STATE OF RHODE ISLAND AND PROVIDENCE PLANTATIONS

PROVIDENCE, SC

DISTRICT COURT
SIXTH DIVISION

BRIAN R. CUNHA :
:
VS. : A.A. NO. 03-80
:
STATE OF RHODE ISLAND :
EX REL CITY OF NEWPORT :

JUDGMENT

This cause came on before DeRobbio, C.J. on an appeal from the Rhode Island Traffic Tribunal Appeals Panel, and upon review of the record and memoranda of counsel, and a decision having been rendered, it is

ORDERED AND ADJUDGED

The decision of the Traffic Tribunal is hereby affirmed.

Dated at Providence, Rhode Island, this 21st day of April , 2004.

ENTER:

BY ORDER:

CHIEF CLERK

April 21, 2004

STATE OF RHODE ISLAND AND PROVIDENCE PLANTATIONS

PROVIDENCE, SC **DISTRICT COURT**

SIXTH DIVISION

BRIAN R. CUNHA	:	
V.	:	**A.A. 03-80**
STATE OF RHODE ISLAND EX REL CITY OF NEWPORT	:	

DECISION

DEROBBIO, C.J. This matter is before the Court on the complaint of Brian R. Cunha filed pursuant to Rhode Island General Laws § 31-41.1-9, seeking judicial review of a final decision rendered by the respondent, Appellate Panel of the Rhode Island Traffic Tribunal, which upheld the Decision of Trial Magistrate Joseph Ippolito.

The Trial Magistrate found the appellant guilty of violations of Section 31-27-2.1 Failure to Submit to A Chemical Test and Section 31-20-9 Obedience to Stop Signs.

The travel of this case is as follows:

On November 13, 2000 Appellant was Charged with (1) a violation of 31-27-2.1 Refusal to Submit to a Chemical test and (2) a violation of 31-20-9 Non-Obedience to a Stop Sign.

On December 1, 2000, Mr. Cunha's case was tried before Magistrate Veiga. During the trial, there was a violation of the sequestration order and the case was dismissed. The State appealed the case to the Appeals Panel. The Appeals Panel heard the case on January 17, 2001 and found that the State had no right to appeal.

On August 27, 2001 the District Court reversed the ruling of the Traffic Tribunal and sustained the State's appeal, remanding the case to the Traffic Tribunal's Appeal Panel for further proceeding.

On March 15, 2002, the Appeals Panel reversed Magistrate Veiga's decision that the sequestration order had been violated and remanded the matter back to the Trial Judge for a hearing on the merits.

On May 23, 2002, the matter was remanded for trial before Magistrate Ippolito. The trial took place over several days from August to October, 2002.

On October 22, 2002, Magistrate Ippolito found that Mr. Cunha had violated R.I.G.L. 31-27-2.1 Refusal to Submit to a Chemical Test and Section 31-20-9 Obedience to Stop Signs.

On November 13, 2002, Mr. Cunha filed a Motion for Relief from Judgment/Order, based on the State's failure to present sufficient evidence to support the officer's findings of reasonable grounds and/or probable cause to arrest. The Motion for Relief was argued on December 10, 2002. Thereafter, on

February 13, 2003, defense counsel received a copy of Magistrate Ippolito's written decision on the motion. Mr. Cunha appealed both the decision following trial and the decision on the Motion for Relief from Judgment/Order to the Appeals Panel.

On March 26, 2003, the Appeals Panel heard oral argument on both appeals and rendered a decision on July 5, 2003.

The Traffic Tribunal Appeals Panel determined that the decision of the Trial Magistrate was a proper determination of the facts and a proper application of the law.

Thereafter Brian R. Cunha filed a complaint for judicial review in the Rhode Island District Court.

The standard of review is provided by Rhode Island General Laws 31-41.1-9(d):

> (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 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 proceeding or reverse or modify the decision if the substantial rights of the appellant have been prejudiced 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.

On questions of fact, 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." Guarino v. Department of Social Welfare, 122 R.I. 583, 584, 410 A.2d 425 (1980) citing Rhode Island General Laws § 42-35-15(g)(5). The Court will not substitute its judgment for that of the Board as to the weight of the evidence on questions of fact. Cahoone v. Board of Review of the Department of Employment Security, 104 R.I. 503, 246 A.2d 213 (1968). Stated differently, the findings of the agency will be upheld even though a reasonable mind might have reached a contrary result. Cahoone v. Board of Review of the Department of Employment Security, 104 R.I. 503, 246 A.2d 213, 215 (1968). See also D'Ambra v. Board of Review, Department of Employment Security, 517 A.2d 1039, 1041 (R.I. 1986).

That the standard of review of the appeals panel is controlled by section 31-41.1-8 which provides:

(f) **Standard of review.** 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 modify the decision if the substantial rights of the appellant have been prejudicial because the judge's findings, inferences, conclusions or decisions are:

(1) In violation of constitutional or statutory provisions in excess of the statutory authority of the judge or magistrate;
(2) Made upon unlawful procedure;
(3) Affected by other error of law;

(4) Clearly erroneous in view of the reliable, probative, and substantial evidence on the whole record; or
(5) Arbitrary or capricious or characterized by abuse of discretion or clearly unwarranted exercise of discretion.

The standard of review that the District Court must apply to the findings, conclusions of law and decision of the Appeals Panel of the Traffic Tribunal are the same standards that the Appeals Panel must apply to the Trial Judge's findings, conclusions of law and decision.

The Appeals Panel has made determinations based on the record and arguments presented to them.

On reviewing the entire record, the Court must determine if the Appeals Panel's decision was improper in view of the evidence and record it reviews.

The Court reviewed the entire record of the Trial Judge and the Appeals Panel.

A review of the entire record demonstrates that the findings of fact, as follows, are substantiated by the evidence presented at the hearings and adopted from the facts outlined by the decision of the Traffic Tribunal's Appeals Panel.

"On November 13, 2000, at approximately 12:41 a.m., Officer John Barker of the Newport Police Department was patrolling the vicinity of Narragansett Avenue and Spring Street when he observed a vehicle turn rapidly onto Spring Street going north. (Tr. at 42.) He followed the vehicle and watched as it turned left onto Franklin Street heading west toward Thames Street. (Tr. at 51.) He testified that the vehicle eventually reached the intersection of Franklin and

Thames Streets, which was controlled by a stop sign and a crosswalk. He further testified that the vehicle failed to come to a complete stop at the sign or the crosswalk before turning right on Thames. (Tr. at 174.) Officer Barker followed the vehicle as it entered Thames Street and pulled into a parking space near Pellum Street. He approached the vehicle and identified appellant as the driver. He thereafter engaged appellant in conversation, explaining that he had observed the vehicle pass through the stop sign without coming to a complete stop. When appellant apologized for not coming to a complete stop, Officer Barker noticed that he was slurring his speech and had an odor of alcohol on his breath. (Tr. at 56-57.) He also noticed that appellant's eyes were watery and that he appeared unsteady on his feet. (Tr. at 58.) He then asked appellant to submit to a series of field sobriety tests, which he agreed to do.

Officer Barker performed the standard battery of tests, including the One-Leg-Stand, the Walk-and-Turn, and the Finger-to-Nose. Appellant failed the One-Leg-Stand. He then began performing the Walk-and-Turn before Officer Barker had completed the instructions and was ultimately unable to maintain his balance or walk heel-to-toe. Accordingly, Officer Barker determined that he had failed the Walk-and-Turn. Similarly, appellant attempted to perform the Finger-to-Nose test before the officer had completed the instructions. Officer Barker then read appellant his rights for use at the scene and informed him that he was being placed under arrest on suspicion of driving while intoxicated. (Tr. at 75-76.)

Appellant was subsequently transported to police headquarters in Newport and read his rights for use at the station. He was then asked to submit to a chemical test, which he refused. (Tr. II at 82-83.) Appellant thereafter asked Officers Cardoza and Harvey about the possibility of posting bail, to which Officer Cardoza responded that the Newport Police did not conduct bail hearings during the night shift. (Tr. II at 93-94.) Officer Harvey then explained to the appellant that he would not be released unless he submitted to a chemical test. (Trial II at 89.)"

The appellant on appeal, in his brief, raises the issue of no reasonable suspicion and no probable cause to arrest in the following form.

> "*No Reasonable Suspicion/No Probable Cause.* There was no reasonable suspicion to support the officer's stop of Mr. Cunha nor was there probable cause to support the subsequent arrest of Mr. Cunha. Although the State alleged that Mr. Cunha failed to stop at a stop sign, the State failed to prove it at trial. Thus, there was no reasonable suspicion to "stop" Mr. Cunha. Moreover, Magistrate Ippolito did not, *in the presence* of Mr. Cunha, impose penalties on the alleged stop sign violation. There were no reasonable grounds to request Mr. Cunha to submit to a chemical test."

Reasonable articulable suspicion does not mean a person is to be found guilty of any crime or misdemeanor beyond a reasonable doubt, nor does it mean that a motor vehicle operator be found guilty of a violation of the motor vehicle act by clear and convincing evidence. It simply means that a law enforcement officer, after examining all of the facts and circumstances present, based upon his experience and reason, concludes that a person is driving under the influence.

As in Terry v. Ohio, 392 U.S. 1, the observation and experiences of a seasoned officer concluded that a person was about to commit a robbery. Even though the robbery did not take place, the officer had a right to stop the person, frisk the person for his own safety. In Terry v. Ohio, the conduct on the part of the officer was declared to be reasonable articulable suspicion for such a stop.

Driving under the influence and refusal to submit to a chemical test are two separate and distinct violations of the law.

The Rhode Island Supreme Court stated:

> Refusing a breathalyzer test and driving under the influence of liquor are wholly distinct and separate offenses as each requires proof of one or more elements which the other does not. State v. Hart, 694 A.2d 681 (R.I. 1997).

The appellant raises the issue that there was no reasonable suspicion to stop his vehicle and therefore no reasonable grounds to arrest him for driving under the influence.

Under Section 31-27-2.1 it is not required to establish that:

> there existed probable cause for the police to stop a vehicle in order to meet its burden of proof under this section. It is clear that reasonable suspicion is the proper standard for evaluating the lawfulness of a stop. State v. Jenkins, 673 A.2d 1094 (R.I. 1996).

In an effort to protect the health, welfare and safety of the public, a police officer in the enforcement of the motor vehicle laws may stop a motorist for the violation of the motor vehicle code; or the observation of a motorist by a police officer for his failure to stop at an intersection where a stop sign was posted gives rise to an officer to stop a motor vehicle pursuant to section 31-20-9 which provides:

Section 31-20-9 provides:

> "Every driver of a vehicle approaching a stop sign shall stop before entering the crosswalk on the near side of the intersection. In the event there is no crosswalk, the driver shall stop at a clearly marked stop line, but if none, **then at the point nearest the intersecting highway where the driver has a view of approaching traffic on the intersecting highway before entering the intersection,** except when directed to proceed by a police officer or traffic control signal."

The stop must be more than a momentary stop. In Rhode Island the interpretation of this statute requires the motor vehicle to come to a complete stop at a stop sign. See Sullivan v. Caruso, 68 R.I. 476.

There is evidence on the record that the Trial Magistrate found that the appellant did not come to a complete stop as required by Section 31-20-9.

The analysis of the law as recited by the Appeals Panel is correct.

Based upon the police officer's observations, there were reasonable grounds to stop the appellant.

In this case, the findings of fact include the observations of the driving of the motor vehicle, and the violation of the stop sign laws pursuant to 31-20-9.

There is evidence on the record of the slurring of speech, the odor of alcohol on his breath, the watery eyes, and the appellant being unsteady on his feet, and the failure to pass the field sobriety test, which gives rise to reasonable grounds to arrest for driving under the influence of alcohol.

> The defendant's commission of a misdemeanor alone (operation of a unregistered vehicle in violation of § 31-8-2) gave the officer probable cause to stop and detain him, and from that point on, any evidence obtained pursuant to the lawful stop, such as the odor of alcohol, 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. State v. Bjerke, 697 A.2d 1069 (R.I. 1997).

The appellant further argues that the Magistrate did not, in his presence, impose a penalty on the stop sign violation in accordance with Rule 18 of the Rules of Traffic Tribunal Rules of Procedure. Rule 18 provides this failure does not cause a judgment of violation of Section 31-20-9 to be dismissed or eliminate reasonable suspicion. It does not affect the reasonable grounds that exist for the arrest for driving under the influence of alcohol or refusal to submit to a chemical test.

Credibility Issue

The appellant raises the issue of the credibility of Officer Barker and he argued in his brief that:

> *Officer Barker's Testimony Was Not Credible.* Officer Barker was thoroughly discredited at trial. As a result, it is clear that the Court should have disregarded Officer Barker's testimony in total. The Court's reliance on Officer Barker's testimony was clearly erroneous. The Appeals Panel erred by failing to overturn the conviction based on Officer Barker's false testimony.

The credibility of the witnesses is a question exclusively for the trial judge to determine. The record demonstrates that Magistrate Ippolito, in his decision, made extensive findings of fact with regard to the testimony of Officer Barker. This evaluation of the testimony was further reviewed on the appellant's motion to vacate and was predicated upon the record of the trial transcript. In making the determination of credibility, the Trial Judge is in the best position to evaluate the testimony. He views the witness as the witness testifies; he sees the witness and determines the quality of the testimony as to how each witness testifies, the

manner of testimony, and weighs the evidence in light of all of the evidence presented, whether there is corroborating or contradictory evidence; weighs and determines the candor of the witness and resolves conflicting testimony. The record demonstrates that the Trial Magistrate made such an analysis, weighed the evidence in light of all of the evidence presented, then determined credibility of the witnesses. This Court cannot substitute its judgment for that of the Trial Magistrate on questions of fact, based upon the credibility of the witnesses and the weight given to the witnesses, unless the Trial Magistrate is clearly erroneous.

This Court lacks 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. Link v. State, 633 A.2d 1345 (R.I. 1993). The Appeals Panel is limited to a determination of whether the hearing justice's decision is supported by competent evidence.

The analysis made by the Appeals Panel is correct, and this Court finds that the Trial Magistrate was not clearly erroneous on the issue of credibility.

So Called Involuntary Constructive Refusal

In his brief, the appellant raises the issue of

> *Involuntary Constructive Refusal.* The Newport Police misled Mr. Cunha and, in essence, refused to allow Mr. Cunha to exercise his right to bail on the night of his arrest. By denying Mr. Cunha his statutory and constitutional rights, Mr. Cunha was unable to obtain evidence that would have exonerated him. The actions of the Newport Police resulted in a charge of involuntary constructive refusal, which cannot stand. Mr. Cunha never refused the chemical test.

A review of the entire record demonstrates that the Appellate Panel's analysis of this issue is not erroneous. The record demonstrates that the Magistrate's findings and conclusion were based upon the admissible evidence as was determined by the Magistrate at trial. There is evidence that the officers properly informed the appellant of the rights and penalties attending a refusal to submit to a chemical test pursuant to Section 31-27-2; that the appellant understood his rights and penalties; and further, that the Magistrate's conclusions were predicated upon a factual finding or a viewing of a video taping of the appellant at the station refusing to submit to a chemical test and the evidence of the officers regarding such refusal.

The so called theory of "Involuntary Constructive Refusal" is not supported by any facts whatsoever.

State's Right to Appeal

The appellant raises the issue that the State has no right to appeal. This issue was raised on an appeal heard by the Appellate Panel of the Traffic Tribunal, and thereafter heard by the District Court. A copy of the decision, which is appended hereto and made a part hereof, is dispositive of the issue.

In this appeal, the appellant further argues that Rule 21 of the Traffic Tribunal's Rules of Procedure were amended on December 5, 2001 to allow the State a right to appeal; and since the appellant was "exonerated" on December 1, 2000, this matter should be dismissed.

In the submission of the rule change to the Supreme Court, pursuant to the Traffic Tribunal authority to make rules pursuant to section 8-8.2-1(a) and the

authority of the Supreme Court pursuant to Section 8-6-2, the Chief Judge offered the rule change to more specifically clarify the State's right to appeal and not to amend the law to give the State the right to appeal. The decision appended hereto is dispositive of this issue.

The appellant argues he filed a motion for relief from judgment on grounds that the State failed to present sufficient evidence to support the Officer's findings of reasonable grounds and probable cause to arrest. The Court addressed this issue and in fact finds that the appellant has failed to demonstrate any grounds for support of such motion, and the decision of the Trial Magistrate was not erroneous.

A review of the entire record demonstrates that there is substantial, probative and reliable evidence to support the findings of fact, conclusions and decisions of the Trial Magistrate and the determination of the Appeals Panel.

On findings of fact, as to the weight of the evidence, neither this Court nor the Traffic Tribunal shall substitute its judgment for that of the Trial Magistrate.

The scope of judicial review by the Court is limited by Section 31-41.1-9(d).

Upon careful review of the evidence, this Court finds that the decision of the Traffic Tribunal was not "clearly erroneous in view of the reliable, probative and substantial evidence on the whole record," and that said decision was not "arbitrary or capricious or characterized by abuse of discretion or clearly unwarranted exercise of discretion."

Accordingly, the decision of the Traffic Tribunal is hereby affirmed.

STATE OF RHODE ISLAND AND PROVIDENCE PLANTATIONS

PROVIDENCE, SC

DISTRICT COURT

SIXTH DIVISION

STATE OF RHODE ISLAND	:	
VS.	:	A.A. NO. 01-07
BRIAN CUNHA	:	

JUDGMENT

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

ORDERED AND ADJUDGED

The Motion to Dismiss is denied. The Decision of the Appellate Panel is reversed. The matter shall be remanded to the Appellate Panel with instructions to address all issues previously reserved.

Dated at Providence, Rhode Island, this 27th day of August, 2001.

ENTER:

BY ORDER:

Jerome Smith

CHIEF CLERK