STATE OF RHODE ISLAND & PROVIDENCE PLANTATIONS

PROVIDENCE, Sc. **DISTRICT COURT**

SIXTH DIVISION

Craig Huntley	:	
	:	
v.	:	**A.A. No. 10 - 0157**
	:	
State of Rhode Island	:	

ORDER

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

Entered as an Order of this Court at Providence on this 17th day of March, 2011.

By Order:

Clerk

Melvin J. Enright
Acting Chief Clerk

Enter:

Jeanne E. LaFazia
Chief Judge

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

CRAIG HUNTLEY	:	
Appellant	:	
	:	
v.	:	**A.A. No. 2010 - 0157**
	:	**(T09-0092)**
STATE OF RHODE ISLAND	:	**(07-509-00139)**
Appellee	:	

FINDINGS & RECOMMENDATIONS

Ippolito, M. In this case Mr. Craig Huntley urges that an appeals panel of the Rhode Island Traffic Tribunal erred when it affirmed a trial magistrate's decision finding him guilty of refusal to submit to a chemical test, a civil violation, in violation of Gen. Laws 1956 § 31-27-2.1. This matter has been referred to me for the making of findings and recommendations pursuant to General Laws 1956 § 8-8-8.1. 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 subsection 31-41.1-9(d).

Mr. Huntley has presented this Court with three reasons why he believes the RITT appellate panel erred when it upheld his conviction for refusal. He points out — quite correctly — that the investigation which led to his being charged — inter alia —

with the civil offense of refusal did not follow the customary course. For instance, he was never asked to submit to field sobriety tests and he was never read the standard "Rights For Use at the Scene." Nevertheless, after reviewing the record of the proceedings before the RITT and considering the applicable statutory and case law, I find I have concluded that the appellate panel's affirmation of Mr. Huntley's conviction by the trial magistrate is supported by substantial and probative evidence of record and is not clearly erroneous. I therefore recommend that Mr. Huntley's conviction on the charge of refusal to submit to a chemical test be affirmed.

I. FACTS & TRAVEL OF THE CASE

The facts which led to the charge of refusal against appellant are fully and fairly stated (with appropriate citations to the trial transcript[1]) in the decision of the panel. See Decision of RITT Appellate Panel, July 26, 2010, at 1-6; the following summary will be sufficient for our purposes.

On June 23, 2009 at approximately one o'clock in the morning, Officer Thomas Pennell — a three-year veteran of the New Shoreham Police Department and a certified breathalyzer operator — responded to a report of a car accident on Corn Neck Road. (Trial Transcript, at 6-8) Upon arrival, he saw a "completely demolished" pickup truck lying across both lanes of the roadway. (Trial Tr. at 9) Officer Pennell also noticed a body on the road, two females in the pickup, and a man at the rear of the pickup, smoking. (Trial Tr. at 10, 13) When he exited his vehicle, Officer Pennell checked the

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1 I shall add my own citations only on those matters I feel are pertinent to the resolution of this appeal.

body for a pulse and found none. (Trial Tr. at 12) He checked on the females in the pickup — who were responsive — and then approached the man, who was leaning against the pickup. (Trial Tr. at 13)

The man, later identified as Mr. Huntley, admitted being the driver of the vehicle. (Trial Tr. at 14) The officer also took notice that appellant was unsteady on his feet and weaving back and forth. (Trial Tr. at 16) Officer Pennell noticed Mr. Huntley's shirt, which was bloodied — his eyes, which were bloodshot and watery —and his breath, which smelled of alcohol. (Trial Tr. at 15-16) Emergency medical personnel (EMT's) were allowed access to him; they brought him to the side of the road, where they checked his blood pressure, his ears and his eyes. (Trial Tr. at 17) Mr. Huntley was then left to sit on the mound on the side of the road. Officer Pennell was concerned about Mr. Huntley's health, for he looked like "... he was going to fall asleep while sitting on the side of the road." (Trial Tr. at 17) At this point Sergeant Paul Deane arrived; he too noticed that appellant's eyes were bloodshot and his breath smelled of alcohol. (Trial Tr. at 66-68)

Officer Pennell's superiors decided no field sobriety tests would be attempted until appellant was medically cleared. (Trial Tr. at 18) Accordingly, he did not interfere with the EMT's as they performed their duties, but merely observed appellant. (Trial Tr. at 19-20) Just before entering into an ambulance, Mr. Huntley admitted to the EMT's he had been drinking alcohol earlier that evening. (Trial Tr. at 19) He said — " ... we just got all f----- up tonight." (Trial Tr. at 20) While accompanying appellant during his ride to the medical center, Officer Pennell again smelled odor of alcoholic beverage. (Trial

Tr. at 22-23)

Appellant's behavior at the Block Island Medical Center was also described. According to Officer Pennell, Mr. Huntley was brought into the emergency room. (Trial Tr. at 24) He again admitted he had been drinking that night; his demeanor fluctuated from calm to angry, his conduct from crying to clenching his fists and grinding his teeth. (Trial Tr. at 25-30) During his treatment, appellant was visited by two friends. (Trial Tr. at 30-32) Sergeant Deane, also a certified breathalyzer operator, was also present at the medical center and once more noticed that Mr. Huntley's eyes were bloodshot and his breath smelled of alcohol. (Trial Tr. at 72)

After appellant's treatment concluded at 2:50 a.m., Officer Pennell and Sergeant Deane evaluated Mr. Huntley and decided he was intoxicated; they jointly decided to place appellant under arrest. (Trial Tr. at 32-33, 75) Officer Pennell read appellant the "Rights For Use at the Station/Hospital." (Trial Tr. at 35) In response, appellant said he understood his rights and declined to make a phone call and signed the form indicating that he was refusing to take the chemical test. (Trial Tr. at 37-38) Then, at 4:02 a.m., Mr. Huntley was transported to police headquarters for processing. (Trial Tr. at 48)

Trooper John J. Gadrow — a nine-year veteran of the Division of State Police and an expert in accident reconstruction — was the final prosecution witness. He joined the investigation early morning hours of June 23rd. At about 10:00 a.m. he examined the crash site. Trooper Gadrow described his findings for the trial magistrate.

He first identified a 122 feet wide "critical speed yawmark" on Corn Neck Road. The trooper explained that yawmarks, which are caused by tires slipping and sliding

sideways simultaneously, are indications that a motorist attempted to make a high speed turn without braking. Trooper Gadrow further related that the yawmarks continued onto a grassy median for an additional 73 feet — in the form of "furrows." Trooper Gadrow then rendered several expert opinions.

First, the yawmarks and furrows were created by Mr. Huntley's vehicle. Secondly, at the time of the accident, appellant was operating at 69 miles per hour, far above the 25 mile per hour speed limit on Corn Neck Road. Finally, based on the placement of the yawmarks, the trooper concluded Mr. Huntley's vehicle, which was travelling southbound, was five feet, two inches in the northbound lane at the time of the accident.

After his arrest, Mr. Huntley was charged with violations of Gen. Laws 1956 § 31-27-2.1 (Refusal to Submit to a Chemical Test — First Offense) and § 31-15-11 (Laned Roadway violation). Appellant was arraigned before the Traffic Tribunal on August 3, 2009 and on August 18, 2009 the case proceeded to trial before Chief Magistrate William Guglietta. The court heard from Officer Pennell, Sergeant Deane, and Trooper Gadrow. After the close of the evidence, counsel made their arguments and the case was continued for decision.

On August 21, 2009, the Chief Magistrate rendered his oral decision, which included an extensive review of the testimony, detailed findings of fact, and references to applicable legal authority. See Decision Transcript, at 3-43. Appellant was adjudicated guilty on both counts; he filed an appeal in the Sixth Division District Court.

The matter was heard by an appeals panel comprised of Magistrate Domenic A.

DiSandro III (Chair), Judge Edward Parker and Judge Albert Ciullo, on December 16, 2009. Before the panel Mr. Huntley asserted that the trial magistrate committed reversible error by convicting appellant on the refusal charge for three distinct reasons:

1. The trial magistrate erroneously found that Officer Pennell had reasonable grounds to believe that Mr. Huntley was operating under the influence, as required by § 31-27-2.1;

2. Officer Pennell failed to comply with the requirements of § 31-27-3 by failing to inform Mr. Huntley of his "Rights For Use at the Scene."

3. Mr. Huntley had not yet been arrested for drunk driving when he was requested to submit to a chemical test.

The panel rejected each of these assertions of error in its July 26, 2010, written decision.

On July 29, 2010, appellant filed an appeal in the Sixth Division District Court pursuant to § 31-41.1-9. A conference was held in this matter and a briefing schedule set; a very helpful memorandum was received timely from appellant; the State's memorandum, due by October 29, 2010, was not received until March 4, 2011.[2]

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[2] In its Memorandum, the State chose not to respond to the arguments made by Appellant Huntley in a substantial manner. Instead, the State's Memorandum asks this Court to take judicial notice of Mr. Huntley's subsequent conviction for Driving Under the Influence, Death Resulting in W1-2009-0234A in May of 2010. Thus armed with the outcome of the criminal side of this tragic case, the State urges this Court, on the authority of State v. Seamans, 935 A.2d 618 (RI 2007), to find that the instant appeal is now moot. See Appellee's (State's) Memorandum at 2-3. This I decline to do, based on the teaching of State v. Hart, 694 A.2d 681 (RI. 1997), wherein our Supreme Court decided that:

> ... [i]t is clear that 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. Foe example, driving under the influence of liquor does not include the element of refusing a breathalyzer test. Refusing a breathalyzer test does not include the element of driving under the influence of liquor. ...

Hart, 694 A.2d at 682.

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 is akin to the standard of review found in Gen. Laws 1956 § 42-35-15(g), the State Administrative Procedures Act ("APA"). Accordingly, I shall rely on cases interpreting the APA as guideposts in the review process.

Under the APA standard, the District Court "* * * may not substitute its judgment for that of the agency and must affirm the decision of the agency unless its findings are 'clearly erroneous.' "[3] The Court will not substitute its judgment for that of the agency (here, the panel) as to the weight of the evidence on questions of fact.[4]

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[3] Guarino v. Department of Social Welfare, 122 R.I. 583, 584, 410 A.2d 425 (1980)(citing R.I. GEN. LAWS § 42-35-15(g)(5)).

[4] Cahoone v. Board of Review of the Department of Employment Security, 104

Stated differently, the findings of the panel will be upheld even though a reasonable mind might have reached a contrary result.[5]

III. APPLICABLE LAW

A. THE REFUSAL STATUTE

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

> (a) Any person who operates a motor vehicle within this state shall be deemed to have given his or her consent to chemical tests of his or her breath, blood, and/or urine for the purpose of determining the chemical content of his or her body fluids or breath. No more than two (2) complete tests, one for the presence of intoxicating liquor and one for the presence of toluene or any controlled substance, as defined in § 21-28-1.02(7), shall be administered at the direction of a law enforcement officer having reasonable grounds to believe the person to have been driving a motor vehicle within this state while under the influence of intoxicating liquor, toluene, or any controlled substance, as defined in chapter 28 of title 21, or any combination of these. * * * (Emphasis added).

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

> * * * If the traffic tribunal judge finds after the hearing that: (1) the law enforcement officer making the sworn report had reasonable grounds to believe that the arrested person had been driving a motor vehicle within this state while under the influence of intoxicating liquor, toluene, or any controlled substance, as defined in chapter 28 of title 21, or any combination of these; (2) the person while under arrest refused to submit to the tests upon the request of a law enforcement officer; (3) the

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R.I. 503, 246 A.2d 213 (1968).

[5] Cahoone v. Board of Review of Department of Employment Security, 104 R.I. 503, 246 A.2d 213, 215 (1968).

> person had been informed of his or her rights in accordance with § 31-27-3; and (4) the person had been informed of the penalties incurred as a result of noncompliance with this section; the traffic tribunal judge shall sustain the violation. The traffic tribunal judge shall then impose the penalties set forth in subsection (b) of this section.
> * * *

Gen. Laws 1956 § 31-27-2.1(c)(Emphasis added).

Noting the presence in the statute of the phrase – "reasonable grounds" – the Rhode Island Supreme Court interpreted this standard to be the equivalent of "reasonable-suspicion." The Court stated simply, "* * * [I]t is clear that reasonable suspicion is the proper standard for evaluating the lawfulness of the stop." State v. Jenkins, 673 A.2d 1094, 1097 (R.I. 1996).

On most occasions an alcohol-related traffic offense (*i.e.,* driving under the influence or refusal) results after a motorist has been stopped for the violation of a lesser (non-alcoholic related) traffic offense.[6] Such stops have been found to comport with the mandate of the fourth amendment that searches and seizures be reasonable. See Whren v. United States, 517 U.S. 808, 810 (1996)(cited in State v. Bjerke, 697 A.2d 1060, 1072 (1997)). After the stop, the procedures necessary to sustain a refusal charge [usually beginning with the administration of field sobriety tests] may be commenced when an officer has reasonable-suspicion to believe that a person has been driving under the influence. See State v. Bjerke, 697 A.2d 1060 (1997); State v. Perry, 731 A.2d 720 (1999).

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6 See Gen. Laws 1956 § 31-27-12 (requiring officer who observes traffic violation to issue summons). In Rhode Island, most minor traffic offenses are civil violations. See Gen. Laws 1956 § 31-27-13(a).

A defendant can only be fully arrested for drunk driving if probable cause exists. See State v. Perry, 731 A.2d 720, 723 n. 1 (R.I. 1999):

> In the event that an officer arrests a person for the offense of driving under the influence of intoxicating liquor, the officer is required to have probable cause to believe that the suspect committed this offense. Probable cause exists when facts and circumstances known to a police officer or of which he or she has reasonably trustworthy information are sufficient to cause a person of reasonable caution to believe that a crime has been committed and the person to be arrested has committed the crime. See, e.g., Beck v. Ohio, 379 U.S. 89, 85 S. Ct. 223, 13 L. Ed. 2d 142 (1964); Draper v. United States, 358 U.S. 307, 79 S. Ct. 329, 3 L. Ed. 2d 327 (1959); State v. Bjerke, 697 A.2d 1069 (R.I. 1997); In re John N., 463 A.2d 174, 178 (R.I. 1983); State v. Jenison, 442 A.2d 866, 874 (R.I. 1982); State v. Bennett, 430 A.2d 424, 426-27 (R.I. 1981).

IV. ISSUE

The issue before the Court is whether the decision of the appeals panel was supported by reliable, probative, and substantial evidence in the record or whether or not it was clearly erroneous or affected by error of law. More precisely, did the panel err when it upheld Mr. Huntley's conviction for refusal to submit to a chemical test?

V. ANALYSIS

In his appeal Mr. Huntley has raised three issues. Each touches on one of the first three [of the four] elements of the charge of refusal. As quoted supra, page 8, the elements of refusal are that a motorist, (1) whom an officer had reasonable grounds to believe was driving under the influence, (2) and who, in fact, has been arrested for drunk driving, refuses a chemical test after (3) being advised of his right to obtain an alternative test and (4) being warned of the penalties of the motorist's failure to do so. See Gen. Laws 1956 § 31-27-2.1(c)(Emphasis added). These shall now be considered seriatim.

A. Reasonable Grounds to Arrest.

Mr. Huntley argues that the state failed to prove the first element of a refusal case, because Officer Pennell did not have reasonable grounds to believe that he [Mr. Huntley] "... had been driving a motor vehicle within this state while under the influence of intoxicating liquor ..." See Gen. Laws 1956 § 31-27-2.1(c)(1). In support of this general assertion, appellant specifically argues that [1] the Officer did not have reasonable grounds to believe he was driving — because Officer Pennell did not see him driving, and [2] the officer did not have reasonable grounds to believe Mr. Huntley was driving under the influence because, inter alia, no field sobriety tests were done and the officer had not observed him driving erratically. See Appellant's Memorandum, at 4-6. The panel rejected these arguments. See Decision of Panel, at 7-9. For the reasons below, I believe the panel's reasoning was correct.

1. Reasonable Grounds on the Element of Driving.

Officer Pennell did not see appellant driving; the officer had been sent to the scene after the accident occurred. When he arrived he saw a vehicle which clearly had been involved in the accident; he also saw a man. The man said he had been driving the vehicle. Despite the foregoing, appellant impliedly challenges the trial magistrate's finding that Officer Pennell had reasonable grounds to believe he was driving the vehicle which was involved in the accident. See Appellant's Memorandum, at 5-6, especially the discussion included therein of Palmer v. Department of Transportation, A.A. No. 91-12 (Dist.Ct.). However, in my view, these few facts — especially his admission that he had been driving, together with

his presence at the scene of the accident in a bloodied condition — were more than sufficient to provide the officer with reasonable grounds to believe that the man — who identified himself as Mr. Huntley — was the operator of the vehicle. In my opinion, Palmer is inapposite.

In support of the sufficiency of this finding may be cited State v. Perry, 731 A.2d 720, 723 (R.I. 1999), in which the operation component of the element reasonable grounds [to believe the motorist was driving under the influence] was found to have been satisfied where (1) a citizen identified Mr. Perry's car as having been involved in a hit-and-run accident and Mr. Perry made an inculpatory statement. Also relevant is a much earlier precedent — State v. Turcotte, 68 R.I. 119, 26 A.2d 625 (1942). In Turcotte, the owner of a parked vehicle involved in an accident exited his place of business and found a man: he "... asked him several times who was driving the car. He wouldn't tell. The last time he told me it was none of my business." Turcotte, 26 A.2d at 626. Although the defendant admitted to the officers who responded that he was the driver, when tried on a charge of operating under the influence (second offense) he maintained that his brother, not he, was the driver. Turcotte, 26 A.2d at 626-27. The Supreme Court found that the defendant's conduct, his admissions, and the unexpected absence of his brother as a witness were sufficient to support the defendant's identification as the driver.[7] Turcotte, 26 A.2d at 627.

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[7] It is certainly true that the absence of the brother as a witness for the defense could not now be considered against Mr. Turcotte. The use of the empty chair doctrine

Thus, the driving element may be proven by an admission. Palmer is inapposite because there was no evidence of an admission. See Palmer, supra page 11, slip op. at 3. Mr. Huntley did admit driving and his statement is sufficient to prove the element of operation.[8]

2. Reasonable Grounds on the Element of Driving While Under the Influence.

Of course, as appellant notes, it is usually the case that a prosecution for drunk driving begins in earnest when an officer asks a motorist to consent to field sobriety tests, which, if failed, go a long way to providing reasonable grounds to believe the motorist was driving under the influence. But they are not indispensable. The absence of field sobriety tests here does not necessarily mean that Officer Pennell did not possess reasonable grounds to believe that Mr. Huntley had been driving while under the influence of intoxicating liquor. To the contrary, even in the

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against a criminal defendant has been held to violate the fifth amendment.

[8] There certainly was no legal impediment to the use of Mr. Huntley's admission of operation against him in the instant trial on these civil traffic offenses.

First, the trial magistrate noted — regarding other statements made by appellant — that statements by Mr. Huntley were generally admissible pursuant to Rule 801 of the Rules of Evidence.

Second, Mr. Huntley was certainly not under arrest when he first addressed Officer Pennell and so the warnings mandated by Miranda v. Arizona, 384 U.S. 436 (1966) were not required.

Third, the corpus delicti rule, which requires independent proof of the elements of an offense before a defendant's admissions may be received into evidence, applies only in criminal cases. State v. Halstead, 414 A.2d 1138, 1143-44 (1980).

absence of field sobriety tests, Officer Pennell was cognizant of ample evidence that appellant had been driving under the influence.

Officer Pennell observed appellant to have had bloodshot watery eyes and to be emitting the odor of an alcoholic beverage. He also admitted drinking. A similar quantum of evidence was found to be sufficient to support an arrest for suspicion of drunk driving in State v. Bjerke, 697 A.2d 1069, 1072 (RI 1997). While it is true that no field sobriety tests were done, they were omitted out of deference to the defendant's condition. This was entirely reasonable.

On the other hand, appellant argues that the officers could have — and should have — asked the EMT's for permission to perform field sobriety tests. Because of a short supply of ambulances in New Shoreham, appellant waited over an hour to be transported. See Appellant's Memorandum, at 5. However, this argument is essentially founded on speculation. We simply do not know what the EMT's answer would have been.[9] Perhaps they would have consented — perhaps not. Accordingly, we must resolve the legal issue before the court based on the events as they occurred and as they are presented in the record presented to us.

B. Failing to Give Rights at the Scene.

Appellant urges that the officer did not give Mr. Huntley his rights at the scene. Factually, this is undeniable. He urges that this omission violated § 31-27-3.

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[9] The answer to this question is not obvious, in light of the repeated testimony that he was unsteady on his feet and the fact that appellant was apparently complaining of a back injury, previously received. (Trial Transcript, at 69)

See Appellant's Memorandum, at 6-9. For the reasons that follow, I believe no violation of § 31-27-3 occurred.

The third element of a refusal case is proof that:

> **(3) the person had been informed of his or her rights in accordance with § 31-27-3;**

Because this section incorporates by reference the mandates of § 31-27-3, we are required to review its contents to determine the rights about which the motorist must be told:

> 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. (Emphasis added)

See Gen. Laws 1956 § 31-27-3. Synthesizing §§ 31-27-2.1(c)(3) and 31-27-3, we see that in the instant refusal case it was necessary for the state to prove that the officer informed Mr. Huntley, immediately after his arrest for operating under the influence, that he had the right to be examined by a physician of his own choosing and at his own expense. The state argues it fulfilled this duty.

The panel recited the trial magistrate's finding that Mr. Huntley, although intensively observed, was not placed under arrest until after his medical treatment was concluded at the medical center. Decision of Panel, at 9. Accordingly, the panel concluded it was never necessary for the officers to give him his "Rights For Use at

the Scene" on Corn Neck Road. Decision of Panel, at 9-10, citing State v. Bruskie, 536 A.2d 522, 523 (R.I. 1988).[10] Accordingly, the success of this second assertion of error depends on the correctness of the trial magistrate's finding that appellant was not placed under arrest until his medical treatment was concluded at the medical center.

The factors to be considered in determining whether a citizen was under arrest at a given point in time were concisely enumerated by our Supreme Court in State v. Bailey, 417 A.2d 915 (R.I. 1980). Among these are: the extent to which defendant's movement was curtailed, the degree of force used, whether a reasonable person would believe he was under arrest in the same circumstances, and whether defendant had choice of not going with police. Bailey, 417 A.2d at 917-18. The Chief Magistrate addressed each of these factors in his oral decision.[11]

As to the first factor — curtailment of movement — the Chief Magistrate found any curtailment was caused by the EMT's treatment, not the officers. He also gave deference to Officer Pennell's statement that had Mr. Huntley tried to leave the scene, he would have checked with his superiors for instructions, because appellant was not under arrest at that time. (Decision Tr. at 33-34; and see Trial Tr. at 45)

As to the second factor — the degree of force used — he found it was light, reasonable, and courteous; he particularly commented on the fact that appellant was

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10 It may be recalled that by the terms of Gen. Laws 1956 § 31-27-3, the officer's duty to notify the motorist of his or her right to an examination by a physician of his choosing does not attach until the person is arrested and/or charged.

11 The Chief Magistrate referenced the reiteration of the four Bailey factors in State

never cuffed, even when he was being read his rights on a gurney at the medical center. (Decision Tr. at 34)

Regarding the third factor — whether a reasonable person would have believed he was under arrest — the Chief Magistrate found that a reasonable person in Mr. Huntley's circumstances would not have considered himself under arrest, especially in light of two particular factors: (1) friends of Mr. Huntley had been allowed to visit him at the medical center and (2) at one point during his treatment, the officer lost sight of Mr. Huntley while he was receiving treatment. (Decision Tr. at 35) With this conclusion I fully agree; any person of ordinary intelligence would know that arrestees are not allowed visitors and they are not left alone.

Finally, the Chief Magistrate found the fourth factor essentially inapplicable, since Mr. Huntley was transported by the EMT's, not the police. (Decision Tr. at 35-36) These findings were affirmed with approval by the panel in its decision. See Decision of Panel, at 11-12.

According to the officers, whom the trial magistrate found credible, they did not interfere with Mr. Huntley's movements at the scene or at the medical facility, but left these determinations to the medical personnel who were present. See Decision Tr. at 33; Trial Tr. at 19-20. Accordingly, I cannot conclude that the panel's affirmation of the trial magistrate's finding that he was not placed under arrest until after his medical treatment was concluded was clearly erroneous.

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v. Vieira, 913 A.2d 1015, 1020 (2007). See Decision Tr. at 33.

Based on this finding [i.e., that appellant was not arrested until his medical treatment at the medical center was completed], the panel noted approvingly that the officers immediately read Mr. Huntley the "Rights For Use at the Station/Hospital" — which enumerates the rights afforded under § 31-27-3. Decision of Panel, at 10.[12] Accordingly, the panel found the officers fully complied with § 31-27-3. Decision of Panel, at 10-11.

Appellant argues this second battery of rights was insufficient and the state must in all refusal cases prove that the "Rights for Use at the Scene" were given. Appellant's Memorandum, at 7-9. However, giving the "Rights for Use at the Scene" is not an element of the offense as it is defined in section 31-27-2.1. Nor is it otherwise required by statute. The "Rights For Use at the Scene" form has been created to provide police officers with an expeditious way in which to fulfill several of their duties — including their duty under § 31-27-3 — but the exact content of the form is not established by statute. Appellant argues that if the giving of the "Rights For Use at the Scene" can be bypassed, the statute is meaningless. But, on the other hand, if these rights are absolutely indispensable, then no motorist who is immediately brought for medical help could ever be charged with refusal. And such cases — i.e., those involving bodily injury — tend to be the most serious.

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[12] Implicitly, the panel found that it would have been superfluous for the officers to read appellant both the "Rights For Use at the Scene" and the "Rights For Use at the Station" sequentially.

Finally, having found full compliance with this element of the offense, the panel nonetheless remarked that the appellant's injuries fully excused the officers' decision not to arrest him earlier. Decision of Panel, at 10. This comment would seem to be unnecessary, an attempt to justify that which required no further justification, for if the arrest was not effectuated until Mr. Huntley arrived at the medical center, the rights-notification procedure undertaken by the officers was entirely proper and sufficient to satisfy section 31-27-3.[13]

C. Failing to Arrest Prior to Requesting Defendant to Submit to a Chemical Test.

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[13] The panel seems to be implying that even if it had found Mr. Huntley was in fact arrested earlier, a finding that § 31-27-3 was violated would not necessarily have resulted. Had this court been required to confront this issue, I believe a 60 year-old precedent may have come into play.

In State v. Lefebvre, 78 R.I. 259, 81 A.2d 348 (1951), a trooper of the Division of State Police arrived at an accident in Hopkinton some 45 minutes after it occurred — at about 5:30 p.m. Although he quickly concluded the defendant should be examined by a physician to determine if he was driving under the influence, he decided his first duty should be to clear the roadway; within ten minutes a second trooper arrived and informed the defendant that he would be taken to a doctor to be examined for drunk driving and that he had a right to contact a second doctor of his choosing. Lefebvre, 78 R.I. at 260-61, 81 A.2d at 349. At about 7:15 p.m., Mr. Lefebvre was brought to a doctor, who, after an examination, pronounced defendant unfit to operate a motor vehicle. Id., 78 R.I. at 262, 81 A.2d at 349. When brought to the Hope Valley barracks at about 8:05 p.m., he was again told of his right to a second examination. Id. He called a Providence physician but was unable to speak to him. Id.

At trial appellant moved to dismiss, asserting that the officers had violated the predecessor to § 31-27-3, particularly the command stated therein that the officer should inform a drunk driving arrestee "immediately" of his right to a second examination. Id., 78 R.I. at 262, 81 A.2d at 349-50. The Supreme Court found that the word "immediately" should not be read in a strict sense but in a "broader, relative sense." Id., 78 R.I. at 262-63, 81 A.2d at 350. Then, after noting the necessary travel time and the fact that no time was wasted, and that fact that the defendant was told of his right to an independent examination several times, the Court affirmed the denial of the motion to dismiss. Id.

Having argued in his second assertion of error that he was under arrest at the scene, or at least when Officer Pennell rode with him to the medical center, appellant urges in the alternative — as his third and final assertion of error — that he had not been placed under arrest prior to the moment when he was asked whether he would consent to take a breathalyzer test. See Appellant's Memorandum, at 9-12. On this basis, he argues that the state did not prove the second element of the offense of refusal (first offense) which involves proof that:

> **(2) the person while under arrest refused to submit to the tests upon the request of a law enforcement officer;**

Appellant urges he had not been placed under arrest prior to the request to take a breathalyzer.

In order to resolve this issue we must revisit the four factors enumerated in State v. Bailey, 417 A.2d at 917-18, which may briefly reiterate thusly: [1] the extent to which defendant's movement was curtailed, [2] the degree of force used, [3] the belief of reasonable person in the same circumstances that he was under arrest, and [4] whether defendant had choice of not going with police. See also Patricia King v. Department of Transportation, A.A. No. 90-203 (Dist.Ct.)(Pirraglia, J.)(Defendant found to be "under arrest" when "placed under arrest" by officer; Court finds insufficient evidence of impairment at that moment).

Appellant argues that he was not under arrest until he was told he was under arrest by Chief Carlone of the New Shoreham Police Department and given his Miranda[14] rights. See Appellant's Memorandum, at 11.

The Chief Magistrate found that appellant was arrested at the medical center before the rights form was read. See Decision Tr. at 37. The panel affirmed this finding. See Decision of Panel, at 12. The officers' position was clear — when Mr. Huntley was turned over to them, the officers considered him under arrest and under their control, although they did not immediately transport him or use force against him. They read him the rights from the "Rights For Use at Station/Hospital" form, which is in evidence as Exhibit 3; after a while, they transported him to the police station. Viewed in retrospect, it is clear that from the moment he was released to the officers by the medical personnel, he was subjected to an unbroken continuum of legal procedures as determined by the officers. For this reason I cannot conclude that the finding of the panel affirming the trial magistrate's decision is supported by reliable, substantial and probative evidence and is not clearly erroneous.

VI. ADDENDUM — THE LANED ROADWAY CHARGE

At this juncture I have addressed all the issues discussed in the Decision of the Panel. I must note, however, that an issue was not addressed in that decision which appellant had raised in his notice of appeal to the panel, his memorandum submitted to the panel, his complaint for judicial review, and the memorandum submitted to this

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[14] The Supreme Court has held that the giving of Miranda rights is not evidence

Court. See Appellant's Complaint, July 29, 2010, at 12 and Appellant's Memorandum, at 14. This is his assertion that the trial magistrate erred when he found him guilty of a laned roadway violation. Appellant does not complain of the panel's omission; he does not seek a remand to give the panel an opportunity to make a decision on this issue. Instead, he makes a substantive argument — that it was improper for the trial magistrate to permit evidence to be introduced which was developed after he was issued the citation for this count.

This evidence was, of course, the testimony of Trooper Gadrow, who did not even arrive on Block Island until after appellant had been cited. Appellant urges that "[i]nformation subsequently gained by another officer cannot be used to remedy a summons which was already issued based on insufficient evidence." Appellant's Memorandum, at 14.

This position is certainly true in refusal cases, for it is an element of the offense that the charging officer had reasonable grounds to believe the motorist had driven while under the influence at the time of the arrest. To my knowledge, appellant's position is correct in no other case —felony, misdemeanor, or violation. All other cases can be (and should be) strengthened after the charge is brought in order to insure that the State's burden of proof is met. I believe appellant was convicted on this count by a lawful procedure; I further believe that the evidence in this case [Trooper Gadrow's expert testimony together with Mr. Huntley's admission that he was the driver], was

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that the person has been arrested. See State v. Kennedy, 569 A.2d 4, 7-8 (R.I. 1990).

substantial and probative; accordingly, I find that the Chief Magistrate's decision sustaining this count was not clearly erroneous.

VII. CONCLUSION

Upon careful review of the evidence, I recommend that this Court find that the decision of the appellate panel was made upon lawful procedure and was not affected by error of law. Gen. Laws 1956 § 31-41.1-9. Furthermore, said decision is not clearly erroneous in view of the reliable, probative and substantial evidence on the whole record. Gen. Laws 1956 § 31-41.1-9.

Accordingly, I recommend that the decision of the Board be AFFIRMED.

Joseph P. Ippolito
MAGISTRATE

MARCH 17, 2011