

STATE OF RHODE ISLAND AND PROVIDENCE PLANTATIONS

CRANSTON, RITT

RHODE ISLAND TRAFFIC TRIBUNAL

CITY OF EAST PROVIDENCE

v.

DENNIS P. LONARDO

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C.A. No. T11-0063

STATE OF RHODE ISLAND  
TRAFFIC TRIBUNAL  
FILED  
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DECISION

PER CURIAM: Before this Panel on January 11, 2012—Judge Almeida (Chair, presiding), Magistrate Noonan, and Magistrate Goulart, sitting—is Dennis Lonardo’s (Appellant) appeal from a decision of Judge Parker (trial judge), sustaining the charged violation of G.L. 1956 § 31-27-2.3, “Revocation of license upon refusal to submit to preliminary breath test.” Appellant was represented by counsel before this Panel. Jurisdiction is pursuant to G.L. 1956 § 31-41.1-8.

Facts and Travel

Officer Ryan Vose (Officer Vose) of the East Providence Police Department charged Appellant with the aforementioned violation of the motor vehicle code. Appellant contested the charge, and the matter proceeded to trial on September 29, 2011.

On July 31, 2011, Officer Vose was on routine patrol in the area of Warren Avenue and Lyon Avenue. (Tr. at 3.) While on patrol, Officer Vose observed the Appellant walking down Warren Avenue. His attention was drawn to the Appellant because the Appellant was stumbling while walking. Officer Vose also observed the Appellant stop walking and sway from side to side. Officer Vose observed the Appellant for a total of thirty seconds. (Tr. at 7.)

Officer Vose, based upon his training and experience, determined that the Appellant may be under the influence of alcohol or narcotics. (Tr. at 3.) Then, Officer Vose observed the

Appellant enter a liquor store on Warren Avenue. Id. Officer Vose positioned his cruiser on Lyon Avenue to continue his observation of the Appellant. (Tr. at 4.)

The Appellant exited the liquor store and got into a red pickup truck parked on Lyon Avenue. After witnessing the Appellant drive away, Officer Vose pursued the Appellant. Shortly thereafter, Officer Vose conducted a traffic stop of the Appellant's vehicle. Id. Officer Vose's justification for the traffic stop was based on his observations of the Appellant walking down the street. (Tr. at 10.) Upon approaching the Appellant's vehicle, Officer Vose asked the Appellant for his license and registration. While speaking with him, Officer Vose smelled alcohol coming from the Appellant's "facial area." (Tr. at 4.) Officer Vose also stated that the Appellant's eyes were bloodshot and watery. Id.

Officer Vose questioned the Appellant, and Appellant told Officer Vose that he had just finished helping a friend paint. During the conversation, the Appellant admitted to Officer Vose that he had consumed a couple of beers while painting. (Tr. at 5.) Based on these observations and the Appellant's own statements, Officer Vose asked the Appellant to submit to a series of field sobriety tests. Officer Vose had the Appellant perform the horizontal gaze nystagmus test, the walk and turn test, and the one-leg stand test. Officer Vose concluded that Appellant showed impairment in all three of the tests, but he did not provide further explanation for his conclusions. Id.

At this point, Officer Vose called for a fellow officer of the East Providence Police Department to respond to the scene with a portable breath test machine. (Tr. at 6.) The assisting officer responded shortly thereafter, and the Appellant refused to blow into the portable breath test machine. Id. Officer Vose then placed the Appellant under arrest for driving while under the influence and cited him for refusing to submit to a preliminary breath test. Id.

At the trial, after presenting the aforementioned facts, Officer Vose rested his case in chief. The Appellant then called Dorey Monez (Ms. Monez). (Tr. at 18.) Ms. Monez testified that on the day of Appellant's arrest, she was employed as a hairdresser at Hair Wizards, which is located across the street from the liquor store where Officer Vose first observed the Appellant. (Tr. at 19.) Ms. Monez stated that she knew the Appellant for twenty years. Ms. Monez concluded her testimony by stating that she observed the Appellant for about a minute, and she saw the Appellant walk normally and without difficulty down Warren Avenue. (Tr. at 24.) The Appellant then made an offer of proof to the trial judge regarding testimony an employee of the liquor store would give. The Appellant's proffer to the Court was that the employee would testify that she did not observe the Appellant display any signs of intoxication on that day. (Tr. at 25.) The trial judge accepted the Appellant's offer of proof.

After accepting the offer of proof, the parties presented closing arguments. The Appellant argued that Officer Vose lacked the requisite reasonable suspicion to conduct a traffic stop of the Appellant. The Appellant highlighted the fact that the traffic stop was conducted solely on Officer Vose's observations of the Appellant walking on the street. Appellant contended that such minimal information was not enough to conduct a traffic stop. In the alternative, the Appellant maintained that Officer Vose needed to witness the Appellant commit an infraction of the motor vehicle code before conducting a traffic stop. Appellant also argued that because no evidence was elicited regarding the Appellant's performance on the field sobriety tests, there were no reasonable grounds to ask the Appellant to submit to a preliminary breath test.

After a brief closing argument by Officer Vose, the trial judge sustained the charge against the Appellant. The trial judge based his decision on Officer Vose's observations of the

Appellant, both before and after the Appellant entered his vehicle. The trial judge determined that the totality of the circumstances weighed in favor of the prosecution. Id. Finally, in sustaining the charge, the trial judge determined that Officer Vose was a credible witness, and the trial judge took into account with his ruling the testimony elicited by Ms. Monez. Id. The instant appeal timely followed.

### 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:

- (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

#### **A. Reasonable Suspicion**

On appeal, Appellant contends that the trial judge's decision to sustain the violation was in violation of constitutional provisions. Appellant argues that Officer Vose lacked the requisite reasonable suspicion to conduct the initial traffic stop because Officer Vose did not observe any violation of the motor vehicle code or improper operation of the Appellant's vehicle.

It is well established that a traffic stop, regardless of how brief and limited, constitutes a seizure for Fourth Amendment purposes, and thus must be reasonable under the circumstances. Whren v. United States, 517 U.S. 806, 809 (1996). The proper standard for determining the lawfulness of a stop is reasonable suspicion. State v. Jenkins, 673 A.2d 1094 (R.I. 1996). Reasonable suspicion means the detaining authority can "point to specific and articulable facts which, taken together with rational inferences from those facts, reasonably warrant [an] intrusion." Terry v Ohio, 392 U.S. 1, 21 (1968).

To determine whether the suspicions of a police officer "are sufficiently reasonable to justify an investigatory stop, the Court must take into account the totality of the circumstances." State v. Keohane, 814 A.2d 327, 330 (R.I. 2003) (citing United States v. Cortez, 449 U.S. 411,

417 (1981)). This Panel must examine all of “the facts and circumstances available to the officer at the time of the search.” State v. Milete, 727 A.2d 1236, 1240 (R.I. 1999). Additionally, our Supreme Court has enumerated factors that contribute to a finding of reasonable suspicion, including “the location in which the conduct occurred, the time at which the incident occurred, the suspicious conduct or unusual appearance of the suspect, and the personal knowledge and experience of the police officer.” Keohane, 814 A.2d at 330 (quoting State v. Holdsworth, 798 A.2d 917, 921 (R.I. 2002)).

It is undisputed that Officer Vose’s reasons for the traffic stop were based solely on his observations of the Appellant and his experience and training as a police officer. Officer Vose observed the Appellant stumbling down the street and swaying from side to side. Officer Vose also witnessed the Appellant enter a liquor store. These observations, along with Officer Vose’s experience and training, led Officer Vose to the conclusion that the Appellant may be intoxicated. Then, the Appellant proceeded to get into his vehicle and drive away. Officer Vose was now confronted with a situation that the Appellant was operating a vehicle while he was intoxicated, which is a criminal offense. See G.L. 1956 § 31-27-2; see also Cortez, 449 U.S. at 417, (an investigatory stop of a person or vehicle must be based on “some objective manifestation that the person stopped is, or is about to be, engaged in criminal activity”).

The reasonableness inquiry of Officer Vose’s actions is, like all reasonable suspicion inquiries, fact specific. See United States v. Zapata, 18 F.3d 971, 975 (1st Cir.1994)). The facts, which must be evaluated through the eyes of a trained police officer, State v. DeMasi, 448 A.2d 1210, 1212 (R.I. 1982) (citing Cortez, 449 U.S. at 419), lead this Panel to the conclusion that the trial judge’s decision was not in violation of constitutional provisions. Officer Vose observed the Appellant display signs of intoxication while walking into a liquor store. Officer Vose then

observed the Appellant get into a vehicle and start to drive away, which led Officer Vose to believe that the Appellant was committing a criminal offense. See Cortez, 449 U.S. at 417. The relevant inquiry in a reasonable suspicion analysis is not just whether criminal activity has occurred, but also whether criminal activity is afoot. See Terry, 392 U.S. 1.

Even though Appellant had not committed a traffic violation before being stopped, a brief investigatory stop was warranted to determine whether the Appellant was driving while intoxicated. The traffic stop was brief and limited to the purpose of determining if the Appellant was intoxicated. Looking at the totality of the circumstances from the view of a trained police officer, this Panel concludes that the initial traffic stop was supported by reasonable suspicion. The trial judge's similar finding was not in violation of constitutional provisions.

#### **B. Preliminary Breath Test**

Next, Appellant contends that the trial judge's decision to sustain the violation was made in violation of statutory provisions. Appellant argues that Officer Vose's testimony failed to show by clear and convincing evidence that Officer Vose had reasons to believe the Appellant was operating a vehicle while under the influence alcohol. Additionally, the Appellant contends that testimony regarding the Appellant's performance on the field sobriety tests is necessary to sustain the charged violation.

Appellant was charged with violating section 31-27-2.3, which states, in pertinent part, that:

“[w]hen a law enforcement officer has reason to believe that a person is driving or in actual physical control of any motor vehicle in this state while under the influence of alcohol, the law enforcement officer may require the person to submit to a preliminary breath analysis for the purpose of determining the person's blood alcohol content.” Sec. 31-27-2.3.

The reason behind a preliminary breath test is for an officer to better determine whether or not a motorist is driving while intoxicated. See id. The statute simply requires that the officer have reasons to believe that a person is driving while under the influence.

In addition to the aforementioned observations, Officer Vose also made several other observations after the traffic stop that led him to believe the Appellant was operating a vehicle while under the influence of alcohol. Most importantly, Appellant admitted to consuming alcohol earlier that day. Officer Vose also noticed a smell of alcohol coming from the Appellant's facial area, in addition to the Appellant's eyes appearing watery and bloodshot. It was these observations that formed the basis for Officer Vose to ask Appellant to submit to a preliminary breath test. The trial judge adopted these findings of fact into his decision sustaining the violation.

This Panel agrees with the trial judge's ruling that Officer Vose had sufficient reasons to ask Appellant to submit to a preliminary breath test. Officer Vose possessed a plethora of facts that led him to believe that the Appellant was possibly operating his vehicle while under the influence of alcohol. Appellant's argument—that Officer Vose's not going into great detail regarding the Appellant's performance on the field sobriety tests is somehow fatal to the prosecution's case in chief—is without merit. Officer Vose's observations—the Appellant having difficulty walking, the smell of alcohol, the bloodshot, watery eyes—and Appellant's admission constituted sufficient reasons to ask the Appellant to submit to a preliminary breath test. See State v. Owens, 418 N.W.2d 340 (Iowa 1988) (court held that officer detecting the smell of alcohol constituted sufficient reason to ask motorist to submit a preliminary breath test). In spite of little evidence regarding the Appellant's performance of the field sobriety tests, Officer Vose's observations alone more than satisfied the statutory requirement that a law



enforcement officer have reason to believe the motorist is driving while intoxicated. See sec. 31-27-2.3. This Panel thus concludes that the trial judge's decision to sustain the violation was not in violation of statutory provisions.

#### Conclusion

This Panel has reviewed the entire record before it. Having done so, the members of this Panel are satisfied that the trial judge's decision is not in violation of constitutional provisions and statutory provisions. Substantial rights of the Appellant have not been prejudiced. Accordingly, Appellant's appeal is denied, and the charged violation sustained.