STATE OF RHODE ISLAND & PROVIDENCE PLANTATIONS

PROVIDENCE, Sc. DISTRICT COURT
SIXTH DIVISION

State of Rhode Island	:	
	:	
v.	:	A.A. No. 08 - 159
	:	
Mark Shallcross	:	

ORDER

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 2nd day of March, 2009.

By Order:

Melvin Enright
Acting Chief Clerk

Melvin J. Enright
Acting Chief Clerk

Enter:

Michael A. Higgins
Acting Chief Judge

March2, 2009

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

STATE OF RHODE ISLAND	:	
	:	
V.	:	A.A. No. 2008 – 159
	:	
MARK SHALLCROSS	:	

FINDINGS & RECOMMENDATIONS

Ippolito, M. The Attorney General, on behalf of the State of Rhode Island, filed this complaint for judicial review of a final decision of an appeals panel of the Rhode Island Traffic Tribunal (RITT) which upheld the dismissal, by a Lincoln town solicitor, of a charge of refusal to submit to a chemical test which had been lodged against respondent Mark Shallcross. In this appeal the state urges that the Rule 27(a) dismissal form submitted by the solicitor was without legal effect. Accordingly, the State seeks reinstatement of the charges against Mr. Shallcross.

Jurisdiction for the instant appeal is vested in the District Court by Gen. Laws 1956 § 31-41.1-9 and the applicable standard of review is found in subsection 31-41.1-9(d). This matter has been referred to me for the making of findings and recommendations pursuant to General Laws 1956 § 8-8-8.1. After a review of the entire record, I find that the decision of the panel is correct and should be affirmed.

I. FACTS & TRAVEL OF THE CASE

On April 18, 2008, Mark Shallcross was charged with a violation of Gen. Laws 1956 § 31-27-2.1, "Refusal to submit to a chemical test," by an officer of the Lincoln Police Department. After respondent was arraigned at the Traffic Tribunal on May 19, 2008 the matter was continued several times until, on July 14, 2008, a Rule 27(a) dismissal form was submitted by the Lincoln Town Solicitor. The dismissal was entered by Magistrate DiSandro of the RITT over the objection of the Attorney General.

The state appealed pursuant to Gen. Laws 1956 § 31-41.1-8 and the matter was given number C.A. No. T08-094. On September 17, 2008, the appeal was heard by an RITT panel comprised of: Magistrate William Noonan (Chair), Judge Lillian Almeida, and Judge Edward Parker. In a decision dated October 15, 2008, the panel affirmed the decision of the trial magistrate, finding that the authority of the solicitor to dismiss pursuant to Rule 27(a) was clear and unambiguous and that the rule superseded any statute to the contrary by virtue of Gen. Laws 1956 § 8-6-2. *Decision of Panel, at p. 5.* On October 21, 2008, the State filed the instant complaint for judicial review in the Sixth Division District Court pursuant to section 31-41.1-9 of the General Laws. Subsequently, this matter was referred to me for the making of Findings and Recommendations pursuant to Gen. Laws 1956 § 8-8-8.1. No memoranda have been submitted directly to this Court but at the request of the Attorney General we shall consider the state's memorandum submitted in this case to the RITT panel. *See Letter of Special Assistant Attorney General Jason Knight dated January 29, 2009.*

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).

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.' "[1] Thus, the Court will not substitute its judgment for that of the panel as to the weight of the evidence on questions of fact.[2] Stated

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1 *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).

2 *Cahoone v. Board of Review of the Dept. of Emp. Security,* 104 R.I. 503, 246 A.2d 213 (1968).

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

III. APPLICABLE LAW

The adjudication of this case necessitates the review of a number of provisions of law. One statute and one rule of procedure which require particular consideration are presented here in full.

A. RULE 27(a) of Traffic Tribunal Rules of Procedure.

The procedure by which the prosecution may dismiss a traffic summons pending before the RITT is described in Rule 27(a) of the Traffic Tribunal Rules of Procedure, which provides as follows:

> **(a) By Prosecution Officer or Attorney for State or Municipality.** *The prosecution officer or the attorney for the state or municipality* may dismiss a summons and the prosecution shall thereupon terminate. The dismissal shall be in writing, either on the customary judgment form or on a separate writing. It shall be dated and signed; the name of the person dismissing the summons shall be printed legibly beneath the signature. A dismissal may not be filed during the trial without the consent of the defendant. (Emphasis added).

Most pertinent to our inquiry is the first sentence, in which those officials who may exercise the power to dismiss are enumerated.

B. REFUSAL CHARGE PROSECUTION AUTHORITY.

The authority for the Attorney General to prosecute refusal cases is found in Gen. Laws 1956 § 42-9-4, which reads as follows:

> **42-9-4. Prosecution of Offenses. —** (a) The attorney general shall draw and present all informations and indictments, or other legal or

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3 *Id., at 506-507, 246 A.2d at 215.*

equitable process, against any offenders, as by law required, and diligently, by a due course of law or equity, prosecute them to final judgment and execution.

(b) The duty of the attorney general under this section shall include the duty to prosecute all charges of violations of §§ 31-27-2.1, 31-27-2.3, and/or 31-27-2.5, jurisdiction over the adjudication of which is conferred upon the traffic tribunal under chapter 41.1 of title 31.

IV. ISSUE AND OVERVIEW OF ANALYSIS

The issue before the Court is whether the decision of the appeals panel was supported by reliable, probative, and substantial evidence on the record or whether it was clearly erroneous or affected by error of law. More precisely, did the panel err when it found that the dismissal form submitted by the town solicitor was entitled to full legal effect?

The unusual posture of this case — *i.e.,* one prosecutor challenging the actions of another — is not an indication that the legal question presented is especially complex. To the contrary, the legal issue at the core of this case is no conundrum and can be resolved by analyzing one statute (Gen. Laws 1956 § 42-9-4) and one rule of procedure (RITT Rule of Procedure 27[a]). After doing so, I conclude that the Attorney General's authority to prosecute refusals does not preempt the filing of a Rule 27(a) dismissal form submitted by a town solicitor. I therefore recommend that the appellate panel's decision be affirmed.

V. ANALYSIS

A. BACKGROUND: THE NATURE OF A 27(a) DISMISSAL

At the outset, we must clarify the nature of a Rule 27(a) dismissal. In its decision, the appellate panel stated that "* * * solicitor filed a writing recommending dismissal * * *" of defendant's refusal charge and that the trial magistrate "dismissed" the charge. *Decision of RITT Appellate Panel, at page 2.* To the use of this terminology I must take exception.

Rule 27(a) was based on criminal Rule of Procedure 48(a); in both, it is provided that when the dismissal is filed "the prosecution shall thereupon terminate." Thus, a dismissal is a unilateral action of the prosecutor and not a motion to be considered by the Court.[4] Accordingly, whatever he purported to do, the magistrate's ruling must be read as a determination that the dismissal was lawful and would be docketed and not as the granting of a motion to dismiss.

B. THE ATTORNEY GENERAL'S AUTHORITY TO PROSECUTE REFUSALS IS NOT EXCLUSIVE.

In its memorandum the Attorney General urges that section 42-9-4(b), *supra*, grants his office the sole authority to prosecute refusal cases and, as a result, the 27(a) dismissal form submitted by the solicitor was a mere recommendation and that the Traffic Tribunal was not bound by it. For the reasons that follow, I conclude that the

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[4] Dismissals pursuant to criminal Rule 48(a) and traffic Rule 27(a) are the procedural successors to the common law *nolle prosequi,* which under Rhode Island practice, was a constitutional prerogative of the Attorney General and his assistants. *See Ex parte McGrane,* 47 R.I. 106, 107 (R.I. 1925) *and 1972 Historical Note to Rule 48.*

Attorney General's authority to prosecute refusals is not exclusive and we may not, therefore, read section 42-9-4 in absolute terms.

1. Prosecutorial Authority Need Not Be Assigned Exclusively.

This situation in which overlapping prosecutorial authority is found is not unprecedented and *per se* improper. Clearly, police prosecutors and city/town solicitors prosecute tens of thousands of misdemeanor cases in the District Court each year. Municipal responsibility for the prosecution of misdemeanor cases has been recognized for many years. *See State v. Peabody,* 25 R.I. 178, 179-80, 55 A. 323 (1903). As the Supreme Court noted in *Cronan ex rel. State v. Cronan,* 774 A.2d 866, 874 (R.I. 2001), "* * * municipal solicitors, law enforcement authorities, and other individuals not affiliated with the Attorney General commonly prosecute or assist in the prosecuting misdemeanors and other offenses in District Court and municipal courts throughout the state."

In *Cronan* the court found that the attorney general had the inherent power to dismiss a private criminal complaint or, in the alternative, to take over the prosecution. *Cronan,* 774 A.2d at 875. Thus, the Supreme Court recognized that in many criminal cases there is an overlapping authority to prosecute shared by the Attorney General and private complainants, and implicitly, the cities and towns.

Of particular guidance is an old case, *State v. Woodmansee,* 19 R.I. 651 (1896), in which the Court held that a statute containing a specific list of persons authorized to make complaint for non-support would be deemed non-exclusive and that private complaints for non-support would be allowed, notwithstanding that provision.

Woodmansee, 19 R.I. at 652. Accordingly, we may conclude that the fact that section 42-9-4 grants the authority to the Attorney General to prosecute refusals does not necessarily give rise to a bar to other officials sharing this power. At this juncture, we must consider whether the city solicitors and the police prosecutors are generally or specially authorized to act in refusal cases.

2. Other Officals Exercise Prosecutorial Authority In Refusal Cases.

A review of customary practice shows that the Attorney General does not prosecute refusal cases solely.

First, the Attorney General and his assistants do not charge refusal citations in the same manner that they "draw" indictments and informations. *See section 42-9-4(a), supra, page 5 and Gen. Laws 1956 § 12-12-1.2.* The first step in a refusal prosecution, in which the prosecutorial discretion to charge *vel non* is exercised, is typically taken by police officers without input from the Attorney General pursuant to the authority vested in them Gen. Laws 1956 § 31-27-12 and Traffic Tribunal Rules of Procedure 3 and 33.

Second, and as the State acknowledges, the police prosecutors are authorized to represent the prosecution at arraignments of refusal charges at the Traffic Tribunal. *See Traffic Tribunal Rules of Procedure 5(a).* However, the state urges their participation is ministerial. I cannot agree. At refusal arraignments possible dispositions may be discussed and the prosecution may be called upon to make a recommendation as to a sentence. Furthermore, in refusal cases the extremely important question of whether a preliminary suspension shall issue is considered. *See Traffic Tribunal Rules of Procedure*

33(a). By its absence from refusal arraignments, the Department of the Attorney General has clearly ceded significant authority regarding the prosecution of refusal cases to the police prosecutors.

C. THE AUTHORITY OF THE POLICE PROSECUTORS AND SOLICITORS TO DISMISS RITT SUMMONSES IS FULLY APPLICABLE TO REFUSALS.

Having presented my view in Subsection B, *supra*, that the powers to prosecute refusals vested in the Attorney General by 42-9-4 are not exclusive, it may seem that further discussion regarding the authority which Rule 27(a) vests in city/town prosecutors would be superfluous. However, I believe it worthwhile to note that even if section 42-9-4 was regarded as granting the Attorney General sole power to prosecute refusals, such a conclusion would be superseded in effect by Rule 27, at least regarding the power to dismiss refusal cases.

A simple reading of Rule 27(a) shows that it fully authorizes dismissals by the police and the solicitors of all traffic citations. No exception is made within the rule for refusals. The rule of statutory construction which provides that provisions which are free of ambiguity and express a clear and definite meaning must be given that meaning without further interpretation has been determined to apply with equal force to the construction of court rules. *See State v. Pacheco,* 481 A.2d 1009, 1019 (R.I.1984). Accordingly, Rule 27(a) must be viewed as vesting police prosecutors and town solicitors with the authority to dismiss refusal cases.

Rule 27, like all the Traffic Tribunal Rules of Procedure, takes precedence over any statutory provision to the contrary, by operation of section 8-6-2 of the General

Laws.[5] Thus, any statutory arguments (based on section 42-9-4 or otherwise) put forward by the Attorney General must fall. This is not an inherent constitutional duty of the Attorney General recognized by art. IX, section 12 of the Rhode Island Constitution; it is statutory, added by P.L. 1994, ch. 378. Accordingly, we must conclude that the Attorney General's power to prosecute refusals is not exclusive but is shared with the police and their attorneys, the city and town solicitors. For these reasons, I believe the Rule 27(a) dismissal form submitted by the Lincoln town solicitor must be accorded legal effect.

D. A PRACTICAL RESOLUTION IS NECESSARY.

My legal finding in this case – that the solicitor's dismissal of the summons in this case was lawful – should not be misinterpreted as approval for the manner in which this case was handled. All observers must recognize that the conflict between the prosecutorial agencies involved in this case was, to say the least, unseemly. Such situations should not be repeated in future.

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[5] The Traffic Tribunal Rules of Procedure became effective on March 31, 2000 when it was approved by the Supreme Court. They had been promulgated by Chief Judge DeRobbio of the District Court pursuant to the version of section 8-6-2 then in effect:

> **8-6-2. Rules of practice and procedure. --** (a) The supreme court, the superior court, the family court, and the district court, by a majority of their members, shall have the power to make rules for regulating practice, procedure, and business therein. The chief judge of the district court shall have the power to make rules for regulating practice, procedure and business in the traffic tribunal. The rules of the superior, family, district court and the traffic tribunal shall be subject to the approval of the Supreme Court. Such rules, when effective, shall supersede any statutory regulation in conflict therewith.

The power to promulgate rules of procedure for the traffic tribunal was transferred to

Most troubling is the fact that the conflict seen in this case is not a dispute between levels of government – i.e., municipal authority vying with state authority. Friction between the levels of government, state-federal or state-municipal is unfortunate but understandable. The conflict in this case arose two agencies both exercising an element of the executive power of the state – the power to prosecute.

We know that state power is implicated because the charge here is a state charge — refusal to submit to a chemical test as proscribed by section 31-27-2.1. With the obvious exception of ordinance charges, "[t]he State is the real party in all criminal prosecutions." *Peabody*, 25 R.I. at 179-80. Everything the municipality does is in criminal cases is a relator (thus the denomination *ex rel.* on all criminal complaints).

At the end of the day, the Attorney General and the police are both empowered to act in refusal cases and they must resolve future conflicts. How they do so is for these prosecution agencies to resolve. This Court (and the RITT in the first instance) cannot mediate between them. Professional courtesy and comity must prevail.

The Attorney General is the chief law enforcement officer of the state. *See Shahinian v. Langlois,* 100 R.I. 631, 636, 218 A.2d 461, 464 (1966). Accordingly, it falls to the Attorney General to invoke the persuasive powers of his office to prevent future recurrences of the kind of prosecutorial conflict seen in the instant case. One would hope that a collegial *modus vivendi* can be achieved.

If diplomacy with the municipal solicitors does not succeed, the Attorney General certainly has the right to enter his appearance at every refusal case arraignment.

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the chief magistrate of the traffic tribunal by P.L. 2008, ch. 1, sec. 2.

The presence of his assistants at every refusal arraignment would divest, in a practical way, the police and solicitors of all decision-making power in refusal cases. Whether this becomes necessary is an issue the Attorney General must confront if reasonable minds cannot come to an understanding.

CONCLUSION

Upon careful review of the evidence, I find that that the decision of the appellate panel was not affected by error of law. *General Laws 1956 § 31-41.1-9(3),(4).* Furthermore, said decision is not clearly erroneous in view of the reliable, probative and substantial evidence on the whole record. *General Laws 1956 § 31-41.1-9(5).*

Accordingly, I recommend that the decision of the appellate panel in this matter be AFFIRMED.

Joseph P. Ippolito
Magistrate
March 2, 2009