STATE OF RHODE ISLAND AND PROVIDENCE PLANTATIONS

CRANSTON, RITT **RHODE ISLAND TRAFFIC TRIBUNAL**

TOWN OF NARRAGANSETT	:	
	:	
v.	:	**C.A. No. T13-0012**
	:	**12501502044**
LAURA IMSWILER	:	

DECISION

PER CURIAM: Before this Panel on May 29, 2013—Judge Almeida (Chair, presiding), Chief Magistrate Guglietta, and Magistrate Goulart, sitting—is Laura Imswiler's (Appellant) appeal from a decision of Magistrate Noonan, 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 November 21, 2012, Appellant was charged with the aforementioned violation of the motor vehicle code by Officer Kevin O'Connor (Officer O'Connor) of the Narragansett Police Department. Appellant was charged after Officer O'Connor observed Appellant fail two field sobriety tests and detected that Appellant was intoxicated. Appellant contested the charge, and the matter proceeded to trial.

On November 21, 2012, at approximately 1:35 a.m., Appellant was parked at a stop sign on the off-ramp of Salt Pond Plaza in Narragansett. (Tr. at 7.) A car owned by witness Stacy Barrette was parked behind Appellant at the stop sign. (Tr. at 5, 6.) A third vehicle struck Barrette's vehicle from behind, causing Barrette's vehicle to propel forward into Appellant's rear bumper. (Tr. at 7.) Police were called to the scene, and Officer O'Connor responded.

Stacy Barrette was the Town's first witness to testify at trial.[1] Barrette testified that she and her friends had been at a bar, Ocean Mist, (a restaurant and bar) for approximately four hours prior to the accident. (Tr. at 6.) Barrette's friend was operating the vehicle while Barrette was a passenger in the back seat of the vehicle.[2] (Tr. at 11.) Barrette's vehicle pulled up to a stop sign behind a black Toyota that was being driven by Appellant. (Tr. at 7.) Barrette's vehicle, parked behind Appellant's vehicle, was hit in the rear by a third car and was pushed into Appellant's vehicle. Id. Barrette testified that her head propelled forward and smashed into the seat. (Tr. at 16.) All passengers and drivers exited their vehicles, and Appellant then informed them that she had called the police. (Tr. at 9.) Once out of the vehicle, Barrette observed that a black BMW caused the accident. (Tr. at 17.) Barrette also observed Appellant exit her vehicle, and also noticed a passenger in Appellant's vehicle. Id. The police arrived at the scene of the accident, and Barrette was transported to the hospital to be examined. (Tr. at 19.) At the hospital, Barrette made a written statement regarding the accident. Id.

Next, Officer O'Connor was called to the stand.[3] (Tr. at 22.) Officer O'Connor began his testimony by describing his experience and training in regards to DUI-related traffic stops and the administration of standardized field sobriety tests. (Tr. at 24-29.) Then, focusing on the events of November 21, 2012, Officer O'Connor testified that he made contact with all parties involved in the accident and identified the operators of the vehicles. (Tr. at 31.) Officer O'Connor then identified the Appellant. The Appellant provided the Officer with her driver's

[1] Stacy Barrette identified Appellant in the courtroom as the other driver included in the three car accident.
[2] Barrette owned the vehicle involved in the accident; however, since she had consumed two alcoholic beverages, she let her friend, who had not consumed any alcohol, drive the vehicle.
[3] Officer O'Connor also identified Appellant in the courtroom.

license. (Tr. at 32.) The Officer asked Appellant and her passenger where they were coming from, and her passenger stated they were coming from Ocean Mist. Id.

Officer O'Connor observed that Appellant was having trouble finding her registration and proof of insurance. (Tr. at 32-33.) The Officer also observed that Appellant's eyes were bloodshot and that she was crying at the time. Id. Officer O'Connor asked both the Appellant and her passenger if they were injured; both responded that they were not. (Tr. at 33.) While speaking to the Appellant, Officer O'Connor noticed the "odor of an alcoholic beverage emanating from her mouth." Id. At this point Officer O'Connor was approximately three feet from her. Id. Officer O'Connor asked Appellant if she had been drinking, to which Appellant responded that she only had one drink. (Tr. at 34.) Appellant then agreed to submit to a standardized field sobriety test after being asked by the officer. Id.

Officer O'Connor escorted the Appellant to a flat, brightly lit area to conduct the test. (Tr. at 35.) Officer O'Connor explained that the test would involve walking and turning. The Officer asked if there was anything wrong with the Appellant that would prevent her from being able to walk down a line, turn, and return; Appellant responded that there was not. (Tr. at 36.) Appellant began the test after being advised on how to proceed by Officer O'Connor. Id. Appellant failed both the walking and balancing tests. (Tr. at 39- 40.) Based on Officer O'Connor's training and experience, he formed the opinion that Appellant was operating her vehicle under the influence of alcohol. (Tr. at 40.)

Appellant was then advised that she was under arrest for suspicion of driving under the influence. Id. Officer O'Connor read Appellant her rights and transported her to the police department. Id. At the Narragansett Police Department, Officer O'Connor read Appellant her "Rights for Use at Station" and offered her the opportunity to make a confidential phone call.

(Tr. at 44.) After Appellant made a phone call, Officer O'Connor asked Appellant if she would be willing to submit to a chemical test. Id. Appellant verbally refused to take the chemical test and signed a document stating her intent to refuse the test.[4] Id. Subsequently, Officer O'Connor prepared a sworn "affidavit" recounting Appellant's actions and arrest.[5] (Tr. at 45.) The document was signed by the officer, but was not validated, or sworn to under oath by the officer. (Tr. at 46-47.)

On cross-examination, Officer O'Connor admitted that the affidavit prepared on the night of the arrest was not sworn to in the presence of a notary. (Tr. at 56.) Officer O'Connor later noted that a second affidavit, identical to the information in the initial affidavit, was notarized the day before this trial, on February 19, 2013, and three months after the arrest. Id. Officer O'Connor also admitted that he did not give the Appellant a copy of the notarized affidavit until the morning of the trial, February 20, 2013. (Tr. at 56-57.)[6]

In rendering his decision from the bench, the trial judge was satisfied that the Town met its burden of proof in presenting its case.[7] (Tr. at 65.) The judge was satisfied with Barrett's testimony, who he claimed was a "particularly credible disinterested witness." Id. The judge stated that he had "no alternative" but to sustain the violation. (Tr. at 69.) The trial judge then

[4] Officer O'Connor composed a report of the incident; however, the trial judge determined that the report of the Officer could not be considered a Sworn Report because it was not signed and verified. This was considered a harmless error by the trial judge. (Tr. at 72.)
[5] It should be noted that this was the first of two affidavits prepared in this case.
[6] The trial judge did not admit the second affidavit into evidence.
[7] Appellant's attorney argued that the Town did not prove by clear and convincing evidence that there was operation. Barrette testified that Appellant's vehicle was parked at the stop sign at the time it was struck. Counsel for Appellant argued Appellant was outside the car when the Officer arrived at the scene. The judge stated that it is "more than enough to infer operation." (Tr. at 66.)

sustained the charged violation of § 31-27-2.1.[8] (Tr. at 75.) The Appellant, aggrieved by this decision, filed a timely appeal to this Panel. The Panel's decision is rendered below.

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 on questions of fact. The appeals panel may affirm the decision of the judge or magistrate, may remand the case for further proceedings, or may reverse or modify the decision if the substantial rights of the appellant have been prejudiced 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 following 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, 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 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 decision is supported by legally competent evidence or is affected

[8] The judge treated the incident as a non-accident and imposed the minimum fines allowed by the law. (Tr. at 75.) The judge also denied a stay requested by Appellant. Id.

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 conclusions on appeal. See Janes, 586 A.2d at 537.

Analysis

On appeal, Appellant argues that the trial judge's decision is affected by error of law. Specifically, Appellant claims that the Town failed to provide a sworn report describing the circumstances of the charge. Appellant supports this claim by pointing to the fact that the hearing judge ruled that no sworn report had been created.

In order for the Court to sustain a charge under § 31-27-2.1, four required conditions must be proved at trial: 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.

In regards to § 31-27-2.1, this Panel has already determined that the requirements of the statute are "clear and unambiguous and should therefore be applied literally." Town of Smithfield v. Badoui Sleiman, A.A. No. 12-22 Summons No. 11-411500622 (2013). In particular, 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).

The statute's language 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"). 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 cannot prove an element required, and the charge must be dismissed. Ignoring this language renders the element of a sworn report a nullity.[9] See Santos, 870 A.2d at 1032.

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.

[9] In its Concession of Error filed on February 26, 2013, the Attorney General concurred "with the view expressed by the dissenting member of the Traffic Tribunal appellate panel" in State of Rhode Island v. Robert Samson,. C.A. No. T11-0039, March 29, 2012, R.I. Traffic Trib. Specifically, Magistrate Goulart stated that while "*Link* clearly limited the use of the sworn report . . . [and] 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[,] . . . [i]t is clear from [*Link's*] . . . reasoning that there must be, at a minimum, a showing that a sworn report was indeed made." Id. at 14.

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); Town of Smithfield v. Badoui Sleiman, A.A. No. 12-22 Summons No. 11-411500622 (2013) (holding that a sworn report is required to sustain a charge under § 31-27-2.1).

In this case, Officer O'Connor conceded that he did not swear to the veracity of the first report before a notary. (Tr. 46-47.) In addition, the trial judge ruled that the second report was not admitted into evidence, and therefore would not be considered. (Tr. at 58.) See Robert K. Samson v. State, No. 12-285 (R.I., filed April 18, 2013) (Unpublished Order) (accepting state's *Concession of Error* and vacating refusal charge because the state admitted that a sworn report is required in a refusal case and the defect cannot be overlooked at a hearing to determine a motorist's violation of a breathalyzer refusal statute); see also Nabeil Sarhan v. State of Rhode Island, No.12-311 (R.I., filed April 18, 2013) (Unpublished Order) (the state conceded error for the same reasons expressed in the contemporaneously filed *Concession of Error* in Samson); Town of Smithfield v. Badoui Sleiman, C.A. No. T12-0022, August 1, 2013, R.I. Traffic Trib. (finding that "[a]bsent a sworn report, the State . . . is unable to establish reasonable grounds that the arrestee was operating under the influence of alcohol or other substance and therefore cannot prove an element required . . . .").

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 first report was not sworn to and the second report was not admitted into evidence, and these omissions are not a harmless error. 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 the omission of a sworn report would, for all practical purposes, invalidate the plain language of § 31-27-2.1. Accordingly, while we conclude that the trial judge's finding that no sworn report was created to be supported by reliable, probative, and substantial evidence on the whole record, we find his decision to sustain the charge was in violation of statutory provisions and affected by error of law for the reasons set forth in Samson, Sarhan, the State's *Concession of Error* in the aforementioned, and Sleiman.

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 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:

_____
Judge Lillian M. Almeida (Chair)

_____
Chief Magistrate William R. Guglietta

DATE: _____

GOULART M., DISSENTING:

I respectfully dissent from the decision of the majority. Pursuant to R.I. Gen. Laws §31-27-2.1, the report of the law enforcement officer serves two important and necessary functions. Initially, the report serves as a prerequisite for a judge or magistrate to preliminarily suspend the license of a motorist charged with refusing to submit to a chemical test. R.I Gen. Laws §31-22-2.1(a).[10] Additionally, the execution of a sworn report is an element the state must establish before a judge or magistrate can sustain the charge of refusing to submit to a chemical test. (emphasis added) R.I. Gen. Laws §31-27-2.1(c).

In the present case, Officer O'Connor testified that he created a sworn report on February 19, 2013. This testimony was neither contradicted nor rebutted and admitted by the trial magistrate. [11] Furthermore, the claim by the majority that the trial magistrate did not consider the sworn report of February 19, 2013 is contradicted by the trial magistrate's decision. Rather, the trial magistrate specifically found that the testimony of Officer O'Connor established that he prepared an affidavit which was properly notarized on February 19, 2013. (emphasis added) (Tr. 69-70). Accordingly, it is error for the majority to claim that the trial magistrate found that no report was created as this claim is contrary to the trial magistrate's findings. For these reasons I do not believe that the trial magistrate's decision was affected by law. Consequently, I dissent.

_____

Magistrate Alan R. Goulart

DATE: _____

[10] This section requires neither the report be sworn nor that the preliminary suspension hearing take place at the motorist's arraignment.

[11] The trial magistrate's decision, sua sponte, to mark the sworn report of February 19, 2013 for identification only is not fatal when analyzing whether evidence exists to support a finding that a sworn report was created.