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

Brendan Bieber	:	
	:	
v.	:	**A.A. No. 10 - 243**
	:	
State of Rhode Island,	:	
(RITT Appellate Panel)	:	

JUDGMENT

This cause came on 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 Appellate Panel is affirmed.

Dated at Providence, Rhode Island, this 7th day of February, 2012.

Enter: **By Order:**

__/s/_____ __/s/_____

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D E C I S I O N

Houlihan, J. In this case Mr. Bieber urges that an appeals panel of the Rhode Island Traffic Tribunal erred when it overturned a trial judge's decision to dismiss 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 may be found in Gen. Laws 1956 § 31-41.1-9(d).

Mr. Bieber argues before this Court that the State failed to satisfy the requisites of Gen. Laws 1956 § 12-7-20, and that, for this reason the charge of refusal should be dismissed. After a review of the entire record, and for the reasons stated below, I have concluded that the decision of the panel is supported by reliable, probative and substantial evidence of record and is not clearly erroneous; I therefore hold that the decision below be affirmed.

FACTS & TRAVEL OF THE CASE

A. FACTS AND TRAVEL OF THE CASE.[1]

On December 22, 2008, Officer Adam Kennet of the North Kingston Police Department was on duty patrolling Route 4. (Trial Transcript at 6). At approximately 2:30am Officer Kennet observed a vehicle traveling 92 miles per hour in 50 mile per hour zone. (Trial Transcript at 11-15) Officer Kennet subsequently stopped the vehicle and encountered the operator, Brendon Bieber. Officer Kennet observed the operator to be lethargic, have watery, blood shot eyes and exude a strong odor of alcoholic beverage from his breath. (Trial Transcript at 18). Upon inquiry from Officer Kennet, the operator admitted to consuming three beers. (Trial Transcript at 18.) Officer Kennet asked the operator to exit the vehicle. Officer Kennet observed the operator to exhibit poor balance once he exited the vehicle. (Trial Transcript at 19). Officer Kennet administered standardized field sobriety tests to the operator and observed clues that indicated he did not pass the tests. (Trial Transcript at 23, 25) Based upon the totality of the circumstances, Officer Kennet opined the operator was impaired, placed him under arrest, handcuffed him and placed him in the rear of his cruiser. (Trial Transcript at 25-26). The following series of events gave rise to the issue on appeal.

At approximately 2:50 a.m., another vehicle traveling on Route 4 struck Officer Kennet's vehicle while Mr. Bieber was in custody. (Trial Transcript at 29). Officer Kennet, after checking Mr. Bieber's well being, then gave chase to the vehicle

[1] The facts of the case were derived solely from the testimony of Officer Adam Kennet.

that had just hit his vehicle and continued south on Route 4.(id.)

About one quarter of a mile down the road, Officer Kennet stopped the second motor vehicle and assisting officers placed the second operator under arrest for driving under the influence. (Trial Transcript at 29). As that investigation was being concluded and Mr. Bieber was being placed into a different cruiser for transport, another vehicle struck one of the assisting cruisers. (Trial Transcript at 30). This resulted in a call for assistance to the State Police and a complete shut down of Route 4. (Trial Transcript at 31). Importantly, the North Kingston police decided to take Mr. Bieber to the hospital for an evaluation. (Trial Transcript at 31). This did not occur until one hour and twenty minutes after the initial stop of Mr. Bieber, at approximately 3:50a.m. (Trial Transcript at 30). Once at the hospital, Mr. Bieber was evaluated by a nurse, read the rights for use at Station and offered an opportunity to make a phone call. (Trial Transcript at 32). Mr. Bieber declined the opportunity to make a phone call and subsequently refused Officer Kennet's request to submit to a blood test (Trial Transcript at 32-33).

B. HEARING BEFORE THE TRIAL JUSTICE IN THE RHODE ISLAND TRAFFIC TRIBUNAL.

The matter was tried in the Traffic Tribunal on January 28, 2008. The sole source of evidence at the trial consisted of the testimony of Officer Kennet of the North Kingston Police Department. At the conclusion of Officer Kennet's testimony counsel for the motorist moved to dismiss the case for a number of reasons. Ultimately, the trial justice dismissed the case for a failure to provide a timely phone

call pursuant to Gen. Laws 1956 § 12-7-20. (Trial Transcript at 78). The State filed an appeal.

C. INITIAL PROCEEDINGS BEFORE THE PANEL.

On April 2, 2008, the appeal was heard by an appellate panel comprised of Judge Albert Ciullo, Magistrate William Noonan and Magistrate Domenic DiSandro. The panel remanded the case to the trial justice for a specific finding of fact relative to the motorist's "demonstrative prejudice, or a substantial threat thereof." See State v. Carcieri, 730 A2d 11, 13(R.I. 1999).

D. HEARING ON REMAND TO TRIAL JUSTICE.

The record does not contain a transcript of any hearing on remand before the trial justice. Instead, an "Amended Decision" was entered on July 18, 2008. The trial justice found as fact that the motorist was not transported to the hospital until one hour and twenty minutes after his detention, that he was not read his rights for use at scene/hospital immediately, and that during that time he had not been informed of his right to make a confidential phone call in order to exercise his right to contact a doctor to have his own test performed. The decision concluded that the charge was dismissed on a showing of prejudice to the defendant for not being afforded a confidential phone call within one hour of the defendant's detention. No further finding of facts were cited. The State filed a timely appeal.

E. SECOND REVIEW BY APPELLATE PANEL.

On October 1, 2008, the matter was heard by an appellate panel comprised of Judge Albert Ciullo, Chief Magistrate William Guglietta, and Magistrate Alan Goulart.

Before the panel, Mr. Bieber asserted that the trial justice correctly dismissed the case. The State argued the trial justice erred in finding substantial prejudice in Officer Kennet's failure to observe the one hour limit contained in § 12-7-20. In a comprehensive discussion of the issue, the Appellate Panel reversed the decision of the trial justice and sustained the violation of § 31-27-2.1. The motorist filed a timely appeal of panel's decision.

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 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]

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. * * *

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:

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[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)).

[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).

> … 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).

The detention of a motorist, even for a request to submit to a breathalyzer test, is subject to Fourth Amendment analysis. See State v. Jenkins, 673 A2d 1094, 1097(R.I. 1996), State v. Bruno, 709 A2d 1048, 1050(R.I 1998). . The proper standard for evaluating the lawfulness of the stop is reasonable suspicion. Jenkins at 1097. Thus, notwithstanding the civil nature of the violation, the Supreme Court has consistently analyzed the detention of a motorist for administration of a breathalyzer pursuant to fourth amendment jurisprudence.

B. GEN. LAWS 1956 § 12-7-20 RIGHT TO USE TELEPHONE FOR CALL TO ATTORNEY-BAIL BONDSPERSON.

Gen. Laws 1956 § 12-7-20 provides arrestees the right to a confidential telephone call. In the event an arrestee is transported to a hospital for a violation relating to drunk driving, the statute requires an opportunity for a confidential call as soon as practicable, not to exceed one hour, for the purpose of securing an attorney or arranging for bail. There is no penalty or remedy contained in the statute for failure to comply with its provisions.

ANALYSIS

Gen. Laws 1956 § 12-7-20 applies when a motorist is detained for an alleged violation of the law related to drunk driving, mandating a call within one hour of the detention. Significantly, the statute refers to arrest for purposes of bail for all offenses and detention for violation of any law related to drunk driving. Prior decisions of this Court have properly distinguished between an arrest for a criminal violation and detention for a civil violation. See Sargent v. State, A.A. No. 11-13 (Dist. Ct. 11/9/11) (Ippolito. M). However, the determination of whether a detention has become an arrest is not solely determined by the nature of the violation. A court must examine a series of factors to determine whether an arrest has occurred. State v. Bailey, 417 A.2d 915, 918(R.I. 1980). These factors include; the extent to which the person's freedom of movement has been curtailed, the degree of force used by the police, the belief of a reasonable innocent person in the same circumstances, and whether the person had the option of not going with the police. Id., citing others.

In this matter, the trial justice found the motorist had been detained for at least one hour and twenty minutes before he received his phone call. During a significant part of this time the motorist was in handcuffs in the back of a police cruiser. Further, upon transfer to the hospital the motorist was never outside of the presence of the arresting officer. It is clear that a reasonable, innocent person in the same circumstances would not have thought he or she was free to go. Based upon the circumstances arising from the hearing it is clear the motorist was under arrest.

The detention of the motorist was clearly related to a drunk driving violation. See Gen. Laws 1956 § 12-7-20. Gen. Laws 1956 §31-27-2.1 itself refers to driving a motor vehicle under the influence numerous times. The "refusal" statute is a part of the chapter entitled motor vehicle offenses and located amongst driving while intoxicated offenses. This statute is clearly intended to work in concert with Gen. Laws 1956 § 31-27-2 et al so as to encourage a motorist to submit to a chemical test when reasonably asked to do so.

Notwithstanding the civil nature of the statute, Gen. Laws 1956 § 31-27-2.1 contains many of the same penalties as Gen. Laws 1956 § 31-27-2, including a longer license suspension and criminal sanctions for a second offense. To view the refusal statute as a stand alone civil violation ignores statutory language and construction as well as the practical effect of the statute. Compare Board of License Com. of Tiverton v. Pastore, 463 A2d 161(R.I. 1983)(License suspension held quasi-criminal).

Since the motorist was under arrest for a drunk driving related violation the Appeals panel was correct in deciding Gen. Laws 1956 § 12-7-20 applicable. Moreover, the hearing and findings by the trial justice clearly established no call was permitted until after one hour after the detention. This is in contravention to the requirements of the statute.

Upon a showing of a failure to comply with a requirement of Gen. Laws 1956 § 12-7-20 the analysis then must turn to whether the motorist can establish "demonstrative or substantive prejudice." See State v. Carcieri, 730 A2d 11, 16(R.I. 1999). Carcieri considered a violation of Gen. Laws 1956 § 12-7-20 and clearly held

the failure to comply with its requirements was not fatal to the State's case and must be considered on a case by case basis. In this matter, the only basis cited for the dismissal of the matter was the violation itself. That is, the trial justice held that substantive prejudice was demonstrated by the passage of time itself. This misses the import of Carcieri. No evidence was submitted to demonstrate any prejudice. The Appeals Panel correctly determined that since no substantive or demonstrative prejudice had been established the violation should be sustained.

Upon careful review of the evidence, I recommend that this Court find that the decision of the appellate panel on the issue 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, the decision that the Traffic Tribunal appellate panel issued in this matter is AFFIRMED.