07-102-010479
RI Lic# 7470412
DOB 3-15-58

STATE OF RHODE ISLAND AND PROVIDENCE PLANTATIONS

PROVIDENCE, S.C. RHODE ISLAND TRAFFIC TRIBUNAL

TOWN OF BRISTOL :
:
v. : C.A. No. T08-0106
:
RICHARD DION :

09 AUG -7 PM 2:55

STATE OF RHODE ISLAND
TRAFFIC TRIBUNAL
FILED

DECISION

PER CURIAM: Before this Panel on December 10, 2008—Magistrate Goulart (Chair, presiding) and Chief Magistrate Guglietta, and Judge Ciullo sitting—is the State of Rhode Island's (State) appeal from a decision of Magistrate DiSandro, dismissing the charged violation of G.L. 1956 § 31-27-2.1, "Refusal to submit to chemical test."[1] Richard Dion, the Appellee (Appellee), was represented by counsel before this Panel. Jurisdiction is pursuant to G.L. 1956 § 31-41.1-8.

Facts and Travel

On April 28, 2008, Officer Russell Wood (Officer Wood) of the Bristol Police Department charged Appellee with violating the aforementioned motor vehicle offense. The Appellee contested the charge, and the matter proceeded to trial.

Officer Wood began his trial testimony by describing his professional training and experience with respect to DUI-related traffic stops and the administration of standardized field sobriety tests. (Tr. 7/16/08 at 5-11.) Then, focusing the court's attention on the date in question, Officer Wood testified that at approximately 12:20 a.m., he observed a vehicle traveling southbound on Thames Street in the northbound travel

[1] The Appellee was also charged with violating G.L. 1956 §§ 31-15-1, "Right half of road"; 31-15-11, "Laned roadways"; 31-16-5, "Turn signal required"; and 31-22-22, "Safety belt use." Based on the credible testimony adduced at trial by Officer Wood, these violations were sustained. (Tr. 8/6/08 at 5-7.) However, only the charged violation of § 31-27-2.1 is presently before this Panel on appeal.

lane. (Tr. 7/16/08 at 11.) Officer Wood observed the vehicle come to a stop at the intersection of Church Street and Thames Street before making a left turn onto Church Street. (Tr. 7/16/08 at 12.)

Once he was in pursuit of the vehicle, Officer Wood noticed it turn onto Hope Street without the use of a turn signal. Id. Once on Hope Street, the vehicle swerved into the northbound lane of Hope Street and then straddled the center dividing line for approximately 400 feet before returning to the southbound travel lane. Id. Before activating his cruiser's emergency lights in an attempt to stop the vehicle, Officer Wood noticed the vehicle swerve into the northbound travel lane on several occasions. Id.

Officer Wood further testified that the operator of the vehicle did not stop in response the police cruiser's emergency lights, but continued southbound on Hope Street. Id. The vehicle then veered sharply to the right, hitting the curb of Hope Street and moving onto it. Id. The vehicle traveled on the curb for several hundred feet before coming to a rolling stop in front of number 10 Hope Street. Id. Officer Wood approached the vehicle and noticed that the operator—later identified at trial as Appellee—was not wearing a safety belt. (Tr. 7/16/08 at 13.)

Before continuing with his trial testimony, the parties stipulated as to the following: that Officer Wood had reasonable suspicion, based upon specific and articulable facts, to stop Appellee's vehicle for investigative purposes; that the arrest of Appellee was based on probable cause; that Officer Wood had reasonable grounds to believe that Appellee had been driving his motor vehicle in the State of Rhode Island under the influence of intoxicating liquor; that Appellee was informed of his right to an

independent physical examination in accordance with G.L. 1956 § 31-27-3;[2] and that Appellee was informed of his "Rights for Use at Scene" and, upon being transported to the Bristol Police Department, his "Rights for Use at Station." (Tr. 7/16/08 at 15-16.)

Returning to his line of questioning, counsel for the State inquired as to whether Appellee was afforded the opportunity to make use of a telephone within one hour after being detained by Officer Wood, as required by G.L. 1956 § 12-7-20.[3] (Tr. 7/16/08 at 16.) Officer Wood testified that he asked Appellee, upon reading the "Rights for Use at Station" form, whether he would like to make use of a telephone, and that Appellee responded in the negative. (Tr. 7/16/08 at 17.) Officer Wood then asked Appellee whether he would submit to a chemical test; Appellee did not answer. Id. Rather, Appellee proceeded to ask Officer Wood several questions regarding the contents of the "Rights" form. Id. After re-reading the form to Appellee two additional times, and upon two read-throughs by Appellee, Appellee stated that he would not submit to a chemical test. Id.

Once Appellee had indicated to Officer Wood that he would not submit to a chemical test, Officer Wood presented Appellee with a document informing him of his

---

[2] Section 31-27-3 reads:

> "A person arrested and charged with operating a motor vehicle while under the influence of . . . 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 . . . ."

[3] Section 12-7-20 reads, in relevant part:

> "Any person arrested . . . shall be afforded, as soon after being detained as practicable, not to exceed one hour from the time of detention, the opportunity to make use of a telephone for the purpose of securing an attorney or arranging for bail . . . ."

right to a physical examination in accordance with § 31-27-3. (Tr. 7/16/08 at 18.) At this time, Appellee asked Officer Wood to use the proffered telephone to contact his personal physician. Id. Appellee was escorted to a phone booth and spent the next thirty to thirty-five minutes attempting to contact his physician. (Tr. 7/16/08 at 19.) When it became apparent that Appellee was experiencing difficultly contacting his physician, Appellee stated his desire to have the examination performed at a nearby hospital. Id.

Officer Wood handcuffed Appellee and transported him to Newport Hospital, where he was subsequently admitted and examined by a Dr. Penza. (Tr. 7/16/08 at 20.) Officer Wood testified that he was not present in the room where Appellee's physical examination was conducted and could not hear what Appellee was saying to the physician, but that he could see both Dr. Penza and Appellee through a glass window in the examination room door. Id.

Following the examination, Dr. Penza informed Officer Wood that Appellee had independently requested a blood alcohol test. Id. After approximately ten minutes, a phlebotomist entered the examination room to extract the blood sample. Id. Officer Wood indicated that he was not in the examination room as Appellee's blood was drawn, but that he continued to observe Appellee through the glass. Id. While Officer Wood maintained that he had no contact with the blood sample, he testified that he approached Dr. Penza as the sample was being obtained and asked that the sample be preserved in the event that the Bristol Police Department decided to seize the blood at a later time for investigative purposes. (Tr. 7/16/08 at 21.) According to Officer Wood, Dr. Penza stated that the lab would hold Appellee's blood for approximately twenty days, pursuant to Newport Hospital policy. (Tr. 7/16/08 at 27.)

On cross-examination by counsel for Appellee, Officer Wood was asked whether he obtained a written release from Appellee prior to speaking with Dr. Penza regarding Appellee's "confidential medical information." (Tr. 7/16/08 at 24.) Officer Wood responded in the negative, stating that it was his understanding of the State Police's blood sample protocol that law enforcement officers were permitted to ask hospital personnel to preserve blood evidence, without a written release, pursuant to an ongoing DUI investigation. (Tr. 7/16/08 at 24, 28.) Officer Wood also clarified that he never ordered Dr. Penza to retain Appellee's blood; rather, he requested that she do so, and Dr. Penza agreed. (Tr. 7/16/08 at 28.)

Officer Wood was also asked on cross-examination whether Appellee was "in custody" during his time at the hospital. Specifically, Officer Wood was asked whether Appellee was handcuffed to his hospital bed during his physical examination. Id. Officer Wood testified that all suspects in police custody are handcuffed to their hospital beds upon being transported to a hospital for examination. (Tr. 7/16/08 at 29.)

At the conclusion of the trial, the trial magistrate found that the charged violation of § 31-27-2.1 had been proved to a standard of clear and convincing evidence. (Tr. 8/6/08 at 7.) However, the trial magistrate concluded that dismissal of the refusal charge was warranted because Appellee's right to a physical examination pursuant to § 31-27-3 had been compromised. The trial magistrate found that Appellee had been informed of his right to an examination immediately following his arrest, and that Officer Wood assisted Appellee in the exercise of his right by transporting him to Newport Hospital. (Tr. 8/6/08 at 9-10.) However, the trial magistrate also found that Officer Wood did not "afford [Appellee] a reasonable opportunity to exercise the right," as he spoke directly to

the physician who performed the physical examination, without Appellee's consent, and also instructed Dr. Penza to hold Appellee's blood in the event that the Bristol Police decided to seize it at a future date. Id. While the trial magistrate found that the mere presence of Officer Wood outside the examination room and the fact that Appellee was "in custody" during his examination did not impinge on Appellee's exercise of his right under § 31-27-3, he went on to find that Appellee was substantially prejudiced by Officer Wood's discussion with Dr. Penza of Appellee's confidential medical information and Officer Wood's request to preserve Appellee's blood. (Tr. 8/6/08 at 12.)

The State, aggrieved by the trial magistrate's decision to dismiss the charged violation of § 31-27-2.1, filed a timely appeal to this Panel. This Panel's decision is rendered forthwith.

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 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 Appellee 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 another 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'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 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, the State argues that the trial magistrate's decision to dismiss the charged violation of § 31-27-2.1 is affected by error of law and clearly erroneous in view of the reliable, probative, and substantial record evidence. Specifically, the State contends that the trial magistrate erred in finding that Appellee was substantially prejudiced by Officer Wood's actions at Newport Hospital on the date in question. In support of its appeal, the State relies on our Supreme Court's decision in State v. Collins, 679 A.2d 862 (1996).

In Collins, the defendant was placed under arrest for suspicion of driving while under the influence of alcohol following a collision between defendant's vehicle and

other vehicle. Id. at 863. Because he complained of injuries, the defendant was transported to a nearby hospital for examination. Id. While at the hospital, the defendant refused, upon the request of the arresting officer, to submit to a chemical test of his breath or blood. Id. However, a blood alcohol test was performed by hospital personnel, and the results of this test were subsequently admitted into evidence at defendant's trial for DUI. Id. at 864. On writ of certiorari, the defendant attributed error to the trial justice's decision to admit the hospital's blood alcohol test results into evidence, as the defendant did not "consent[] to the taking of the test upon which the analysis [wa]s made." Section 31-27-2. The State argued that substantial rights of the defendant were not prejudiced by the trial justice's evidentiary ruling, as the blood test was performed by hospital personnel rather than law enforcement. Id.

Relying on its earlier decision in State v. Lussier, 511 A.2d 958 (R.I. 1986), the Court in Collins reaffirmed that there is a "bright-line distinction between records that [a]re the 'results of actions taken by hospital personnel . . . [and] those taken under the supervision of some law enforcement agency.'" Id. at 865 (quoting Lussier, 511 A.2d at 961). The Court stressed that the DUI statute, § 31-27-2, including its provision relating to the right of a "person arrested and charged with operating a motor vehicle while under the influence of intoxicating liquor . . . to have an additional chemical test" performed, "does not apply to blood tests performed by private health-care providers for the purpose of administering medical treatment." Id. at 865. The Court was satisfied that the defendant was not prejudiced by the admission of the blood alcohol evidence at his trial, as "the purpose of § 31-27-2 is to render inadmissible the results of chemical tests carried out under the supervision, direction, and authority of the police or law enforcement

officials in the event that the requirements of that statute are not satisfied." Id. (Emphasis added.)

Although our Supreme Court's decision in Collins was rendered in the criminal context and involved a different statute, this Panel is satisfied that its reasoning is fully applicable to the context of civil chemical test refusal cases. Like the defendant in Collins, Appellee refused to submit to a chemical test upon the request of the arresting officer; as such, the chemical test performed on Appellee by Newport Hospital personnel was not "carried out under the supervision, direction, and authority of the police or law enforcement . . . ." Id. The record reflects that the decision to submit to the blood test was made by Appellee upon being apprised by Officer Wood of his right to a physical examination pursuant to § 31-27-3, and that the drawing and testing of Appellee's blood—including the blood alcohol content—was pursuant to Newport Hospital's established blood testing protocol, and not at the direction or under the supervision of the Bristol Police Department. The record also reflects that Officer Wood did not, as Appellee suggests, "commandeer" Appellee's blood by ordering Dr. Penza to preserve the blood for a future criminal investigation. Rather, the members of this Panel are satisfied that Appellee's blood would have been preserved for twenty days pursuant to Newport Hospital policy, whether or not Officer Wood had much such a request.

Further, based on the plain and clear language of Lussier and its progeny, it would be anomalous for this Panel to conclude that substantial rights of Appellee were prejudiced where the results of his blood test were not, as in Collins, admitted into evidence at his trial on the refusal charge. As the members of this Panel are satisfied that Appellee was "immediately inform[ed] . . . of [his] right [to a physical examination] and

[was] afford[ed] . . . a reasonable opportunity to exercise the right" by Officer Wood, Section 31-27-3, the trial magistrate's decision to dismiss the refusal charge upon a finding that substantial rights of Appellee were prejudiced requires reversal.

Conclusion

This Panel has reviewed the entire record before it. Having done so, the members of this Panel are satisfied that the trial magistrate's decision to dismiss the charged violation of § 31-27-2.1 was affected by error of law and clearly erroneous in light of the record evidence. As we conclude that substantial rights of the State have been prejudiced, this Panel grants the State's appeal, reverses the decision of the trial magistrate, and sustains the charged violation of § 31-27-2.1. This matter is hereby remanded to the trial magistrate for the imposition of sanctions consistent with this Panel's decision for the State.

ENTERED: