STATE OF RHODE ISLAND & PROVIDENCE PLANTATIONS

PROVIDENCE, Sc. **DISTRICT COURT**
SIXTH DIVISION

Colleen Lawrence	:	
	:	
v.	:	**A.A. No. 13 - 139**
	:	
State of Rhode Island	:	
(RITT Appeals Panel)	:	

O R D E R

This matter is before the Court pursuant to § 8-8-8.1 of the General Laws for review of the Findings and 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 and Recommendations of the Magistrate are adopted by reference as the Decision of the Court and the decision of the Appeals Panel is AFFIRMED.

Entered as an Order of this Court at Providence on this 29th day of April, 2014.

By Order:

____/s/_____
Stephen C. Waluk
Chief Clerk

Enter:

____/s/_____
Jeanne E. LaFazia
Chief Judge

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

Colleen Lawrence	:	
	:	
v.	:	**A.A. No. 2013-139**
	:	**(T13-007)**
State of Rhode Island	:	**(07-303-06160)**
(RITT Appeals Panel)	:	

F I N D I N G S & R E C O M M E N D A T I O N S

Ippolito, M. Before this Court comes Ms. Colleen Lawrence, seeking to overturn a decision of an Appeals Panel of the Traffic Tribunal which affirmed her adjudication for "Refusal to Submit to a Chemical Test," a civil violation defined in 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). This matter has been referred to me for the making of findings and recommendations pursuant to Gen. Laws 1956 § 8-8-8.1. For the reasons stated herein, I shall recommend to the Court that the decision of the appeals panel be AFFIRMED.

I
FACTS AND TRAVEL OF THE CASE

The facts of the incident which led to the charge of refusal to submit to a chemical test being lodged against Ms. Lawrence are fully and fairly stated (with appropriate citations to the trial transcript) in the decision of the appeals panel. I shall begin to quote from the appeals panel's narrative at the point when Officer Jason Head — a ten-year veteran of the Newport Police Department who had made a number of drunk-driving arrests — first observed the vehicle being driven by Ms. Lawrence on Broadway:

> … on September 2, 2012, at approximately 1:35 a.m., [Officer Head] was on a patrol shift specifically for DUI enforcement when he observed a vehicle behind him make an abrupt U-turn. (1/30/13, Tr. at 15-16.) Subsequently, Officer Head activated his emergency lights and siren, and turned around in order to initiate a traffic stop. (1/30/13, Tr. at 17.) Before Appellant pulled over, she barely missed making contact with a parked vehicle. (1/30/13, Tr. at 18.) Upon approaching the vehicle, Officer Head observed that the vehicle was missing a brake light, the operator had difficulty operating the window, and she already had her driver's license in her hand by the time the officer reached the vehicle. (1/30/13, Tr. at 18-19.) As he waited for the Appellant to produce her registration he observed Appellant's mumbled speech, detected an odor of alcohol emanating from the vehicle, and noted Appellant's bloodshot watery eyes. (1/30/13, Tr. at 21.) When asked by Officer Head whether she had consumed alcohol, Appellant responded that she had had two glasses of wine earlier in the evening. Id.
>
> As the Appellant exited her vehicle at the officer's request, Officer Head observed that Appellant "took a couple of off balance side steps … toward traffic." (1/30/13, Tr. at 23.) Appellant

> eventually gained her balance and walked to the rear of the vehicle by holding onto the vehicle for support. Id. Officer Head requested that the Appellant submit to a field sobriety test, to which the Appellant consented. (1/30/13, Tr. at 24.) Before Appellant consented, she informed the officer that she was on prescription medication. Id. As Appellant performed the field sobriety tests, Officer Head observed that Appellant had trouble balancing after she used her arms for balance, walked off the line, and missed heel to toe. (1/30/13, Tr. at 28.) The Appellant failed both of the field sobriety tests that were administered, and Officer Head arrested the Appellant for suspicion of operating under the influence and advised her of her rights by reading the "Rights For Use at the Scene" card. (1/30/13, Tr. at 33-34.) The Appellant was then transported to police headquarters. (1/30/13, Tr. at 36.)[1]

At Newport Police Headquarters, she given was her "Rights For Use at Station" and was offered the opportunity to make a confidential telephone call, which she declined.[2] When asked to consent to a chemical test for the presence of alcohol in her breath, she refused.[3] And so, she was charged with "Refusal to Submit to a Chemical Test" in violation of Gen. Laws 1956 § 31-27-2.1.[4]

After her arraignment on September 20, 2012, Ms. Lawrence entered a plea

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1 Decision of Appeals Panel, at 2-3.

2 Decision of Appeals Panel, at 3 citing Trial Transcript I, at 37-38.

3 Decision of Appeals Panel, at 3 citing Trial Transcript I, at 38.

4 Ms. Lawrence was also charged with "Failure to Yield" — in violation of Gen. Laws 1956 § 31-17-2. See Summons No. 07-303-06160. This charge was dismissed by the trial magistrate after trial for failure of proof. Trial Transcript II, at 18.

of not guilty to the refusal charge.[5] The case proceeded to trial on January 30, 2013 before Administrative Magistrate David Cruise. The prosecution's first and only witness was Officer Head, who gave testimony consistent with the foregoing narrative.[6] The defense then presented the testimony of Dr. Steven Karlin, who testified that what appeared to the officer to be the indicia of alcohol consumption by Ms. Lawrence was actually manifestations of her mental condition.[7] After closing arguments,[8] the trial ended for the day.[9]

On February 1, 2013, Magistrate Cruise rendered his decision.[10] He began by undertaking a thorough review of the testimony given by the witnesses in the case.[11] He then presented his evaluation of the case that the State had presented against Ms. Lawrence —

> … I want to say that I found Officer Head's testimony to be credible. He was calm and I believe thorough during his testimony. In fact, when reviewing the DVD, I found Head to be calm and polite to Ms. Lawrence and quite professional. As we all know when we are reviewing the facts in a chemical test refusal case, we must

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5 See Docket Sheet, Summons No. 07-303-06160.

6 Trial Transcript I, at 4 et seq.

7 Trial Transcript I, at 78-97.

8 Trial Transcript I, at 100-106 (defense) and 106-110 (prosecution).

9 Trial Transcript I, at 115.

10 See Trial Transcript II, passim.

11 Trial Transcript II, at 2-11.

> place ourselves in the shoes of the officer, as to what was in his mind at the time of the stop. Officer Head observed Ms. Lawrence's vehicle make an abrupt turn. He observed her almost step out of a parked car while attempting to pull over — excuse me, he observed her almost hit a parked car while attempting to pull over and stop. He testified to the odor of alcohol in this operator's breath, her bloodshot eyes and slurred speech. When exiting the vehicle, she almost stepped into traffic while almost losing her balance. In the Officer's opinion, she performed poorly on the walk and turn and the one-legged stand. Based upon the totality of the circumstances and based upon the Officer's observations, he had reasonable grounds to believe Ms. Lawrence was impaired and operating a motor vehicle while under the influence. Based on this, I believe the State has met its burden by the standard of clear and convincing evidence. …[12]

As a result, he sustained the charge of refusal to submit to a chemical test and sentenced her forthwith to the statutory minimums.[13]

The matter was heard by an appeals panel composed of Judge Alan Goulart (Chair), Judge Edward Parker, and Magistrate Domenic DiSandro on May 1, 2013. The appeals panel addressed two assertions of error. First, that the State had not proven that Officer Head had reasonable grounds to believe Ms. Lawrence had

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[12] Trial Transcript II, at 16-17. Earlier in his bench decision the trial magistrate had found that the other three elements had been proven — (a) that she had refused to submit to a chemical test, (b) that she had been informed of the penalties that would ensue from her refusal, and (c) that she had been informed of her right to an independent examination pursuant to Gen. Laws 1956 sec. 31-27-3. Trial Transcript II, at 12-13.

[13] Trial Transcript II, at 17. The sentence imposed included a six-month license suspension and a $200 fine. Id.

operated her vehicle while under the influence; and second, that the Officer did not testify that Appellant was operating under the influence. In its August 22, 2013 decision, the appeals panel rejected these arguments.

The appeals panel approached the former issue by referencing the first element of § 31-27-2.1 — which requires the officer to have possessed "reasonable grounds" to believe the operator had been driving under the influence.[14] Then, the panel explained that "reasonable grounds" was equivalent to the "reasonable-suspicion" standard known within Fourth Amendment jurisprudence.[15] And, the appeals panel further expounded that, when determining whether this standard was met, our Courts must consider the "totality of the circumstances."[16]

The appeals panel then applied these principles to the instant case. It began by noting that the trial magistrate had found Officer Head did indeed have reasonable suspicion to believe Ms. Lawrence was operating under the influence.[17]

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[14] Decision of Appeals Panel, at 5.

[15] Decision of Appeals Panel, at 5-6 citing State v. Jenkins, 673 A.2d 1094, 1097 (R.I. 1996) and State v. Keohane, 814 A.2d 327, 330 (R.I. 2003).

[16] Decision of Appeals Panel, at 6, citing Keohane, 814 A.2d at 330 citing in turn United States v. Cortez, 449 U.S. 411, 417 (1981) and State v. Tavarez, 572 A.2d 276, 278 (R.I. 1990).

[17] Decision of Appeals Panel, at 6.

Employing the "totality of the circumstances" approach, the appeals panel enumerated the factors pointed out by the trial magistrate on this question — the fact that she almost hit a parked car while attempting to pull over, the strong odor of alcohol she emitted, her bloodshot and watery eyes, and the fact that she almost stepped into traffic when she lost her balance.[18] The appeals panel also noted that the trial magistrate found Doctor Karlin's testimony —while interesting and forthright — to be unpersuasive regarding the ultimate issue before the Court.[19]

The appeals panel addressed the second issue raised by Appellant summarily. It cited Officer Head's testimony where he stated "I concluded that probable cause was established; that Colleen Lawrence was under the influence of alcohol or some sort of drug …."[20] Accordingly, finding no abuse of discretion and finding that the trial magistrate's decision was supported by the testimony and evidence of record, the appeals panel upheld Ms. Lawrence's adjudication on the charge of refusal.[21]

Four days later, on August 26, 2013, Ms. Lawrence filed an appeal to the Sixth Division District Court. A conference was held before the undersigned on

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18 Decision of Appeals Panel, at 6.

19 Decision of Appeals Panel, at 6.

20 Decision of Appeals Panel, at 7 citing Trial Transcript I, at 33.

21 Decision of Appeals Panel, at 8.

October 15, 2013 and a briefing schedule was set. Both parties have submitted memoranda which ably relate their respective viewpoints. I have found both to be most helpful in resolving the instant case.

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 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.'"[22] 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."[23] The review undertaken by this Court, like that of the Traffic Tribunal 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."[24]

III
APPLICABLE LAW
A
THE REFUSAL STATUTE
1
Theory — Distinctions Between Refusal and DWI Charges.

Any discussion of the civil offense of refusal to submit to a chemical test must begin by distinguishing it from the criminal charge of drunk driving, for

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[22] 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). See also Link v. State, 633 A.2d 1345, 1348 (R.I. 1993)

[23] 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).

[24] Link, 633 A.2d at 1348 citing Environmental Scientific Corporation v. Durfee, 621 A.2d 200, 208 (R.I. 1993).

although interwoven factually many cases, they are conceptually discrete. Drunk driving is a criminal offense against the public health and welfare. Our Supreme Court declared in State v. Locke,[25] that the statute that criminalizes drunk driving is a valid exercise of the police power, the goal of which is to reduce the "carnage"[26] perpetrated on our highways by "drivers who in drinking become a menace to themselves and to the public."[27] In sum, like the charge of reckless driving, it proscribes dangerous conduct on the highways.

On the other hand, the civil charge of refusal[28] has its origins in the implied consent law — which provides that, by operating a motor vehicle in Rhode Island,

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[25] 418 A.2d 843, 849 (R.I. 1980).

[26] Locke, 418 A.2d at 849-50 citing People v. Brown, 174 Colo. 513, 522-23, 485 P.2d 500, 505 (1971) and DiSalvo v. Williamson, 106 R.I. 303, 305-06, 259 A.2d 671, 673 (1963).

[27] Locke, 418 A.2d at 850 citing Campbell v. Superior Court, 106 Ariz. 542, 546, 479 P.2d 685, 689 (1971).

[28] The charge of refusal to submit to a chemical test is stated in subsection 31-27-2.1(c):

> … 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

a driver impliedly promises to submit to a chemical test designed to measure the amount of alcohol in his or her blood whenever a police officer has reasonable grounds to believe he or she has driven while under the influence of liquor.[29] And a motorist who reneges on his or her implied promise to take such a test may be charged with the civil offense of refusal.[30]

In Locke, supra, the Supreme Court called suspensions under our implied-consent law "a nonviolent method of extracting consent to the minimal intrusion

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> 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.

[29] The implied-consent law is stated in the same statute as the charge of refusal — § 31-27-2.1 — in subsection (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. * * *

We see that, by its terms, the law also applies to controlled substances and the chemical toluene but these aspects of the statute are immaterial in the instant case.

[30] Indeed, the charge of refusal might have been more simply entitled — "Violation of the implied-consent law."

necessary to obtain evidence of intoxication"[31] and "critical to attainment of the goal of making the highways safe by removing drivers who are under the influence."[32] And so, at its essence, a refusal charge is an offense against our State's scheme for identifying (and eliminating) drunk and unsafe drivers on our highways. In theory — though certainly not in fact — a refusal charge is akin to a charge of failing to have one's vehicle inspected (which is a feature of the State's effort to identify and eliminate unsafe vehicles on our roads).

It is critical that we understand that the validity of a refusal charge does not depend on subsequent proof of intoxication. Indeed, the defendant's actual intoxication vel non is immaterial in a refusal case. This was the teaching of State v. Bruno,[33] in which the trial judge acquitted Mr. Bruno because he presented a medical opinion that the behavior and personal attributes he exhibited during the car-stop were entirely attributable to a non-alcoholic cause.[34] Nevertheless, the Supreme Court reinstated the charge, holding that — so long as the State proves

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[31] Locke, 418 A.2d at 850 citing DiSalvo, supra, 106 R.I. at 306, 259 A.2d 673.

[32] Locke, 418 A.2d at 850 citing Brown, supra, 174 Colo. at 523, 485 P.2d at 505.

[33] 709 A.2d 1048 (R.I. 1998).

[34] Bruno, 709 A.2d at 1049. The alternate cause proffered was prescribed medication. Id.

that the motorist provided an officer with indicia of intoxication sufficient to satisfy the reasonable-grounds standard — the Court must affirm the violation.[35]

In my view, it is this aspect of refusal law — that the ultimate truth of what the motorist did or did not do is entirely immaterial — which is most jarring to the uninitiated; a refusal case is not a "light" version of a drunk-driving charge. They flow from entirely different legal sources.[36] Indeed, in refusal cases we focus on an issue — the question of reasonable grounds — that in all other parts of penal law is merely a preliminary question, not the ultimate question.

2

Elements of the Offense of Refusal to Submit to a Chemical Test

The four elements of a charge of refusal which must be proven at trial are enumerated in the statute. In plain language, they are — one, that the officer had reasonable grounds to believe that the motorist had driven while intoxicated; two, that the motorist, having been placed in custody, refused to submit to a chemical test; three, that the motorist was advised of his rights to an independent test; and four, that the motorist was advised of the penalties that are incurred for a refusal.[37]

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35 Bruno, 709 A.2d at 1049-50.

36 As we have seen in this section, drunk-driving cases have their origins in the police power that criminalizes breaches of the peace and refusal charges derive from a regulatory scheme to monitor the condition of drivers.

37 See 31-27-2.1(c), supra at 10 n. 28.

Since Appellant alleges a failure of proof regarding the first element of § 31-27-2.1(c), it is upon this part of the law that we will concentrate our attention. Let us set out this part of the statute once again:

> … (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 …
> (Emphasis added)

The language of the statute is unambiguous, except for the standard of evidence that must be present — "reasonable grounds." The "reasonable grounds" standard could have been problematic to employ had the Rhode Island Supreme Court not declared it to be equivalent to the "reasonable-suspicion" standard, which is well-known in fourth amendment litigation."[38]

But while we know the standard of evidence to be utilized, its application will never be perfunctory, for there is no bright-line rule regarding the quality or quantity of the evidence that must be mustered to satisfy the reasonable-grounds test; instead, a judgment must be made in each case on the basis of the totality of the circumstances present therein. We are fortunate,

[38] State v. Jenkins, 673 A.2d 1094, 1097 (R.I. 1996). It is the standard by which so-called "stop-and-frisks" are evaluated. See Terry v. Ohio, 392 U.S. 1 (1968).

therefore, to have at our disposal a number of cases decided by our Supreme Court which have performed this exercise. We shall review these cases now.

I believe we may profitably commence with State v. Bjerke.[39] In Bjerke the initial stop was justified on alternative grounds — the investigation of a criminal offense. Nevertheless, the Supreme Court paused to note the factors present in the case upon which reasonable grounds may be discerned:

> The defendant's commission of a criminal misdemeanor alone gave the officer probable cause to stop and detain him, and then from that point on, any evidence obtained pursuant to that lawful stop, such as the odor of alcohol, the 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. (Emphasis added).[40]

Accordingly, from Bjerke, we may draw that emitting the odor of alcohol, slurred speech and bloodshot eyes are accepted as indicia of intoxication.

Next, we may examine State v. Bruno, supra, in which multiple indicia of the consumption of alcohol were exhibited. Among these were swerving and speeding, evidence of vomit in the vehicle, the odor of alcohol, slurred speech, and appearing confused.[41]

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[39] 697 A.2d at 1069 (R.I. 1997).

[40] Bjerke, 697 A.2d at 1072.

[41] Bruno, 709 A.2d at 1049.

Finally, in evaluating the sufficiency of this finding of reasonable-suspicion we may consider State v. Perry.[42] On the issue of driving under the influence, the Court noted front-end damage to the car, the smell of alcohol, bloodshot eyes, and stumbling.[43] And although no field tests were administered, the Court ruled that reasonable grounds were present.[44]

IV
ISSUE

The issue before the Court is whether the decision of the appeals panel was clearly erroneous in light of the reliable, probative, and substantial evidence of record or whether it was affected by error of law. Or, did the appeals panel err when it upheld Ms. Lawrence's conviction for refusal to submit to a chemical test?

V
ANALYSIS

In her Second Supplemental Memorandum, Ms. Lawrence enumerates four issues that she asserts have been preserved on appeal. They are —

(1) The trial magistrate employed an improper fact-finding standard;
(2) The trial magistrate employed an improper evidentiary standard;
(3) The trial magistrate erroneously disregarded the testimony of Dr. Karlin;

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42 731 A.2d 720, 723 (R.I. 1999).

43 Perry, 731 A.2d at 722.

44 Perry, 731 A.2d at 722-23.

(4) The State failed to prove Officer Head possessed "reasonable grounds" to believe Ms. Lawrence had driven while under the influence of liquor, a precondition to a lawful request to submit to a chemical test.[45]

We shall now address these arguments individually, in reverse order.

A

The Officer Had Reasonable Grounds Upon Which to Request Ms. Lawrence to Submit to a Chemical Test

As stated above, the appeals panel summarized the trial magistrate's findings on the issue of "reasonable grounds."[46] In my view, this is a fair summary of the more expansive factual findings made by the trial magistrate. With these fact findings in hand, the panel held that the trial magistrate's finding — that Officer Head did have "reasonable grounds" to believe Ms. Lawrence had driven under the influence — was supported by the evidence.[47] Accordingly, citing Link, supra, it affirmed the trial magistrate's decision on this point.[48]

Before this Court (as she did before the appeals panel) Ms. Lawrence asserts that Officer Head did not have reasonable grounds to believe she had

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45 Appellant's Second Supplemental Memorandum, at 3-4.

46 Decision of Appeals Panel, at 6.

47 Decision of Appeals Panel, at 7.

48 Decision of Appeals Panel, at 7.

operated under the influence.[49] And so, we shall evaluate the validity of the decision of the appeals panel.

In all, the State presented five indicia that Ms. Lawrence had operated under the influence: (1) she had admitted to the consumption of alcohol, (2) she had watery, and bloodshot eyes, (3) she emitted a strong odor of alcohol, (4) she swayed as she exited her motor vehicle, and (5) her driving — i.e., that she almost hit a vehicle as she was attempting to pull over for the officer.[50]

I should say that in my view the last item — i.e., nearly hitting a parked car — is particularly telling. After all, our mission is to determine whether the Officer had reasonable grounds to believe Ms. Lawrence was driving under the influence. And what does the phrase "driving under the influence" actually mean? Well, in Rhode Island it can have two meanings — one, that the operator was driving with a blood-alcohol concentration (by weight) above .08%[51] or two, that the operator was "incapable of safely operating" her vehicle.[52] Since an officer, absent some

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[49] Appellant's Complaint, at 10-11 and Appellant's Second Supplemental Memorandum, at 3-4.

[50] The first was omitted by the appeals panel in its enumeration, undoubtedly inadvertently, since this statement was not contested. See Decision of Appeals Panel, at 6.

[51] See Gen. Laws 1956 § 31-27-2(b)(1) and State v. Lussier, 511 A.2d 958, 960 (R.I. 1986)(defining § 31-27-2, as it then existed, as a per se law).

[52] See Gen. Laws 1956 § 31-27-2(b)(1).

particular expertise, is not in a position to predict motorists' BAC levels, it is really this latter issue that he or she is considering. And in my view there can be no more predictive evidence on this issue than specific examples of a motorist's lack of ability to drive safely and smoothly.

In any event, I believe the facts elicited at Ms. Lawrence's trial are sufficient — when measured against the standards established in prior Rhode Island Supreme Court decisions, especially the Perry case[53] — to allow this Court to find that the appeals panel's finding that Officer Head possessed "reasonable grounds" to believe Ms. Lawrence had driven under the influence of liquor was not clearly erroneous but was supported by substantial evidence of record.

B

The Trial Magistrate Did Not Err By Failing to Accept the Doctor's Testimony as Persuasive.

Doctor Steven Karlin, a psychiatrist with a longstanding and ongoing professional relationship with Ms. Lawrence, gave testimony at the trial[54] which culminated in his expression to the Court of two medical opinions concerning Ms. Lawrence's behavior on the evening in question — (1) what appeared to Officer Head to be indicia of alcohol consumption on the part of Ms. Lawrence were in

[53] I cite the Perry case in particular because in that case no field sobriety tests were done.

fact manifestations of her mental state[55] and (2) Ms. Lawrence was unable to decide whether or not to submit to a chemical test.[56] Appellant urges that the trial magistrate erred when he failed to give appropriate weight to these expert opinions.[57] It appears that the appeals panel gave only passing attention to both these issues. As a result, I have undertaken my own review of these questions. Doing so, I find that the trial magistrate committed no error on either point.

1

Ms. Lawrence's Attempt to Refute the "Indicia" of Her Intoxication

It is clear from a reading of his bench decision that the trial magistrate did not evince any lack of regard for Doctor Karlin or the testimony he gave. To the contrary, he found it "interesting and forthright."[58] But he found it did not have much "impact" on the ultimate issue. [59] In other words, he found it immaterial. And with this assessment, I fully agree; indeed, the trial magistrate's decision that

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54 Trial Transcript I, at 78-97.

55 Trial Transcript I, at 88.

56 Trial Transcript I, at 92.

57 Appellant's Complaint, at 9-10 and Appellant's Second Supplemental Memorandum, at 7-8.

58 See Trial Transcript II, at 17.

59 Id.

Dr. Karlin's testimony was not probative on the ultimate issue reflects his understanding of § 31-27-2.1 jurisprudence.

I believe this issue is governed by our Supreme Court's ruling in State v. Bruno (1998). As cited above, Bruno stands for the proposition that — so long as the officer is aware of sufficient indicia of intoxication — he or she may request the motorist to submit to a chemical test; and if the motorist refuses, he or she may suffer the penalties provided in § 31-27-2.1. And these penalties will stand even if it is subsequently revealed that some (or all) of these indicia had a source other than drug or alcohol intoxication.[60] Accordingly, the trial magistrate committed no error by failing to find Dr. Karlin's testimony exonerated Ms. Lawrence.

2

Ms. Lawrence's Alleged Inability to Respond to Officer Head's Request to Submit to a Chemical Test Is Not a Recognized Defense

Ms. Lawrence also asserts, relying on the testimony of Dr. Karlin, that she was unable to knowingly and voluntarily refuse Officer Head's request that she submit to a chemical test.[61] But although she mentions this (in passing), implying that it should cause her adjudication for refusal to be set aside, she does not say

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[60] Bruno, 709 A.2d at 1049-50 discussed supra at 12-13.

[61] Appellant's Complaint, at 9 and Second Supplemental Memorandum, at 7.

why — i.e., she neither (a) alleges that § 31-27-2.1 requires the State to prove that the motorist refused the chemical test knowingly and voluntarily nor (b) specifies a provision of constitutional law that is violated if a unknowing or involuntary refusal is admitted into evidence (and subsequently penalized). And on an issue of such precedential importance, we should not be left to guess.

For instance, Ms. Lawrence cites no precedents which hold that — in order to be admissible — a declaration that one is refusing to submit to a breathalyzer test must meet those prerequisites to admission which apply to confessions.[62] Neither does she urge that she had a right to consult counsel before she made her

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[62] And to my knowledge, there is no Rhode Island case which places evidence of a refusal within the ambit of the constitutional requirement that, in order to be admissible, a confession must be shown to have been made be voluntarily, a principle that has been applied in many Rhode Island Supreme Court cases. E.g. State v. Carlson, 432 A.2d 676, 679 (R.I. 1981)(quoting Blackburn v. Alabama, 361 U.S. 199, 80 S.Ct. 274 (1960), for the statement — "A confession, to be voluntary, must be the product of a rational intellect and a free will.").

Conversely, the Court has held that the penalties for refusal do not compel a criminal defendant (in a drunk-driving case) to testify against himself in violation of the privilege against self-incrimination (of the Fifth Amendment) as it is not "communicative" evidence. State ex rel. Widergren v. Charette, 110 R.I. 124, 129-32, 290 A.2d 858, 861-62 (1972) citing Schmerber v. California, 384 U.S. 757, 86 S.Ct. 1826 (1966).

Finally, the United States Supreme Court has ruled that admitting evidence that a drunk-driving defendant refused a breathalyzer also does not offend the Fifth Amendment. South Dakota v. Neville, 459 U.S. 553, 559-64, 103 S.Ct. 916, 920-23 (1983). Of course, in Rhode Island such testimony is barred by statute unless the defendant elects to testify. Gen. Laws 1956 § 31-27-2(c)(1).

decision to refuse.[63] Nor does she assert that the implied-consent law violates the fourth amendment bar to searches and seizures.[64] As a result, we cannot judge the validity of the legal theory she seems to invoke.[65]

C

The Standard of Proof Issue

Appellant urges that the trial magistrate applied the wrong standard of proof — impliedly.[66] I add this proviso because there is no doubt the trial magistrate recited the proper standard of proof in a civil traffic violation — clear

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[63] This theory was firmly rejected in Dunn v. Petit, 120 R.I. 486, 490-93, 388 A.2d 809, 811-13 (1978)

[64] The Court has ruled in State v. Locke, 418 A.2d 843 (R.I. 1980) and State v. Roberts, 420 A.2d 837, 839 (R.I. 1980) that a motorist's submission to a breathalyzer test does not constitute an unreasonable search and seizure under the fourth amendment.

[65] I pause before leaving this issue to note that, although she did not expressly raise it, the insanity defense would not apply at a refusal trial, since it is civil in nature. I find no Rhode Island cases on point. However, I am persuaded against the proposition by the fact that the weight of authority, although undeniably sparse, holds that the insanity defense does not apply at violation of probation hearings, which are also what we may call quasi-criminal in nature. See State v. Olson, 656 N.W.2d 650, 655 (N.D. 2003) citing Neil P. Cohen, The Law of Probation and Parole, §§ 22:21, 22:40 (2d ed.1999), People v. Breaux, 101 Cal.App.3d 468, 161 Cal.Rptr. 653, 657 (1980) and State v. Qualls, 50 Ohio App.3d 56, 552 N.E.2d 957, 962 (1988).

[66] See Appellant's Complaint, at 8-9 and Appellant's Supplemental Memorandum, at 1, citing Trial Transcript II, at 17.

and convincing evidence.[67] Instead, Ms. Lawrence finds fault with his subsequent comment — "... clear and convincing evidence is not a hard standard to meet."[68] She draws the Court's attention to Parker v. Parker (1968),[69] which, she states, stands for the proposition that clear and convincing evidence is a high standard to meet; and quotes from Justice Kelleher's opinion wherein he states that the standard is met if "the truth of the facts asserted by the proponent is highly probable."[70] But, although the Court did set out a hierarchy of burdens of proof, it only found that clear and convincing evidence to be "somewhere in between" beyond a reasonable doubt and a preponderance, it never stated clear and convincing was closer to the former.

This is obviously an expression of an opinion. Words like "hard" and "easy" only have meaning in comparison to concepts of a similar character — in this case, standards of proof. The clear and convincing standard would undoubtedly be viewed as "not hard" in comparison to the criminal standard —

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67 Trial Transcript II, at 17.

68 See Appellant's Complaint, at 8-9 and Appellant's Supplemental Memorandum, at 1, citing Trial Transcript II, at 17.

69 103 R.I. 435, 238 A.2d 57 (1968). Parker concerned an issue of the existence vel non of a common law marriage.

70 103 R.I. at 442, 238 A.2d at 60-61.

beyond a reasonable doubt;[71] on the other hand, it would be considered "hard" when compared with the civil standard — a fair preponderance. For these reasons, I do not believe the comment complained of betrays per se any misapprehension as to the applicable standard.[72]

D

Improper Fact-Finding Standard

Appellant Lawrence urges that the trial magistrate improperly utilized a subjective fact-finding standard.[73] She makes this charge based on a particular sentence he uttered during his bench decision —

> As we all know, when we are reviewing the facts in a chemical test refusal case, we must place ourselves in the shoes of the officer, as to what was in his mind at the time of the stop. (Decision Tr. 16) (Emphasis added)[74]

She urges that this statement indicated an intention on the part of the trial

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71 Because refusal cases are inevitably compared to DUI cases, it is natural that the burden is perceived as a lesser standard.

72 The fact that the Court in this case did not misstate the standard of proof distinguishes it, for instance, from State v. Perkins, 460 A.2d 1245 (R.I. 1983) (double jeopardy precludes retrial of defendant for manslaughter of a child where the Court used the terminology associated with Rule 29 judgments of acquittal when granting Rule 33 motion for new trial).

73 See Appellant's Complaint, at 7-8.

74 See Appellant's Complaint, at 7.

magistrate to "rubber stamp" the officer's determination of reasonable grounds.[75] With this assertion I cannot agree.

I believe the trial magistrate was merely following the mandate of subsection (c)(1), that required him to determine whether "the … officer … had reasonable grounds to believe that the arrested person had been driving … under the influence of intoxicating liquor."[76] The statute required the trial magistrate to determine what facts Officer Head had learned pertinent to making an evaluation of Ms. Lawrence's condition.

And we know, from our fourth amendment jurisprudence, that in determining the existence, vel non, of reasonable suspicion to justify an investigatory stop[77] the Court must view "the totality of the circumstances"[78] as if "from the vantage point of a prudent, reasonable police officer in light of the facts

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75 Id.

76 See Gen. Laws 1956 § 31-27-2.1(c)(1) quoted in full supra at 10 n. 28.

77 Our Supreme Court recently reiterated, in State v. Taveras (2012), that "… a police officer may conduct an investigative stop provided [the officer] has a reasonable suspicion based on specific and articulable facts that the person detained is engaged in criminal activity." State v. Taveras, 39 A.3d 638, 647 (R.I. 2012) cert. den. 133 S.Ct. 249 citing Abdallah, 730 A.2d at 1076 (quoting State v. Halstead, 414 A.2d 1138, 1147 (R.I. 1980).

78 Taveras, 39 A.3d 638 at 647 citing United States v. Cortez, 449 U.S. 411, 417, 101 S.Ct. 690, 66 L.Ed.2d 621 (1981), State v. Tavarez, 572 A.2d 276, 278 (R.I. 1990), and State v. Keohane, 814 A.2d 327, 330 (R.I.2003).

known to him [or her] at the time of detention,"[79] incorporating "the personal knowledge and experience of the police officer."[80] Nevertheless, this is an objective test.[81] This is the protocol that the trial magistrate followed. At no time did he cede his authority to determine reasonable suspicion to the officer. Accordingly, I believe he committed no error on this point.

VI
CONCLUSION

Upon careful review of the evidence, I recommend that this Court find 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.

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[79] Taveras, 39 A.3d at 647 citing Michigan v. Long, 463 U.S. 1032, 1050, 103 S.Ct. 3469, 3481 (1983). On other occasions, the Supreme Court has said that the Courts must examine the question as if "through the eyes of a trained police officer." See State v. Casas, 900 A.2d 1120, 1131 (R.I. 2006) citing State v. DeMasi, 448 A.2d 1210, 1212 (R.I.1982) citing Cortez, 449 U.S. at 419, 101 S.Ct. at 695-96.

[80] Casas, 900 A.2d at 1131 citing Abdallah, 730 A.2d at 1077.

[81] Casas, 900 A.2d at 1131 citing Ohio v. Robinette, 519 U.S. 33, 38, 117 S.Ct. 417, 420-21 (1996).

Accordingly, I recommend that the decision that the Traffic Tribunal appeals panel issued in this matter be AFFIRMED.

/s/
Joseph P. Ippolito
MAGISTRATE

APRIL 29, 2014