforceable only in the Superior Court. In contrast, in Calore the fines imposed for a motor code infraction were definite and without discretion, thus making the fine susceptible to the administrative process.

This Panel finds the Calore Court's reasoning to be dispositive. Here, the Appellant was charged with a violation of § 31-27-2.1. As the Calore Court correctly stated, the motor vehicle code was not in place at the time our Constitution was adopted. The Appellant has also not presented this Panel with any statute that was in place at the time our Constitution was adopted that supports his argument that he is entitled to a jury trial. Nor has this Panel found a statute that was in place in 1842 that is similar to § 31-27-2.1.

The nature of the proceedings is civil in nature. See § 31-41.1-6; see also Bendick, 558 A.2d at 944 (court found it significant that the adjudication of motor vehicle offenses was civil in nature). The fine for violating the statute is clearly articulated in § 31-27-2.1(b). The judges and magistrate of this Court are without authority or discretion to either increase or decrease the fine, thus, limiting the need for a jury. Therefore, this Panel holds that there is no right to a jury trial

for a motor vehicle code infraction because there was no such right when our Constitution was adopted.

B. "Rights for Use at the Scene" Card

Next, Appellant contends that the record is devoid of facts to prove that Appellant's "Rights for Use at Scene" were read to him before he refused to take the breathalyzer. In particular, Appellant maintains that the officer failed to specify during his testimony at trial, which specific rights were read to the Appellant at the scene before the Appellant refused to take the chemical test, and the card was not admitted into evidence.

Section 31-27-2 states that anyone who drives a vehicle under the influence of intoxicating liquor shall be guilty of a misdemeanor. Expounding upon the requirements set out in § 31-27-2, the Rhode Island Supreme Court explained:

> "an individual charged with driving while intoxicated must be informed of the following: (1) his or her Miranda rights; (2) his or her right to be examined by a physician of his choice; (3) his or her right to refuse to submit to a breathalyzer examination; and (4) the consequences attendant on refusal to consent to the test." State v. DeOliveira, 972 A.2d 653, 660 (R.I. 2009) (citing State ex rel. Town on Middletown v. Anthony, 713 A.2d 207, 212 (R.I. 1998)).

The "Rights for Use at the Scene" [3] and "Rights for Use at Station" forms have been "designed through a combined effort of the Department of Health, Department of Transportation (DOT) and the Attorney General's office and [are] distributed to local police departments." See Levesque v. Rhode Island Dept. of Transp., 626 A.2d 1286, 1288 (R.I. 1993). The "Rights for

[3] The "Rights for Use at Scene" form read as follows:

> "You are suspected of driving under the influence of intoxicating liquor and or drugs. You have the right to remain silent. You do not have to answer any questions or give any statements. If you do answer questions or give statements, they can and will used in evidence against you in court. You have the right to an attorney. If you cannot afford an attorney, one will be provided to you. You have the right to be examined, at your expense immediately by a physician selected by you. You will be afforded a reasonable opportunity to exercise this right." ("Rights for Use at Station" form.)

Use at Station" and "Rights for Use at the Scene" reflect the current language of §31-27-2.1.[4] The two forms apprise drivers of their Miranda rights, right to be examined by a physician of their choosing, right to refuse to submit to a breath test, and the penalties incurred by a refusal to submit to a chemical test pursuant to §31-27-2.1.

A person arrested and charged with operating a vehicle under the influence of intoxicating liquor is entitled to be immediately informed of his right to be examined by an independent physician pursuant to §31-27-3. Section 31-27-3 states that

> "A person arrested and charged with operating a motor vehicle while under the influence of narcotic drugs or intoxicating liquor, whatever its alcoholic content, shall have the right to be examined at his or her own expense immediately after the person's arrest by a physician selected by the person, and the officer so arresting or so charging the person shall immediately inform the person of this right and afford the person a reasonable opportunity to exercise the right, and at the trial of the person the prosecution must prove that he or she was so informed and was afforded that opportunity." (Emphasis added.)

To satisfy the requirements of section 31-27-3, the actual Rights for Use at the Scene Card must be admitted into evidence unless the police officer is capable of reciting the language of the Rights for Use at the Scene Card from memory.

Here, Officer Melo made a bare assertion during his testimony that he had read the Rights for Use at the Scene Card to the Appellant after the administration of the sobriety tests. (Tr. at 40-41.) However, such a bare assertion without introducing the Rights For Use at the Scene Card into evidence does not comply with the statutory mandates required by sections 31-27-2.1 and 31-27-3. See State v. Joyce, T05-0158 (holding that the refusal charge must be dismissed because the arresting officer did not submit the "Rights for Use at the Scene" card during trial). Both statutes require that the prosecution prove that motorists were informed of their right to

[4] Section 31-27-2.1 reads in pertinent part: "that the person had been informed of his or her rights in accordance with § 31-27-3; that the person had been informed of the penalties incurred as a result of noncompliance with this section; and that the person had refused to submit to the tests upon the request of law enforcement officer. . . ."

contact an independent physician following their arrest for operating a vehicle under the influence.

Therefore, after a review of the record, it is the finding of this Panel that the trial judge's decision to sustain the refusal charge when the Rights for Use at the Scene Card was not admitted into evidence was clearly erroneous. Substantial rights of the Appellant were prejudiced. Thus, the Appellant's appeal is granted, and the refusal charge is dismissed.

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 affected by error of law, and in violation of constitutional provisions, and was clearly erroneous based on the reliable, probative, and substantial evidence when he sustained the charged violations. Substantial rights of Appellant have been prejudiced. Accordingly, the charged violation of G.L. § 31-27-2.1 is dismissed, and Appellant's appeal is granted.

ENTERED:

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Administrative Magistrate R. David Cruise (Chair)

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Judge Lillian M. Almeida

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Judge Edward C. Parker

DATE: ______________