STATE OF RHODE ISLAND AND PROVIDENCE PLANTATIONS

PROVIDENCE, S.C. RHODE ISLAND TRAFFIC TRIBUNAL

TOWN OF RICHMOND	:	
	:	
v.	:	C.A. No. T10-0051
	:	
ROBERT MATTLEY	:	

DECISION

PER CURIAM.: Before this Panel on November 23, 2010—Magistrate Noonan (Chair, presiding) and Judge Parker and Magistrate DiSandro, sitting—is the State of Rhode Island's (Appellee) appeal from a decision of Chief Magistrate Guglietta, dismissing the charged violation of G.L. 1956 § 31-27-2.1, "Refusal to submit to chemical test." Robert Mattley (Appellee) was represented by counsel before this Panel. Jurisdiction is pursuant to § 31-41.1-8.

Facts and Travel

On April 22, 2010, after observing Appellee's vehicle run a stop sign and operate his vehicle in an erratic manner, an Officer of the Richmond Police Department, (Officer Zoglio) conducted a traffic stop. After observing Robert Mattley (Appellee) fail a series of sobriety tests, Officer Zoglio charged him with violating the aforementioned motor vehicle offense. Appellee contested the charge, and the matter proceeded to trial.

Officer Zoglio 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. at 2.) He testified that he had been a patrol officer with the Richmond Police Department for four years, following his graduation from the

Rhode Island Municipal Police Academy. (Tr. at 3.) While at the Police Academy, the officer testified that he had been trained to administer field sobriety tests, including the horizontal gaze nystgamus (HGN), the walk-and-turn, and the one-leg stand test. (Tr. at 5.) He also informed the court that in his four years with the Richmond Police Department, he had been a part of some 85 arrests for DUI. (Tr. at 4.)

Turning to the events of April 22, 2010, Officer Zoglio testified that he was on patrol near Nooseneck Hill Road in Richmond, Rhode Island when he witnessed Appellee's vehicle run a stop sign. (Tr. at 8.) He then observed Appellee's vehicle, "cross over into the high-speed lane and then all the way back into the breakdown lane." Id. Based upon this erratic driving, Officer Zoglio activated his emergency lights and conducted a traffic stop of Appellee's vehicle near Dawley Park in Richmond. (Tr. at 9.)

Officer Zoglio testified that upon making contact with Appellee, he immediately noticed a strong smell of alcohol emanating from the Appellee's vehicle and observed Appellee to have bloodshot and watery eyes. (Tr. at 10.) He also indicated that based upon his responses and overall demeanor, it was apparent to the officer that Appellee "didn't know where he was at the time." (Tr. at 10.) After radioing for backup, the officer had Appellee perform a series of field sobriety tests. (Tr. at 13.) After observing Appellee fail all the tests administered, Officer Zoglio informed him that he was under arrest for suspicion of DUI; he read Appellee the "Rights for Use at Scene," secured him in the rear of his police cruiser, and transported him to the Richmond Police Barracks. (Tr. at 15-17.)

At the station, Officer Zoglio, processed Appellee, and read him the "Rights for Use Station." Thereafter, Appellee denied his opportunity to use the telephone, signed

the "Rights for Use at Station" form indicating that he refused to submit to a chemical test. (Tr. at 18.)

On cross-examination, counsel for the Appellee focused his questioning on the language of the offer to use the phone. The officer testified that he was unsure if he ever used the word "confidential" when offering Appellee the opportunity to use the telephone. (Tr. at 22.) Officer Zoglio indicated that the "Rights for Use at Station" form, which he read to the Appellee in its entirety, informs the arrestee that he shall be afforded an opportunity to make use of the telephone, but the word "confidential" can be found nowhere on the form. (Tr. at 23.)

At the conclusion of testimony the trial judge dismissed the refusal charge. The trial judge indicated that he was convinced by the officer's testimony, that Appellee had been operating his vehicle under the influence of alcohol. (Tr. at 40.) However, it was the opinion of the trial judge that the charge could not stand because although Appellee was apprised of his right to use the telephone, he was not informed that he had the right to make a "confidential" phone call.[1] Aggrieved by this decision, the State filed an appeal before this Panel. Forthwith is this Panel's Decision.

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

[1] Appellee did, in fact, use the telephone. However the call was made after he had refused the test and had signed the form indicating such. (Tr. at 24.) The confidentiality issue upon which this case turns obviously applies to an opportunity to use the telephone *before* a motorist comes to the decision whether he or she will submit to the chemical test.

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

mandated by [the legislature], a suspect must be informed of his or her right to a confidential phone call." Id. However, the Court went on to hold that "the failure to notify a suspect of his [or her] right to use a telephone is not fatal to the state's case unless a defendant is prejudiced thereby." Id. This Panel will not speculate as to what Appellee may or may not have done had the word confidential been used in informing of his opportunity to use the telephone. See Ziegler v. Providence Biltmore Hotel Co., 195 59 R.I. 326, A. 397, 400 (1937). Moreover, there is nothing in the facts that would allow for any speculation, as the record clearly indicates that police complied with the proper procedures.

As noted earlier, the trial judge's decision to dismiss the charge in this instance essentially means that "Rights for Use at Station" form, employed by virtually every police department in this State, provides insufficient notice to an arrested motorist of his or her rights. Our Supreme Court had held otherwise. The "Rights for Use at Station" form has been "designed through a combined effort of the Department of Health, Department of Transportation (DOT) and the Attorney General's office and [is] distributed to local police departments." Levesque v. Rhode Island Dept. of Transp., 626 A.2d 1286, 1288 (R.I. 1993). More relevant to this case, the Carcieri Court essentially offered its stamp of approval to the usage of this form. It held:

> "We are satisfied that the language which contains three separate notifications within the Rights for Use at Station" form provided adequate notice to the suspect of his or her rights under the statute." [A] suspect has a right to a confidential phone call, and the obligation of the arresting officer to inform the suspect of this right *is satisfied* by the use of the "Rights for Use at Station" form." Carcieri 730 A.2d at 16 (emphasis added).

On the facts of this case, dismissal of the refusal charge is not warranted. The procedures—specifically, the reading of the "Rights" form— employed by police complied with what is required under the law. Therefore, the members of this Panel conclude that the decision of the trial judge to dismiss the charged violation of § 31-27-2.1 was affected by error of law and in violation of statutory provisions.

Conclusion

In his decision, the trial judge made it clear that he was "convinced that the [Appellee] was under the influence at the time." (Tr. at 40.) Further he held, "[t]here's no question in my mind that he was a drunk driver. But for the fact of the telephone call, he would have been convicted in this [case]. Id. With that, this Panel sustains the charge against him. This matter is hereby remanded to the trial judge for sentencing pursuant to a violation of § 31-27-2.1.

ENTERED: