STATE OF RHODE ISLAND & PROVIDENCE PLANTATIONS

PROVIDENCE, Sc. **DISTRICT COURT**
SIXTH DIVISION

Leslie Haley	:	
	:	
v.	:	**A.A. No. 13 - 071**
	:	
State of Rhode Island	:	
(RITT Appeals Panel)	:	

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 at Providence on this 25th day of March, 2014.

By Order:

___/s/_____
Stephen C. Waluk
Chief Clerk

Enter:

_____/s/_____
Jeanne E. LaFazia
Chief Judge

STATE OF RHODE ISLAND & PROVIDENCE PLANTATIONS
PROVIDENCE, Sc. **DISTRICT COURT**
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Leslie Haley	:	
	:	
v.	:	**A.A. No. 2013-071**
	:	**(T12-0019)**
State of Rhode Island	:	
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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. For the second time Ms. Leslie Haley comes to this Court seeking relief from her conviction for refusal to submit to a chemical test, a civil traffic violation. In our February 18, 2011 decision, this Court decided that Ms. Haley may have satisfied her duty under the implied-consent law (to submit to a chemical test for alcohol) when she took a preliminary breath test (PBT) after being arrested for suspicion of drunk driving.[1] We made a conditional finding because the statute requires that the test — in order to satisfy the implied-

[1] The importance of this issue is manifest — if she satisfied her duty under the implied-consent law by taking the PBT, she cannot be convicted of refusal despite having declined to submit to a full breath test at the police station.

consent law — operate on "the principle of infrared light absorption." Because the record before us was silent on that point, we remanded the case to the RITT for a factual determination of this issue to be made.

Upon remand, the original trial magistrate, the Honorable Domenic DiSandro, conducted a hearing on the question and then decided that the PBT used by Ms. Haley did not operate on the principle of infrared light absorption; accordingly, he reinstated Ms. Haley's conviction for refusal. The case has returned to this Court after the Magistrate's determination was upheld by an RITT Appeals Panel.

This matter has been referred to me for the making of findings and recommendations pursuant to General 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). After a complete review of the record, I conclude that Ms. Haley's consent to the PBT after her arrest did not satisfy her duty under the implied-consent law.

I
FACTS & TRAVEL OF THE CASE

The facts which led to the charge of refusal against appellant are fully and fairly stated in our earlier opinion. See Haley v. State of Rhode Island, Findings and Recommendations of the Magistrate, February 18, 2011, at 2-3. Pertinent to

the instant appeal, we concluded there was simply no doubt that Ms. Haley was arrested before she submitted to the PBT, where she had been placed in the back of the police vehicle, completely curtailing her freedom of movement. Id., at 12-13 citing State v. Bailey, 417 A.2d 915, 917-18 (R.I. 1980) and King v. Department of Transportation, A.A. No. 90-203 (Dist.Ct)(Pirraglia, J.). We then noted that a motorist complies with the implied consent law if he or she submits to any test for the alcohol content of breath or blood that comports with the technical requirements of § 31-27-2.1(d) — i.e., that the test rely in whole or in part on the principle of infrared light absorption. Id., at 13-14 citing § 31-27-2.1(d)(which was quoted at 12).

But since we were not able to resolve the issue on the record before us, and since we cannot expand the record in RITT appeals, we had no alternative but to remand the case for a factual determination of the workings of the PBT that Ms. Haley used —

> … I must regretfully recommend that this matter be remanded to the Traffic Tribunal for a further hearing on the issue of whether the PBT instrument used to test Ms. Haley was operated on "the principle of infrared light absorption." If it did, I find that by consenting to the PBT after her arrest she satisfied her obligation under the implied-consent law and she did not commit the civil offense of Refusal to Submit to a Chemical Test as established in § 31-27-2.1(c); if not, I find that the PBT she took was a nullity.

Id., at 14. Accordingly, the case was returned to the RITT. See ORDER, February

18, 2011 (LaFazia, C.J.).

On March 8, 2012, Magistrate DiSandro conducted a hearing on the nature of the PBT test used by Ms. Haley. The State called Mr. Al Giusti, supervisor of the Breath Analysis Unit of the Department of Health,[2] as its first and only witness. Hearing Transcript, at 18 et seq. He testified that his office was responsible for insuring compliance with state law and regulations in the field of breath analysis, including inspecting and calibrating all test instruments used by all Rhode Island law enforcement officers. Hearing Transcript, at 21. Specifically, his officers certify breath test machines and the officers who use them. Id.

Mr. Giusti noted that § 1.2 of the Department's breath test regulations references the definition of chemical test in § 31-27-2.1 of the General Laws. He told the Court of his training in the Intoxilyzer 5000, the breath-test machine used at all Rhode Island police stations. Hearing Transcript, at 26-27. He explained that the Intoxilyzer 5000 uses a principle called infra-red light absorption, which he explained. Hearing Transcript, at 27-29.

He then addressed the subject of preliminary breath testers or PBT's. Hearing Transcript, at 29. He said that all PBT's used by police officers in

[2] He testified he had been the supervisor for two years; before that, he had been an inspector in the office for five years. Hearing Transcript, at 20.

Rhode Island are distributed by his office. Hearing Transcript, at 29-30. Moreover, all the units in Rhode Island are the same model — the Drager 6510. Hearing Transcript, at 30-31.

Mr. Giusti explained that he's been trained by the manufacturer on the use of the PBT machine used here four or five times. Hearing Transcript, at 31. As a result, he is a certified instructor and "tech" on the Drager machine. Id. He related that among the items about which he was trained was the manner of operation of the machine. Hearing Transcript, at 32.

With this background in hand, Mr. Giusti told the Court that the Drager 6510 operates on a principle called "fuel-cell technology." Hearing Transcript, at 33. He explained how that technology works, how ethanol molecules are oxidized, creating an electrical impulse. Hearing Transcript, at 34. He testified that the particular Drager machine that was being used by Officer Connor of the Warwick police department on April 22, 2007 (the date Ms. Haley was stopped) bore the serial number 251. Hearing Transcript, at 37-39. Mr. Giusti concluded his direct examination by testifying that the Drager 6510 does not operate on the principle of infra-red light absorption. Hearing Transcript, at 40.

On cross-examination Mr. Giusti reiterated that all PBT units issued to law enforcement in 2007 were Drager 6510's. Hearing Transcript, at 46-47. He added that, when they issued the Drager 6510's, they instructed the police

departments to discard any other machines; indeed, they confiscated several machines. Hearing Transcript, at 49-50. He acknowledged that other PBT's are manufactured — he indicated he knew of four or five others; but he added that they all use fuel-cell technology, not infra-red light absorption. Hearing Transcript, at 48-49. Nevertheless, he had to admit that he was not present when Ms. Haley was stopped. Hearing Transcript, at 50. And he acknowledged that, under the regulations, a PBT is a chemical test, to be used to guide the officer on whether to make an arrest. Hearing Transcript, at 51-53. The State and the defense then rested. Hearing Transcript, at 55. After argument by counsel, the case was continued to March 22, 2012 for decision. Hearing Transcript, at 61.

Magistrate DiSandro began his bench decision by thoroughly summarizing the travel of the case. Decision Transcript, at 2-8. He then undertook a detailed summary of the testimony of Mr. Giusti. Decision Transcript, at 8-16. In particular, he reviewed the two pertinent breath-analysis technologies — (1) infra-red-light-absorption and (2) fuel-cell — and how they function. Decision Transcript, at 11-12, 13-14. Finally, he outlined Mr. Giusti's testimony regarding the identity of the PBT used by Ms. Haley. Decision Transcript, at 14-16. Finally, Magistrate DiSandro found Mr. Giusti's testimony to be "credible, convincing, and clear." Decision Transcript, at 16.

Accordingly, the magistrate found —

> … the PBT that was administered to Haley by Connor after her arrest on April 22nd, 2007 utilized fuel-cell technology to test Haley's breath sample for the presence of alcohol. The Court concludes the PBT test consented to was not a test of her breath for the presence of alcohol, which relies in whole or in part upon the principle of infra-red light absorption. Consequently, Haley's voluntarily taking of the PBT after she was arrested does not satisfy her duty to take a chemical test under the implied consent law, precluding conviction under Section 31-17-2.1(c). The PBT administered to Haley was not, therefore, a "chemical test" within the meaning of the General Law 31-27-2.1.

Decision Transcript, at 16-17. Ms. Haley took an appeal and the matter was heard on May 23, 2012 by an appeals panel composed of Magistrate Noonan (Chair), Chief Magistrate Guglietta, and Magistrate Goulart. In its April 8, 2013 decision, the appeals panel affirmed Magistrate DiSandro's bench decision reinstituting Ms. Haley's conviction for refusal to submit to a chemical test.

On April 11, 2013, Ms. Haley filed an appeal to the Sixth Division District Court pursuant to § 31-41.1-9. Thereafter, a conference was conducted with counsel for Appellant Haley and the State, at the conclusion of which a briefing schedule was established. Helpful memoranda have been received from both parties.

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.' "[3] The Court will not substitute its judgment for that of the agency (here, the panel) as to the weight of the evidence

[3] Guarino v. Department of Social Welfare, 122 R.I. 583, 584, 410 A.2d 425 (1980)(citing Gen. Laws 1956 § 42-35-15(g)(5)).

on questions of fact.[4] Stated differently, the findings of the panel will be upheld even though a reasonable mind might have reached a contrary result.[5]

III
APPLICABLE LAW

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):

> (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).

Section (d) of the refusal statute makes clear the types of tests which fall within its ambit:

> (d) For the purposes of this section, any test of a sample of blood, breath, or urine for the presence of alcohol which relies in whole or in part upon the principle of infrared light absorption is considered a chemical test.

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

[5] Id.

Gen. Laws 1956 § 31-27-2.1(d)(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).

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 appeals panel err when it affirmed Ms. Haley's conviction for

refusal to submit to a chemical test because the PBT test she took did not satisfy her obligations under the implied-consent law?[6]

V
ANALYSIS

In this, her second appeal to the District Court, Ms. Haley argues that in the post-remand hearing the State never proved what kind of PBT she took — therefore, there is no basis upon which we may find the machine's technology was not founded on the principle of infra-red light absorption. See Appellant's Memorandum of Law, at 5-6. As a result, she urges that Mr. Giusti's extensive testimony regarding the Drager 6510 PBT was immaterial. See Appellant's Memorandum of Law, at 6-7. She argues that the hearing magistrate and the second appeals panel impermissibly "pyramided" inferences to find the PBT she took did not employ infra-red light absorption technology. See Appellant's Memorandum of Law, at 7-8. For the reasons I shall now state, I believe this argument is not persuasive.

A
The Law of Inferences

We are fortunate — in grappling with Ms. Haley's argument — that our Supreme Court recently provided us with a primer on the law of inferences in

[6] Other arguments made by Ms. Haley in writing before the appeals panel were waived at oral argument. See Decision of Panel, at 5 n. 1 and the audio

State v. Robat, 49 A.3d 58 (R.I. 2012). Mr. Justice Robinson, writing for a majority of the members of the Court, commenced his discussion of inferences from fundamental principles —

> It is axiomatic that "[i]nferences and presumptions are a staple of our adversary system of factfinding." County Court of Ulster County, New York v. Allen, 442 U.S. 140, 156, 99 S.Ct. 2213, 60 L.Ed.2d 777 (1979); see also State v. Stone, 924 A.2d 773, 783 (R.I.2007); State v. Ventre, 910 A.2d 190, 198 n. 5 (R.I.2006). From that axiom, it follows that the state may prove the guilt of a defendant "by a process of logical deduction, reasoning from an established circumstantial fact through a series of inferences to the ultimate conclusion of guilt." Vargas, 21 A.3d at 353 (internal quotation marks omitted); see also Cipriano, 21 A.3d at 425; Stone, 924 A.2d at 783; Mattatall, 603 A.2d at 1107; Caruolo, 524 A.2d at 581–82. We remain mindful, however, that "[t]he pivotal question in determining whether circumstantial evidence is sufficient to prove guilt beyond a reasonable doubt is whether the evidence in its entirety constitutes proof beyond a reasonable doubt or is of such a nature that it merely raises a suspicion or conjecture of guilt." Lyons, 924 A.2d at 765 (alteration in original) (internal quotation marks omitted); see also Stone, 924 A.2d at 783; Caruolo, 524 A.2d at 581.

Robat, 49 A.3d at 74-75. From this quote we see importance of circumstantial evidence in our system of justice and that circumstantial proof is not at all disfavored. Indeed, the Supreme Court also reminded in Robat that —

> It is well established in the jurisprudence of this Court that 'we do not distinguish between the probative value of circumstantial and direct evidence.' State v. Patel, 949 A.2d 401, 414 (R.I. 2008);

Robat, 49 A.3d at 74 (additional citations omitted). Nevertheless, as the Court

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disk of the oral argument at 13:40 – 14:00.

stated, the evidence must be sufficient to meet the standard of proof — which in Robat was the criminal standard, proof beyond a reasonable doubt. Inferences which merely raise suspicion or which foster speculation or conjecture cannot satisfy this, or logically, any lesser standard of proof.

With this background in mind let us now define the term invoked by Appellant, the "pyramiding of inferences." It is not true, as the Appellant seems to imply, that inferences may never be pyramided. Robat, 49 A.3d at 74 n. 16. To the contrary, the pyramiding of inferences is permitted unless they are grounded on an ambiguous fact, amenable to inferences inconsistent with guilt –

> With respect to inferences, we have stated that, when "the initial inference in the pyramid [of inferences] rests upon an ambiguous fact that is equally capable of supporting other reasonable inferences clearly inconsistent with guilt, [the] pyramiding of inferences * * * becomes speculative * * * and thus insufficient to prove guilt beyond a reasonable doubt." Vargas, 21 A.3d at 353 (omissions in original) (emphasis added) (internal quotation marks omitted); see In re Derek, 448 A.2d at 768 ("[A]n inference resting on an inference drawn from established facts must be rejected as being without probative force where the facts from which it is drawn are susceptible of another reasonable inference." (internal quotation marks omitted)); see also State v. Sivo, 925 A.2d 901, 910 (R.I.2007); Mattatall, 603 A.2d at 1107; Dame, 560 A.2d at 334; Caruolo, 524 A.2d at 582.

Robat, 49 A.3d at 75. Thus, inferences are allowed to be drawn so long as they are grounded on facts which only point to guilt.

B

Application of Principles to the Case

In this case I believe the findings made by the hearing magistrate are sufficiently grounded in fact to justify his conclusion that the PBT she used did not operate on the principle of infra-red light absorption — and her consequential adjudication of guilt on the refusal charge. I agree with the panel that the trial magistrate did not "pyramid" inferences, he made one — that Ms. Haley used a Drager PBT given to her by a Warwick police officer.

The evidence in support of this finding was indeed ample, although admittedly circumstantial.[7] Mr. Giusti, the person who distributes PBT's to the Rhode Island law enforcement community, testified that when he issued the Drager 6510's he instructed the departments to discard all other machines and that, indeed, he seized other machines. On the basis of these categorical statements, the trial magistrate had every reason to find that the PBT machine used by Warwick Police on April 22, 2007 was a Drager 6510 machine. In fact,

[7] My recommendation to affirm the Decision of the appeals panel should not be taken as tacit approval of the State's failure to call a witness with personal knowledge of the type of PBT used during the stop of Ms. Haley. When available, direct evidence is to be preferred to the circumstantial. Had one of the officers testified as to the type of machine used, the instant appeal, which has involved the time and effort of the appeals panel and this Court, would have been rendered all but frivolous.

any notion that the officer was carrying a non-regulation machine is pure speculation.

Having drawn the inference that the machine used was a Drager 6510, the trial magistrate merely applied Mr. Giusti's uncontradicted testimony that the Drager 6510 uses fuel-cell technology, not infra-red light absorption technology. And so, the magistrate found that the PBT machine used by Ms. Haley was a Drager 6510.[8]

As a result, the Magistrate found the PBT test taken by Ms. Haley did not satisfy her obligations under the implied-consent law. Accordingly, she was convicted of refusal to submit to a chemical test. And, in my view, the charge was proven to a standard of clear and convincing evidence. See Gen. Laws 1956 § 31-41.1-6(a).[9]

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[8] The Magistrate's conclusion on this point is an example of deductive reasoning — from the general (or categorical) to the specific — a perfectly proper form of logic.

And it is notable that the appeals panel approved this conclusion independently of Mr. Giusti's statement that he is unaware of any PBT's that do use infra-red light absorption technology. See Decision of Panel, at 8.

[9] On page 7 of her Memorandum, Ms. Haley comments that there was no proof that Officer Connors was a certified PBT operator, apparently to call into question the ultimate admissibility of the PBT results. But the results were never admitted. In Rhode Island PBT results are only to be used as a guide to the officer when deciding whether a suspect should be arrested for drunk driving. See Gen. Laws 1956 § 31-27-2.3(a). Since Ms. Haley took the PBT test after she was arrested, the results have always been immaterial. Id.

It is for the same reason that the argument made in Appellant's Sur-Reply

VI
CONCLUSION

Upon careful review of the evidence, I recommend that this Court find that the second decision rendered by an appeals panel in this case — on the issue of the preliminary breath test — was 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 rendered by the appeals panel of the Traffic Tribunal be AFFIRMED.

/s/
Joseph P. Ippolito
MAGISTRATE

MARCH 25, 2014

Memorandum is also off-point. Yes, the prerequisites for the admissibility of chemical tests taken on electronic instruments (either a machine used at the station such as the Intoxilyzer 5000 or a PBT like the Drager 6510) are challenging. But in the bench decision in a criminal DUI charge cited by Ms. Haley the issue was the identity of the particular machine and when it had been tested and re-certified. Here, we are interested in neither of those issues, merely the type of machine it was. But, to reiterate, we are not concerned with the admissibility of the results of the PBT.