

**STATE OF RHODE ISLAND & PROVIDENCE PLANTATIONS  
PROVIDENCE, Sc.**

**DISTRICT COURT  
SIXTH DIVISION**

**Alec Cambio**

v.

**State of Rhode Island  
(RITT Appeals Panel)**

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**A.A. No. 12-250**

JUDGMENT

This cause came before Houlihan J. on Administrative Appeal, and upon review of the record and a decision having been rendered, it is

**ORDERED AND ADJUDGED**

The decision of the appeals panel is affirmed.

Dated at Providence, Rhode Island, this 12<sup>th</sup> day of August, 2014.

Enter:

By Order:

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STATE OF RHODE ISLAND & PROVIDENCE PLANTATIONS  
PROVIDENCE, Sc.

DISTRICT COURT  
SIXTH DIVISION

Alec Cambio :  
 :  
v. : A.A. No. 2012-250  
 : (T12-0070)  
State of Rhode Island : (12-304-500353)  
(RITT Appeals Panel) :

**DECISION**

**Houlihan, J.** The instant case constitutes Mr. Cambio’s attempt to set aside the appeals panel’s decision upholding a Magistrate’s decision convicting him of a charge of refusal to submit to a chemical test, a civil violation, under 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 is found in Gen. Laws 1956 § 31-41.1-9(d).

For the reasons stated herein, the decision of the appeals panel is AFFIRMED.

**FACTS AND TRAVEL OF THE CASE**

On March 4, 2012, at approximately 11:30pm Officer Michael Morse of the Portsmouth Police Department stopped at the Mobile Extra Mart on East Main Road

to get a cup of coffee. <sup>1</sup> See Tr. Trans. p. 10. Once at the Extra Mart Officer Morse was advised by the store clerks that a vehicle had pulled in to the pump area about a half hour to an hour earlier. Id. Since pulling in, the vehicle had not moved and no one had exited the vehicle. Id. The vehicle had remained running. Id. The clerks requested Officer Morse check on the operator. Id.

Officer Morse located Mr. Alec Cambio in the driver's seat with his head on the steering wheel. Id. at p.11. Mr. Cambio was unresponsive to Officer Morse's efforts to gain his attention. Id. Upon opening the door Officer Morse detected a strong odor of alcohol and observed Mr. Cambio's eyes to be bloodshot, watery and glassy. Id. at pp.11-12. Further, Officer Morse observed Mr. Cambio's speech to be slurred. Id. at p.14. Upon exiting the vehicle, Mr. Cambio apologized for driving drunk. Id. at p. 13.

Additional members of the Portsmouth Police Department responded and, after a brief investigation, charged Mr. Cambio with Refusal to Submit to a Chemical Test, a civil traffic violation defined in Gen. Laws 1956 § 31-27-2.1.

The case proceeded to trial in May of 2012 before a Magistrate of the Rhode Island Traffic Tribunal (RITT) and Mr. Cambio was found guilty. Later, an appeals panel of the Traffic Tribunal affirmed his conviction. See RITT "Decision," dated November 30, 2012.

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<sup>1</sup> The record contained no reference to donuts.

On appeal to this Court, Mr. Cambio now urges his conviction be set aside because the time between operation of his motor vehicle and detention was such that the arresting officer could not reasonably infer Mr. Cambio had been operating under the influence. Compare, State v. Lusi, 625 A2d 1350(R.I. 1993).

### **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 of review is a duplicate of that found in Gen. Laws 1956 § 42-35-15(g), the State Administrative Procedures Act ("APA"). Accordingly, we are able to rely on cases interpreting the APA standard as guideposts in this 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.’ ”<sup>2</sup> And our Supreme Court has noted that in refusal cases reviewing courts lack “the authority to assess witness credibility or to substitute its judgment for that of the hearing judge concerning the weight of the evidence on questions of fact.”<sup>3</sup>

### **APPLICABLE LAW**

#### **A. THE REFUSAL STATUTE.**

This case involves a charge of refusal to submit to a chemical test. See Gen. Laws 1956 § 31-27-2.1. The civil offense of refusal is predicated on the implied consent law, which is stated in subsection 31-27-2.1(a):

(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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<sup>2</sup> Guarino v. Department of Social Welfare, 122 R.I. 583, 584, 410 A.2d 425 (1980) citing Gen. Laws 1956 § 42-35-15(g)(5).

<sup>3</sup> Link v. State, 633 A.2d 1345, 1348 (R.I. 1993).

The four elements of a charge of refusal which must be proven at a trial before the Traffic Tribunal are stated later in the statute:

... 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).

## **ANALYSIS**

### **A. Raise or waive rule**

At the outset of this analysis it is significant to note that this exact issue was not raised before the Trial magistrate or the Appeals panel. Pursuant to the appellate rule of raise or waive, this issue is not properly before the court. Fisk v. MacGregor, 464 A.2d 719, 726(R.I. 1983).<sup>4</sup> However, even if the issue were properly preserved, it is

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<sup>4</sup> The Operator made claims of failure of proof of operation and error in admission of statements based on “constructive arrest” before the Appellant panel. Apparently, the erudite decision rendered by the panel resolved those issues to the satisfaction of the Operator.

the opinion of this Court that Mr. Cambio's reliance upon State v. Lusi, 625 A.2d 1350(RI 1993) is misplaced . Compare State v. Ford, 56 A3d 463, 470(RI 2012).

**B. Reasonable basis to conclude operation under the influence**

Mr. Cambio cites State v. Lusi, 625 A.2d 1350(RI 1993) for the proposition that it is unreasonable for the Trial Magistrate to find reasonable suspicion that Mr. Cambio was operating under the influence when the last person to see Mr. Cambio operating the vehicle observed the operation some 30-60 minutes prior to Officer Morse's investigation. Thus, no arresting officer could extrapolate Mr. Cambio's condition back to the time of operation. This argument fails for the following reasons.

First, this matter centers upon a reasonable request to submit to a breathalyzer exam, not proof of driving while intoxicated based upon breathalyzer readings. For this reason, the doctrine contained in Lusi is inapplicable. In Lusi the Supreme Court held proof of blood alcohol content at the time of operation may be inferred from the readings later obtained from breathalyzer or blood exams. See State v. Lusi, 625 A.2d 1350, 1355(RI 1993). No such extrapolation is necessary when seeking to prove a failure to submit to a reasonable breathalyzer exam because no readings are at issue. The arresting officer only needs to have reasonable suspicion that the operator had been driving under the influence.

Second, the record contains more than sufficient evidence for Officer Morse to conclude that Mr. Cambio had been operating under the influence. A clerk at the

Extra Mart directly observed Mr. Cambio operating his motor vehicle thirty to sixty minutes prior to his interaction with Officer Morse. (Tr. trans. at p. 10). Mr. Cambio was the only person present in the car when Officer Morse approached. Id. at p. 11. Officer Morse found Mr. Cambio slumped forward laying on his steering wheel and talking to himself. Id. Officer Morse observed the operator to have bloodshot, watery and glossy eyes, a strong odor of alcohol coming from his breath and slurred speech. Id. at pp. 12-14. Mr. Cambio apologized to Officer Morse for driving drunk. Id. at p.14. Mr. Cambio then performed poorly on the field sobriety tests and exhibited signs of impairment. Id. at pp. 14-20. Based on the totality of the circumstances, Officer Morse had more than reasonable suspicion to conclude Mr. Cambio had been operating under the influence.

## **CONCLUSION**

Upon careful review of the evidence, this Court finds that the decision of the appeals 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 hold that the decision the Traffic Tribunal appeals panel issued in this matter be AFFIRMED.