

STATE OF RHODE ISLAND

CRANSTON, RITT

RHODE ISLAND TRAFFIC TRIBUNAL

STATE OF RHODE ISLAND

v.

JOSEPH SOUSA

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**C.A. No. T21-0006
20001530288**

DECISION

PER CURIAM: Before this Panel on March 24, 2021—Magistrate DiChiro (Chair), Associate Judge Almeida, and Magistrate Kruse Weller, sitting—is Joseph Sousa’s (Appellant) appeal from a decision of Magistrate Alan R. Goulart (Trial Magistrate) of the Rhode Island Traffic Tribunal, sustaining the charged violation of G.L. 1956 § 31-27-2.1, “Refusal to submit to chemical test.” The Appellant appeared before this Panel represented by counsel. Jurisdiction is pursuant to § 31-41.1-8.

I

Facts and Travel

On December 11, 2020, Trooper Jason DiFusco (Trooper DiFusco) of the Rhode Island State Police observed a vehicle swerving while driving on Interstate 95 (I-95). (Tr. 7:7-8, 13:4-7, February 9, 2021). Based upon his observations of the vehicle, Trooper DiFusco pulled over the vehicle for a violation that could potentially be related to driving under the influence. *Id.* at 15:18-24. Trooper DiFusco identified the operator of the vehicle as Appellant and subsequently charged Appellant with the above-mentioned violation. *See* Summons No. 20001530288.

The Appellant pled not guilty to the charged violation and the matter proceeded to trial on February 9, 2021 and February 19, 2021. First, Trooper DiFusco testified at trial. He

testified as to his experience and training in observing individuals driving under the influence (DUI). Trooper DiFusco testified that he has worked for the Rhode Island State Police for five years and trained for six months at the police academy. *Id.* at 7:7-18, 8:16-17. While at the Academy, Trooper DiFusco received DUI training, his ARIDE certification and became a drug recognition expert. *Id.* at 8:17-23. He explained that in ARIDE training he learned additional standard field sobriety tests which included additional assessments and basic drug impairment techniques. *Id.* at 9:1-9. Moreover, Trooper DiFusco explained that he received about 90 hours of training in drug impairment and additionally was trained to identify individuals who were under the influence. *Id.* at 9:13-22. Trooper DiFusco also testified that he learned how to conduct the horizontal gaze nystagmus (HGN) test, the walk and turn and one-leg stand field sobriety tests. *Id.* at 11:4-8. Additionally, he learned about the characteristics of an intoxicated person, which include bloodshot watery eyes, slurred speech, poor dexterity, and inability to maintain balance. *Id.* at 12:1-8. Trooper DiFusco also explained that he has had the opportunity to observe people who are under the influence every day and he did 62 DUI stops last year. *Id.* at 10:1-6.

Next, Trooper DiFusco recalled the events of the night in question. While traveling northbound on I-95 on December 11, 2020 at around 9:40p.m., Trooper DiFusco testified that he observed a 2020 black Cadillac bearing Rhode Island Registration QQ546 enter the on-ramp to I-95 from either Route 6 or Memorial Boulevard. *Id.* at 12:14-24, 13:1-3. He noticed that the vehicle was unable to maintain its lane because it swerved into the second lane from the first lane. *Id.* at 13:4-7. The lanes eventually merged, and the vehicle continued on to the ramp from I-146 north to I-95 north. *Id.* at 13:6-10. Trooper DiFusco then observed that the vehicle was unable to navigate the turn properly as the vehicle swerved into the second lane again with both

its rear and front tires. *Id.* at 13:11-13. The vehicle crossed the right white fog lane with its passenger side front and rear tires and swerved again into the second lane. *Id.* at 13:13-16. The operator then activated its left turn signal and moved into the second lane. *Id.* at 13:18-19. After moving into the second lane, the vehicle increased its speed and swerved back into the first lane where there was a silver sedan driving parallel. *Id.* at 14:4-10. At that point, Trooper DiFusco testified that he activated his emergency lights and conducted a motor vehicle stop. *Id.* at 14:10-11.

After approaching the vehicle from the passenger side, Trooper DiFusco observed a closed box of Macallan whiskey. *Id.* at 17:5-6. He asked the Appellant for his license and registration but testified that the Appellant was unable to figure out how to open the glove box to obtain the vehicle registration, which Appellant told him was because he owns three cars and this car was new. *Id.* at 17:8-12, 19:14-15. He also observed the Appellant to have bloodshot watery eyes, slurred speech and detected an odor of an alcoholic beverage emanating from the interior of the vehicle. *Id.* at 17:12-15. Trooper DiFusco testified that he told the Appellant he smelled alcohol and asked the Appellant whether he was drinking that night, to which Appellant responded, "No." *Id.* at 17:15-16, 18:13-18. Trooper DiFusco further explained that the Appellant indicated the smell of alcohol was because of the Macallan whiskey that was in a box on the passenger seat. *Id.* at 18:21-23. However, Trooper DiFusco testified he did not see any spilled alcohol and there was no indication that the box was wet. *Id.* at 19:1-5.

At that point, Trooper DiFusco asked the Appellant to exit the vehicle. *Id.* at 19:16-17. He continued to observe bloodshot watery eyes, slurred speech and detected the odor of an alcoholic beverage emanating from the Appellant's breath. *Id.* at 19:19-22. Trooper DiFusco testified that he requested that Appellant submit to a series of tests, and Appellant agreed. *Id.* at

19:22-24. Trooper DiFusco described the instructions of the HGN test to the Appellant and conducted the test. *Id.* at 23:4-8. He indicated that prior to the test he asked the Appellant if he had any sort of physical or medical impairment that would affect his eyes, and Appellant responded, “No.” *Id.* at 27:10-14. After the Appellant completed the HGN test, Trooper DiFusco then asked the Appellant if he had any issues with his legs as he was going to conduct a walk and turn test next. *Id.* at 28:1-4. The Appellant asked for his lawyer and refused to submit to the walk and turn test or the one-leg field sobriety test. *Id.* at 28: 4-13.

Trooper DiFusco testified that based on his observations of the vehicle in motion and his personal contact with operator, he believed the Appellant was under the influence of alcohol to a degree that made him incapable of operating a motor vehicle safely and took the Appellant into custody. *Id.* at 28:14-22, 29:1-4. He placed Appellant under arrest and read Appellant his rights for use at the scene. *Id.* at 29:15-20. Trooper DiFusco then transported Appellant to the Lincoln Woods barracks and indicated that Appellant asked for water because he was a diabetic. *Id.* at 31:6-9, 30:17-18. Once at the station, Trooper DiFusco testified that he read Appellant his rights for use again at the station, and Appellant made a confidential phone call. *Id.* at 32:8-9, 33:15-18. After the Appellant made the phone call, Trooper DiFusco asked Appellant to submit to a chemical test. Appellant refused and indicated that he wasn’t feeling well. *Id.* at 34:5-18. Lincoln Rescue was called to assist and examine the Appellant. *Id.* at 34:7-8. Trooper DiFusco testified that Appellant signed the refusal form and indicated on the form that he had refused to take the test. *Id.* at 34:16-22.

Next, Appellant’s counsel cross-examined Trooper DiFusco. He questioned Trooper DiFusco regarding the conversation with the Appellant outside of the vehicle. *Id.* at 40:13-14. Specifically, he asked if Trooper DiFusco remembered the conversation with the Appellant in

which the Appellant explained that he was a diabetic, currently taking four medications and wasn't feeling well. *Id.* at 40:16-23. Moreover, Appellant's counsel questioned Trooper DiFusco about his statement in the police report, "I immediately detected the odor typically associated with an alcoholic beverage" to indicate that the word typically means more likely than not. *Id.* at 41:7-18, 42:1-2.

Thereafter, Appellant testified at trial and explained that the black Escalade is registered under one of the businesses that he owns, and he does not drive that vehicle daily. *Id.* at 62:7-17. He explained that December 11, 2020 was the first time he drove that particular vehicle. *Id.* at 63:1-3. Appellant further explained that on December 11, 2020 he went to Capriccio's but did not drink any alcoholic beverages. *Id.* at 63:7-20. While at Capriccio's, he indicated that he mentioned to several people that he was feeling nauseous and dizzy because he was on a new medication. *Id.* at 63:21-24, 64:1-3.

The Appellant further testified that after he was stopped by Trooper DiFusco, he explained to Trooper DiFusco that he was on medications and was not feeling well. *Id.* at 67:6-13. However, he stated that Trooper DiFusco did not respond to any statements that he was not feeling well. *Id.* at 67:18-24.

Lastly, Joseph Ferreira (Mr. Ferreira) testified at trial. He testified that he was with the Appellant at Capriccio's on December 11, 2020 and did not see Appellant drink any alcoholic beverages. *Id.* at 80:8-11, 81:20-22. He also explained that Appellant told him that he was not feeling well. *Id.* at 82:2-4. Mr. Ferreira further testified that he did not feel there was any reason why Appellant would not be able to drive home. *Id.* at 82:7-9.

After hearing all the testimony and evidence presented, the Trial Magistrate recounted the facts asserted. (Tr. 4:1-9:14 February 19, 2021). The Trial Magistrate accepted Trooper

DiFusco's testimony as completely credible and thoughtful. *Id.* at 4:4-7. Moreover, the Trial Magistrate stated, "it's uncontradicted that the State has proven elements two through four, both through the testimony of Trooper DiFusco and the documents which have been admitted." *Id.* at 11:5-8. In doing so, the Trial Magistrate explained the critical issue is "whether the trooper had reasonable grounds to ask the defendant to submit to a chemical test." *Id.* at 11:11-13. As such, the Trial Magistrate found that based on the considerations of the vehicle in motion, where the defendant was operating the vehicle in a fashion that would raise a reasonable red flag for any officer, and Trooper DiFusco's observations that Appellant had bloodshot watery eyes, slurred speech, and the smell of alcohol coming from the Appellant's breath, that it was "completely reasonable for the trooper to believe the defendant was under the influence while operating the motor vehicle." *Id.* at 12:5-20. Thus, the Trial Magistrate was "satisfied the State has proven by clear and convincing evidence that the defendant refused the chemical test after being obligated to submit to it." *Id.* at 13:15-17. The Trial Magistrate found the Appellant guilty of the charged violation and imposed a six-month suspension of license, a \$200 fine, 10 hours of community service, and DUI school. *Id.* at 15:16-19. Appellant subsequently filed this timely appeal.

II

Standard of Review

Pursuant to § 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 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 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 Mut. Ins. 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.” *Id.* (citing *Envtl. Sci. 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.” *Id.* Otherwise, it must affirm the hearing judge's (or magistrate's) conclusions on appeal. *See Janes*, 586 A.2d at 537.

III

Analysis

On appeal, Appellant contends that the Trial Magistrate's decision was clearly erroneous in view of the reliable probative and substantial evidence on the whole record, and arbitrary or capricious or characterized by an abuse of discretion. *See* § 31-41.1-8(f). Specifically, Appellant

argues that the officer used a “more likely than not standard.” *See* Appellant’s Notice of Appeal at 3.

Moreover, at oral argument, Appellant’s counsel argued that there must be a balance. Specifically, there must be more to prove than the indicia of bloodshot watery eyes because there is no way to refute the allegation if the police officer identifies these physical characteristics. In addition, Appellant’s counsel also argues that there should be further investigation into the symptoms, as there may be an alternative explanation for bloodshot watery eyes or slurred speech such as a medical condition.

The State argued that the Appellant was given ample opportunity to be examined by physician of his choice, that he was examined by a medic at the station, and that Appellant was given water. Moreover, the State argued there were no symptoms listed on the medications that would cause the smell of alcohol or bloodshot watery eyes. As such, the State contends there was no error and the burden of reasonable suspicion was met.

Appellant was charged with § 31-27-2.1, “Refusal to Submit to a Chemical Test” which provides in relevant part:

- (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.
- (b) If a person, having been placed under arrest, refuses upon the request of a law enforcement officer to submit to the tests, as provided in § 31-27-2, none shall be given, but a judge or magistrate of the traffic tribunal or district court judge or magistrate, 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, toluene, or any controlled substance, as defined in chapter 28 of title 21, or any combination of these; 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 be immediately suspended, however, said suspension shall be subject to the hardship provisions enumerated in § 31-27-2.8.

Based on the plain language of the statute, the standard for administering a chemical test is reasonable suspicion to believe that the driver is operating under the influence of alcohol. *Id.*

Reasonable suspicion exists when “the detaining authority can ‘point to specific and articulable facts which, taken together with rational inferences from those facts, reasonably warrant that intrusion.’” *State v. Bjerke*, 697 A.2d 1069, 1071 (R.I. 1997) (quoting *Terry v. Ohio*, 392 U.S. 1, 21 (1968)). In determining “whether an officer’s suspicions 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. Factors contributing to a finding of reasonable suspicion of criminal activity include “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 officer.” *State v. Holdsworth*, 798 A.2d 917, 921 (R.I. 2002).

The Appellant did not refute the allegation that he was swerving while driving. In fact, at oral argument on appeal, Appellant’s counsel admitted to this fact and agreed that the Appellant’s swerving gave the officer reasonable suspicion to pull him over. However, the Appellant contends that Trooper DiFusco erred in using a more likely than not standard to assume that the smell he detected was alcohol and that swerving was an indicia of driving under the influence.

This argument is not relevant on appeal as the Appeals Panel is unable to consider *de novo* whether the police officer had reasonable suspicion to pull over the Appellant. *See Link*, 633 A.2d at 1348. The relevant question before this Panel is whether the Trial Magistrate made any error in ruling that the police officer had reasonable suspicion to stop the car based on a clear and convincing standard. *See* § 31-41.1-6. Pursuant to § 31-41.1-6, the burden of proof in a hearing for an adjudication of a traffic violation shall be upon the state, city, or town, and the charge may be established by clear and convincing evidence. Thus, the standard the Appeals Panel reviews, is the clear and convincing standard. *See id.*

The record reveals that the Trial Magistrate's ruling that the police officer had reasonable suspicion was clearly supported by the evidence. Trooper DiFusco testified that he pulled over Appellant after observing the vehicle in motion swerve several times into different lanes of traffic. (Tr. 13:4-19 February 9, 2021). During the traffic stop, Trooper DiFusco observed the Appellant to have bloodshot watery eyes, slurred speech and detected an odor of an alcoholic beverage emanating from the interior of the vehicle. *Id.* at 17:12-15. Thus, based on Trooper DiFusco's testimony, the Trial Magistrate found that it was "completely reasonable for the trooper to believe the defendant was under the influence while operating the motor vehicle" satisfying the clear and convincing standard. (Tr. 12:5-20, February 19, 2021).

In addition, Appellant contends that during the traffic stop police should be required to investigate into the conditions of the driver. Specifically, at oral argument, Appellant's counsel argued in this case, that Trooper DiFusco should have investigated further when the Appellant explained that he did not feel well and was currently on several medications.

However, there is no law or affirmative requirement that a police officer investigate into the medical condition of a driver. A police officer is only required to prove he or she had

reasonable suspicion to conduct a traffic stop. *See Bjerke*, 697 A.2d at 1071. Thus, the focus of the court’s inquiry is to determine, based on the police officer’s observations, whether the officer had reasonable suspicion to suspect the operator of the vehicle was driving under the influence. This factual and credibility determination is within the sole discretion of the Trial Magistrate. *See Link*, 633 A.2d at 1348.

Thus, as Rhode is an implied consent state pursuant to § 31-27-2.1(a),¹ the Trial Magistrate must determine, based on the totality of the circumstances, if the police officer had reasonable suspicion to suspect the operator was driving under the influence. *See Link*, 633 A.2d at 1348. Here, the Trial Magistrate did find based on Trooper DiFusco’s testimony that it was “completely reasonable for the trooper to believe the defendant was under the influence while operating the motor vehicle.” (Tr. At 12:5-20 February 19, 2020). As 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,” this Panel will not disturb the Trial Magistrate’s factual findings or credibility determinations. *Link*, 633 A.2d at 1348.

Therefore, based on a review of the record, this Panel is satisfied that the Trial Magistrate did not overlook or misconceive material evidence and that the Trial Magistrate’s decision was supported by reliable probative, and substantial evidence. *See* § 31-41.1-8(f)(5).

¹ “Any person who operates a motor vehicle within this state shall be deemed to have given his or 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.” § 31-27-2.1(a).

IV

Conclusion

This Panel has reviewed the entire record before it. Having done so, the members of this Panel determine that the Trial Judge's decision was not clearly erroneous in view of the reliable, probative, and substantial evidence on the whole record. *See* § 31-41.1-8(f)(5). The substantial rights of the Appellant have not been prejudiced. Accordingly, Appellant's appeal is denied, and the charged violation is sustained.

ENTERED:

Magistrate Michael DiChiro Jr. (Chair)

Associate Judge Lillian Almeida

Magistrate Erika Kruse Weller

DATE: _____