

**STATE OF RHODE ISLAND AND PROVIDENCE PLANTATIONS**

**CRANSTON, RITT**

**RHODE ISLAND TRAFFIC TRIBUNAL**

**TOWN OF BURRILLVILLE**

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v.

**C.A. No. T13-0072  
13416501401**

**MICHAEL RHODES**

**DECISION**

**PER CURIAM:** Before this Panel on January 29, 2014—Magistrate Goulart (Chair, presiding), Judge Parker, and Magistrate DiSandro III, sitting—is Michael Rhodes’s (Appellant) appeal from a decision of Magistrate Cruise (Trial Magistrate), sustaining the charged violation of G.L. 1956 § 31-27-2.1(b), “Refusal to Submit to a Chemical Test.” The Appellant appeared before this Panel represented by counsel. Jurisdiction is pursuant to G.L. 1956 § 31-41.1-8.

**Facts and Travel**

On October 5, 2013, Officer Ryan Hughes (Officer or Officer Hughes) of the Burrillville Police Department charged Appellant with the aforementioned violation of the motor vehicle code. The Appellant contested the charge, and the matter proceeded to trial on October 25, 2013.

At trial, Officer Hughes testified that on the night of the arrest, he was working patrol on South Main Street. At approximately 2:08 A.M., while the Officer was traveling southbound, he observed a 1997 Saturn approaching in the northbound lane at a high rate of speed. (Tr. at 6-7.)<sup>1</sup> Officer Hughes testified that he obtained a Radar reading of 51 miles per hour (mph) using a properly calibrated radar device. (Tr. at 7.) The reading was made while the vehicle was traveling on a stretch of the road where the posted limit reduces from 45 mph, to 25 mph. (Tr. at

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<sup>1</sup> At the beginning of the trial, the parties stipulated to Officer Hughes’s training and experience in relation to all phases of DUI investigations. (Tr. at 2.)

11.) In addition to the speed of the car, Officer Hughes observed the passenger's side tires cross over the white painted line as it navigated a winding segment of South Main Street. Id.

As the Officer passed the vehicle, he testified that he turned on his overhead lights to make a U-turn, and turned them off in a matter of seconds once he completed the U-turn. (Tr. at 12.) Officer Hughes explained that he did not keep his overhead lights on because he wished to obtain further observations of the vehicle. (Tr. at 15.) Upon observing the Appellant go through a stop sign—at the intersection of South Main Street and Pascoag Main Street—and take a right-hand turn without using a turn signal, the Officer turned his overhead lights on again to pull the car over. (Tr. at 14.) Officer Hughes estimated that thirty seconds had elapsed from the time he made the U-turn until the time he turned on his overhead lights to pull the vehicle over. (Tr. at 15.) Either during, or shortly after the Officer turned on his overhead lights, the Appellant's vehicle took another right turn onto Park Place, without using a turn signal. (Tr. at 17.) After less than 100 feet, the vehicle came to a stop on Park Place. Id.

Next, the Officer testified that while conducting the traffic stop, he decided to use high risk protocol, based on his belief that the behavior of the driver was abnormal. (Tr. at 18.) The Officer testified that he felt Appellant's actions, traveling about 300-400 feet after the overhead lights came on, were abnormal, and wanting of behavior sufficient to charge the Appellant with eluding. (Tr. at 75.) As part of using the high risk protocol, the Officer unholstered and drew his firearm immediately upon exiting his vehicle. (Tr. at 22.) He explained that he directed the Appellant via the PA system to remove the keys from the ignition, and place them on the ground or the roof. (Tr. at 20.) He further instructed the Appellant to use his left arm to open the door, to slowly exit, and to lift up his shirt to show if he had a weapon in his waistband. (Tr. at 21.)

Officer Hughes testified that he had his gun “trained” on the Appellant while giving the directives, and that the Appellant was very compliant in following the orders. (Tr. at 20.)

Officer Hughes stated that at the moment his Sergeant arrived on the scene, he went on the passenger side of Officer Hughes’s cruiser and drew a gun, pursuant to the high risk protocol. (Tr. at 21-22.) Thereafter, Officer Hughes approached the Appellant, reholstered his gun, and placed Appellant in handcuffs. (Tr. at 21.) Officer Hughes advised the Appellant that he was being detained, but noted he was not under arrest. (Tr. at 23.) Subsequently, Officer Hughes patted the Appellant down for weapons, and no weapons were found. (Tr. at 23-24.)

Officer Hughes further testified that the handcuffs were removed during the beginning of the conversation with the Appellant. (Tr. at 28.) Then the Officer recounted questioning Appellant on why his vehicle had been traveling outside the white painted line, to which Appellant responded that it was because he was text messaging. (Tr. at 27.) Additionally, during this brief interaction, the Officer observed that Appellant’s breath gave off a moderate odor consistent with an alcoholic beverage, his eyes were bloodshot and watery, and his speech was normal. (Tr. at 29.) Appellant’s counsel objected to the admissibility of statements, made by Appellant to the Officer, while Appellant was handcuffed; the Trial Magistrate overruled the objection. (Tr. at 24-25.)

Officer Hughes then testified that he asked Appellant to submit to field sobriety tests, the Horizontal Gaze Nystagmus test, the walk and turn, and the one-leg stand. (Tr. at 32.) While administering the tests, Officer Hughes noticed multiple clues which indicated to him that the Appellant was likely intoxicated. (Tr. at 36-38.) The Officer subsequently asked Appellant to take the Preliminary Breath Test (PBT), and the results indicated he was over the legal limit to drive. (Tr. at 39.)

Based on the totality of the circumstances—the odor of alcohol on his breath, the bloodshot and watery eyes, the clues from the Standard Field Sobriety tests, and the performance on the PBT—Officer Hughes testified that he decided to arrest the Appellant on suspicion of driving under the influence. Id. The Appellant was handcuffed, escorted into the rear of the vehicle, and read his rights for use at the scene. (Tr. at 42.) Next, Officer Hughes described a conversation he had had with Appellant after he was placed in the car, in which Appellant stated that he had consumed five or six beers earlier in the evening. (Tr. at 45.) In response to the testimony regarding the conversation, counsel for Appellant renewed his objection to the testimony, arguing that Appellant’s Miranda Rights had been violated, and that a post arrest reading of the rights does not remedy further investigation. (Tr. at 46.) The Trial Magistrate overruled the objection, and the testimony resumed. Id.

Subsequently, Officer Hughes testified that while conducting an inventory search of the vehicle, he discovered a marijuana pipe with partially burned marijuana and a Bud Light platinum beer bottle, which appeared to have been recently consumed. (Tr. at 46-7.) After the search, Appellant was then transported to the station, processed, and read his rights for use at the station. (Tr. at 49.) Subsequently, the Officer explained that he went over the refusal form with Appellant, and Appellant signed on the line indicating his decision to refuse. (Tr. at 51.)

On cross-examination, the Officer testified that he had conducted several high risk stops in the prior six months, but had not filled out the required use of force sheet for the stops. (Tr. at 79.) Officer Hughes further testified that on the night of the incident, he thought the Appellant posed a danger because of the time of day, and because it was unclear how many people were in the vehicle. (Tr. at 77-78.) Additionally, the Officer stated that he did not have time to run Appellant’s license plate prior to conducting the high risk stop. (Tr. at 81.) Further, he agreed

that once the overhead lights came on, Appellant stopped in a reasonable amount of time. (Tr. at 84-85.)

Officer Hughes explained that he was unable to see into the vehicle, and thus, could not tell if there were additional passengers. (Tr. at 101.) He testified that he was trained to assume that everyone has a weapon, and that he has had motorists jump out of vehicles and advance on him in prior stops. (Tr. at 100-101.) Lastly, Officer Hughes explained that the use of the handcuffs was a safety precaution—the handcuffs were put on the Appellant for less than ten seconds while he was searched for a weapon—and not as a result of an offense or crime. (Tr. at 103, 107-108.) Officer Hughes told the Appellant that he was detained but not under arrest; however, the Officer did not explain to the Appellant that the detention would only be until the protective search for weapons was complete. (Tr. at 87.) Officer Hughes denied cuffing the Appellant and putting him in the cruiser while searching the car. Id.

After the prosecution rested its case, Appellant's counsel made a motion to dismiss the charges. (Tr. at 112.) In support of the motion, he averred that the detention of Appellant was an arrest without probable cause, thus, rendering all of the evidence inadmissible because it was obtained post arrest. Id. The Trial Magistrate denied the motion and found that there was a sufficient amount of evidence on the record to continue forward. (Tr. at 123-124.)

The Appellant also testified at the hearing. The Appellant stated that as soon as he saw the overhead lights behind him, he pulled over his car. (Tr. at 126.) The Appellant testified that after pulling over in his car, he was immediately ordered to remove the keys from the ignition, slowly open the door with his left hand, and exit the vehicle. Id. Once out of the car, he observed the Officer pointing a gun at him and the Officer ordered him to get on his knees, lift his shirt, and then put his hand behind his back. (Tr. at 127.) The Appellant testified that while

the Officer cuffed him, patted him down, and began to ask some questions, another officer had arrived on the scene and walked to the passenger's side of his vehicle. (Tr. at 128.)

The Appellant then stated that Officer Hughes said, "I smell alcohol on you" and let Appellant know that he was going to search the car. (Tr. at 130.) Thereafter, Appellant testified that the Officer put him into the backseat of the police cruiser while his car was searched. Id. The Appellant testified that the handcuffs were removed after the search of the car had been completed, at which time the Officer said to the Appellant that "we're going to do the field sobriety test." (Tr. at 135.) He testified that he did not do well on the field sobriety tests and that he blew over the limit on the PBT. (Tr. at 151-52.) Finally, Appellant testified that he was brought to the police station and read his rights, but he was not offered a phone call. (Tr. at 154.)

At the close of evidence, both sides made closings arguments. Subsequently, the Trial Magistrate rendered a bench decision, recounting many of the aforementioned facts in his decision. The Trial Magistrate found it significant that the Officer was credible and that Officer Hughes had reasonable grounds to believe Appellant had been driving under the influence based upon the observations during the SFSTs, the PBT, the Appellant's bloodshot eyes, and his slurred speech.<sup>2</sup> (Tr. at 174.)

The Trial Magistrate addressed the issues of the stop and the arrest by stating "[t]he issue is . . . the arrest that took place or what [Appellant] says is or characterizes the arrest that took place after the stop. It's my feeling that this [O]fficer, who I find credible and truthful, did a good job in this stop." (Tr. at 172.) Further, the Trial Magistrate gave credence to Officer Hughes's testimony and found that as soon as the Appellant was in custody, the Officer holstered his gun, and once the search of the car was complete, the Appellant was removed from the police

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<sup>2</sup> The testimony of Officer Hughes indicated that Appellant's speech was not slurred. (Tr. at 29.)

cruiser. (Tr. at 173.) However, there was one part of Officer's testimony on the sequence of events which the Trial Magistrate disregarded. Contrary to the Officer's testimony, the Trial Magistrate adopted the Appellant's testimony that the restraints were not removed until after the car was searched and the Appellant was taken from the backseat of the police cruiser. Id.

In rendering his decision, the Trial Magistrate determined the evidence presented at trial that the Appellant had committed the offenses was clear and convincing, and, thus, sustained the charges. (Tr. at 174.) Aggrieved by the Trial Magistrate's decision, Appellant timely filed the instant 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 argues that the Trial Magistrate’s decision to sustain the charge was clearly erroneous in light of the reliable, probative, and substantial evidence on the record, and that the Trial Magistrate’s decision was affected by error of law. Specifically, Appellant contends that he was under arrest, or a de facto arrest, without probable cause, and thus, both the evidence obtained and observations made by Officer Hughes should be excluded as fruit of the poisonous tree.

### **The Exclusionary Rule**

As a preliminary issue, this Panel must first determine if the exclusionary rule applies in the civil jurisdiction context of a “Refusal to Submit to a Chemical Test” violation. The exclusionary rule<sup>3</sup> is a court created remedy to deter unreasonable police conduct, not an

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<sup>3</sup> The exclusionary rule states that “[i]n the trial of any action in any court of this state, no evidence shall be admissible where the evidence shall have been procured by, through, or in

independent constitutional right. See 31A C.J.S. Evidence § 358; see also general 29 Am. Jur. 2d Evidence § 604. Its application is grounded in criminal jurisdiction relative to violations of the Fourth Amendment. See id.

The United States Supreme Court has noted that “[i]n the complex and turbulent history of the rule, the Court never has applied it to exclude evidence from a civil proceeding, federal or state.” United States v. Janis, 428 U.S. 433, 447 (1976); see also Ins. v. Lopez-Mendoza, 468 U.S. 1032 (1984) (holding that credible evidence obtained by immigration officers did not need to be excluded). The Supreme Court also held the exclusionary rule inapplicable to a civil federal deportation proceeding. Immigration & Naturalization Serv. v. Lopez-Mendoza, 468 U.S. 1032, 1041-42 (1984). In both decisions, the Court “weigh[ed] the likely social benefits of excluding unlawfully seized evidence against the likely costs.” Id. at 1041. In both cases, the Court determined that the deterrence value of the exclusionary rule in the context of the each case was “slight.” Id. at 1042. The Court held that “application of the exclusionary rule in the federal civil proceeding would contribute little more to the deterrence of unlawful conduct by state officials,” because “the state law enforcement officials were already ‘punished’ by the exclusion of the evidence in the state criminal trial . . . and the evidence was also excludable in any federal criminal trial that might be held.” Id.

The Rhode Island Supreme Court has also considered the application of the exclusionary rule in the civil context. See State v. Spratt, 120 R.I. 192, 386 A.2d 1094 (1978); see also Bd. of License Comm'rs of Town of Tiverton v. Pastore, 463 A.2d 161 (R.I. 1983). In Spratt, the Court declined to apply the exclusionary rule in probation revocation hearings. 120 R.I. at 194, 386 A.2d at 1096. The Spratt Court reasoned “that extension of the exclusionary rule to probation consequence of any illegal search and seizure as prohibited in section 6 of article 1 of the constitution of the state of Rhode Island.” G.L. 1956 § 9-19-25.

revocation proceedings would adversely affect the rehabilitative purposes underlying the probation system.” Id. The Court held that “the potential benefit to society from refusing to extend the exclusionary rule to revocation hearings outweighs any harm resulting from that refusal.” Id. Conversely, the Pastore Court concluded that the exclusionary rule applies to liquor license revocation proceedings because the proceedings are quasi-criminal. 463 A.2d at 164-65. Specifically, the Court held that “the potential deterrent effect of the exclusionary rule on the agents of an intrasovereign agency is strong enough to outweigh the costs to society of refusing to admit evidence obtained in violation of constitutional imperatives.” Id. Ultimately in both cases, our Supreme Court followed the analysis of the United States Supreme Court, and focused on “whether any increased deterrence of future police misconduct would result from extending the rule and then [the Court] balance[d] that incremental increase against the risks to society that [an] extension [of the exclusionary rule] is likely to produce.” Id. at 165-66 (quoting Spratt, 120 R.I. at 194, 386 A.2d at 1095).

In this instance, the exclusionary rule should not apply because this is a civil setting, and the evidence would be inadmissible in a concurrent criminal proceeding for a “Driving Under the Influence” charge. See Spratt, 120 R.I. 192, 386 A.2d 1094. Moreover, since the evidence would be excluded in a criminal context, there is little “increased deterrence of future police misconduct [that] would result from extending the rule.” Pastore, 463 A.2d at 164-65; see also Powell v. Sec'y of State, 614 A.2d 1303, 1306-07 (Me. 1992) (holding that the exclusionary rule should not be applied in an administrative license suspension proceeding because the evidence was excluded from the criminal proceeding and “there is little additional deterrent effect on police conduct by preventing consideration of the evidence by the hearing examiner”). Additionally, the costs to society resulting from excluding the evidence would be substantial

because the “state's interest in the case of a license [suspension] is in keeping suspected drunk drivers off the roads.” Levesque v. Rhode Island Dep't of Transp., 626 A.2d 1286, 1290 (R.I. 1993); see also Powell, 614 A.2d at 1307. Thus, this Court concludes that the exclusionary rule does not apply in the context of a “Refusal to Submit to a Chemical Test” violation proceeding.

### **The Arrest**

In the alternative, even if the exclusionary rule applied in the context of the refusal proceeding, it may not apply in this case. In determining when the exclusionary rule applies, a threshold issue is whether or not the actions by Officer Hughes rose to the level of an arrest of the Appellant prior to the DUI investigation. This inquiry is ultimately a question of law, and must be reviewed to determine if the Trial Magistrate made an error of law in finding that Appellant was not under arrest until he was read the on scene rights. See United States v. Forna-Castillo, 408 F.3d 52, 63-65 (1st Cir. 2005) (“While we review the court's factual findings for clear error, the ultimate conclusion whether a seizure is a de facto arrest ‘qualifies for independent review’ because it presents a ‘mixed question of law and fact.’” (quoting United States v. Trueber, 238 F.3d 79, 91, 93 (1st Cir. 2001)) (internal citations omitted)).

Our Supreme Court has used a three-factor balancing test in order to determine whether an individual has been, in fact, arrested at a given time. State v. Bailey, 417 A.2d 915 (R.I. 1980). Under Bailey, our Court examines (1) the extent to which the person’s freedom of movement has been curtailed and the degree of force used by the police; (2) the belief of a reasonably innocent person in these same circumstances; and (3) whether the person had the option of not going with the police. See id. at 915-18. Moreover, this Panel has also consistently relied on the factors outlined in Bailey to ascertain when an individual is under arrest. See Providence v. Christina Machado, C.A. No. T13-0019, August 19, 2013, R.I. Traffic Trib.

### **Bailey Factor One**

In analyzing the first factor, it must be taken into account that inherently, “a traffic stop significantly curtails the “freedom of action” of the driver and the passengers . . . .” Berkemer v. McCarty, 468 U.S. 420, 436 (1984). Additionally, during a stop, a motorist may be detained briefly and “the officer may ask the detainee a moderate number of questions to determine his [or her] identity and to try to obtain information confirming or dispelling the officer's suspicions.” Id. at 439.

Here, the Appellant’s freedom of movement was curtailed to a further extent than that at a traditional traffic stop. See Tr. at 20-24. Not only was the defendant ordered out of his car via a PA system, but also, a gun was pointed at him by two police officers, he was asked to lift his shirt to show no weapon was on his waistband, and he was handcuffed and patted down. Id. The Appellant was ordered to do the above at 2:00 a.m., with at least two police officers present, and without an explanation as to why the force was being used. See id.

As for the degree of force used, “[t]here is no per se rule that pointing guns at people, or handcuffing them, constitutes an arrest . . . . But use of guns and handcuffs must be justified by the circumstances . . . . Moreover, [the court] must look at the intrusiveness of all aspects of the incident in the aggregate.” Robinson v. Solano Cnty., 278 F.3d 1007, 1013-15 (9th Cir. 2002) (citing Baker v. Monroe Township, 50 F.3d 1186, 1193 (3d Cir. 1995)) (internal citation omitted). Thus, it is necessary to determine the reasonableness of the actions of Officer Hughes, based on the circumstances. See id.

Although a police officer may order an individual out of a vehicle as part of a routine traffic stop without offending the Fourth Amendment, in order for a police officer to take further action—such as to conduct a pat down of an individual during a traffic stop, to use handcuffs, or

to draw a gun—a police officer must possess articulable facts to indicate that the individual poses a danger and may be armed. See United States v. Brignoni-Ponce, 422 U.S. 873, 880 (1975); see also United States v. Campbell, 741 F.3d 251, 260 (1st Cir. 2013) (explaining “a police officer may in appropriate circumstances and in an appropriate manner approach a person for purposes of investigating possibly criminal behavior even though there is no probable cause to make an arrest”; such temporary traffic stops are analogous to Terry stops). Further, “[t]he officer's initial actions must be justified at their inception and his subsequent actions must be ‘responsive to the emerging tableau—the circumstances originally warranting the stop, informed by what occurred, and what the officer learned, as the stop progressed.’” United States v. Taylor, 511 F.3d 87, 90 (1st Cir. 2007) (quoting United States v. Coplin, 463 F.3d 96, 100 (1st Cir. 2006), cert. denied, 549 U.S. 1237, (2007)). Accordingly, a court must look at “the totality of the circumstances to see whether the officer had a particularized, objective basis for his or her suspicion.” Estrada v. Rhode Island, 594 F.3d 56, 65-68 (1st Cir. 2010) (quoting United States v. McKoy, 428 F.3d 38, 39 (1st Cir. 2005) (citing United States v. Arvizu, 534 U.S. 266, 273 (2002)). The reason an officer must “enunciate specific and articulable facts . . .[.]” is that the Fourth Amendment “becomes meaningful only when it is assured that at some point the conduct of those charged with enforcing the laws can be subjected to the . . . scrutiny of a judge who must evaluate the reasonableness of a particular search or seizure in light of the particular circumstances.” State v. Collodo, 661 A.2d 62, 65 (R.I. 1995) (quoting Terry v. Ohio, 392 U.S. 1, 21 (1968)). Finally, “[w]hile no ‘scientifically precise formula’ can determine whether a Terry stop rises to the level of a formal arrest, the ‘ultimate inquiry’ is whether there was a formal arrest or restraint on freedom of movement of the degree associated with a formal arrest.” United States v. Campbell, 741 F.3d 251, 266 (1st Cir. 2013) (internal citation omitted).

Moreover, many instances have been found by federal courts and our Supreme Court to have provided reasonable suspicion for an officer to conduct a Terry stop during a traffic stop. Such instances are when he or she has questions on immigration status of a motorist, Estrada, 594 F.3d 56; has reasonable suspicion of gang affiliation, Arizona v. Johnson, 555 U.S. 323 (2009); he or she has observed furtive movements by driver or passengers in combination with other factors State v. Foster, 842 A.2d 1047, 1051-52 (R.I. 2004); and when the officer(s) are outnumbered by suspects. United States v. Cruz, 156 F.3d 22, 26 (1st Cir. 1998) (holding that officer's frisk was justified in part because of the number of occupants in the vehicle, “who outnumbered the police officer five to one”).

Here, none of those circumstances previously upheld was present to Officer Hughes. See Tr. at 18-20. A distinguishing factor herein from other cases is the immediate use of the high risk protocol prior to contact with the Appellant. See Tr. at 18. Officer Hughes did not run the license plate of the Appellant; he did not inquire as to whether backup could be obtained quickly; he made no observations on Appellant’s demeanor; and the Officer did not know the identity of the driver. See Tr. at 18-20. Additionally, there was no specific information obtained about the driver other than the traffic violation and the “abnormal behavior” of the vehicle. (Tr. at 18.) Despite the absence of such information, the testimony from Officer Hughes expressly revealed that the decision to use the high risk protocol was made as soon as he pulled over the car. See Taylor, 511 F.3d at 90; see also Tr. at 18.

This Panel finds that the actions in this case violated the settled case law and precedent established by both the Rhode Island and United States Supreme Courts. See id. The purported circumstances articulated by Officer Hughes lack a factual basis to support a finding that there was a particular danger or criminal activity. See Estrada, 594 F.3d at 65-68. Based upon the

facts of record, the articulable facts given by Officer Hughes would not lead a reasonable police officer to believe that this particular individual was dangerous. See Mckoy, 428 F.3d at 40. Thus, not only was the level of restraint and force used, excessive, but also the additional seizure was not justified. See id.

### **Bailey Factors Two and Three**

The analysis related to the last two factors of State v. Bailey—the belief of an innocent person and whether there was an option not to go with the officer—are intertwined and will be addressed together. See Bailey, 417 A.2d at 915-18. The Supreme Court has “acknowledged that a traffic stop is a seizure for Fourth Amendment purposes because few motorists would feel free either to disobey a directive to pull over or to leave the scene of a traffic stop without being told they might do so.” Campbell, 741 F.3d at 265 (quoting Berkemer, 468 U.S. at 437-38 (internal quotations omitted)). An ordinary traffic stop “curtails the ‘freedom of action’ of the detained motorist and imposes some pressures on the detainee . . . .” Berkemer, 468 U.S. at 421. Although there is some pressure on the motorist, the Supreme Court has said that during the ordinary traffic stop, there is little “danger that a person questioned will be induced “to speak where he would not otherwise do so freely.” Miranda v. Arizona, 384 U.S., 436, 467 (1966). A reasonable person knows that “detention of a motorist pursuant to a traffic stop is presumptively temporary and brief. The vast majority of roadside detentions last only a few minutes.” Berkemer, 468 U.S. at 437. Further, a reasonable person expects when he is pulled over “that he will be obliged to spend a short period of time answering questions and waiting while the officer checks his license and registration that he may then be given a citation, but that in the end he most likely will be allowed to continue on his way.” Id. However, the atmosphere of the stop changes when “a motorist who has been detained pursuant to a traffic stop thereafter is subjected

to treatment that renders him ‘in custody’ for practical purposes . . . [,]” because the traffic stop is no longer ordinary and the motorist is entitled to the protections of *Miranda*. Id. at 421.

During the subject stop in the instant appeal, Appellant was told by Officer Hughes that he was not under arrest but that he was being detained, and then was subsequently handcuffed. (Tr. at 23.) By the Officer’s own admission, the Appellant was not informed that the detention was to search for weapons. Id. In determining the impact of an officer’s conduct, the Supreme Court has acknowledged that “[a] policeman’s unarticulated plan has no bearing on the question [of] whether a suspect was ‘in custody’ at a particular time; the only relevant inquiry is how a reasonable man in the suspect’s position would have understood his situation.” Berkemer, 468 U.S. at 421-22. From the Appellant’s perspective, in a matter of a few minutes, he was stopped, ordered out at gunpoint, patted down, and handcuffed. See Tr. at 18-20. This Panel finds that a reasonable innocent person in the same circumstances would believe he or she was under arrest, or, at the very least “in custody” for Miranda purposes, and that an individual cuffed and escorted into a police cruiser by an officer has little choice but to comply, especially when the officer had already displayed his gun. See Berkemer, 468 U.S. at 421-22. Finally, there were no facts presented that the Appellant was free to leave. In fact, while the Appellant was at gun point, it was reasonable for him to believe he was not free to leave. See Tr. at 18-20. By weighing the Bailey factors in light of the reliable, probative, and substantial evidence of record, this Panel finds that the arrest was unlawful and violated Appellant’s rights under the Fourth Amendment and article I, section 6 of the Rhode Island Constitution.

### **Exceptions to the Exclusionary Rule**

Even when the exclusionary rule applies, its application is limited because there are exceptions to the rule. See Janis, 428 U.S. at 447 (explaining the “plain view” exception to the

exclusionary rule). “It is well established that under certain circumstances the police may seize evidence in plain view without a warrant.” Coolidge v. New Hampshire, 403 U.S. 443, 465 (1971) (such circumstances include a search pursuant to an arrest). “Where the initial intrusion that brings the police within plain view of such an article is supported, not by a warrant, but by one of the recognized exceptions to the warrant requirement, the seizure is also legitimate.” Id.; see also State v. Werner, 615 A.2d 1010, 1013 (R.I. 1992) (explaining that if “the police have probable cause to believe that an automobile, or a container located therein, holds contraband or evidence of a crime, then police may conduct a warrantless search of the vehicle”).

The evidence obtained by Officer Hughes and used by him as the calculus to form reasonable grounds to believe Appellant had operated his motor vehicle under the influence of alcohol included the general physical characteristics of intoxication, the odor of alcohol on Appellant’s breath, blood shot watery eyes, and the presence of open alcohol in Appellant’s vehicle. See Tr. at 29, 46-47. This evidence is non-testimonial in nature and in plain view of Officer Hughes during a lawful stop of Appellant’s vehicle. See Janis, 428 U.S. at 447.

The totality of circumstances Officer Hughes observed constituted evidence that was in plain view and readily observed, detected, and recognized as evidence of intoxication. See Coolidge, 403 U.S. at 465 (explaining “plain view” exception). Such evidence Officer Hughes was neither led to, nor would not have located but for the unreasonable seizure of Appellant. The totality of circumstances, including such plain view evidence, reference to Appellant’s failed performance during the standardized field sobriety test, and voluntarily consented to evidence would constitute evidence not subject to the exclusionary rule. See Coolidge, 403 U.S. 443; see also Janis, 428 U.S. 433. Thus, even if the exclusionary rule were applicable in Refusal

Violation cases, the evidence from the search in this matter is still admissible because of the plain view exception to the exclusionary rule. See id.

**Conclusion**

This Panel has reviewed the entire record before it, and having done so, concludes that the Trial Magistrate's decision was ultimately not affected by error of law and was supported by the reliable, probative, and substantial evidence of record. Substantial rights of the Appellant have been not been prejudiced. Accordingly, the Appellant's appeal is denied.

ENTERED:

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Judge Edward C. Parker

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Administrative Magistrate Domenic A. DiSandro, III

Goulart, Alan R., M., concurring in part and dissenting in part: I agree with the majority that the Appellant's arrest was unlawful and violated both the United States and Rhode Island Constitutions. However, I disagree with the majority's determination that the exclusionary rule does not apply in refusal cases. Rather, I believe that the exclusionary rule should apply in this case as a deterrent to the egregious police conduct; and therefore, I respectfully dissent in the majority's decision.

The majority relies on Spratt for the proposition that since the evidence would be excluded in a criminal context, it is “unrealistic to believe that a police officer will be further deterred from engaging in an unlawful search by the knowledge that his conduct will render the illegally obtained evidence inadmissible [at a civil proceeding] . . . .” State v. Spratt, 120 R.I. 192, 193, 386 A.2d 1094, 1095 (1978) (declining to extend the exclusionary rule to probation revocation hearings). This reliance is misplaced. The exclusionary rule in Rhode Island, codified by G.L. 1956 § 9-19-25, broadly excludes evidence “[i]n the trial of any action in any court of this state . . . where the evidence shall have been procured by, through, or in consequence of any illegal search and seizure . . . .” See § 9-19-25 (emphasis added). The statute does not limit the rule’s application to “criminal” actions, nor does the statute restrict the rule’s applicability in civil proceedings.

Indisputably, courts have rarely applied the exclusionary rule outside a criminal context, but they have, on occasion, extended the rule to civil proceedings. See Bd. of License Comm’rs of Town of Tiverton v. Pastore, 463 A.2d 161, 164-65 (R.I. 1983). In Pastore, our Supreme Court concluded that the exclusionary rule applies to liquor license revocation proceedings because the proceedings, although technically civil in nature, are in substance and effect quasi-criminal. Id. at 164-65. The Court determined that quasi-criminal proceedings are those where the object is to “penalize for the commission of an offense against the law,” thereby invoking the application of the exclusionary rule. Id. at 165. Although civil in nature, a refusal hearing is in substance and effect quasi-criminal because the object is to “penalize for the commission of an offense against the law”—that offense being non-compliance with the refusal statute, § 31-27-2.1. See Levesque v. R.I. Dept. of Transportation, 626 A.2d 1286 (R.I. 1993) (“Section 31-27-2.1 imposes several penalties upon persons who refuse to submit to chemical tests . . . .”)

(emphasis added). Therefore, similar to the civil proceeding in Pastore, the exclusionary rule should apply to refusal hearings.

The majority's limited application contradicts our legislature's intent for a broad application of the rule as evidenced by the use of the words "any action." This language suggests that state actors bear an obligation to obey the Fourth Amendment, and that obligation is not lifted simply because the evidence obtained by the law enforcement officer is to be used in a civil proceeding. See e.g. I.N.S. v. Lopez-Mendoza, 468 U.S. 1032 (1984) (Brennan, J., dissenting) ("there is no principled basis for distinguishing between the deterrent effect of the rule in criminal cases and in civil deportation proceedings").

This straightforward reading of the exclusionary rule properly reflects the purpose of the rule: "to deter—to compel respect for the constitutional guaranty in the only effectively available way—by removing the incentive to disregard it." Elkins v. United States, 364 U.S. 206, 217 (1960) (holding that evidence illegally seized by state officers cannot lawfully be introduced against a defendant in a federal criminal trial). This Panel is faced with the exact circumstance the exclusionary rule seeks to deter—outrageous police conduct and consequent evidence procured in violation of the Fourth Amendment of the United States Constitution and section 6 of article 1 of the Constitution of the State of Rhode Island. However, the majority's disinclination to extend the rule to a refusal violation, because it is civil in nature, resultingly increases the incentive for law enforcement officers to disregard an individual's constitutional rights.

Moreover, a refusal proceeding "often serves the same function as a criminal trial, and the [civil refusal] hearing may very well present the only forum in which the State will seek to use evidence of a [refusal], even when that evidence would support an independent criminal

charge.” Cf. Pennsylvania Bd. of Probation and Parole v. Scott, 524 U.S. 357 (1998) (Souter, J., Ginsberg, J., Breyer, J., dissenting). The deterrent function of the exclusionary rule is therefore implicated as much by a refusal proceeding as by a conventional trial. Id.

In sum, the exclusionary rule is a “necessary and inherent constitutional ingredient” of the protections of the Fourth Amendment. United States v. Janis, 428 U.S. 433 (1976) (Brennan, J., dissenting). It is the sole deterrent of egregious and outrageous police conduct. I believe that even in a civil context, police officers and prosecutors should not be permitted to avail themselves of the fruits of an illegal search in order to impose sanctions upon a person whose constitutional rights have been violated. Accordingly, I dissent.

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Magistrate Alan R. Goulart (Chair)

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