STATE OF RHODE ISLAND AND PROVIDENCE PLANTATIONS

PROVIDENCE, S.C. RHODE ISLAND TRAFFIC TRIBUNAL

CITY OF WARWICK :
:
v. : C.A. No. T09-0021
:
ROBERT MALO :

DECISION

PER CURIAM: Before this Panel on April 8, 2009—Judge Almeida (Chair, presiding) and Judge Parker and Magistrate DiSandro sitting—is Robert Malo's (Appellant) appeal from a decision of Magistrate Goulart, sustaining the charged violation of G.L. 1956 § 31-27-2.1, "Refusal to submit to chemical test."[1] The Appellant was represented by counsel before this Panel. Jurisdiction is pursuant to G.L. 1956 § 31-41.1-8.

Facts and Travel

On January 14, 2009, Officer James Vible (Officer Vible) of the Warwick Police Department charged Appellant with the aforementioned violation of the motor vehicle code. The Appellant contested the charge, and the matter proceeded to trial.

Officer Vible began his trial testimony by describing his professional training and experience with respect to DUI-related traffic stops. (Tr. at 8-9.) Then, focusing the Court's attention on the date in question, Officer Vible testified that at approximately 1:20 a.m. he was traveling southbound on Narragansett Parkway when he observed a black Mercury "traveling very close . . . to the vehicle in front of it." (Tr. at 10.) Officer Vible estimated the distance between the black Mercury and the other vehicle as "a couple of feet." Id.

[1] The Appellant was also charged with violating G.L. 1956 §§ 31-15-1, "Right half of road"; and 31-15-12, "Interval between vehicles." However, these charges are not presently before this Panel on appeal.

Officer Vible then observed the suspect vehicle "swerve over the . . . white fog line with both [of] its passenger side tires and then swerve across its lane of travel over" the center dividing line. (Tr. at 11.) Officer Vible indicated that both of the driver's side tires crossed over the center dividing line in the roadway before the vehicle "swerve[ed] back into its proper lane and continued to . . . follow closely . . . the vehicle to its front . . . ." Id. The vehicle traveling in front of the black Mercury then "accelerated [in] a very . . . quick manner." Id.

Officer Vible continued to follow the suspect vehicle on Narragansett Parkway in order to obtain a radar speed reading. Id. However, before Officer Vible was able to record the speed of the black Mercury, it accelerated rapidly. (Tr. at 11-12.) According to Officer Vible, it appeared that the black Mercury was "chasing" the other vehicle. (Tr. at 12.) Upon making these observations, Officer Vible initiated a pursuit of both vehicles. Id.

Once Officer Vible closed the distanced between his police cruiser and the black Mercury, he activated his cruiser's emergency lights and siren in an attempt to initiate a traffic stop. Id. When the Mercury had stopped on the side of the roadway, Officer Vible approached the vehicle and made contact with the operator, identified at trial as Appellant. (Tr. at 12-13.) Officer Vible observed that Appellant's eyes were "severely bloodshot and watery" and that there was a "moderate odor of a fruity, intoxicating beverage . . . emanating from [Appellant's] breath . . . ." (Tr. at 14.) As he conversed with Appellant, Officer Vible also noted that Appellant's speech was slurred. Id. The Appellant informed Officer Vible that he had recently left O'Rourke's bar where he had consumed "several" drinks. Id. The Appellant also admitted to having consumed "a couple drinks" at the 37 West night club in Cranston. (Tr. at 15.)

Upon making these initial observations, Officer Vible requested Appellant's driver's license, vehicle registration, and proof of insurance. (Tr. at 14.) While Appellant was able to

provide a driver's license and insurance card, he "fumble[ed]" with the contents of his glove compartment while searching for his vehicle registration, "passing his . . . vehicle registration a couple times" before he was able to provide Officer Vible with the requested documentation. (Tr. at 15.)

Officer Vible asked Appellant to remove the key from his vehicle's ignition, place his car keys on the dashboard, and exit the vehicle. Id. The Appellant complied with Officer Vible's request, and followed him to the rear of his vehicle. (Tr. at 15-16.) Officer Vible then asked Appellant whether he would submit to a battery of standardized field sobriety tests; Appellant consented to the tests. (Tr. at 16.) Once the tests had been administered, Officer Vible concluded, based on his professional training and experience conducting DUI-related traffic stops, that Appellant had failed the field sobriety tests. (Tr. at 16-20.) Officer Vible placed Appellant under arrest on suspicion of driving while under the influence of alcohol and/or drugs. (Tr. at 21.)

Officer Vible testified that he read Appellant his "Rights for Use at Scene" in their entirety from the pre-printed card and that Appellant understood the rights as read. (Tr. at 22.) Officer Vible then transported Appellant to the Warwick Police Department for booking. Id. Once at police headquarters, Appellant was seated next to the chemical testing equipment and was advised of his "Rights for Use at Station" by use of the pre-printed form. (Tr. at 23.) Officer Vible indicated that he read the "Rights" form in its entirety and that Appellant understood the rights contained therein. (Tr. at 24.)

Once the "Rights" form had been read to Appellant, Officer Vible asked Appellant whether he would like to avail himself of his right to use a telephone within one hour of arrest; Appellant answered in the affirmative, but indicated that he would need to retrieve the desired

telephone number from his cellular phone. Id. When asked to describe the location where Appellant placed his confidential phone call, Officer Vible testified that Appellant used his cellular phone in the "cell block area" while Officer Vible observed him through a window in the doorway. Id. Officer Vible indicated that he was unable to hear Appellant's voice for the duration of Appellant's ten minute phone call. (Tr. at 24-25.)

When Appellant had completed his telephone call, Officer Vible requested that Appellant sit next to the chemical testing equipment. (Tr. at 25.) He then asked Appellant whether he understood the rights that had been read to him; Appellant asked Officer Vible to repeat the penalties associated with refusing to submit to a chemical test. Id. Having reviewed the penalties with Appellant, Officer Vible asked Appellant to submit to a chemical test. Id. The Appellant responded that "he wanted to wait for his lawyer to call him back." Id. According to Officer Vible, he explained to Appellant that he had been asked to submit to "a time sensitive test" and that Officer Vible "need[ed] a definite time as far as when [Appellant's] lawyer would get back to him . . . ." Id. Officer Vible made clear to Appellant that he "couldn't wait until the morning before giving him the test." Id.

Officer Vible further testified that he and Appellant "went back and forth and talked for about five or ten minutes and then . . . [Appellant] stated that he . . . wasn't refusing to take the test, but wanted . . . to wait for his lawyer . . . to call back . . . ." (Tr. at 26.) After approximately ten minutes had elapsed, Officer Vible informed Appellant that he "wasn't going to wait any longer and that if [Appellant] wouldn't give [him] a definite answer, either yes or no, [he] would consider [that] a refusal." Id. Officer Vible made clear that Appellant's lengthy period of indecision constituted a refusal to submit to a chemical test. Id.

At the conclusion of Officer Vible's trial testimony, counsel for Appellant moved to dismiss the charged violation of § 31-27-2.1 on the grounds that it was unclear when Appellant's "refusal" occurred. (Tr. at 69.) The trial magistrate decided to reserve judgment on Appellant's dismissal motion until Appellant had rested with or without testimony. Id.

The Court next heard testimony from Appellant. The Appellant testified that he "repeatedly told [Officer Vible] that . . . [he] would like to hear from [his] attorney before [he] made [his] decision" with respect to the requested chemical test. (Tr. at 72.) According to Appellant, "had [he] known that [he] was going to be marked as a refusal" for choosing to wait for his attorney to return his phone call, he "would have taken the test." (Tr. at 73.) When counsel asked Appellant about his understanding of the "Rights" form—in particular his rights "relative to an attorney"—Appellant testified that he believed that he "would get to talk to [his] attorney regardless of the time and availability." (Tr. at 74.) In addition, Appellant testified that Officer Vible never informed Appellant of a "last opportunity" to submit to a chemical test prior to charging him with a refusal. Id.

Following the trial, the trial magistrate sustained the charged violation of § 31-27-2.1. The Appellant, aggrieved by this decision, filed a timely appeal to this Panel. Our decision is rendered below.

Standard of Review

Pursuant to G.L. 1956 § 31-41.1-8, the Appeals Panel of the Rhode Island Traffic Tribunal possesses appellate jurisdiction to review an order of a judge or magistrate of the Rhode Island Traffic Tribunal. Section 31-41.1-8(f) provides in pertinent part:

> The appeals panel shall not substitute its judgment for that of the judge or magistrate as to the weight of the evidence on questions of fact. The appeals panel may affirm the decision of the judge or magistrate, or it may remand the case for further proceedings or

> reverse or modify the decision if the substantial rights of the appellant have been prejudicial because the judge's findings, inferences, conclusions or decisions are:
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> (1) In violation of constitutional or statutory provisions;
> (2) In excess of the statutory authority of the judge or magistrate;
> (3) Made upon unlawful procedure;
> (4) Affected by other error of law;
> (5) Clearly erroneous in view of the reliable, probative, and substantial evidence on the whole record; or
> (6) Arbitrary or capricious or characterized by abuse of discretion or clearly unwarranted exercise of discretion.

In reviewing a hearing judge or magistrate's decision pursuant to § 31-41.1-8, this Panel "lacks the authority to assess witness credibility or to substitute its judgment for that of the hearing judge [or magistrate] concerning the weight of the evidence on questions of fact." Link v. State, 633 A.2d 1345, 1348 (R.I. 1993) (citing Liberty Mutual Insurance Co. v. Janes, 586 A.2d 536, 537 (R.I. 1991)). "The review of the Appeals Panel is confined to a reading of the record to determine whether the judge's [or magistrate's] decision is supported by legally competent evidence or is affected by an error of law." Link, 633 A.2d at 1348 (citing Environmental Scientific Corp. v. Durfee, 621 A.2d 200, 208 (R.I. 1993)). "In circumstances in which the Appeals Panel determines that the decision is clearly erroneous in view of the reliable, probative, and substantial evidence on the whole record or is affected by error of law, it may remand, reverse, or modify the decision." Link, 633 A.2d at 1348. Otherwise, it must affirm the hearing judge's [or magistrate's] conclusions on appeal. See Janes, 586 A.2d at 537.

Analysis

On appeal, Appellant argues that the trial magistrate's decision is affected by error of law and clearly erroneous in light of the reliable, probative, and substantial record evidence. Specifically, Appellant contends that the trial magistrate erred in finding that Appellant

"refused" to submit to chemical testing upon the request of Officer Vible. The Appellant maintains that his indecision as to whether to submit to a chemical test does not amount to a knowing and voluntary decision to refuse; rather, it was the product of confusion as to whether or not he was entitled to the advice of counsel prior to choosing to submit to a chemical test. It is Appellant's position that, based on the language of the "Rights for Use at Scene" and "Rights for Use at Station" forms, he was entitled to the advice of counsel prior to choosing whether to submit to chemical testing. Accordingly, once he invoked his right to counsel by placing a confidential phone call to his attorney, Officer Vible was under an affirmative obligation to wait until Appellant's counsel had returned Appellant's phone call prior to renewing his request that Appellant submit to a chemical test.

The Appellant's argument is premised on the assumption that the "Rights" forms in general and their mention of the arrestee's right to a confidential phone call, in particular, create an impression in the mind of the arrestee that he or she has a right to the advice of counsel prior to deciding whether to submit to a chemical test. This impression is at odds with the bright-line rule of Dunn v. Petit, 120 R.I. 486, 490, 388 A.2d 809, 811 (1978), that "no constitutional right to counsel adheres at the moment of decision as to whether or not to submit to [a] [chemical] test." The members of this Panel believe that the language of the "Rights" forms easily can be reconciled with the holding and reasoning of Dunn.

When an individual is placed under arrest on suspicion of operating a motor vehicle under the influence of intoxicating liquor, he or she may be subject to both civil and criminal proceedings and penalties. For example, the arrestee may be charged criminally under § 31-27-2 for "driving under the influence of liquor" and separately charged under the civil chemical test refusal statute, § 31-27-2.1. Since the arresting officer is unsure at the time of arrest how the

arrestee will ultimately be charged, the officer must necessarily advise the arrestee of the rights that attach in both civil and criminal proceedings. The ubiquitous "Rights for Use at Scene" and "Rights for Use at Station" forms were specifically designed with this dual purpose in mind, advising the arrestee of his or her Sixth Amendment right to "the assistance of counsel at all 'critical stages' of the [criminal] prosecution," State v. Oliveira, 961 A.2d 299, 308-309 (R.I. 2008) (citing Iowa v. Tovar, 541 U.S. 77, 80-81, 124 S.Ct. 1379 (2004)), as well as his or her right to a confidential phone call pursuant to § 12-7-20.[2]

The right of an arrested person to place a phone call to an attorney of his or her choosing within one hour of arrest—a right that is specifically enumerated on the "Rights" cards—differs from the right to counsel discussed in Dunn in three important respects: it is not of constitutional origin, it applies equally to both civil and criminal cases, and it is far narrower in scope. Unlike the sweeping Sixth Amendment right to counsel, the narrowly-tailored statutory right of an arrestee to a confidential phone call exists only within one hour of arrest and is exercised when the arrestee makes a phone call; it is not necessary that the arrestee actually make contact with an attorney. Section 12-7-20 affords an arrestee—including an arrestee facing the decision of whether or not to submit to a chemical test—with an opportunity to make limited use of a telephone for the purpose of obtaining confidential legal advice or bail; it does not guarantee that such advice will be forthcoming. Simply put, § 12-7-20 allows the arrestee to use a phone; it

[2] Section 12-7-20 reads, in pertinent 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; provided, that whenever a person who has been detained for an alleged violation of the law relating to drunk driving must be immediately transported to a medical facility for treatment, he or she shall be afforded the use of a telephone as soon as practicable, which may not exceed one hour from the time of detention. The telephone calls afforded by this section shall be carried out in such a manner as to provide confidentiality between the arrestee and the recipient of the call.

does not guarantee that an attorney will be on the receiving end to take the call and provide timely, helpful legal advice.

The relevant inquiry in the present case is not whether Appellant, when confronted with the decision of whether to submit to a chemical test, was aware that the right that he possessed was the narrow statutory right to place a confidential phone call to an attorney and not the more sweeping constitutional right to have the assistance of counsel at all "critical stages" of the criminal DUI investigation. Rather, the relevant inquiry is whether Appellant, when fully apprised of the rights that attach in both the civil and criminal contexts, had a meaningful opportunity to exercise those rights at the appropriate juncture. The record before this Panel reflects that Appellant was fully advised of the rights available to him in the civil context, including his statutory right under § 12-7-20 to speak privately with an attorney prior to rendering a decision on whether to submit to chemical testing. (Tr. at 24-25.) The record also reflects that Appellant availed himself of his opportunity to contact counsel within one hour of his arrest by Officer Vible, even though his opportunity did not result in legal advice. Id. Thus, the members of this Panel are satisfied that Appellant was afforded all of the rights that he was entitled to in a civil refusal case.

In support of his argument, Appellant cites to a number of non-Rhode Island cases, all of which are factually and legally similar. The discussion of only one of these cases will prove instructive. In Calvert v. State, 184 Colo. 214, 218, 519 P.2d 341, 343 (1974), the petitioner was arrested on suspicion of operating his motor vehicle under the influence of intoxicating liquor and was given the Miranda warnings that are contained in our own State's "Rights for Use at Scene" and "Rights for Use at Station" forms. Based on this recitation of the rights that attach in the criminal DUI context, the petitioner "manifested his desire to call his attorney before

deciding whether or not to submit to the test." Id. The arresting officers responded that petitioner "had no such right." Id. The Calvert Court held that "[w]here, as here, law enforcement officers, even though inadvertently, either through an act of omission or commission, cause a suspect's misunderstanding of the state of the law, he cannot be held strictly accountable for his refusal to take implied consent tests." Id. The court reasoned that the best practice is for law enforcement to advise the motorist that "the [Miranda] right to remain silent does not include the right to refuse to submit to the test or the right to prior consultation with an attorney." Id.

However, Calvert and other cases with similar reasoning are clearly distinguishable from the case at bar. Like the petitioner in Calvert, Appellant did not, based on the bright-line rule enunciated in Dunn v. Petit, supra, have a constitutional right to consult with counsel prior to deciding whether to submit to a chemical testing. However, unlike the petitioner in Calvert, Appellant possessed an additional, more limited statutory right under § 12-7-20 "to make use of a telephone for the purpose of securing an attorney or arranging for bail . . . ." Section 12-7-20. Thus, as motorists in Rhode Island are afforded by statute with more rights than motorists in jurisdictions that follow the reasoning employed by the Calvert Court, the members of this Panel conclude that dismissal of a refusal charge is a disproportionate remedy where, as here, the motorist is somewhat "confused" about the rights that attach in the civil and criminal contexts, but is ultimately afforded the proper rights for a refusal case.

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 is not clearly erroneous in light of the reliable, probative, and substantial record evidence or otherwise affected by other error of law.

Substantial rights of Appellant have not been prejudiced. Accordingly, Appellant's appeal is denied, and the charged violation sustained.

ENTERED: