STATE OF RHODE ISLAND & PROVIDENCE PLANTATIONS
PROVIDENCE, Sc. DISTRICT COURT
SIXTH DIVISION

Adam Bussey	:	
	:	
v.	:	**A.A. No. 11 - 0116**
	:	
State of Rhode Island	:	

O R D E R

This matter is before the Court pursuant to § 8-8-8.1 of the General Laws for review of the Findings & Recommendations of the Magistrate.

After a de novo review of the record and the memoranda of counsel, the Court finds that the Findings & Recommendations of the Magistrate are supported by the record, and are an appropriate disposition of the facts and the law applicable thereto.

It is, therefore, ORDERED, ADJUDGED AND DECREED,

that the Findings & Recommendations of the Magistrate are adopted by reference as the Decision of the Court and the decision of the appellate panel of the Traffic Tribunal is AFFIRMED.

Entered as an Order of this Court on this 20th day of December, 2011.

Enter:

/s/
Jeanne E. LaFazia
Chief Judge

By Order:

/s/
Melvin Enright
Acting Chief Clerk

STATE OF RHODE ISLAND & PROVIDENCE PLANTATIONS
PROVIDENCE, Sc. DISTRICT COURT
SIXTH DIVISION

ADAM BUSSEY	:	
Appellant	:	
	:	**A.A. No. 2011 - 0116**
v.	:	**(T11-0033)**
	:	**(11-412-500799)**
STATE OF RHODE ISLAND	:	
(RITT Appellate Panel)	:	
Appellee	:	

F I N D I N G S & R E C O M M E N D A T I O N S

Ippolito, M. In this case Mr. Adam Bussey urges that an appeals panel of the Rhode Island Traffic Tribunal erred when it affirmed a trial magistrate's decision finding him guilty of refusal to submit to a chemical test, a civil violation, in violation of Gen. Laws 1956 § 31-27-2.1. This matter has been referred to me for the making of findings and recommendations pursuant to Gen. Laws 1956 § 8-8-8.1. Jurisdiction for the instant appeal is vested in the District Court by Gen. Laws 1956 § 31-41.1-9; the applicable standard of review is found in subsection 31-41.1-9(d).

In his Notice of Appeal Mr. Bussey has presented two grounds for reversal of the appellate panel's decision. They are: (1) the panel erred in finding that the Woonsocket Police officer possessed reasonable suspicion to believe appellant had been

operating under the influence when he was arrested for obstruction of an officer; and (2) the panel erred in ruling it was proper for the officer to defer reading the "Rights For Use at Scene" form to the appellant until after he arrived at the police station. However, after reviewing the record of the proceedings before the RITT and considering the applicable statutory and case law, I have concluded that the appellate panel's affirmation of Mr. Bussey's conviction is supported by substantial and probative evidence of record and is not clearly erroneous. I therefore recommend that Mr. Bussey's conviction on the charge of refusal to submit to a chemical test be affirmed.

I. FACTS & TRAVEL OF THE CASE

The facts which led to the charge of refusal against appellant are fully and fairly stated (with appropriate citations to the trial transcript) in the decision of the panel. See Decision of RITT Appellate Panel, August 24, 2011, at 1-5; for our purposes, the following briefer summary will suffice:

On February 20, 2011 at approximately 1:15 A.M., Officer Jamie Martin — a four-year veteran of the Woonsocket Police Department with more than thirty-five suspected DUI stops — was on patrol with his partner in the Market Square area when a pickup truck pulled out of a parking lot, spinning its tires, creating smoke, in the midst of people. (Trial Transcript, at 5, 10-11, 41). The vehicle was neither speeding nor fish-tailing. (Trial Transcript, at 49). The officers followed the vehicle for about one-quarter mile, at which point they stopped it on Main Street. (Trial Transcript, at 10-11, 58). Mr. Bussey — after telling the other officer that he did not have a license in his possession — gave a false name: "Aaron" Bussey. (Trial Transcript, at 12, 15). When Officer

Martin asked the driver his name once more, he would not answer, so he was asked to exit his vehicle. (Trial Transcript, at 13, 15).

According to Officer Martin's testimony, as Mr. Bussey exited the truck he became combative and aggressive. (Trial Transcript, at 13-14, 16). As a result, appellant was handcuffed in the rear seat of the police cruiser. (Trial Transcript, at 14, 16). During this process, the motorist was yelling and screaming, which provided Officer Martin with an opportunity to observe a strong odor of alcohol on his breath. (Trial Transcript, at 16, 18). The officer also noticed that appellant's eyes were bloodshot and watery. (Trial Transcript, at 18). He was slurring his words. (Trial Transcript, at 18-19). The officer concluded that the motorist appeared to be intoxicated. (Trial Transcript, at 19).

When Officer Martin learned the motorist's real name from one of the passengers, he confronted appellant. (Trial Transcript, at 16-17, 20). Mr. Bussey admitted he had lied. (Trial Transcript, at 17). As a result, Officer Martin placed Mr. Bussey under arrest for Obstructing an Officer, a misdemeanor established in Gen. Laws 1956 § 11-32-1. (Trial Transcript, at 20). The officer explained that he did not ask appellant to perform field sobriety tests at the scene because the road was narrow due to snow banks and the sidewalks were under three feet of snow; it would also not have been safe to perform field tests there due to the number of people who had exited recently closed bars. (Trial Transcript, at 17, 21).

Officer Martin brought Mr. Bussey to the Woonsocket Police Station, which was only a quarter-mile from the scene of the stop. (Trial Transcript, at 22). He asked Mr. Bussey to perform field sobriety tests and appellant agreed; he passed the walk-and-turn

test but failed the one-leg stand test. (Trial Transcript, at 22, 29-31). Thereafter, Officer Martin read appellant the "Rights For Use at the Scene." (Trial Transcript, at 32). Next, Officer Martin read appellant the "Rights For Use at the Station/Hospital," but while the officer was doing so, Mr. Bussey interrupted him to demand a blood test and to refuse the breathalyzer (Trial Transcript, at 33-34, 35).

Appellant attempted, unsuccessfully, to make a confidential phone call. (Trial Transcript, at 35). Appellant then signed the form indicating his refusal to submit to a breath test and demanded instead a blood test. (Trial Transcript, at 36-37). Officer Martin then allowed appellant to make additional telephone calls. Id. After making these calls, appellant withdrew his demand for a blood test. Id.

Mr. Bussey was charged with two civil violations: (1) Gen. Laws 1956 § 31-27-2.1 (Refusal to Submit to a Chemical Test — First Offense) and (2) Gen. Laws 1956 § 31-16-1 (Care In Starting From Stop). Appellant was arraigned before the Traffic Tribunal on March 3, 2011 and on April 22, 2011 the case proceeded to trial before Chief Magistrate William Guglietta. The court heard from one witness — the aforementioned Officer Martin. After the close of the evidence, counsel made their arguments and the case was continued for decision.

On May 13, 2011, the Chief Magistrate rendered his oral decision, which included an extensive review of the testimony, detailed findings of fact, and references to applicable legal authority. See Decision Transcript, at 2-42. He adjudicated appellant guilty on both counts; Mr. Bussey then filed an appeal pursuant to Gen. Laws 1956 § 31-41.1-8.

The matter was heard by an appeals panel comprised of Magistrate David Cruise (Chair), Judge Lillian Almeida and Magistrate Domenic A. DiSandro III on June 15, 2011. In its August 24, 2011 written decision, a majority[1] of the panel upheld Mr. Bussey's adjudication for refusal, denying assignments of error on the following three points:

First, the panel rejected the assertion that the trial magistrate erred by finding Officer Martin's testimony to be credible, in view of the variations between his testimony and his police report, noting that it [i.e., the panel] is not empowered to substitute its judgment for that of the trial magistrate on issues concerning the weight of evidence. See Link v. State, 633 A.2d 1345, 1348 (R.I. 1993). Decision of Panel, at 7-8.

Second, the panel also rejected Mr. Bussey's claim that Officer Martin did not possess reasonable-suspicion to stop him initially. It found the appellant's spinning of his tires was sufficient to justify a traffic stop under § 31-16-1. See Whren v. United States, 517 U.S. 806 (1996). The panel also found his arrest for a violation of the misdemeanor "Obstructing an Officer" under § 11-32-1 was justified. Finally, the panel found that Officer Martin was justified thereafter to pursue the DUI investigation, citing the indicia of intoxication Mr. Bussey exhibited. Decision of Panel, at 8-10.

Third, the panel also denied Mr. Bussey's assertion that Officer Martin violated § 31-27-2.1 by reading him the "Rights For Use at the Scene" only when he arrived at the station. The panel noted that appellant was arrested for the Obstruction charge; it

[1] Judge Lillian Almeida filed a dissent from the decision of the panel. Decision of Panel, at 15-18.

further accepted the officer's testimony that he moved his investigation to the police station because of the unsafe road conditions. Even though Officer Martin had noticed indicia of intoxication in Mr. Bussey at the scene, the officer deferred reading appellant his rights until after the field sobriety tests were administered. Only then was Mr. Bussey arrested for DUI. The panel, acknowledging that section 31-27-3 requires that a person arrested to be notified of his or her rights "immediately," took a broader, more practical approach in applying the statute, relying on the Supreme Court's decision in State v. Lefebvre, 78 R.I. 259, 81 A.2d 348 (1951). Accordingly, it found no error. Decision of Panel, at 10-14. For these reasons the verdict of the trial magistrate was upheld.

On August 31, 2011, appellant filed an appeal in the Sixth Division District Court pursuant to Gen. Laws 1956 § 31-41.1-9. A conference was held in this matter; counsel for appellant and for the State agreed to submit the case based on the record certified by the Traffic Tribunal, dispensing with the submission of further memoranda.

II. STANDARD OF REVIEW

The standard of review which this Court must employ is enumerated in Gen. Laws 1956 § 31-41.1.-9(d), which provides as follows:

> (d) Standard of review. The judge of the district court shall not substitute his or her judgment for that of the appeals panel as to the weight of the evidence on questions of fact. The district court judge may affirm the decision of the appeals panel, or 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 appeals panel's findings, inferences, conclusions or decisions are:
> (1) In violation of constitutional or statutory provisions;
> (2) In excess of the statutory authority of the appeals panel;
> (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.

This standard is akin to the standard of review found in Gen. Laws 1956 § 42-35-15(g), the State Administrative Procedures Act ("APA"). Accordingly, I shall rely on cases interpreting the APA as guideposts in the review process.

Under the APA standard, the District Court "* * * may not substitute its judgment for that of the agency and must affirm the decision of the agency unless its findings are 'clearly erroneous.' "[2] The Court will not substitute its judgment for that of the agency (here, the panel) as to the weight of the evidence on questions of fact.[3] Stated differently, the findings of the panel will be upheld even though a reasonable mind might have reached a contrary result.[4]

III. APPLICABLE LAW

A. THE REFUSAL STATUTE

This case involves a charge of refusal to submit to a chemical test. See Gen. Laws 1956 § 31-27-2.1. The civil offense of refusal is predicated on the implied consent law, which is stated in subsection 31-27-2.1(a):

---

[2] Guarino v. Department of Social Welfare, 122 R.I. 583, 584, 410 A.2d 425 (1980)(citing R.I. GEN. LAWS § 42-35-15(g)(5)).

[3] Cahoone v. Board of Review of the Department of Employment Security, 104 R.I. 503, 246 A.2d 213 (1968).

[4] Cahoone v. Board of Review of Department of Employment Security, 104 R.I. 503, 246 A.2d 213, 215 (1968).

> (a) Any person who operates a motor vehicle within this state shall be deemed to have given his or her consent to chemical tests of his or her breath, blood, and/or urine for the purpose of determining the chemical content of his or her body fluids or breath. No more than two (2) complete tests, one for the presence of intoxicating liquor and one for the presence of toluene or any controlled substance, as defined in § 21-28-1.02(7), shall be administered at the direction of a law enforcement officer having reasonable grounds to believe the person to have been driving a motor vehicle within this state while under the influence of intoxicating liquor, toluene, or any controlled substance, as defined in chapter 28 of title 21, or any combination of these. * * * (Emphasis added).

The elements of a charge of refusal which must be proven at a trial before the Traffic Tribunal are stated later in the statute:

> * * * If the traffic tribunal judge finds after the hearing that: (1) the law enforcement officer making the sworn report had reasonable grounds to believe that the arrested person had been driving a motor vehicle within this state while under the influence of intoxicating liquor, toluene, or any controlled substance, as defined in chapter 28 of title 21, or any combination of these; (2) the person while under arrest refused to submit to the tests upon the request of a law enforcement officer; (3) the person had been informed of his or her rights in accordance with § 31-27-3; and (4) the person had been informed of the penalties incurred as a result of noncompliance with this section; the traffic tribunal judge shall sustain the violation. The traffic tribunal judge shall then impose the penalties set forth in subsection (b) of this section.
> * * *

Gen. Laws 1956 § 31-27-2.1(c)(Emphasis added).

Noting the presence in the statute of the phrase – "reasonable grounds" – the Rhode Island Supreme Court interpreted this standard to be the equivalent of "reasonable-suspicion." The Court stated simply, "* * * [I]t is clear that reasonable suspicion is the proper standard for evaluating the lawfulness of the stop." State v. Jenkins, 673 A.2d 1094, 1097 (R.I. 1996).

On most occasions an alcohol-related traffic offense (*i.e.,* driving under the influence or refusal) results after a motorist has been stopped for the violation of a lesser (non-alcoholic related) traffic offense.[5] Such stops have been found to comport with the mandate of the fourth amendment that searches and seizures be reasonable. See Whren v. United States, 517 U.S. 808, 810 (1996)(cited in State v. Bjerke, 697 A.2d 1060, 1072 (1997)). After the stop, the procedures necessary to sustain a refusal charge [usually beginning with the administration of field sobriety tests] may be commenced when an officer has reasonable-suspicion to believe that a person has been driving under the influence. See State v. Bjerke, 697 A.2d 1060 (1997); State v. Perry, 731 A.2d 720 (1999).

A defendant can only be fully arrested for drunk driving if probable cause exists. See State v. Perry, 731 A.2d 720, 723 n. 1 (R.I. 1999):

> In the event that an officer arrests a person for the offense of driving under the influence of intoxicating liquor, the officer is required to have probable cause to believe that the suspect committed this offense. Probable cause exists when facts and circumstances known to a police officer or of which he or she has reasonably trustworthy information are sufficient to cause a person of reasonable caution to believe that a crime has been committed and the person to be arrested has committed the crime. See, e.g., Beck v. Ohio, 379 U.S. 89, 85 S. Ct. 223, 13 L. Ed. 2d 142 (1964); Draper v. United States, 358 U.S. 307, 79 S. Ct. 329, 3 L. Ed. 2d 327 (1959); State v. Bjerke, 697 A.2d 1069 (R.I. 1997); In re John N., 463 A.2d 174, 178 (R.I. 1983); State v. Jenison, 442 A.2d 866, 874 (R.I. 1982); State v. Bennett, 430 A.2d 424, 426-27 (R.I. 1981).

---

[5] See Gen. Laws 1956 § 31-27-12 (requiring the officer who observes a traffic violation to issue summons). In Rhode Island, most minor traffic offenses are civil violations. See Gen. Laws 1956 § 31-27-13(a).

IV. ISSUE

The issue before the Court is whether the decision of the appeals panel was supported by reliable, probative, and substantial evidence in the record or whether or not it was clearly erroneous or affected by error of law. More precisely, did the panel err when it upheld Mr. Bussey's conviction for refusal to submit to a chemical test?

V. ANALYSIS

As stated at the outset of this opinion, in this appeal Mr. Bussey has cited two instances in which he believes the RITT appellate panel committed error. They are: (1) that the Woonsocket Police did not possess reasonable suspicion to believe appellant had been operating under the influence until after he was arrested for obstruction of an officer; and (2) that it was not improper for the officer to defer reading the "Rights For Use at the Scene" form to the appellant until he was at the police station. Each touches on one of the four elements of the charge of refusal: the first — that the officer had reasonable grounds to believe the motorist had driven under the influence, and the third — that the motorist had been advised of his right to obtain an alternative test. See Gen. Laws 1956 § 31-27-2.l(c) quoted supra at 8. We shall of course evaluate these arguments technically and individually.

A.

Mr. Bussey argues that the State failed to prove the first element of a refusal case, because Officer Martin did not have reasonable grounds to believe that he [Mr. Bussey] "… had been driving a motor vehicle within this state while under the influence of intoxicating liquor …" until after he was arrested for Obstruction of a Police Officer.

See Gen. Laws 1956 § 31-27-2.1(c)(1). The panel rejected this argument, finding instead that the arrest was justified on grounds other than drunk-driving. See Decision of Panel, at 8-10. Nevertheless, in the interest of providing the District Court with the most comprehensive findings possible, I shall consider appellant's assertion fully.

Legally and logically, appellant's first argument requires us to consider two subsidiary legal questions:

(1) Whether appellant is correct in his assertion that Officer Martin did not possess reasonable suspicion to believe Mr. Bussey had been driving under the influence as of the moment he was arrested?

(2) If the answer to the first question is yes, we must also consider whether the absence of reasonable suspicion at that moment is legally determinative in this case?

These questions shall now be discussed seriatim.

1. Did Officer Martin Possess Reasonable Suspicion to Believe Mr. Bussey Had Been Driving Under the Influence as of the Moment of His Arrest?

We must begin this inquiry by determining the moment of appellant's arrest. This is often a difficult question, involving the application of objective and subjective criteria. See State v. Bailey, 417 A.2d 915, 917-18 (R.I. 1980)[6] and State v. Vieira, 913 A.2d 1015, 1020 (2007). However, in the present case the moment of arrest

[6] Among these are: the extent to which defendant's movement was curtailed, the degree of force used, whether a reasonable person would believe he was under arrest in the same circumstances, and whether defendant had choice of not going with police. Bailey, 417 A.2d at 917-18.

is patently obvious and requires no discussion: Mr. Bussey was arrested when he was seized, cuffed, and placed in the police cruiser.

Our next task is to ascertain — if we can — what indicia of intoxication were known to the officers before the moment of Mr. Bussey's arrest. Let us review the testimony: Officer Martin testified that as Mr. Bussey exited his vehicle he raised his right hand in what the officers perceived to be an aggressive manner and was immediately cuffed and placed in the backseat of the cruiser. (Trial Transcript, at 14, 16). It appears that as he came out of the truck he began screaming — including profanity — "at the top of his lungs." (Trial Transcript, at 16). This gave the officer the opportunity to smell "a strong odor of an intoxicating beverage on his breath." (Trial Transcript, at 18). He also stated Mr. Bussey's eyes were bloodshot and watery and his speech was slurred. (Trial Transcript, at 18-19). As we can see, the observation of the indicia and the arrest were happening concurrently.

As a result, it is not clear from the record how many of these indicia were ascertained before Officer Martin arrested Mr. Bussey and how many were observed afterward. If they all occurred before the arrest they would be sufficient to constitute reasonable-suspicion. If not, it would be insufficient. From my reading of the trial magistrate's decision, it does not appear that he made a specific finding concerning the sequence of events.

And, from my reading of the record, it does not appear the appellate panel addressed the issue at all. What is more, from the record before me, I too am unable to determine the precise sequence of events. The testimony of Officer Martin is ambiguous

on this point. Therefore, on this record, I cannot find that Officer Martin had reasonable grounds to believe Mr. Bussey had been driving while under the influence at the moment of arrest.[7] As a result, our resolution of the second issue becomes determinative.

2. Must the State Show that the Officer Had Reasonable-Suspicion to Believe the Motorist Had Been Driving Under the Influence As of the Moment of Arrest When the Arrest Is For A Reason Other Than DUI?

For reasons I shall explain, I shall answer this second question in the negative. There are, of course, standards which govern the legality of a traffic stop which results in an arrest and the issuance of a refusal citation. For instance, the standards for the stop and the arrest are of constitutional dimension, being grounded on the fourth amendment; on the other hand, the standards for the issuance of the refusal citation are statutory — they also comprise the elements of a refusal charge found in § 31-27-2.1(c). We shall now briefly consider whether the facts in the instant case meet these tests.

a. Legality of the Stop. It is necessary to show that the stop was lawful. See State v. Jenkins, 673 A.2d 1094, 1097 (R.I. 1996). The arrest must also be shown to be lawful — or proof of the resulting events may be suppressed.

In this case I believe the stop was lawful. Appellant was stopped for an apparent violation of Gen. Laws 1956 § 31-16-1 (Care In Starting From Stop). Stops for violations of traffic violations have been found to comport with the mandate of the

[7] Based on this finding, I find myself at odds with the position adopted by the dissenting judge — that Officer Martin had probable cause to arrest Mr. Bussey for drunk-driving at the moment he arrested him for obstruction of an officer.

fourth amendment that searches and seizures be reasonable. See Whren v. United States, 517 U.S. 808, 810 (1996)(cited in State v. Bjerke, 697 A.2d 1060, 1072 [1997]). Accordingly, I believe Mr. Bussey's arrest was not problematic.

b. Legality of the Arrest. We begin by noting that when a warrantless arrest is made, the requirement of probable cause is said to be "absolute." State v. Burns, 431 A.2d 1199, 1203 (R.I. 1981) citing Dunaway v. New York, 442 U.S. 200, 208 (1979). The Rhode Island Supreme Court has stated that " … a police officer has probable cause to make an arrest when he personally knows or reliably has been informed of facts sufficient to justify the belief of a person of reasonable caution that a crime has been committed or is being committed by the person to be arrested." State v. Burns, 431 A.2d 1199, 1203 (R.I. 1981) citing Brinegar v. United States, 338 U.S. 160, 175-76 (1949).

In this case, it is clear Mr. Bussey was arrested for Obstruction of a Police Officer, a misdemeanor. In light of the passenger's statement, it appeared to the officer he had given a false name. Indeed, he admitted it. Therefore, probable cause on the charge of obstruction existed and the initial arrest of Mr. Bussey was lawful.

c. Legality of the Issuance of the Refusal Citation. To reiterate, I do not believe the elements of § 31-27-2.1 require the State to prove — at least not in all cases[8] — that reasonable-suspicion of drunk-driving existed at the time of arrest. In my view

[8] As we shall see, if the DUI is the only basis for the arrest, it would be necessary that probable cause for DUI be proven; otherwise not. See State v. Perry, 731 A.2d 720, 723 n.1 (R.I. 1999) quoted supra at 9-10. In Perry the Supreme Court specially approved the arrest when probable cause was present — not for DUI — on the charge of leaving the scene of an accident. Id.

subsection 31-27-2.1(c) requires proof of just four elements, which I will restate informally. They are — that (1) a person under arrest whom an officer has reasonable grounds to believe was driving under the influence (2) refused to take a breathalyzer after (3) being told of his/her right to obtain an alternative test and (4) being warned of the consequences of refusing. While the statute seems to indicate the person must be under arrest, the language of the statute does not require that the person be under arrest for DUI. The terms of the offense clearly militate in favor of a construction that the language of the refusal charge only requires that reasonable grounds be obtained before the officer requests the motorist to submit to the breath test.

I believe there is no question Officer Martin observed appellant to have had bloodshot and watery eyes and to be emitting the odor of an alcoholic beverage. By his arm marking, it was clear to the officer that appellant had been to a local drinking establishment. He also admitted drinking. He failed one field sobriety test. A similar quantum of evidence was found to be sufficient to support a finding of reasonable-suspicion of drunk driving in State v. Bjerke, 697 A.2d 1069, 1072 (RI 1997).

B.

Appellant urges that the officer did not give him his "Rights For Use at the Scene" at the scene. Factually, this is undeniable. He urges that this omission violated § 31-27-3. See Appellant's Notice of Appeal, at 1-2. For the reasons that follow, I believe no violation of § 31-27-3 occurred.

The third element of a refusal case is proof that:

(3) the person had been informed of his or her rights in accordance with § 31-27-3;

Because this section incorporates by reference the mandates of § 31-27-3, we are required to review its contents to determine the rights about which the motorist must be told:

> 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)

See Gen. Laws 1956 § 31-27-3. Synthesizing §§ 31-27-2.1(c)(3) and 31-27-3, we see that in the instant refusal case it was necessary for the State to prove that the officer informed Mr. Bussey, immediately after his arrest for operating under the influence, that he had the right to be examined by a physician of his own choosing and at his own expense.

But, Appellant goes further. He argues that in all refusal cases the State must prove that the "Rights for Use at the Scene" were given at the scene. Appellant's Notice of Appeal, at 1-2. However, giving the "Rights for Use at the Scene" is not an element of the offense as it is defined in section 31-27-2.1. Nor is it otherwise required by statute. The "Rights For Use at the Scene" form has been created to provide police officers with an expeditious way in which to fulfill several of their duties — including their duty under § 31-27-3 — but the exact content of the form

is not established by statute. Appellant argues that if the giving of the "Rights For Use at the Scene" can be bypassed, the statute is meaningless. But, on the other hand, if these rights are absolutely indispensable, then no motorist who is immediately brought for medical help could ever be charged with refusal. And such cases — i.e., those involving bodily injury — tend to be the most serious.

The panel noted the defendant was not under arrest for DUI until he was at the station. Accordingly, the panel found the officers fully complied with § 31-27-3. See Decision of Panel, at 12.

Finally, having found full compliance with this element of the offense, the panel nonetheless remarked that the delay in the DUI investigation was fully excused by exigent circumstances, which delayed Mr. Bussey's arrest for DUI. Decision of Panel, at 13. This comment would seem to be unnecessary, an attempt to justify that which required no justification, for if the arrest for DUI was not effectuated until Mr. Bussey arrived at the station, the rights-notification procedure undertaken by the officers was entirely proper and sufficient to satisfy the mandates of § 31-27-3. I therefore believe the panel's reliance on State v. Lefebvre, 78 R.I. 259, 81 A.2d 348 (1951)[9], was completely unnecessary.

---

[9] The panel seems to be implying that even if it had found Mr. Bussey was in fact arrested earlier, a finding that § 31-27-3 was violated would not necessarily have resulted. Had this Court been required to confront this issue, I believe a 60 year-old precedent may have come into play.

In State v. Lefebvre, 78 R.I. 259, 81 A.2d 348 (1951), a trooper of the Division of State Police arrived at an accident in Hopkinton some 45 minutes after it occurred — at about 5:30 p.m. Although he quickly concluded the defendant should be examined by a physician to determine if he was driving under the influence, he decided his first duty

C.

We have reviewed the two questions presented on purely legal grounds. A few comments are now appropriate on the general policy issue presented by both questions in this case — namely: Is adherence to the customary sequence which the police follow in these matters critical? I have concluded, based on my review of a Rhode Island Supreme Court precedent — State v. Perry, 731 A.2d 720 (R.I. 1999) — that it is not.

In Perry, Central Falls Police Officer Joseph Greenless responded to an accident scene and obtained, from the driver of a damaged vehicle, the license plate of the car that had rear-ended him. Perry, 731 A.2d at 721. After running the plate he learned it was registered to Mr. Perry. Id. Proceeding to the defendant's address, he observed a vehicle with the plates described that had front-end damage. Id. Mr. Perry appeared and indirectly admitted involvement in the accident. Id. During this conversation, Officer

---

should be to clear the roadway; within ten minutes a second trooper arrived and informed the defendant that he would be taken to a doctor to be examined for drunk driving and that he had a right to contact a second doctor of his choosing. Lefebvre, 78 R.I. at 260-61, 81 A.2d at 349. At about 7:15 p.m., Mr. Lefebvre was brought to a doctor, who, after an examination, pronounced defendant unfit to operate a motor vehicle. Id., 78 R.I. at 262, 81 A.2d at 349. When brought to the Hope Valley barracks at about 8:05 p.m., he was again told of his right to a second examination. Id. He called a Providence physician but was unable to speak to him. Id.

At trial appellant moved to dismiss, asserting that the officers had violated the predecessor to § 31-27-3, particularly the command stated therein that the officer should inform a drunk driving arrestee "immediately" of his right to a second examination. Id., 78 R.I. at 262, 81 A.2d at 349-50. The Supreme Court found that the word "immediately" should not be read in a strict sense but in a "broader, relative sense." Id., 78 R.I. at 262-63, 81 A.2d at 350. Then, after noting the necessary travel time and the fact that no time was wasted, and the fact that the defendant was told of his right to an independent examination several times, the Court affirmed the denial of the motion to dismiss. Id.

Greenless noticed certain indicia of alcohol consumption in Mr. Perry — his breath smelled of alcohol, his eyes were bloodshot, and he had difficulty standing. Perry, 731 A.2d at 722. Based on this last factor, the officer did not attempt to administer any field sobriety tests but instead arrested Mr. Perry for leaving the scene of an accident. Id. Mr. Perry, who was not given his DUI rights until he arrived at the police station, was charged with refusal because he blew a "deficient sample" into the breathalyzer machine. Id.

After Mr. Perry was found guilty of refusal to submit to a chemical test, the appellate panel — relying on the Supreme Court's opinion in State v. Capuano, 591 A.2d 35 (R.I. 1991) — found the element of "operation" of the motor vehicle had not been proven. Perry, 731 A.2d at 722. The Supreme Court reversed, finding the trial judge properly relied on Mr. Perry's admissions to establish reasonable-suspicion on the issue of operation. Perry, 731 A.2d at 723.

I must concede that the Perry case is distinguishable factually from the case at bar. In Perry there is no question that indicia of alcohol consumption sufficient to constitute reasonable-suspicion were present before the defendant's arrest. However, I believe the Perry case is instructive because the Court expressed no qualms about the fact that Mr. Perry was not given his DUI rights until he was brought to the police station.[10] Moreover, the Supreme Court specifically analyzed the validity of the arrest solely with regard to the existence of probable cause vel non on the charge of leaving

[10] In this regard Perry would seem to undercut the dissent's finding of prejudice in the officer's failure to admonish the motorist at the scene. Decision of Panel, at 15-18.

the scene charge, not the potential DUI charge; indeed, it commented in a footnote that probable cause for DUI need only be shown when the defendant is being arrested for DUI. Perry, 731 A.2d at 723 n.1.

In conclusion, I believe the Rhode Island Supreme Court signaled in Perry that, in a refusal prosecution where a motorist was originally arrested for a charge other than DUI, it shall not be necessary for the State to prove that the arresting officer possessed reasonable-suspicion that the motorist had operated under the influence at the time of arrest. To the contrary, if the defendant has been legitimately arrested on another charge, reasonable-suspicion as to operation under the influence may be developed after the arrest.

VII. CONCLUSION

Upon careful review of the evidence, I recommend that this Court find that the decision of the appellate panel was made upon lawful procedure and was not affected by error of law. Gen. Laws 1956 § 31-41.1-9. Furthermore, said decision is not clearly erroneous in view of the reliable, probative and substantial evidence on the whole record. Gen. Laws 1956 § 31-41.1-9.

Accordingly, I recommend that the decision of the RITT appellate panel be AFFIRMED.

/s/
Joseph P. Ippolito
MAGISTRATE

DECEMBER 20, 2011