STATE OF RHODE ISLAND AND PROVIDENCE PLANTATIONS

PROVIDENCE, SC. **RHODE ISLAND TRAFFIC TRIBUNAL**

CITY OF WOONSOCKET :
:
V. : **C.A. No. T11-0033**
:
ADAM BUSSEY :

DECISION

CRUISE, M., DISANDRO, M.: Before this Panel on June 15, 2011—Administrative Magistrate Cruise (Chair, presiding), Magistrate DiSandro, and Judge Almeida, sitting—is Adam Bussey's (Appellant) appeal from a decision of Chief Magistrate Guglietta, sustaining the charged violations of G.L. 1956 §§ 31-16-1 and 31-27-2.1, "Care in starting from stop" and "Refusal to submit to a chemical test," brought by the State of Rhode Island (Appellee). Both parties were represented by counsel before this Panel. Jurisdiction is pursuant to § 31-41.1-8.

I

Facts and Travel

On February 20, 2011, after observing Appellant operate his vehicle in an unsafe manner, Officer Jamie Martin of the Woonsocket Police Department (Officer Martin) conducted a traffic stop. Officer Martin initially observed Appellant driving erratically. Upon stopping the Appellant, Officer Martin approached the vehicle and observed a strong odor of alcohol on the Appellant's breath. Furthermore, Appellant had bloodshot eyes and was acting aggressively. (4/22/11 Tr. at 18.) Appellant failed to present Officer Martin with a valid driver's license, and provided Officer Martin with a false name. (4/22/11 Tr. at 17.)

Officer Martin placed Appellant under arrest for "obstructing officer in execution of duty" and "license to be carried and exhibited on demand" pursuant to §11-32-1 and §31-10-27. Officer Martin then transported Appellant to the Woonsocket Police Station. Upon arriving, Officer Martin conducted a field sobriety test, which Appellant failed. At this time, Officer Martin charged Appellant with violating. § 31-27-2.1. Appellant contested the charge, and the matter proceeded to trial.

The trial began with Officer Martin's testimony regarding his background and experience as a police officer, in particular with "Driving Under the Influence" (DUI) stops. (4/22/11 Tr. at 5.) He testified that in his four years as a police officer, he had conducted "30, 35 maybe" DUI stops. (4/22/11 Tr. at 5.) Further, Officer Martin testified that he had received formal training at the Rhode Island Municipal Police Academy, where he learned to administer a breath test and field sobriety tests. (4/22/11 Tr. at 6.)

Turning to the events of February 20, 2011, Officer Martin testified that at about 1:00 a.m., he observed Appellant's vehicle "spinning. . . the tires, it was dangerous in that situation with all the people around." (4/22/11 Tr. at 11.) Officer Martin and his partner proceeded to follow Appellant's vehicle for approximately a quarter mile. (4/22/11 Tr. at 58.) Officer Martin then conducted a traffic stop of Appellant's vehicle. Officer Martin's partner asked Appellant to provide him with a license and registration. (4/22/11 Tr. at 11.) Appellant stated to Officer Martin's partner that he did not have his driver's license in his possession at that time. (4/22/11 Tr. at 12.) Appellant then provided Officer Martin's partner with a false name. Id. Appellant stated his name was Aaron Bussey. (4/22/11 Tr. at 15.) Officer Martin testified that he felt Appellant was being dishonest and asked Appellant to exit the vehicle. Id.

Upon exiting the vehicle, Appellant became combative and began to yell at Officer Martin and his partner. (4/22/11 Tr. at 14.) At this time, Officer Martin observed Appellant make an aggressive gesture with his right hand. (4/22/11 Tr. 13-14.) Officer Martin placed handcuffs on the Appellant and secured him in the backseat of his police cruiser. (4/22/11 Tr. at 16.) During this initial stop, Officer Martin also observed a strong odor of an alcoholic beverage on the Appellant's breath. (4/22/11 Tr. at 18.) Additionally, Officer Martin observed that Appellant's eyes were bloodshot and watery. Officer Martin testified that Appellant "appeared to . . . be intoxicated at the time." (4/22/11 Tr. at 19.)

Officer Martin ascertained Appellant's real identity by asking the vehicle's other occupants. (4/22/11 Tr. at 20.) Having obtained Appellant's real name, Officer Martin then placed Appellant under arrest for "obstructing officer in execution of duty" and "license to be carried and exhibited on demand" pursuant to §11-32-1 and §31-10-27, respectively. (4/22/11 Tr. at 20.) Officer Martin did not perform field sobriety tests at this time because, as he explained, "the roads were narrow due to snow banks," and he felt he "could not safely do it on the sidewalk." (4/22/11 Tr. at 21.) The sidewalks around Appellant's vehicle were full with people exiting recently closed bars. (4/22/11 Tr. at 17.)

Following Appellant's arrest, Officer Martin brought appellant to the Woonsocket Police Department, located approximately a quarter mile from the scene of the initial traffic stop. (4/22/11 Tr. at 22.) Upon arriving at the Woonsocket Police Department, Officer Martin continued his DUI investigation. Officer Martin conducted a battery of field sobriety tests on the Appellant. (4/22/11 Tr. at 29-31.) Appellant failed the one-leg stand test and passed the eight part walk and turn test. (4/22/11 Tr. at 29-30.) Subsequently, Officer Martin read Appellant the "Rights for Use at the Scene" and placed Appellant under arrest for suspicion of DUI. Appellant

was then read his "Rights for Use at Station." (4/22/11 Tr. at 33.) Appellant elected to make a confidential phone call per his rights under G.L. 1956 § 12-7-20. (4/22/11 Tr. at 35.)

Following his confidential phone call, Appellant signed his refusal to take a breath test. (4/22/11 Tr. at 37.) Appellant instead demanded his right "as a U.S. citizen to get a blood test." Id. Following this demand, Officer Martin allowed Appellant to make several additional phone calls. Id. Following this second round of phone calls, Appellant then informed Officer Martin he no longer wished to submit to a blood test. Id.

On cross-examination, Officer Martin testified that of his thirty-five suspected DUI stops, the operator of the motor vehicle was sober "probably five, ten times." (4/22/11 Tr. at 41.) Officer Martin admitted that at the time of the motor vehicle stop, Appellant's truck was neither speeding nor fishtailing. (4/22/11 Tr. at 49.) During cross-examination Appellant's counsel attempted to show numerous inconsistencies between Officer Martin's police report filed on February 20, 2011 and his aforementioned testimony. (4/22/11 Tr. at 64-68.) Furthermore, upon cross examination, Officer Martin admitted he did not read the "Rights for Use at the Scene" despite suspecting Appellant had been driving under the influence in violation of § 31-27-2.

At the conclusion of the testimony, the trial magistrate sustained the charge against the Appellant. The trial magistrate held that the initial stop and arrest of the Appellant was valid. (5/13/11 Tr. at 16.) The trial magistrate noted that that the Officer was acting properly in stopping the vehicle for failure to use care in starting from stop, in violation of § 31-16-1, stating in pertinent part,

> "I'm satisfied from Officer Martin's testimony that the spinning of the tires, in light of the fact that there was heavy traffic; there were people in the area; there was no sidewalks for the people to walk, that there could be the kicking up of something or some sort of debris coming in contact with people; that it does in fact violate the statute on reasonable safety." (5/13/11 Tr. at 16.)

The trial magistrate subsequently found that Officer Martin's DUI investigation stemmed from this valid initial traffic stop. (5/13/11 Tr. at 17.) The trial magistrate concluded that based on Officer Martin's observations including the strong odor of alcohol on the Appellant, bloodshot watery eyes, slurred speech, aggressive behavior, a stamp from a local bar on Appellant's hand, and Appellant's failure of the one-leg stand field sobriety test—Officer Martin had reasonable grounds to believe that Appellant was operating his motor vehicle under the influence of alcohol. (5/13/11 Tr. at 41-42.) As such, finding that the State met its burden in proving all the elements of the offense under § 31-27-2.1, the trial magistrate then imposed penalties. (5/13/11 Tr. at 42, 47.)

Appellant appealed this Decision. The Decision of the majority of the Appeals Panel is rendered below. Judge Almeida, dissenting from this Decision, has filed a dissenting opinion.

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 on questions of fact. The appeals panel may affirm the decision of the judge or magistrate, may remand the case for further proceedings, or may 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 following 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, capricious, or characterized by abuse of discretion or clearly unwarranted exercise of discretion."

In reviewing a hearing judge'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 concerning the weight of the evidence on questions of fact." Link v. State, 633 A.2d 1345, 1348 (R.I. 1993) (citing Liberty Mutual Insurance 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 decision is supported by legally competent evidence or is affected by an error of law." Link, 633 A.2d at 1348 (citing Environmental Scientific 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." Link, 633 A.2d at 1348. Otherwise, it must affirm the hearing judge's conclusions on appeal. See Janes, 586 A.2d at 537.

III

Analysis

On appeal, Appellant contends that the trial magistrate's decision is affected by error of law; clearly erroneous based on the reliable, probative, and substantial record evidence; characterized by abuse of discretion; and in violation of constitutional and statutory provisions. Appellant asserts that the trial magistrate's credibility determinations regarding Officer Martin's testimony were clearly erroneous. Additionally, Appellant argues that the trial magistrate erred in finding that Officer Martin had reasonable suspicion to conduct the initial traffic stop of Appellant's vehicle. Furthermore, Appellant asserts that the trial magistrate erred in determining that the rights of the Appellant were not prejudiced by having his "Rights for Use at the Scene"

read to him at the Woonsocket Police Department, rather than at the scene of the initial traffic stop. This Court will review each of these issues seriatim.

A

The Trial Magistrate's Credibility Determinations

Appellant asserts that the trial magistrate erred in crediting the trial testimony of Officer Martin. Appellant also argues Officer Martin's testimony lacked credibility due to discrepancies between Officer Martin's courtroom testimony and the February 20, 2011 police report. Appellant cites Officer Martin's statements at the hearing that there were people in the street during the initial traffic stop, that Appellant had bloodshot eyes, and that Appellant had slurred speech. Appellant notes that these statements were only made at the hearing and did not appear in the police report. As such, the Appellant contends that there were gross oversights on the part of the trial magistrate which amounted to clearly erroneous findings based on the reliable, probative, and substantial record evidence.

The Rhode Island Supreme Court has stated that this Panel "lacks the authority to assess witness credibility or to substitute its own judgment for that of the hearing magistrate concerning the weight of the evidence on questions of facts." 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 Appeals Panel is "limited to a determination of whether the hearing justice's decision is supported by legally competent evidence." Marran v. State, 672 A.2d 875, 876 (R.I. 1996). The trial magistrate was present for Officer Martin's April 22, 2011 testimony and decided that any discrepancies between Officer Martin's testimony and his police report were minor, and was satisfied Officer Martin's testimony was credible. (5/13/11 Tr. at 32.) It is entirely within the trial magistrate's discretion to weigh such evidence and testimony. See Link, 633 A.2d at 1348.

In this case, there is ample evidence in the record to support all of the trial magistrate's findings. See id. The trial magistrate heard testimony presented by the State of Rhode Island's witness, Officer Martin, regarding his experience with DUI investigations, the circumstances surrounding the initial traffic stop of Appellant's vehicle, the interaction between Appellant and the Officers, the conditions present at the scene of the initial stop, and the subsequent DUI investigation, and made a determination that this testimony was reliable. As such, this Panel is satisfied that the trial magistrate's finding that Officer Martin was "very credible" is not clearly erroneous, and is based on the reliable, probative, and substantial record evidence. Therefore, the members of this Panel conclude that the trial magistrate's decision to sustain the charged violations is supported by legally competent evidence and is unaffected by error of law or abuse of discretion.

B

The Initial Traffic Stop and Sobriety Test

Appellant additionally contends that Officer Martin did not have adequate grounds to conduct the initial traffic stop. The United States Supreme Court has made clear that the decision to stop a vehicle is considered reasonable only when the police have probable cause to believe that a traffic violation has occurred. See Whren v. United States, 517 U.S. 806 (1996). As such, Officer Martin was required to have specific and articulable facts providing reasonable suspicion to stop the Appellant. See Terry v. Ohio, 392 U.S. 1, 21 (1968) (requiring specific and articulable facts to detain a person, even if the stop is brief); see also State v. Roussell, 770 A.2d 858. 860 (R.I. 2001) (denying a Motion to Suppress the fruits of a search since the Officer acted reasonably in conducting a traffic stop). In the instant matter, Officer Martin made numerous observations of Appellant's vehicle driving in an erratic and potentially dangerous manner in

violation of § 31-16-1, "Care in starting from stop." The language of § 31-16-1 states: "[n]o person shall start a vehicle which is stopped, standing, or parked unless and until the movement can be made with reasonable safety." In this case, Officer Martin testified that he observed Appellant's vehicle "spinning. . . the tires" in a dangerous fashion (4/22/11 Tr. At 11.) As such, it is clear that the trial magistrate's finding that Officer Martin met the requisite standard to conduct a traffic stop was not clearly erroneous based on the substantial record evidence. See State v. Bjerke, 697 A.2d 1069, 1071 (R.I. 1997) (where probable cause did exist to conduct a traffic stop since the driver committed a criminal offense in the presence of the officer).

Furthermore, the record evidences that Officer Martin had reasonable grounds to arrest the Appellant and later to conduct a field sobriety test at the Woonsocket Police Station. The trial magistrate found Officer Martin's testimony to be credible regarding Appellant's failure to produce a valid drivers license following the initial motor vehicle stop, which pursuant to § 31-10-27 is an arrestable offense. See id. Furthermore, Appellant's aggressive behavior toward Officer Martin also warranted a valid arrest under § 11-32-1, "Obstructing officer in execution of duty." See id.

Following Appellant's initial arrest, Officer Martin had adequate grounds to pursue a DUI investigation. It is well settled in Rhode Island that a police officer has reasonable grounds to suspect an individual is operating a motor vehicle under the influence of alcohol when he or she exhibits tangible indicia of alcohol consumption through his or her speech, physical appearance, and performance on field sobriety tests. See State v. Perry, 731 A.2d 720, 723 (R.I. 1999) (holding probable cause exits where the facts and circumstances known to a police officer or of which he or she has reasonable trustworthy information are sufficient to cause a person of reasonable caution to believe that a crime has been committed). Given the totality of the

circumstances in this instance—including Appellant's aggressive attitude, blood shot and watery eyes, the smell of alcohol in the vehicle, and a stamp from a local bar on Appellant's hand—this Panel is satisfied that Officer Martin had reasonable grounds to suspect that the Appellant was operating his motor vehicle under the influence of alcohol. These factors clearly gave Officer Martin reasonable grounds to conduct a field sobriety test in order to further his investigation. See id. Upon Appellant's failure of the one-leg stand test, Officer Martin had clearly obtained adequate evidence to suspect that Appellant was operating a motor vehicle under the influence of alcohol. See id.

This Panel has concluded that the trial magistrate's determinations regarding the validity of the initial stop, arrest of the Appellant, and subsequent DUI investigation on behalf of Officer Martin were supported by reliable, probative, and substantial evidence.

C

"Right for Use at the Scene" Analysis

Appellant also contends that the trial magistrate's finding that Officer Martin properly read the "Rights for Use at the Scene" at the Woonsocket Police Station is in violation of the statutory provisions of § 31-27-2.1 Section 31-27-2 states that anyone who drives a vehicle under the influence of intoxicating liquor shall be guilty of a misdemeanor. Expounding upon the requirements set out in § 31-27-2, the Rhode Island Supreme Court explained:

> "an individual charged with driving while intoxicated must be informed of the following: (1) his or her Miranda rights; (2) his or her right to be examined by a physician of his choice; (3) his or her right to refuse to submit to a breathalyzer examination; and (4) the consequences attendant on refusal to consent to the test." State v. DeOliveira, 972 A.2d 653, 660 (R.I. 2009) (citing State ex rel. Town on Middletown v. Anthony, 713 A.2d 207, 212 (R.I. 1998)).

The "Rights for Use at the Scene" [1] and "Rights for Use at Station" forms have been "designed through a combined effort of the Department of Health, Department of Transportation (DOT) and the Attorney General's office and [are] distributed to local police departments." See Levesque v. Rhode Island Dept. of Transp., 626 A.2d 1286, 1288 (R.I. 1993). The "Rights for Use at Station" and "Rights for Use at Scene" reflect the current language of §31-27-2.1. [2] The two forms apprise drivers of their Miranda rights, right to be examined by a physician of their choosing, right to refuse to submit to a breath test, and the penalties incurred by a refusal to submit to a chemical test pursuant to §31-27-2.1.

1

Timing of the "Rights for Use at the Scene"

A person arrested and charged with operating a vehicle under the influence of intoxicating liquor is entitled to be immediately informed of his right to be examined by an independent physician pursuant to §31-27-3. Section 31-27-3 states that

> "A person arrested and charged with operating a motor vehicle while under the influence of narcotic drugs or intoxicating liquor, whatever its alcoholic content, shall have the right to be examined at his or her own expense immediately after the person's arrest by a physician selected by the person, and the officer so arresting or so charging the person shall immediately inform the person of this right and afford the person a reasonable opportunity to exercise the right, and at the trial of the person the prosecution must prove that he or she was so informed and was afforded that opportunity."

[1] The "Rights for Use at Scene" form read as follows:

> "You are suspected of driving under the influence of intoxicating liquor and or drugs. You have the right to remain silent. You do not have to answer any questions or give any statements. If you do answer questions or give statements, they can and will used in evidence against you in court. You have the right to an attorney. If you cannot afford an attorney, one will be provided to you. You have the right to be examined, at your expense immediately by a physician selected by you. You will be afforded a reasonable opportunity to exercise this right." ("Rights for Use at Station" form.)

[2] Section 31-27-2.1 reads in pertinent part: "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 law enforcement officer. . . ."

In this case, at the scene of the initial traffic stop, Officer Martin arrested Appellant for "Obstructing officer in execution of duty" and "License to be carried and exhibited on demand" pursuant to § 11-32-1 and § 31-10-27. Officer Martin continued his ongoing DUI investigation at the Woonsocket Police Station because of the dangerous road conditions present at the initial traffic stop site. It was not until after Appellant had failed the one-leg stand test that Officer Martin read Appellant his "Rights for Use at the Scene" and asked Appellant to submit to a breath test. (4/22/11 Tr. at 31.) Under a literal reading of § 31-27-3, Officer Martin was required to read the "Rights for Use at the Scene" directly after placing Appellant under arrest for operating a motor vehicle under the influence of alcohol. Due to the dangerous conditions at the traffic stop however, the scene of the DUI investigation shifted to the Woonsocket Police Department and was not concluded until after Appellant failed the one-leg stand test. While Officer Martin noticed numerous factors at the scene of the initial stop that led him to have a reasonable belief that Appellant was operating his vehicle under the influence of alcohol, the Appellant was initially arrested for offenses unrelated to operating a vehicle under the influence of alcohol. It was only later, at the Woonsocket Police Department, that Appellant was placed under arrest for operating a motor vehicle under the influence of alcohol. Following Appellant's arrest for this offense, Officer Martin then properly and immediately read the Appellant his "Rights for Use at the Scene," thereby satisfying the statutory requirements of § 31-27-3.

The Supreme Court of Rhode Island has interpreted the term "immediately" in a broad relative sense. State v. Lefebvre, 78 R.I. 259, 81 A.2d 348 (1951). In Lefebvre, the Rhode Island Supreme Court noted that in exigent circumstances, the term "immediately" in § 31-27-3 can be understood to mean within a convenient time as is reasonably requisite, or may be reasonably necessary. See, 78 R.I. 259, 81 A.2d 348 (1951). In the current case, there were a

myriad of factors which prohibited Officer Martin from conducting a full DUI investigation at the scene of the initial traffic stop. At the time Officer Martin stopped Appellant's vehicle, snow banks made the surrounding roadway "very narrow," and traffic was heavy. (4/22/11 Tr. at 21.) Additionally, numerous local bars were also emptying onto the street, and Officer Martin felt unsafe performing the field sobriety tests on the crowded sidewalk or in the street. (4/22/11 Tr. at 21.) At the time of the initial arrest, Appellant was acting aggressively toward the police, and Officer Martin did not feel safe uncuffing him on the crowded street in order to perform a field sobriety test. (4/22/11 Tr. at 21.) As such, in their totality, the circumstances at the initial traffic stop limited Officer Martin's ability to safely perform a field sobriety test. These factors constitute the type of exigent circumstances that warrant a broader reading of the statutory term "immediately" contained in § 31-27-3. See State v. Lefebvre, 78 R.I. at 259, 81 A.2d at 348. There is no indication whatsoever that Officer Martin intentionally or unnecessarily wasted time in bringing Appellant to the Woonsocket Police Station to perform the field sobriety tests. See id. Officer Martin responded to the unfavorable circumstances at the traffic stop by brining Appellant to the Woonsocket Police station so that he could safely administer the field sobriety tests. For the reasons stated above, this Panel is satisfied that the trial magistrate's findings were not in violation of the statutory provisions contained within § 31-27-2.1

2

Prejudicial Misconduct

Appellant further contends that Officer Martin's failure to read him his "Rights for Use at the Scene" amounts to prejudice misconduct. The Rhode Island Supreme Court has held that dismissal is not appropriate in "Refusal to submit to a chemical test" violations unless the Appellant was prejudiced by the denial of his rights. State v. Carcieri, 730 A.2d 11, 15 (R.I.

1999). Black's Law Dictionary defines prejudice as "damage or detriment to one's legal rights or claims." 300 (6th ed. 1990). Therefore, Appellant must make a showing of prejudice in order for the trial magistrate's decision to be overturned. See Carcieri, 730 A.2d at 15.

However, in the instant matter, Appellant has provided no evidence whatsoever demonstrating "prejudice, or a substantial threat thereof." See id. Appellant was read the "Rights for Use at the Scene" after failing the one leg field sobriety test at the Woonsocket Police Department. At this time, Officer Martin felt he had adequate evidence to request Appellant to submit to a breath test. After being read his "Rights for Use at the Scene," Appellant made no statements, nor sacrificed any opportunities. (4/22/11 Tr. at 22.) Even assuming arguendo that Officer Martin should have read Appellant his "Rights for Use at the Scene"—after making observations at the initial traffic stop that created a reasonable suspicion that Appellant was operating his motor vehicle under the influence of alcohol—it would have been impossible for the Appellant to have exercised any of the rights afforded to him before being read his "Rights for Use at the Station" at the Woonsocket Police Station. See (4/22/11 Tr. at 79.) Appellant could not have made a confidential phone call or obtained an independent medical exam while he was being taken the quarter mile from the traffic stop to the police station. See id. For these reasons, this Panel is satisfied that Officer Martin's actions did not rise to the level of "prejudicial misconduct" that warrants dismissal. See Carcieri, 730 A.2d at 15.

Conclusion

Upon review of the entire record, this Panel concludes that the trial judge's decision was not erroneous or affected by an error of law. Substantial rights of the Appellant have not been prejudiced. Accordingly, the Appellant's appeal is denied, and the charged violation is sustained.

ENTERED:

DISSENTING, ALMEIDA, J.:

I write separately to express my dissent with the holding of the majority Decision. Appellant was clearly prejudiced by Officer Martin's conduct at the scene of the initial traffic stop. When an individual is detained by law enforcement officers, "the Fourth Amendment is implicated and the detention must be in conformance with the strictures of that amendment." State v. Bjerke, 697 A.2d 1069, 1071 (R.I. 1997); see Terry v. Ohio, 392 U.S. 1, 18 (1968). In cases involving a warrantless stop and detention, "reasonableness is the touchstone for distinguishing lawful from unlawful seizures." Bjerke, 697 A.2d at 1071. Probable cause only exists when the facts and circumstances known to an arresting officer are sufficient to warrant a prudent person to believe a defendant has committed or is committing an offense. U.S. v.

Cleveland, 106 F.3d 1056, 1060 (1st Cir. 1997). In order to prove that probable cause existed at the time of the initial traffic stop, the state must establish that the arresting officer had "specific and articulable facts which, taken together with rational inferences from those facts, reasonably warrant that intrusion." Terry, 392 U.S. at 21; see Bjerke, 697 A.2d at 1071. Some factors that may contribute to reasonable suspicion 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 police officer." State v. Halstead, 414 A.2d 1138, 1148 (R.I. 1980) (citations omitted).

While requesting information from the Appellant, Officer Martin observed several specific and articulable facts to determine he was under the influence. Officer Martin observed the Appellant operating his motor vehicle in an unsafe manner. (4/22/11 Tr. at 18); See State v. Halstead, 414 A.2d 1138, 1148 (R.I. 1980) (listing factors to contribute to reasonable suspicion, including suspicious conduct and personal knowledge and experience of the officer). Moreover, Officer Martin determined that the Appellant was under the influence of alcohol based on the odor of alcohol emanating from the Appellant, his behavior, and bloodshot eyes. See Bjerke, 697 A.2d at 1072 (where later evidence obtained pursuant to a lawful stop was, in effect, plain view and allowed to support an arrest, including odor of alcohol, slurred speech, and bloodshot eyes). Accordingly, Officer Martin had reasonable grounds to believe the operator was operating under the influence at the time of the stop. Additionally, Officer Martin admitted through his own testimony that he had formulated probable cause that Appellant had been operating his motor vehicle under the influence at the time of the initial traffic stop. (4/22/11 Tr. at 19.) As such, the Appellant should have been arrested at this time and read his "Rights for Use at the Scene." See U.S. v. Cleveland, 106 F.3d at 1060.

I feel that it is an error for this Panel to determine that the Appellant was not prejudiced by Officer Martin's misconduct. Due process is violated when formal charges are withheld for an unreasonably oppressive and unjustifiable time after probable cause is formulated. See Ross v. U.S., 349 F.2d 210, 212 (D.C. 1965). A suspect is subject to "special disadvantage" when arrest is purposefully delayed. Nickens v. U.S., 323 F.2d 808, 813 (D.C. 1963). In the current case, based on the testimony presented at trial, Officer Martin unreasonably delayed placing Appellant under arrest for a suspected DUI. Officer Martin should have placed Appellant under arrest upon formulating probable cause that Appellant had been operating his motor vehicle under the influence of alcohol. However, rather than promptly placing Appellant under arrest and reading him his "Rights for Use at the Scene," Officer Martin transported the Appellant to the Woonsocket Police Station and conducted a battery of field sobriety tests. As a result of this delay between the formulation of probable cause and the subsequent arrest for suspicion of DUI, Appellant was not read his "Rights for Use at the Scene" until he was present at the Woonsocket Police Station.

The Rhode Island Supreme Court has held that "an individual charged with driving while intoxicated must be informed of his or her right to be examined by a physician of his choice; [and] his or her right to refuse to submit to a breathalyzer examination" State v. DeOliveira, 972 A.2d 653, 660 (R.I. 2009) (citing State ex rel. Town of Middletown v. Anthony, 713 A.2d 207, 212 (R.I. 1998)). The statutory language of G.L. 1956 § 31-27-3 makes clear that an arresting officer must "immediately inform" an individual arrested and charged with "operating a motor vehicle under the influence" of his right to be examined by a private physician. The term "immediately" as used in § 31-27-3 requires that an arresting officer inform a detainee of his rights as soon as is reasonably possible. State v. Lefebvre, 78 R.I. 259, 81 A.2d 348 (1951).

Based on the testimony presented at trial, Officer Martin had formulated probable cause warranting the arrest of the Appellant at the scene of the initial traffic stop. At this time, Officer Martin should have immediately informed Appellant of his "Rights for Use at the Scene." By failing to do so, Officer Martin circumscribed the intent of the legislature requiring that an individual arrested for suspicion of operating a motor vehicle under the influence be immediately apprised of his right to an independent medical examination. The Rhode Island Supreme Court has made clear that "when the language of a statute is clear and unambiguous, we must enforce the statute as written by giving the words their plain and ordinary meaning." Park v. Rizzo Ford, Inc., 893 A.2d 216, 221 (R.I. 2006). Reading the statute to allow an arresting officer to engage in significant delay after formulating probable cause would nullify the requirement that the rights be read "immediately." See id. Officer Martin had probable cause to arrest the Appellant at the scene and engaged in an unwarranted delay, denying the Appellant his statutory right pursuant to § 31-27-3. For the aforementioned reasons, the conduct of Officer Martin substantially prejudiced Appellant. Therefore, I would grant the appeal and dismiss the charged violation for "refusal to submit to a chemical test." For these reasons I dissent.

ENTERED: