STATE OF RHODE ISLAND & PROVIDENCE PLANTATIONS
PROVIDENCE, Sc. **DISTRICT COURT**
SIXTH DIVISION

Robert Samson	:	
	:	
v.	:	**A.A. No. 12 - 093**
	:	
State of Rhode Island	:	
(RITT Appellate 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 21st day of September, 2012.

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
SIXTH DIVISION

Robert Samson	:	
	:	
v.	:	**A.A. No. 2012-093**
	:	**(T11-0039)**
State of Rhode Island	:	**(11-416-500180)**
(RITT Appellate Panel)	:	

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. In this case Mr. Robert Samson urges that an appeals panel of the Rhode Island Traffic Tribunal erred when it affirmed a trial magistrate's decision finding him guilty of refusal to submit to a chemical test, a civil violation enumerated in Gen. Laws 1956 § 31-27-2.1. Jurisdiction for the instant appeal is vested in the District Court by Gen. Laws 1956 § 31-41.1-9; the applicable standard of review may be found in Gen. Laws 1956 § 31-41.1-9(d). This matter has been referred to me for the making of findings and recommendations

pursuant to Gen. Laws 1956 § 8-8-8.1.

Mr. Samson presents three reasons why his conviction should be set aside. First, that the appellate panel erred when it sustained his conviction even though the prosecution failed to prove a sworn report was created in conjunction with his arrest; second, that the panel erred when it sustained the trial magistrate's finding that the arresting officer had reasonable grounds to believe appellant had operated while under the influence of intoxicating liquor; and third and finally, that the panel failed to recognize that Mr. Samson was denied his right to a confidential phone call while in custody at the Burrillville Police Station. Appellant's Complaint, at 2-3. After a review of the entire record, I have concluded that the decision of the panel in this case is supported by reliable, probative and substantial evidence of record and was not clearly erroneous; I therefore recommend that the decision below be affirmed.

I. FACTS & TRAVEL OF THE CASE

The facts which led to the charge of refusal against appellant are fully and fairly stated (with appropriate citations to the trial transcript) in the decision of the panel. See Decision of RITT Appellate Panel, March 29, 2012, at 1-5; they may be summarized here as follows.[1]

[1] What follows is a somewhat briefer version of the narrative presented by the panel in its opinion.

During the afternoon of March 14, 2011, Patrol Officer Kathleen Kelly, an eleven-year veteran of the Burrillville Police Department with experience in drunk driving cases, was maintaining a fixed post on South Main Street when she observed a vehicle approach her position traveling faster than the posted speed limit — twenty-five miles per hour. (Trial Tr. at 12-13). After she clocked the vehicle to be traveling forty-two or forty-three miles per hour, she activated her cruiser's overhead lights, attempting to stop the vehicle. (Trial Tr. at 19-20). However, it did not stop for over one-half mile. (Trial Tr. at 20-21). She had not observed the vehicle, a GMC Envoy, to have broken any other rules of the road. (Trial Tr. at 73, 84).

When it did stop, Officer Kelly approached the vehicle and asked the driver — whom she identified to be the Appellant, Mr. Robert Samson — to produce his license, registration and proof of insurance. (Trial Tr. at 22-23). But he failed to fully comply, providing other documents instead. (Trial Tr. at 23). Officer Kelly noticed Mr. Samson's eyes to be bloodshot and watery, and his breath to contain a strong odor of alcohol. (Trial Tr. at 24, 87-88). He admitted that he was coming from a local bar, where he had consumed two or three drinks. (Trial Tr. at 24-25).

During this process, Lieutenant John Connors arrived to assist Officer Kelly, as she had requested. (Trial Tr. at 25).

Mr. Samson attempted to leave his vehicle, but was told to remain seated.

(Trial Tr. at 26). Officer Kelly then observed the motorist to be screaming inside his vehicle — she looked and saw that he was using his cell phone. (Trial Tr. at 26). At this juncture, Officer Kelly asked Mr. Samson to perform standardized field sobriety tests. (Trial Tr. at 27). He responded that he would; he also indicated he had no physical limitations which would preclude him from performing them. (Trial Tr. at 27, 29-30, 80-82). He did two — the walk-and-turn and the one-legged stand tests — and, in the estimation of Officer Kelly, failed both. (Trial Tr. at 30-35, 80). Officer Kelly concluded appellant was intoxicated. (Trial Tr. at 36).

Officer Kelly then placed Mr. Samson under arrest, read him the prescribed "Rights For Use at Scene," and — with the assistance of Lt. Connors — transported him to the Burrillville Police Station. (Trial Tr. at 37-45). Once there, she read him the "Rights For Use At Station."(Trial Tr. at 46-52).

Officer Kelly gave Mr. Samson the opportunity to make a telephone call, but never expressly told him he had the right to a "confidential" call. (Trial Tr. at 53, 67-70). In any event, he did use the telephone to make calls; Officer Kelly advised Mr. Samson that he was using a recorded line. (Trial Tr. at 70). Officer Kelly could hear him speaking to someone on the phone, but could not discern what he was saying. (Trial Tr. at 55, 58, 67). She then asked him to submit to a chemical test; he initially responded by asking her what he should do, but ultimately refused to take the test, signing the rights form accordingly. (Trial Tr. at

56, 58-59). Mr. Samson then was able to contact his wife, who responded to pick him up. (Trial Tr. at 64).

Officer Kelly composed and signed what she called an "affidavit" regarding Mr. Samson's arrest, but conceded the document was not sworn to before a notary. (Trial Tr. at 64-67).

At his arraignment at the Traffic Tribunal on March 17, 2011, Mr. Samson entered a not guilty plea. The presiding magistrate considered whether a license suspension should be issued — but declined to do so. See Traffic Tribunal Rules of Procedure 33.

The case was tried on June 7, 2011 before Traffic Tribunal Judge Albert Ciullo. Officer Kelly testified in conformity with the narrative presented above.

Mr. Samson also testified, indicating that he suffered from poor eyesight, sore knees and duck feet, but conceded that he never related these conditions to the officer. (Trial Tr. at 111-12, 117-18). He denied he was told he could make a confidential call or that the phone calls he was making were being recorded. (Trial Tr. at 114). He testified his first call to his wife did not go through, but his second one did. (Trial Tr. at 123). He indicated Officer Kelly's presence in the next room limited the content of his conversation with his wife, as he was concerned the officer could hear him. (Trial Tr. at 115, 123-24).

After the close of the evidence, the trial judge sustained the refusal charge,

finding that: (1) the initial stop of the Appellant was valid — although he dismissed the speeding charge due to the state's lack of compliance with a request for proof of calibration. (Trial Tr. at 139); (2) there was no showing of prejudice regarding the lack of confidentiality of Mr. Samson's phone call (Trial Tr. at 137-39, 140-41); (3) Officer Kelly had prepared an "affidavit" in support of her arrest of appellant, even though it had not been sworn and signed in the presence of the notary; and (4) Officer Kelly had reasonable grounds to conclude Appellant was operating his motor vehicle under the influence.

Mr. Samson then filed an appeal to the RITT's appellate review panel, where he raised the issues of (1) the lack of confidentiality of his phone call, (2) the officers' failure to create a sworn report, and (3) the absence of reasonable grounds to detain him for drunk driving. The matter was heard by an appellate panel comprised of Magistrate Alan Goulart (Chair), Magistrate Domenic DiSandro, and Magistrate William Noonan on July 27, 2011. In its March 29, 2012 decision, the panel rejected each of Appellant's assertions of error.

First, a majority of the appellate panel decided, relying on Link v. State, 633 A.2d 1345, 1349 (R.I. 1993), that the creation of an affidavit is not an element of proof in the trial of a refusal case but is only necessary for the issuance of a pre-trial suspension. Decision of Panel, at 7-9 citing Gen. Laws 1956 § 31-27-2.1(c). Commenting on this issue, the panel stated that the officer's testimony "…

proved the requisite elements of the underlying charge to satisfy the necessities of a sworn report." Decision of Panel, at 9. As a result, it held that the requirements of § 31-27-2.1(c) were satisfied. Id. It should be noted that one member of the panel dissented from this ruling, asserting resolutely that the plain language of § 31-27-2.1(c) requires proof that a sworn report was created.

Second, the panel unanimously declared itself satisfied that Officer Kelly had reasonable grounds to believe Appellant had been driving under the influence of alcohol. However, it did so without itemizing the evidence and testimony of record which — in its view — provided this assurance. Decision of Panel, at 10-11.

Third, the panel unanimously approved the trial judge's decision that Appellant Samson was not prejudiced by the fact that he was not provided with a truly confidential phone call. Decision of Panel, at 11-12. Finally, the appellate panel found that Mr. Samson's right to make a confidential call pursuant to § 12-7-20 was not abridged. Decision of Panel, at 11-13.

On April 5, 2012, Appellant filed an appeal in the Sixth Division District Court. A conference was held before the undersigned on May 15, 2012 and a briefing schedule was set. Appellant Samson has relied on his complaint; the Appellee State of Rhode Island submitted a memorandum on August 1, 2012.

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

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

questions of fact.[3] Stated differently, the findings of the panel will be upheld even though a reasonable mind might have reached a contrary result.[4]

III. APPLICABLE LAW

A. THE REFUSAL STATUTE.

This case involves a charge of refusal to submit to a chemical test, which is enumerated in Gen. Laws 1956 § 31-27-2.1. Three provisions of this statute are relevant to the resolution of this case.

The first is subsection (a), where we find Rhode Island's "implied consent law," which is the foundation of the civil offense of refusal:

> (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. * * *

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

[4] Cahoone v. Board of Review of Department of Employment Security, 104 R.I. 503, 246 A.2d 213, 215 (1968).

Thus, under subsection (a), all drivers are deemed to have consented to a chemical test for alcohol under limited circumstances — as when an officer has reasonable grounds to believe the motorist has been driving under the influence. This is the fundamental principle underlying the civil offense of refusal, its sine qua non, for, absent this provision, drivers could suffer no penalty for refusal.

The next pertinent provision, subsection (b), is procedural — it establishes the protocol by which a motorist's driving privileges may be suspended on an interim basis, pending the final resolution of the charge of refusal.

> a judge of the traffic tribunal …, upon receipt of a report of a law enforcement officer: that he or she had reasonable grounds to believe the arrested person had been driving a motor vehicle within this state under the influence of intoxicating liquor …; that the person had been informed of his or her rights in accordance with § 31-27-3; that the person had been informed of the penalties incurred as a result of noncompliance with this section; and that the person had refused to submit to the tests upon the request of a law enforcement officer; shall promptly order that the person's operator's license or privilege to operate a motor vehicle in this state shall be immediately suspended … .

Gen. Laws 1956 § 31-27-2.1(b).

Finally, subsection (c) enumerates the four elements of a charge of refusal which must be proven at a trial before a judge of the Traffic Tribunal:

> … 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).

Noting the presence in the statute of the phrase – "reasonable grounds" – the Rhode Island Supreme Court interpreted this standard to be the equivalent of "reasonable-suspicion." The Court stated simply, "* * * [I]t is clear that reasonable suspicion is the proper standard for evaluating the lawfulness of the stop." State v. Jenkins, 673 A.2d 1094, 1097 (R.I. 1996). On most occasions an alcohol-related traffic offense (i.e., driving under the influence or refusal) results after a motorist has been stopped for the violation of a lesser (non-alcoholic related) traffic offense.[5] Such stops have been found to comport with the mandate of the fourth amendment that searches and seizures be reasonable. See Whren v. United States, 517 U.S. 808, 810 (1996)(cited in State v. Bjerke, 697 A.2d 1060, 1072 (1997)). After the stop, the procedures necessary to sustain a refusal charge [usually beginning with the administration of field sobriety tests] may be commenced

[5] See Gen. Laws 1956 § 31-27-12 (requiring officer who observes traffic violation to issue summons). In Rhode Island, most minor traffic offenses are civil violations. See Gen. Laws 1956 § 31-27-13(a).

when an officer has reasonable-suspicion to believe that a person has been driving under the influence. See State v. Bjerke, 697 A.2d 1060 (1997); State v. Perry, 731 A.2d 720 (1999). At the same time, the officer's acquisition of "reasonable suspicion" [that the motorist was operating under the influence] becomes the first element to be proven in a refusal case. See Gen. Laws 1956 § 31-27-2.1(c). Thus, the Court has pronounced that in alcohol cases, reasonable suspicion is the standard which, if present, empowers the arresting/charging officer to take two crucial actions in alcohol cases: (1) the initial stop and (2) the request of the motorist to take a chemical test. The Court confirmed that the reasonable-suspicion test carries this dual role in State v. Perry, 731 A.2d 720, 723 (1999).

B. SECTION 12-7-20 (RIGHT TO A CONFIDENTIAL PHONE CALL).

A second provision which must be considered in the resolution in this case is Gen. Laws 1956 § 12-7-20, which grants arrestees the right to a telephone call:

> **12-7-20. Right to use telephone for call to attorney — Bail bondsperson. —** Any person arrested under the provisions of this chapter 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.

We may note that, by its terms, the right established in § 12-7-20 applies only to phone calls made for the purpose of securing an attorney and arranging for bail. However, in State v. Quattrucci, 39 A.2d 1036 (R.I. 2012), the Rhode Island Supreme Court ruled that the right to a phone call provided under § 12-7-20 does apply in the context of a civil violation proceeding — such as refusal to submit to a chemical test. Quattrucci, 39 A.2d at 1041-42.

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 panel err when it upheld Mr. Samson's conviction for refusal to submit to a chemical test?

V. ANALYSIS

As summarized above, Mr. Samson's complaint presents three grounds upon which he asserts his conviction for refusal to submit to a chemical test must be vacated. The first two arise out of the first element of proof in a refusal case — that the State must demonstrate that "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." Gen. Laws 1956 § 31-27-2.1(c)(1).

We shall first address the issue of the sworn report. Thereafter, we shall evaluate Mr. Samson's argument that the officer did not, in fact, have reasonable grounds to believe he had been driving under the influence. Finally, we shall consider his claim that his right to a confidential phone call under section 12-7-20 was abrogated.

A. DID THE PANEL ERR IN FINDING THAT THE STATE WAS NOT REQUIRED TO PROVE THAT OFFICER KELLY'S REPORT HAD BEEN "SWORN TO"?

Relying on the plain language of subdivision 31-27-2.1(c)(1), Mr. Samson urges that the State must prove that the officer — the same officer who had reasonable grounds to believe the motorist had been driving under the influence — made a sworn report of the incident; he asserts that Officer Kelly never made a sworn report. As a result, he asserts that the first element of a refusal case was not proven at his trial and his conviction for refusal must be overturned. The State — adopting a broader or contextual reading of section 2.1 — argues that proof of the sworn report is unnecessary. Therefore, it urges affirmance.

This question presents issues of law and fact. But, since a significant issue of statutory construction is implicated, I shall put that to one side and, in the first

instance, address the validity of the factual premise upon which Appellant relies — that Officer Kelly failed to create a "sworn report."

1. The Factual Predicate.

Factually, there is no doubt that the officer created a report. She testified that she signed the report and left it at the station. It was thereafter, at a time unknown to her, notarized. Such is her testimony and it is undisputed. Armed with this testimony, Mr. Samson argues that the report was not properly notarized and therefore it may not be considered legally "sworn."

To respond to Appellant's argument, we must pose the question: What is a "sworn report?" Black's Law Dictionary does not define the term, but defines the analogous term, "sworn statement," to be — "A statement given under oath; an affidavit." BLACK'S LAW DICTIONARY, (9th ed. 2009) at 1539. In addition to administering the oath to the statement-giver, the notary or other officer signs a "jurat" — "a certificate of the fact that the witness appeared before [the notary], and was sworn to the truth of what he or she stated." United States v. Julian, 162 U.S. 324, 325 16 S.Ct. 801, 802 (1896)(addressing duties of U.S. Commissioners). In this case, Officer Kelly prepared a report but she never took an oath as to its

truth. Because this was not done in the instant case, I must agree with Mr. Samson — Officer Kelly's report cannot be considered a "sworn report."[6]

2. The Positions of the Parties and the Opinions Below.

With this definition in hand, let us address the legal question before us — Is Officer Kelly's failure to create a sworn report fatal to the State's case? As stated above, appellant's argument originates in the language of the refusal statute which states that "the officer making the sworn report" must have reasonable grounds to believe the motorist had been driving under the influence. See Gen. Laws 1956 § 31-27-2.1(c)(1). He asserts that the State must show that a sworn report was created; otherwise, a failure of proof must be declared and the charge must be dismissed.

Certainly, the plain language of the statute would suggest the existence of such a requirement.

But the panel's majority did not focus on the language of subdivision 31-27-2.1(c)(1). Instead, they viewed the statute as a whole, and found the report is relevant only to the question of the issuance vel non of the preliminary suspension under subsection (b) and is immaterial to the ultimate trial under subsection (c).

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[6] Neither may an unsworn report be considered an "affidavit." See Scarborough v. Wright, 871 A.2d 937, 938-39 (R.I. 2005)("An affidavit is a written statement that has been sworn to by the affiant before a person authorized to administer oaths.").

In adopting this approach the members of the appellate panel placed great reliance on the Supreme Court's opinion in Link v. State, 633 A.2d 1345 (R.I. 1993). Decision of Panel, at 7-9. In Link, the Court affirmed the appellate panel's ruling reinstating a refusal charge that had been dismissed because the sworn report inaccurately stated the amount of a fee that would be assessed upon conviction. Link, 633 A.2d at 1349. The Court explained that the prosecution of refusal cases under § 31-27-2.1 is bifurcated into "two distinct parts." Link, supra, at 1349. And, once the preliminary suspension has entered — "the role of the sworn report ends." Link, supra, at 1349. Lastly, the Court declared that the outcome of the refusal trial (under subsection[c]) is "based on whatever evidence is adduced at the hearing and [is] not dependent on the validity of the (officer's) sworn report." Link, supra, at 1349. Relying on these sweeping statements, the majority of the panel found that the making of a "sworn" report was not an element of proof at trial under subsection (c) and rejected the Appellant's assertion of error accordingly.

The dissenting magistrate, while acknowledging the teaching of Link, maintained nonetheless that the clear and unambiguous text of subdivision 31-27-2.1(c)(1) requires proof that a "sworn report" was created and this phrase must be accorded due weight and its plain and ordinary meaning. Decision of Panel, at 14 (Dissenting opinion).

3. The Legal Question — Resolution.

Undeniably, each of the appellate panel opinions has merit: the majority follows case precedent; the dissent gives effect to the text of the statute. Because they adopt different approaches they are not in direct conflict, except on the ultimate question. Much of what is stated in each opinion is unassailable. Accordingly, we need not repeat their analyses here. The question which faces this Court is simply — Which approach shall we adopt?

After due consideration of both approaches, I find myself inclined toward the majority's contextual analysis. I reach this result not because I find any great weaknesses in the dissent's approach[7] but because I simply can find no responsible way to avoid applying the Supreme Court's commanding statements in Link — binding on this Court — that the report is completely immaterial to the verdict in

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[7] Let me point to one, which arises only by inference. It is an assumption of the dissenting opinion that the failure to swear to a report is a more grievous infirmity than creating an inadequate sworn report — i.e., one that contains an error as to the penalties (as in Link) or which contains insufficient facts to show the officer possessed grounds to request a chemical test. On this basis the dissent distinguishes Link. But is it really true that a defect in form is more serious than a defect in substance? I believe this question is unsettled, especially in light of one recent case — State v. Huguenin, 662 A.2d 708 (R.I. 1995), in which a search warrant which was inadvertently not signed by the judge was deemed valid. Huguenin, 662 A.2d at 711. The outcome of this question — if deemed material — may well depend on whether the Supreme Court views the officers' failure to create a proper sworn report to be devious or innocent. Compare Huguenin, supra, with Lisi v. Resmini, 603 A.2d 321, 323-24 (R.I. 1992)(submission of false notarization deemed grounds for suspension from practice of law).

a refusal trial. Therefore, notwithstanding the text of the statute, which would seem to require otherwise, I believe this Court is constrained to find that the officer's failure to create a sworn report is not fatal to the State's efforts to secure a conviction for refusal to submit to a chemical test. I shall therefore recommend affirmance of the decision of the panel on this issue.[8]

B. DID THE PANEL ERR IN FINDING THE TROOPER HAD REASONABLE GROUNDS TO BELIEVE MR. SAMSON HAD BEEN OPERATING UNDER THE INFLUENCE?

Mr. Samson also urges that the State failed to prove the first element of a refusal case because Officer Kelly did not have reasonable grounds to believe that he "… had been driving a motor vehicle within this state while under the

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[8] Although I have concluded that the creation vel non of a sworn report is immaterial at the trial on the merits, I feel obligated to offer a comment on the propriety vel non procedure followed by members of law enforcement in this case.

It appears that an officer purported to notarize Officer Kelly's report in her absence and without administering the oath — which is, of course, the hallmark of the creation of an affidavit or sworn report. Consequently, a document with a false jurat was presented to the Traffic Tribunal. This is conduct which has caused attorneys to be suspended from the practice of law. See Lisi v. Resmini, 603 A.2d 321, 323-24 (R.I. 1992). And, if done with fraudulent intent, making a false notarization may also be a crime. See Gen. Laws 1956 § 42-30-16. Finally, presenting a false notarization may constitute contempt of court.

For these reasons, I believe the procedure followed in this case by the officers regarding the "sworn report" is troubling — requiring additional attention by appropriate authorities. Because the Department of the Attorney General is a party to this litigation, I believe it is aware of all the pertinent facts; as a result, I need not make any further referral. Looking forward, I trust the Department shall undertake the education of the law enforcement community so that recurrences of the conduct seen here may be avoided.

influence of intoxicating liquor ….” See Gen. Laws 1956 § 31-27-2.1(c)(1) and Appellant’s Complaint, at 4. He suggests that the officer acted on a “hunch.” Id. He further asserts that her testimony regarding Mr. Samson’s alleged failure to successfully complete the field sobriety tests was “not compelling.” Appellant’s Complaint, at 2-3. The panel’s treatment of this issue was perfunctory. Accordingly I must undertake my own analysis of the question.

Of course, there is no bright-line rule regarding the quality or quantity of facts which must be mustered to meet the test of reasonable grounds; instead, a judgment must be made in each case on the basis of the totality of the circumstances present therein. To this end, I reviewed the refusal cases previously decided by the Rhode Island Supreme Court in order to examine the quality and quantum of the indicia of reasonable suspicion (reasonable grounds) contained therein; next, I compared the indicia of reasonable grounds in the precedents to the indicia present here. Having done so, I am more than satisfied that the State’s proof cleared this hurdle. I shall now elaborate on the steps of this analysis.

1. Reasonable Grounds on the Element of Driving While Under the Influence.

In considering the prior cases which have addressed the quantum and quality of evidence necessary to form reasonable grounds (alternatively called

the "reasonable-suspicion" standard), I believe we may profitably commence with State v. Bjerke, 697 A.2d 1069 (RI 1997). In Bjerke the initial stop was justified on alternative grounds — the investigation of a criminal offense. Nevertheless, the Supreme Court paused to note the factors present in the case upon which reasonable grounds may be discerned:

> The defendant's commission of a criminal misdemeanor alone gave the officer probable cause to stop and detain him, and then from that point on, any evidence obtained pursuant to that lawful stop, such as the odor of alcohol, the slurred speech, and bloodshot eyes, would in effect be in plain view of the arresting officer and would support an arrest for suspicion of driving while under the influence. (Emphasis added).

Bjerke, supra, 697 A.2d at 1072. Accordingly, from Bjerke, we may draw that emitting the odor of alcohol, slurred speech and bloodshot eyes are accepted as indicia of intoxication.

Next, we may examine State v. Bruno, 709 A.2d 1048 (RI 1998). In Bruno, multiple indicia of the consumption of alcohol were exhibited. Among these were swerving and speeding, evidence of vomit in the vehicle, the odor of alcohol, slurred speech, and appearing confused. Bruno, supra at 1049.

Finally, in evaluating the sufficiency of this finding of reasonable-suspicion we may review State v. Perry, 731 A.2d 720, 723 (R.I. 1999), in which the operation component of the element reasonable grounds [to believe the motorist was driving under the influence] was found to have been satisfied

where (1) a citizen identified Mr. Perry's car as having been involved in a hit-and-run accident and Mr. Perry made an inculpatory statement. On the issue of operation under the influence, the Court noted front-end damage, the smell of alcohol, bloodshot eyes, and stumbling. Perry, 731 A.2d at 722. On this basis, the Supreme Court upheld the trial court's finding that reasonable grounds were present.

2. Comparing the Indicia In the Instant Case to the Precedents.

All in all, the State presented six indicia that Mr. Samson had operated under the influence: (1) he had admitted to the consumption of alcohol, (2) he had watery and (3) bloodshot eyes, (4) he emitted the odor of alcohol, (5) his violation of the traffic laws — by speeding, and (6) his failure to properly execute the field sobriety tests. I believe these facts are sufficient — when measured against the standards established in prior Supreme Court decisions, especially the Perry case — to allow this Court to find that the appellate panel's finding that officer Kelly possessed "reasonable grounds" to believe Mr. Samson had driven under the influence of liquor was not clearly erroneous and was in fact supported by substantial evidence of record.

C. IS THE PANEL'S DECISION AFFIRMING THE TRIAL MAGISTRATE'S DECISION NOT TO DISMISS THE INSTANT CASE BASED ON A BREACH OF APPELLANT'S RIGHT TO A CONFIDENTIAL TELEPHONE CALL PURSUANT TO SECTION 12-7-20 CLEARLY ERRONEOUS?

For the reasons that follow, I conclude that this question also must be answered in the negative.

Ruling before the Supreme Court's decision in Quattrucci, supra, was issued, the trial judge determined that Mr. Samson's right to a confidential phone call was indeed violated. He nonetheless declined to dismiss the case on this basis because he found a lack of prejudice, citing State v. Carcieri, 730 A.2d 11 (R.I. 1999). The appeals panel, relying on Carcieri, supra, affirmed.[9] Decision of Panel, at 11-12. It too centered on the absence of a showing of prejudice. Id.

After a review of the Supreme Court's teaching in Quattrucci, I believe it supports affirmance of the panel on this issue. The Court in Quattrucci emphasized that the right enunciated in section 12-7-20 "… only attaches when the purpose of the call is to speak to an attorney or to arrange for bail." 39 A.3d at 1043. Mr. Samson never spoke to an attorney and he did not need bail — he was apparently released to appear pursuant to a summons. He used

[9] The decision of the panel in this case made no reference to Quattrucci, though it was issued 20 days after the Supreme Court's decision was published.

the phone to speak to his wife, to request her to respond to the police station to pick him up. Therefore, his rights under § 12-7-20 were not violated.

The State also urges that, even if appellant's rights under § 12-7-20 were violated, dismissal would have been an excessive and unwarranted remedy because Mr. Samson cannot demonstrate prejudice. See State's Memorandum of Law, at 4-5. The panel cited State v. Carcieri, 730 A.2d 11 (RI 1999), for the principle that prosecutorial misconduct will not require dismissal unless there is demonstrable proof of prejudice or a substantial threat thereof. Carcieri, 730 A.2d at 16 citing United States v. Morrison, 449 U.S. 361, 365 (1981). See also State v. Veltri, 764 A.2d 163, 167-68 (RI 2001). In Carcieri, the Court found a lack of prejudice where the police did not obtain incriminating information and the attorney-client relationship was not invaded — because Mr. Carcieri was not speaking to his attorney. Carcieri, 730 A.2d at 16-17. Applying the Carcieri decision to the facts of the instant case, we are led to the inescapable conclusion that Mr. Samson cannot show prejudice because — even if the officer heard the contents of Appellant's call — there was no evidence she revealed what she heard.

VI. CONCLUSION

Upon careful review of the evidence, I recommend that this Court find that the decision of the appellate panel was made upon lawful procedure and was not affected by error of law. Gen. Laws 1956 § 31-41.1-9. Furthermore, said decision is 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 that the Traffic Tribunal appellate panel issued in this matter be AFFIRMED.

/s/
Joseph P. Ippolito
MAGISTRATE

SEPTEMBER 21, 2012