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

David DiOrio	:	
	:	
v.	:	**A.A. No. 2019 - 020**
	:	
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 on this 19th day of December, 2019.

By Order:

/s/
Stephen C. Waluk

Enter:

/s/
Jeanne E. LaFazia
Chief Judge

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

David DiOrio	:	
	:	
v.	:	**A.A. No. 2019-020**
	:	**(T18-0024)**
State of Rhode Island	:	**(18-503-501857)**
(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. In this case Mr. David DiOrio urges that an Appeals Panel of the Rhode Island Traffic Tribunal (RITT) erred when it affirmed his conviction for a civil violation, Refusal to Submit to a Chemical Test, G.L. 1956 § 31-27-2.1, for which he had been cited by a member of the South Kingstown Police Department. *First,* he asserts that the State failed to prove that the arresting officer possessed reasonable grounds to believe that he had operated the vehicle; *and second,* he argues that the initial stop was not supported by reasonable suspicion, as required by the Fourth Amendment.

For the reasons I will explain in this opinion, and based upon the record before me, I have concluded that the Appeals Panel's ruling

affirming Mr. DiOrio's conviction for Refusal to Submit to a Chemical Test was neither clearly erroneous nor contrary to law. I shall therefore recommend to the Court that the decision rendered by the Panel in Mr. DiOrio's case be AFFIRMED.

I
Facts and Travel of the Case
A
The Investigation and the Arrest

The facts of the stop which resulted in the charge of refusal to submit to a chemical test being lodged against Mr. DiOrio are fairly presented in the decision of the Appeals Panel. As stated by the Panel, the incident began thusly:

> While on routine patrol on October 23, 2018, Patrolman [Thomas] Bouffard of the South Kingstown Police Department received a call from dispatch at 7:11 p.m. reporting that "a white male approximately 40 to 50 years of age, wearing a pink shirt, left [D'Angelo's] in a white SUV, bearing Rhode Island registration UE 752," and "may have been intoxicated and … may not have paid for his food."

Decision of Appeals Panel, at 2 (quoting *Trial Transcript I,* at 8-9).[1] The Officer identified the latter issue (*i.e.,* the non-payment of the food) as

[1] Since the trial was conducted over two days, the transcript of the first day, December 5, 2018, will be cited as *Trial Transcript I* (or *Tr. I*) and the second transcript, regarding the proceedings of December 17, 2018, will be cited as *Trial Transcript II* (or *Tr. II*).

being his main concern. *Id*. at 40.

Based upon the vehicle registration number he had been given, the Officer responded to South County Commons, where he "located the vehicle 'parked in a parking lot behind Shogun in South County Commons.'" *Decision of Appeals Panel,* at 2-3 (quoting *Trial Transcript I,* at 10). The vehicle's lights were on and the engine was running; in it was Mr. DiOrio. *Id*. at 3 (citing *Tr. I,* at 10-11). Officer Bouffard then approached the vehicle. He made certain observations and then spoke to the driver:

> … Appellant had "a reddish face, slurred speech, severely bloodshot, watery eyes[,] [a]nd there was a strong odor of an alcoholic beverage emanating from the vehicle." Patrolman Bouffard testified that Appellant informed him that he was coming from playing tennis in Smithfield and had just come from D'Angelo's. Subsequently, Patrolman Bouffard asked Appellant to exit the vehicle, at which point "[Appellant] appeared unsteady on his feet[,]" so Patrolman Bouffard "asked [Appellant] if he would consent to standardized field sobriety tests, which he did." Patrolman Bouffard also asked Appellant if he had any medical issues which would prevent him from performing those tests, and Appellant replied that "he had a left ankle injury and that it would be hard for him to walk a straight line." However, Patrolman Bouffard did not observe Appellant walk with a limp and Appellant did not complain of any pain.

Id. at 3 (citing *Tr. I,* at 12-14).

Because of these indicia of intoxication, Patrolman Bouffard

administered three standardized field sobriety tests to Mr. DiOrio, which, in the Officer's estimation, Appellant failed. *Decision of Appeals Panel,* at 3-4 (citing *Trial Transcript I,* at 14-22). As a result, Mr. DiOrio was arrested for suspicion of drunk driving; his Rights for Use at the Scene and his Rights for Use at the Station were read to him. *Id*. at 4 (citing *Tr. I,* at 23-26). And, after he made a confidential telephone call, Appellant was asked by the Officer to submit to a chemical test. *Id*. (citing *Tr. I,* at 25). He refused. *Id*. at 4 (citing *Tr. I,* at 26). Accordingly, Mr. DiOrio was cited for the civil offense of Refusal to Submit to a Chemical Test, in Summons No. 18-503-501857 (which may be found in the electronic record (ER) at 192).

B

The Trial

Mr. DiOrio entered a plea of not guilty at his arraignment on November 5, 2018, and the matter proceeded to trial on December 5, 2018 and December 17, 2018 before Magistrate Goulart of the Rhode Island Traffic Tribunal. At the trial Officer Bouffard was the sole witness. He began his testimony by relating his experience and training regarding persons suspected of driving under the influence. *Id.* at 2 (citing *Tr. I,* at 4-7). He then testified concerning the events which led to Mr. DiOrio's arrest in conformity with the narrative presented *ante*.

When the trial resumed on December 17, 2018, the Magistrate rendered his verdict. *Decision of Appeals Panel,* at 4. He reviewed Officer Bouffard's testimony at length and, in sum, found it to be "completely credible." *Id*. at 4 (citing *Trial Transcript II,* at 6-9 and quoting the Trial Magistrate (as to the Officer's veracity), at 15). As a result, the Trial Magistrate found that each element of the charge had been proven and imposed a fine of $200, a 30-day license suspension, and 10 hours of community service. *Id*. at 4-5.

C

Proceedings Before the Appeals Panel

Mr. DiOrio filed a timely appeal and, on January 30, 2019, the matter was heard by an Appeals Panel composed of Chief Magistrate DiSandro (Chair), Judge Almeida, and Magistrate Noonan. *Decision of Appeals Panel,* at 1. The Panel's unanimous decision, which was issued on March 29, 2019, overruled Appellant's two claims of error: *first,* that the State never proved Mr. DiOrio had "operated" his vehicle within the meaning of § 31-27-2.1 and *second,* that the State failed to demonstrate that Patrolman Bouffard's stop of Mr. DiOrio was justified by "reasonable suspicion" — as required by the Fourth Amendment to the United States Constitution and various Rhode Island statutes. And so,

we shall now present the Panel's analysis of each of these issues.

1

Appeals Panel's Analysis — The Element of Operation

The Appeals Panel began its analysis of this issue by noting that, under Rhode Island's Implied Consent Law, a police officer may request that a motorist submit to a breathalyzer test only if the officer has "reasonable grounds" to believe that he or she has operated a vehicle in this State while under the influence of alcohol. *Decision of Appeals Panel,* at 6-7 (citing § 31-27-2.1 and *State v. Bruno,* 709 A.2d 1048, 1050 (R.I. 1998) (holding that "reasonable suspicion" is the proper standard upon which the legality of breathalyzer requests must be gauged)).[2] Therefore, in the instant case, the State was required to show that Patrolman Bouffard had reasonable suspicion that Mr. DiOrio had operated his vehicle. The Appeals Panel considered this question in two factual contexts: (a) with regard to the period in which he was sitting in his vehicle *at* the South County Commons, not moving, but with the motor running (as he was when the officer first saw him) and (b) the

[2] It is perhaps worth clarifying here the exact nature of Appellant's claim of error. He is asserting that the State failed to prove that Officer Bouffard had reasonable grounds to believe that he had driven (or was driving) his vehicle. He is not questioning, at least in this claim of error, that the Officer reasonably believed he was *intoxicated*. Therefore, I shall, for the most part, dispense with the phrase "while intoxicated" when referencing this argument.

earlier time-period when he drove *to* South County Commons (from D'Angelo's), which the Officer did not observe. The Panel rightly discussed these scenarios separately, as they implicate different substantive and evidentiary issues.

(a)

The Element of Operation — In "Actual Physical Control"

The Panel addressed the non-moving scenario first, and began by presenting Title 31's definitions of the terms "driver" and "operator."

> (c) "Driver" means any operator or chauffeur who drives or is in actual physical control of a vehicle.
>
> and
>
> (d) "Operator" means every person, other than a chauffeur, who drives or is in actual physical control of a motor vehicle upon a highway or who is exercising control over or steering a vehicle being towed by a motor vehicle.

G.L. 1956 § 31-1-17(c) & (d).

The Panel then related that, in *State v. Peters,* 172 A.3d 156 (R.I. 2017), our Supreme Court held that § 31-1-17 "… provides for *two* types of operators: the driver or a person in actual control of the vehicle. Accordingly, … in certain circumstances, an operator may be distinct and separate from a driver." *Decision of Appeals Panel,* at 7 (quoting *Peters*, 172 A.3d at 160 (emphasis in original)). From this statement, the

Panel concluded that "an individual need only be 'in actual physical control' of a vehicle in order to be considered 'operating' the vehicle. *Decision of Appels Panel, id.* (quoting *Peters, id.*). And, with this interpretation of the law firmly in hand, the Panel proceeded to evaluate the scene which Officer Bouffard observed when he arrived at South County Commons to determine if his actions constituted "operation."

The Appeals Panel declared unhesitatingly that, since Mr. DiOrio had "actual physical control" of the vehicle (given that he was sitting in the driver's seat with the lights on and the engine running), he was its "operator." *Id.* at 7-8 (citing *Trial Transcript I,* at 10-11 *and State v. Morris,* 666 A.2d 419, 419-20 (R.I. 1995)). In the view of the Panel, this conclusion ineluctably followed from the fact that "[s]tarting a vehicle's engine *in sequence with* shifting the engine into drive and pressing the gas pedal sets the vehicle in motion." *Id.* (Emphasis in original). Therefore, the Officer had reasonable suspicion to believe that Mr. DiOrio operated his vehicle, when he saw him at South County Commons.

(b)

The Element of Operation — Driving *to* South County Commons

The Appeals Panel also considered whether the State had

proven that Officer Bouffard possessed reasonable suspicion to believe that Mr. DiOrio had operated his vehicle: namely, that the Officer had reasonable grounds to believe that Appellant had done so *en route* from D'Angelo's to South County Commons. *Decision of Appeals Panel,* at 8-10. In other words, the Panel found that the element of reasonable suspicion of operation could be proven by reference to conduct which Officer Bouffard did not see.

At the outset of its discussion of this second theory, the Panel recalled our Supreme Court's opinion in *State v. Perry,* 731 A.2d 720 (R.I. 2000), in a summary that is both succinct and enlightening:

> Operation of a motor vehicle may be properly inferred based on an officer's observations. *State v. Perry*, 731 A.2d 720 (R.I. 2000). In *Perry*, the Court found that although the arresting officer did not observe the defendant operate a motor vehicle, the officer had reasonable suspicion to believe that the defendant was operating a motor vehicle while intoxicated. *Id.* There, at the scene of a hit-and-run accident, the driver of the automobile that had been struck gave the responding officer the license plate number and a description of the vehicle that struck his automobile. *Id.* at 722. Subsequently, the officer drove to the address obtained from the registration information and located a vehicle with front-end damage matching the description given by the driver. *Id.* The officer also spoke with the defendant, who exhibited signs of intoxication and told the officer that he "motioned to the other driver to follow him." *Id.* Based upon the facts given to the officer by the first motorist, defendant's statement to the officer, and the officer's

> observations of intoxication, the Court determined that the trial judge properly drew the inference that the officer formed a reasonable suspicion that the defendant operated a motor vehicle while he was under the influence of alcohol. *Id.* at 723.

Decision of Appeals Panel, at 8. In sum, the *Perry* Court found that the element of operation (or, more precisely, reasonable suspicion of operation) had been satisfied by the statement of a third party, the admissions of the defendant, and the indicia of intoxication which the officer observed about the defendant.

Fortified by the Court's decision in *Perry,* the Panel then turned to Mr. DiOrio's case, which it deemed analogous. *Decision of Appeals Panel,* at 8. And, applying *Perry,* the Panel found that Officer Bouffard did possess reasonable suspicion to believe that Appellant had operated while under the influence based on the following facts and circumstances: (1) the statement which had been given to dispatch (and relayed to the Officer) concerning a possible theft by a possibly intoxicated person; *Decision of Appeals Panel,* at 8 (citing *Trial Transcript I,* at 9-10); (2) the Officer's discovery of the vehicle; *id.* at 9 (citing *Trial Tr. I, id.*); (3) the Officer viewed a sub sandwich on the front seat and the putative driver admitted he had come from D'Angelo's; *id.* (citing *Trial Tr. I,* at 9-10, 13); (4) Appellant was sitting in the front seat

of a vehicle with the engine running and he made no mention of another driver; *Decision of Appeals Panel, id*. (citing *Trial Tr. I,* at 13); and (5) Patrolman Bouffard observed signs of intoxication on Mr. DiOrio's person and he later failed standardized field sobriety tests; *id*. (citing *Trial Tr. I,* at 12, 23). Based on the foregoing, the Panel affirmed the Trial Magistrate's finding that the Officer did possess reasonable suspicion to believe that Appellant had been operating his vehicle. *Id*. at 9-10 (citing Trial Magistrate's findings, *Trial Tr. II,* at 10-11, and the standard of review found in G.L. 1956 § 31-41.1-8(f)(5)).

2

Appeals Panel's Analysis — Reasonable Suspicion to Stop

The Appeals Panel next considered whether the Trial Magistrate erred in finding that the State proved that Patrolman Bouffard's initial stop of Mr. DiOrio was lawful.

The Panel began its discussion by setting out a few of the core principles which govern this area of the law. *One*: that an officer may stop a vehicle only if he or she possesses reasonable suspicion to believe that an offense is being (or has been) committed. *Decision of Appeals Panel,* at 10 (citing *State v. Keohane,* 814 A.2d 327, 330 (R.I.2003). *Two*: reasonable suspicion is said to exist when the detaining officer can "point

to specific and articulable facts which, taken together with rational inferences from those facts, reasonably warrant that intrusion." *Decision of Appeals Panel, id*. (citing *State v. Bjerke,* 697 A.2d 1069, 1071 (R.I. 1997) (quoting *Terry v. Ohio,* 392 U.S. 1, 21 (1968))). *Three*: the reasonable-suspicion test is applied by examining the totality of the circumstances surrounding the stop. *Id.* (citing *Keohane,* 814 A.2d at 330). *Four*: pertinent factors which may be considered in determining whether the detaining officer possessed "reasonable suspicion of criminal activity 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 officer.' " *Id.* (quoting *State v. Holdsworth,* 798 A.2d 917, 921 (R.I. 2002). The Panel then applied these principles to Mr. DiOrio's detention.

As it began its analysis on this issue, the Panel rejected Appellant's argument that the information received from the D'Angelo's employee had to be viewed as an anonymous tip — and that, as a result, the information received within it had to be viewed with skepticism. Instead, it found that the initial report, that a person had left the shop without paying, required further investigation. *Id.* at 11 (citing *Trial Transcript I,* at 40). In the Panel's view, that report (together with the

description of the person as being possibly intoxicated and the detailed information as to the vehicle), provided Patrolman Bouffard with "specific and articulable facts" sufficient to justify the stop of the vehicle, because it rationally gave rise to an inference that someone who may have been intoxicated may have been in such a state of mind that he left the shop without paying, intentionally or unintentionally. *Decision of Appeals Panel,* at 10-11 (citing *Bjerke,* 697 A.2d at 1071, and *Keohane,* 814 A.2d at 330). Accordingly, the Panel concluded that the related issue — of whether the officer had reasonable suspicion to believe that Mr. DiOrio had been driving while intoxicated — was irrelevant.[3] *Id*. at 12.

On April 4, 2019, Mr. DiOrio filed an appeal of the panel's decision in the Sixth Division District Court. A conference was held before the undersigned on April 23, 2019 and a briefing schedule was set. Both parties have submitted helpful memoranda. This matter has

[3] Having justified the stop, the Panel went on to find that the foregoing, together with the observations the officer made as to the Appellant's condition, and the statements made by Mr. DiOrio, were sufficient to justify his arrest for driving under the influence. *Decision of Appeals Panel,* at 12 (citing *Bjerke,* 697 A.2d at 1072 and *Trial Transcript I,* at 12). As a result, the Panel declared it was satisfied that the Trial Magistrate did not abuse his discretion and that the verdict was not in violation of constitutional or statutory law; neither was it clearly erroneous in view of the reliable, probative, and substantial evidence of record. *Decision of Appeals Panel,* at 12.

been referred to me for the making of findings and recommendations pursuant to G.L. 1956 § 8-8-8.1.

D

Positions of the Parties

1

Appellant's Memorandum

In his Memorandum, Appellant repeats the arguments he made before the Appeals Panel: *one,* that the State did not prove that Officer Bouffard had reasonable suspicion to believe he had operated a motor vehicle; *Appellant's Memorandum,* at 2; *and two,* that the initial stop of him by Patrolman Bouffard was not predicated upon reasonable suspicion that he had (or was then engaging) in criminal activity. *Appellant's Memorandum,* at 3-6.

(a)

The Element of Operation

Appellant argues that the State failed in its duty to prove that he was operating a motor vehicle at the time of the stop beyond a reasonable doubt. *Appellant's Memorandum,* at 2. He cites *State v. Capuano,* 591 A.2d 35 (R.I. 1991) for the proposition that sitting at the controls of a vehicle does not constitute operating a motor vehicle. *Appellant's Memorandum, id.* Mr. DiOrio also distinguishes our decision

in *State of Rhode Island v. Menge,* A.A. No. 16-87 (Dist.Ct.1/27/2018, *reconsideration denied* 5/24/2018), in which we found that operation had been proven based upon defendant's admission that he had driven to the spot where the police found him. *Id*.

(b)

Reasonable Suspicion to Stop

Next, Appellant argues that the stop of his vehicle was not supported by reasonable suspicion. To this end he cites our opinion in *State v. DiPrete,* A.A. No. 2010-173 (Dist.Ct.2011), in which we found that reasonable suspicion had not been shown — where the officer acted solely on the basis of departmental knowledge, information that was never presented at trial. *Appellant's Memorandum,* at 3-4. Mr. DiOrio urges that, like the informant in *DiPrete,* the caller herein was anonymous, and anonymous informants lack any presumption of reliability. *Id*. at 4.

Finally, Appellant calls to our attention the United States Supreme Court's decision in *Navarette v. California,* 572 U.S. 393 (2014), in which the Court upheld the stopping of a driver on the highway based on information received from an anonymous tipster. *Appellant's Memorandum,* at 5-6.

2

Appellee-State's Memorandum

(a)

The Element of Operation

The State began its response to Mr. DiOrio's first claim of error by reminding us that our Supreme Court has declared that:

> [a]n individual person "operates" a motor vehicle "when in the vehicle he intentionally does any act or makes any use of electrical agency which alone or in sequence will set in motion the motive power of the vehicle ….

State's Memorandum, at 5 (citing *Morris, ante,* 666 A.2d at 419). And, since the Court in *Morris* held that by starting his friend's vehicle, the defendant "operated" that vehicle, the State urges that Mr. DiOrio was "operating" his vehicle when he sat in its driver's seat while the motor was running, because he was in "actual physical control" of it. *State's Memorandum,* at 5-6 (citing *Morris,* 666 A.2d at 419-20 and *Peters, ante,* 172 A.3d at 160).

The State also argues that Patrolman Bouffard had reasonable grounds to believe that Mr. DiOrio had operated his vehicle outside his presence — that is to say, from D'Angelo's to South County Commons. *State's Memorandum,* at 7-8. Relying upon *Perry*, the State urges that the Officer's knowledge that a vehicle matching the description given

and with a particular license plate had left D'Angelo's (and arrived at an address associated with the vehicle), was information sufficient, when taken together with reasonable inferences taken from that information, to constitute reasonable grounds to believe that Appellant had driven. *Id*. (citing *DeSimone Elec. v. CGM, Inc.,* 901 A.2d 613, 621 (R.I. 2006)).

II

Standard of Review

The standard of review which must be employed in this case is enumerated in G.L. 1956 § 31-41.1.-9(d), which states 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 prejudiced because the appeals panel's findings, inferences, conclusions or decisions are:
>
> (1) In violation of constitutional or statutory provisions;
>
> (2) In excess of the statutory authority of the appeals panel;
>
> (3) Made upon unlawful procedure;
>
> (4) Affected by other error of law;
>
> (5) Clearly erroneous in view of the reliable, probative, and substantial evidence on the whole record; or
>
> (6) Arbitrary or capricious or characterized by abuse of discretion or clearly unwarranted exercise of discretion.

This provision is a mirror-image of the standard of review found in G.L. 1956 § 42-35-15(g) — a provision of the Rhode Island 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.'" *Guarino v. Dep't. of Soc. Welfare,* 122 R.I. 583, 584, 410 A.2d 425 (1980) (*citing* G.L. 1956 § 42-35-15(g)(5)). *See also Link v. State,* 633 A.2d 1345, 1348 (R.I. 1993).

Our Supreme Court has reminded us that, when handling 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." *Link,* 633 A.2d at 1348 (*citing Liberty Mutual Ins. Co. v. Janes,* 586 A.2d 536, 537 (R.I. 1991)). This Court's review "… 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 Envtl. Sci. Corp. v. Durfee,* 621 A.2d 200, 208 (R.I. 1993)).

III
Applicable Law

Before this Court, Mr. DiOrio argues, as he did before the appeals Panel, that the Trial Magistrate committed two prejudicial errors in finding him guilty of the refusal charge for which he was cited: (1) that the State failed to prove the first statutory element of the refusal charge — *i.e.,* that Patrolman Bouffard had reasonable grounds to believe that he had driven (while intoxicated), and (2) that the State failed to prove that the officer's initial stop was supported by (and justified by) reasonable suspicion to believe that he had committed an offense. And so, at this juncture, I shall present a general discussion of the law pertinent to both of these arguments.

A
The Refusal Statute — Elements of the Offense

By driving in Rhode Island, motorists promise to submit to a chemical test designed to measure their blood-alcohol content, whenever a police officer has reasonable grounds to believe they have driven while under the influence of liquor. This is the gist of the so-called "implied-consent law."[4] *See State v. Pacheco,* 161 A.3d 1166, 1172 (R.I. 2017). And

[4] The implied-consent law is stated in § 31-27-2.1(a):

motorists who renege on that promise may be charged with the civil offense of "refusal to submit to a chemical test," and, if the charge is proven, suffer the suspension of their operator's licenses, among other penalties.[5] Thus, at its essence, a refusal charge is an offense against our state's regulatory scheme for identifying drunk and unsafe drivers on our highways.

The charge of refusal contains four statutory elements. They are: (1) that the officer had reasonable grounds to believe that the motorist had driven while intoxicated;[6] (2) that the motorist, having been placed in

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> 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. …

[5] Subsection 31-27-2.1(c) provides:

> … If the judge finds after the hearing that: (1) the law enforcement officer making the sworn report had reasonable grounds to believe that the arrested person had been driving a motor vehicle within this state while under the influence of intoxicating liquor, toluene, or any controlled substance, as defined in chapter 28 of title 21, or any combination of these; (2) the person, while under arrest, refused to submit to the tests upon the request of a law enforcement officer; (3) the person had been informed of his or her rights in accordance with § 31-27-3; and (4) the person had been informed of the penalties incurred as a result of noncompliance with this section, the judge shall sustain the violation. …

[6] The "reasonable grounds" standard is equivalent to the "reasonable-suspicion" standard, which is well-known in Fourth Amendment jurisprudence

custody, refused to submit to a chemical test; (3) that the motorist was advised of his rights to an independent test under § 31-27-3; and (4) that the motorist was advised of the penalties that are incurred for a refusal. *See* § 31-27-2.1(c), *ante* at 20, n.5. In the instant case, Mr. DiOrio urges that the State failed to prove that Officer Bouffard had reasonable grounds to believe that he had driven under the influence — or, more specifically, that he had driven at all, whether or not he was intoxicated.

The State must also prove that the initial stop was legal, *i.e.,* supported by reasonable suspicion. *See State v. Jenkins,* 673 A.2d 1094, 1097 (R.I. 1996) *and State v. Bruno,* 709 A.2d 1048, 1050 (R.I. 1998). Finally, the prosecution must prove that the motorist was notified of his or her right to make a phone call for the purposes of securing bail as provided in G.L. 1956 § 12-7-20. *See State v. Quattrucci,* 39 A.3d 1036, 1040-42 (R.I. 2012).

However, the State need not show that the motorist was actually operating under the influence. *Bruno,* 709 A.2d at 1050; *Hart,* 694 A.2d at 682. Neither must it prove that the officer had probable cause to arrest the defendant for such a charge. *See Jenkins, ante,* 673 A.2d at 1097.

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as the test for the legality of an investigatory stop. *State v. Jenkins,* 673 A.2d 1094, 1097 (R.I.1996) (citing *Terry v. Ohio,* 392 U.S. 1 (1968)).

B

The Legality of Car Stops

As his second claim of error Mr. DiOrio asserts that the State failed to prove that his stop by Patrolman Bouffard was legal — that is, supported by reasonable suspicion that he was involved in criminal activity. As we related *ante,* in *Jenkins,* 673 A.2d at 1097 and *Bruno,* 709 A.2d at 1050, our Supreme Court held that the State must prove the legality of the stop in every refusal case. The Court acknowledged, as it did so, that it was incorporating by reference the principles of law which have developed regarding car stops under the Fourth Amendment's ban on unreasonable searches and seizures.[7]

For Fourth Amendment purposes, a car stop is regarded as a type of seizure. And so, a short review of the case law regarding the legality of stops of vehicles under the Fourth Amendment would seem to be particularly helpful to the resolution of Mr. DiOrio's argument that he was stopped illegally.

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[7] The Fourth Amendment guarantees — "[t]he right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures." U.S. CONSTITUTION, amend. IV. The Fourth Amendment is made applicable to the states through the Due Process Clause of the Fourteenth Amendment. *See Wolf v. Colorado,* 338 U.S. 25, 27-28 (1949)(finding Fourth Amendment's protection of privacy interests implicit in "the concept of ordered liberty" and thus, binding on the states).

1

The Fourth Amendment Generally

The Fourth Amendment protects Americans from unreasonable restraints on the liberty of their persons by officers of the government. These restraints are denominated seizures. The Supreme Court of the United States has declared that "… a person is 'seized' only when, by means of physical force or a show of authority, his freedom of movement is restrained." *United States v. Mendenhall,* 446 U.S. 544, 553 (1980). We determine whether a person was seized by an officer by asking whether "… a reasonable person would have believed that he was not free to leave." *Mendenhall,* 446 U.S. at 554; *Florida v. Royer,* 460 U.S. 491, 501-02 (1983); *State v. Griffith,* 612 A.2d 21, 23 (R.I.1992).[8] If a reasonable person would have concluded that he or she was free to leave, then the

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[8] Accordingly, it is questionable whether Patrolman Bouffard's initial contact with Mr. DiOrio — *i.e.,* approaching his vehicle, asking for identification and posing a few questions — constituted a seizure cognizable under the Fourth Amendment. See *Mendenhall, ante,* 446 U.S. 544, 557-58 (1980) *and Florida v. Royer,* 460 U.S. 491, 501 (1983) (plurality opinion); *see also* 4 W. LaFave, SEARCH AND SEIZURE, § 9.4(a), *The Mendenhall-Royer Free to Leave Test* (5th ed., Oct. 2018 Update) *and* cases cited at nn.58 and 79, which hold that approaching and questioning a person seated in a vehicle located in a public place does not, without more, constitute a seizure. Among these are *State v. Burroughs,* 955 A.2d 43, 49-55 (Conn.2008) (Approaching vehicle, absent of show of force, held not to constitute seizure) *and State v. Daoud,* 973 A.2d 294, 297 (N.H. 2009). However, since the State did not advance this theory (of non-seizure) at trial, and it was not discussed by the Appeals Panel, I shall not address the issue *sua sponte.*

officer's actions need not be constitutionally justified.[9]

However, a finding that an officer's intrusion upon a person's liberty constitutes a seizure must be followed by a secondary inquiry identifying the level of that restraint; that is, was it a full arrest or something lesser — a mere temporary detention such as an "investigatory stop" or a "routine traffic stop." And each of these types of seizures must be justified by a different quantum of inculpatory evidence: a full arrest must be justified by probable cause, an investigatory stop by reasonable suspicion, and a routine traffic stop by probable cause that a traffic offense has been committed. *Whren, ante,* 517 U.S. at 809-10.

In this case, Mr. DiOrio has not urged that he was subjected to an arrest when Officer Bouffard first approached him; neither has the State argued that the officer was making a routine traffic stop. Therefore, we need only consider whether, when he approached Mr.

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[9] The Fourth Amendment is also not impacted if the officer's intrusion into the liberty of the citizen was the result of consent given voluntarily. *See Mendenhall,* 446 U.S. at 555-60. *Also, State ex rel. Town of Little Compton v. Simmons,* 87 A.3d 412, 416-17 (R.I. 2014). In *Simmons*, the Court held that the defendant, who was approached while running down a roadway in Tiverton and stopped him to ask if he had been involved in an accident; he conceded he had been and was driven back to the scene of the accident in Little Compton. *Simmons*, 87 A.3d at 413-14. The Court found consent to stop, pat-down and transport. *Id*. at 415-17. In any event, since the issue of consent was not raised by the State at trial, I shall not discuss it.

DiOrio, the officer was making a legal investigatory stop based on reasonable suspicion.

2

Investigatory Stops: Justified by Reasonable Suspicion

(a)

The *Terry* Standard

As we stated *ante*, a finding of a "seizure" does not, *per se,* indicate that an "arrest" has been made. Professor LaFave, in his Fourth Amendment treatise, explained the relationship between the two concepts thusly:

> …it remains to be asked whether the seizure constitutes an "arrest." For many years courts (including the Supreme Court) acted as if no such distinct issues existed. As a consequence, even the mere stopping of a moving motor vehicle might be assumed to be an arrest; if probable cause could be established only by consideration of facts obtained subsequent to the stopping, the arrest would thus be deemed illegal. But at least since *Terry v. Ohio,* it has become clear that this approach is inappropriate and unnecessary … (footnotes omitted).

3 W. LaFave, SEARCH AND SEIZURE, § 5.1(a), *What Constitutes an Arrest* (5th ed., Oct. 2018 Update). In other words, prior to the publication of the U.S. Supreme Court's opinion in *Terry v. Ohio,* 392 U.S. 1 (1968), it could have been assumed (and often was) that a Fourth Amendment "seizure" was synonymous with an "arrest," and therefore probable cause was

necessary to justify all seizures. *See Henry v. United States,* 361 U.S. 98, 103 (1959) (Court held the arrest occurred when the officers stopped the vehicle). *See also Terry,* 392 U.S. at 35 (Douglas, J., dissenting).

But *Terry* altered our Fourth Amendment jurisprudential landscape radically. Although the Supreme Court conceded that even brief, investigatory car stops constitute Fourth Amendment "seizures" of the person or persons within the vehicle, it held that lesser restraints or intrusions — *i.e.,* those not rising to the level of an arrest — would no longer require probable cause. *Terry,* 392 U.S. at 16-19, 27. Henceforth, investigative stops would pass Fourth Amendment muster if the officer possessed "reasonable suspicion based on specific and articulable facts that the person detained is engaged in criminal activity." *Casas,* 900 A.2d at 1131 (quoting *Keohane, ante,* 814 A.2d at 330 (*quoting State v. Abdallah,* 730 A.2d 1074, 1077 (R.I.1999))). *See also State v. Taveras,* 39 A.3d 638, 642 n.6 (R.I. 2012).

(b)

Applying the *Terry* Standard

When applying the *Terry* standard, a court must evaluate the totality of the circumstances. *Casas,* 900 A.2d at 1131-32 (*citing Dunaway v. New York,* 442 U.S. 200, 212 (1979)). Moreover, the

circumstances must be weighed "as understood by those versed in the field of law enforcement." *United States v. Cortez,* 449 U.S. 411, 418 (1981).

And, when determining whether the officer's actions were based on reasonable suspicion, the Court may consider hearsay evidence known to the officer, so long as he or she had a "substantial basis" for relying on such information. *In re John N.,* 463 A.2d 174, 177 (R.I. 1983) (citing *State v. Burns,* 431 A.2d 1199, 1204 (R.I. 1981)). It must also be found to be "reasonably trustworthy." *John N., id.* (citing *State v. Belcourt,* 425 A.2d 1224, 1227 (R.I. 1981)). As it happens, two types of hearsay evidence have been given special attention by the Courts; these are: departmental knowledge and anonymous tips. Since both are arguably relevant to the instant case, we shall now discuss each, in turn.

(c)

Information Received through Police Channels

The Fourth Amendment doctrine that an officer may make a stop on the basis of information gained through police channels[10] was first applied with regard to full arrest — first with regard to the existence and execution of arrest warrants, and subsequently with

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[10] *See generally* 4 W. LaFave, SEARCH AND SEIZURE, § 9.5(j), *Information via Police Channels* (5th ed., Oct. 2018 Update).

regard to warrantless arrests. Later, it was extended to determinations of whether a stop was supported by reasonable suspicion. And so, I shall now endeavor to trace the evolution of this doctrine from arrests to stops.

i. Arrests Based on Reports of Warrants.

The seminal case in this area is *Whiteley v. Warden,* 401 U.S. 560 (1971). In *Whiteley,* the U.S. Supreme Court held that if members of one police department issue a bulletin indicating that a warrant has been issued for an individual, others in the law enforcement community may act in reliance upon it. *Whiteley*, 401 U.S. at 568. But, the Court made it clear that proof that the officer acted based on a report of a warrant does not, *per se,* prove Fourth Amendment compliance. The question of the ultimate legality of the arrest will not be resolved until the existence and sufficiency [in terms of probable cause] of the cited warrant is proven in Court. Justice Harlan explained the process:

> We do not, of course, question that the Laramie police were entitled to act on the strength of the radio bulletin. Certainly police officers called upon to aid other officers in executing arrest warrants are entitled to assume that the officers requesting aid offered the magistrate the information requisite to support an independent judicial assessment of probable cause. Where, however, the contrary turns out to be true, an otherwise illegal arrest cannot be insulated from challenge by the decision of the instigating officer to rely on *fellow officers* to make the arrest.

Whiteley, 401 U.S. at 568 (Emphasis added). Accordingly, when an officer executes a warrant on the basis of information related by fellow officers, *Whiteley* mandates a second step to the probable cause evaluation process — one in which the warrant is *validated* by proof that the warrant was indeed issued and that it met constitutional standards.

In the 1990's, the Rhode Island Supreme Court acknowledged *Whiteley* and incorporated its doctrine — which it termed "the fellow-officers rule" in *State v. Taylor,* 621 A.2d 1252 (R.I. 1993). The *Taylor* case involved a simple fact-pattern: Mr. Taylor was arrested pursuant to an arrest warrant and cocaine and other items were found in his jacket. *Taylor,* 621 A.2d at 1253. Based on this discovery, a search warrant for his vehicle was obtained and a handgun was found. *Id.* At his trial on possession charges, the arrest warrant could not be located. *Id.* Quoting from a summary of *Whiteley* in a successor case, *United States v. Hensley,* 469 U.S. 221 (1985), Justice Murray explained that, in determining whether the legality of an arrest based on a communication from a colleague, the Court must focus on what the *communicating* officer,[11] not the *arresting* officer, knew:

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[11] We may note that Justice Murray employed the term "communicating officer" in lieu of Justice Harlan's term, "instigating

> *Whiteley* supports the proposition that, when evidence is uncovered during a search incident to an arrest in reliance on a flyer or bulletin, its admissibility turns on whether the officers who *issued* the flyer possessed probable cause to make the arrest. It does not turn on whether those relying on the flyer were themselves aware of the specific facts which led their colleagues to seek their assistance.

Taylor, 621 A.2d at 1255 (citing *Hensley*, 469 U.S. at 231). Applying these principles, the Court ruled the items seized should have been suppressed, because the legality of the warrant could not be proven (*i.e.,* because it was missing and could not be produced by the State). *Taylor,* 621 A.2d at 1257. Accordingly, Mr. Taylor's conviction was reversed. *Id*.

The following year, in *State v. Austin,* 641 A.2d 56 (1994), *ante,* Justice Murray elaborated upon the fellow-officers rule, in equally comprehensible terms:

> … a police officer is entitled to make a valid arrest on the basis of information obtained from another police officer; but in order to sustain the validity of the arrest in court, the warrant underlying the arrest must be proved to have been based on sufficient probable cause.

Austin, 641 A.2d at 58 (citing *Taylor,* 621 A.2d at 1255). The *Austin* case was remanded with instructions for the Court to examine the arrest

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officer." Her word — particularly where the other officer is a dispatcher — is more apt.

warrant and undertake a *Whiteley-Taylor* analysis. *Austin*, 641 A.2d at 58.

ii. Warrantless Arrests.

The doctrine born in *Whiteley* — that an officer may act based on his own knowledge together with the knowledge of other officers — was first extended to warrantless arrest cases, not by the U.S. Supreme Court, but by the lower federal courts and the state courts.

The first Rhode Island case to extend *Whiteley* to warrantless-arrest case was *State v. Duffy,* 112 R.I. 276, 308 A.2d 796 (1973). The facts of the case are these: on January 7, 1970, Robert Duffy was arrested for suspicion of burglary by Lt. Lionel E. Hetu of the Division of State on the basis of a Johnston Police radio call; his actions were approved by the Rhode Island Supreme Court:

> … we believe that information relayed to a police officer via police radio may provide probable cause to arrest. While it is true that Lieutenant Hetu did not have first-hand knowledge of what had transpired in Johnston, the existence of probable cause can be determined on the basis of the *collective information available to the law enforcement organizations as a whole* and not solely on that knowledge of the arresting officer. *Mattern v. State,* 500 P.2d 228 (Alaska 1972); *State v. Cobuzzi,* 161 Conn. 371, 288 A.2d 439 (1971).

Duffy, 112 R.I. at 280, 308 A.2d at 799 (1973) (Emphasis added). Thus,

the Rhode Island Supreme Court recognized that probable cause will be determined on the basis of the knowledge of all officers involved, not just the arresting officer. We can see that, from the outset, the requirement of validation was present in warrantless-arrest cases. Indeed, we see that, in *Duffy*, this requirement was satisfied when a Johnston Police officer testified as to the report of the house break he had caused to be broadcast. *Duffy, id.*

The validity mandate was reiterated in *State v. Smith,* 121 R.I. 138, 396 A.2d 110 (1979). When Mr. Smith walked into the Providence Police Station of his own accord, to make a complaint of a theft, he was arrested by an officer who had noticed that he matched a witness's description of the perpetrator of a pharmacy robbery the previous day. *Smith,* 121 R.I. at 139-40, 396 A.2d at 111-12. The defendant moved to suppress the results of the line-up which was later arranged, arguing that his arrest had been illegal — that is, lacking in probable cause. *Smith,* 121 R.I. at 141, 396 A.2d at 112. Defendant appealed from the denial of the motion.

Writing for the Court, Justice (later Chief Justice) Weisberger concluded his explication of the concept of probable cause and how it is determined by adding — "An arresting officer in the field may rely on

departmental knowledge which comes through official channels. Duffy, supra." *Smith*, 121 R.I. at 141, 396 A.2d at 113 (Emphasis added). Validation was provided in *Smith* through the testimony of the citizen who provided the description of the robber. Reviewing the merits of the trial judge's ruling, the Court found he was correct to find probable cause. *Smith,* 121 R.I. at 142, 396 A.2d at 113. *See also State v. Firth,* 418 A.2d 827, 829 (R.I. 1980)(In *Firth* the police lieutenant who issued the pick-up order testified — explaining the basis of his suspicion; probable cause not found nonetheless).

iii. Reasonable Suspicion in Investigatory-Stop Cases.

Ultimately, the requirement of validation was extended to *Terry*-stop cases in *Hensley, ante*, in which the St. Bernard, Ohio Police Department issued a "wanted flyer" to police departments in the Cincinnati area for Appellee Hensley after an informant told an officer that he had participated in an armed robbery. *Hensley,* 469 U.S. at 223. Six days after the flyer's issuance, a Covington, Kentucky officer stopped Mr. Hensley while his dispatch was attempting to confirm the existence of a warrant. *Hensley,* 469 U.S. at 224. He ordered Hensley and his passenger out of the car. *Ibid*. Shortly thereafter, they were arrested for the possession of weapons found. *Hensley,* 469 U.S. at 225. The District

Court denied Mr. Hensley's Motion to Suppress but the Court of Appeals for the Sixth Circuit reversed. *Id*. The U.S. Supreme Court reversed, finding that the officers did have reasonable suspicion to stop the defendant. *Hensley,* 469 U.S. at 225-26.

Extrapolating from the particular facts in *Hensley,* Justice O'Connor explained that the constitutionality of a stop based on a flyer or bulletin turns on whether the officers issuing the bulletin themselves had reasonable suspicion to stop the target.

> Assuming the police make a *Terry* stop in objective reliance on a flyer or bulletin, we hold that the evidence uncovered in the course of the stop is admissible if the police who *issued* the flyer or bulletin possessed a reasonable suspicion justifying a stop, … , and if the stop that in fact occurred was not significantly more intrusive that would have been permitted the issuing department. [Citation omitted]

Hensley, 469 U.S. at 233. Thus, the Court specifically rejected the Circuit Court's rationale that the omission of such facts rendered the flyer defective. *Hensley,* 469 U.S. at 230-33. It is the reasonable suspicion of the issuing officer that counts and the officer stopping the defendant need not have been provided with articulable facts. Relying on *Whiteley v. Warden,* the Supreme Court found that a car stop made by members of one police department could lawfully be made based on articulable facts constituting reasonable suspicion possessed by members of a second

department. *Hensley,* 469 U.S. at 230-33. Finally, it should be noted that validation was provided in *Hensley* through the testimony of the officer who received the original informant's statement. *Hensley,* 469 U.S. at 233.[12]

The concept of "departmental knowledge" was recognized in the reasonable-suspicion setting by the Rhode Island Supreme Court two years before *Hensley* in *John N., ante.* In *John N.*, a police officer was informed at roll-call that the owner/operator of a certain motor vehicle was believed to be harboring a wanted man known to wear cowboy hats. *John N.,* 463 A.2d at 175-76. Later, the car was stopped after being entered by three men, including one wearing a cowboy hat. *John N.,* 463 A.2d at 176-77. The Court overruled the defendant's challenge to the stop on the basis that it was grounded on unsubstantiated hearsay, *citing Burns, ante,* for the proposition that hearsay may be used to determine probable cause and *Duffy, ante, Smith, ante,* and *Firth, ante,* for the principle that officers may rely on collective information to form probable cause. *Id*. Accordingly, it sanctioned the use of "departmental

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[12] As one Court construing *Hensley* phrased the situation, when one officer makes a *Terry* stop based on the statements of another, the knowledge of the latter is legally imputed to the former. *United States v. Torres,* 534 F.3d 207, 210 (3rd. Cir. 2008).

information" to form reasonable-suspicion for the stop. *Id.* After approving the stop of the vehicle, the Supreme Court found the arrest of the juvenile John N., a passenger, to be illegal — as it was lacking in probable cause. *John N.,* 463 A.2d at 178.

Finally, we must note that it is not clear from the opinion in *John N.* that evidence of validation was presented by the State.

(d)

Information Received from Informants — Known and Anonymous

Finally, we must discuss the manner in which the Courts view the information garnered from informants as they perform reasonable-suspicion analyses.[13] This is certainly a difficult area in which to apply constitutional principles — fact-intensive, to say the least. The following comments from *Adams v. Williams* may well serve to explain the Supreme Court's thinking in this area:

> … Informants' tips, like all other clues and evidence coming to a policeman on the scene, may vary greatly in their value and reliability. One simple rule will not cover every situation. Some tips, completely lacking in indicia of reliability, would either warrant no police response or require further investigation before a forcible stop of a suspect would be authorized. …

Adams v. Williams, 407 U.S. 143, 147 (1972). It is helpful, therefore, that

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[13] *See generally* 4 W. LaFave, SEARCH AND SEIZURE, § 9.5(i), *Information from an Informant* (5th ed., Oct. 2018 Update).

the State and Mr. DiOrio have both directed our attention to the Supreme Court's decision in *Alabama v. White,* 496 U.S. 325 (1990), I also believe *Alabama v. White* is illuminating and must be analyzed at some length.

In *White,* Corporal Davis of the Montgomery Police Department received an anonymous phone call indicating that Ms. Vanessa White would be exiting a certain apartment at a certain time carrying an attaché case containing cocaine; she would then enter a certain vehicle and travel to Dobey's Motel. *White*, 496 U.S. at 327. The Corporal and his partner proceeded to the apartment and watched Ms. White exit the apartment and enter the vehicle, which was stopped when it approached the motel. *Id*. After obtaining Ms. White's consent to search, the officers found marijuana in the attaché and cocaine in her purse. *Id*.

After her Motion to Suppress was denied, Ms. White pled guilty — preserving the right to appeal from the denial of the Motion to Suppress. *White*, 496 U.S. at 327-28. The Alabama Court of Criminal Appeals reversed and the Alabama Supreme Court denied certiorari. *White,* 496 U.S. at 328. The United States Supreme Court reversed. *Id*.

Citing *Illinois v. Gates,* 462 U.S. 213 (1983), the High Court indicated that "veracity," "reliability," and "basis of knowledge" are

highly relevant factors in determining whether — under the "totality of the circumstances" — an informant's tip establishes probable cause or reasonable suspicion. *White*, 496 U.S. at 328-29. While the Court indicated the tip in *White* did not provide much in the way of "basis of knowledge" or "veracity," it did find the tip to constitute reasonable-suspicion based on the corroboration the tip received before Ms. White was stopped. *White*, 496 U.S. at 329-31. The Supreme Court of the United States accorded particular significance to the fact that the anonymous tip accurately predicted Ms. White's *future* conduct.

A second informant-information case decided by the United States Supreme Court — *Florida v. J.L.,* 529 U.S. 266 (2000) — while not a car-stop case, is also informative and will help us establish parameters. In *J.L.,* the Court affirmed a Florida Supreme Court decision which had reinstated a trial judge's ruling suppressing evidence seized after an investigatory stop. Unlike the *White* case, *Florida v. J.L.* centered, not on the stop of a vehicle, but of a juvenile pedestrian. After an anonymous person reported to the Miami-Dade Police Department that a young black man standing at a certain bus stop wearing a plaid shirt was carrying a gun, officers responded and — based solely on the tip — frisked the defendant and seized a gun. *J.L.,* 529 U.S. at 268. In a

decision authored by Justice Ginsburg, the Court indicated that the indicia of reliability found in *White*, particularly the corroborative value of the informant's ability to *predict* Ms. White's movements, was not present in *Florida v. J.L.* The Court stressed that although the aspect of the tip that provided the identity of the target was corroborated, the information regarding the criminal activity was not. *J.L.,* 529 U.S. at 272. Accordingly, the Court decided the tip in *J.L.* fell short of the standard pronounced in *White. J.L.,* 529 U.S. at 271. The Court declined to adopt a special rule for firearms cases. *J.L.,* 529 U.S. at 272-73.

Turning to local precedent, we see that the U.S. Supreme Court's holding in *White* was embraced by the Rhode Island Supreme Court in *Keohane, ante,* 814 A.2d at 329. In *Keohane,* the Woonsocket Police received an anonymous tip that the defendant would be traveling to Providence to purchase heroin which he would then sell in Woonsocket. *Keohane,* 814 A.2d at 328. Mr. Keohane and his companion — a Mr. Manzano — were followed to Providence, where they met with several men on Bucklin Street, and were stopped when they returned to Woonsocket. *Id.* While no narcotics were found on their persons, Manzano told police where they could find drugs in the van, which they did. *Id.* Relying on *White*, the Court, in a *per curiam* opinion, found the

tip had been sufficiently corroborated to become reliable and that the reasonable suspicion standard had been satisfied. *Keohane*, 814 A.2d at 330-31.

Alongside *Keohane* we must contrast a subsequent case — *State v. Casas,* 900 A.2d 1120 (R.I. 2006), facially similar, in which the Supreme Court of Rhode Island had "concerns" regarding the sufficiency of the facts known to the officers and whether they constituted reasonable suspicion. *Casas,* 900 A.2d at 1132. Like *Keohane*, the case concerned an informant's tip and extensive movements by a suspected drug dealer. But in *Casas,* "… little, if any, informant information was confirmed before the stop." *Casas,* 900 A.2d at 1132. The Court called the justification for the stop "dubious." *Casas,* 900 A.2d at 1132. However instructive, the Court's comments must be considered mere dicta — because no items were seized as a result of the stop, the Court made no decision on the reasonable-suspicion issue. *Casas,* 900 A.2d at 1132.

These are the most recent examples of reasonable-suspicion/ informant's-tip cases decided by our Supreme Court.[14]

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[14] It is probably worth noting that, subsequent to *Keohane* and *Casas,* the Court decided a *probable-cause*/informant's-tip case: *State v. Burgess,* 138 A.3d 195, (R.I.2016), in which the Court held an arrest based on a tip from a known informant was not supported by probable cause, stating that it was not aware of "any case in which probable cause to arrest a suspect was found based on a

(e)

Navarette v. California

In their memoranda, both parties have brought to our attention a case decided by the U.S. Supreme Court on April 22, 2014, which has not yet been applied by our Rhode Island Supreme Court, *Navarette v. California,* 572 U.S. 393 (2014), but which, in my estimation, must be at the center of any proper analysis of the instant case — or indeed, any case in which the prosecution asserts that an officer's reasonable suspicion derives from an anonymous or informer's tip which is conveyed to the detaining officer through police channels. It has been read to permit officers to accord allegations contained in *anonymous* tips substantial credibility even if they are only *minimally* corroborated. The facts in *Navarette* are instructive.

In *Navarette* the Humboldt County 911 dispatcher received a call regarding a Silver Ford 150 pickup traveling southbound on Highway 1 which had run the caller off the roadway approximately five minutes before. *Navarette*, 572 U.S. at 395. The call was referred to the

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tip from a first-time informant who has merely been detained on an outstanding warrant, where the tip is devoid of predictive detail and fails to indicate the informant's basis of knowledge of the alleged criminal activity, and police undertake no effort to corroborate or independently investigate such a bare-bones tip." *Burgess*, 138 A.3d at 204.

Mendocino County dispatcher and a California Highway Patrol (CHP) officer was sent to intercept the truck. *Id*. The officer located the truck at 4:00 p.m. and pulled it over at 4:05. *Navarette*, *id*. And, as the officer and a colleague approached the pickup truck, they smelled the odor of marijuana. *Id*. The following search revealed 30 pounds of marijuana. *Id*.

The Court, after reviewing its previous rulings in *White* and *J.L.,* held that the "anonymous" phone call did meet the reliability standard because (a) it was contemporaneous, (b) the truck was found at a location consistent with the phone call, and (c) it was made through the 911 system — which callers know subjects them to identification. *Navarette*, 572 U.S. at 397–404. And so, based solely on the 911 call, the Court held that the officer possessed reasonable suspicion to believe that the operator was driving under the influence. *Navarette,* 572 U.S. at 404. It therefore upheld the stop.

IV
Analysis

As we have set out *ante*, Appellant has asserted two claims of error alleging that the State failed to prove two elements of the charge of refusal: *first*, that the officer had reasonable suspicion to believe that Mr. DiOrio had operated the vehicle, and *second*, that Officer Bouffard did not have reasonable suspicion to make his initial stop of Appellant.

Accordingly, as to these two issues, the question is simply — what did the officer know? In my view, the answer to both questions is — the Appeals Panel's finding that he knew enough is not clearly erroneous.

A

Alleged Failure of Proof — The Element of Operation

As stated *ante,* the Appeals Panel rejected Mr. DiOrio's argument that he could not be convicted of refusal because the State was unable to show that he had "operated" his motor vehicle. Of course, in a prosecution for refusal, as opposed to a prosecution for drunk driving, the State does not have to prove that the defendant was driving, only that the officer had reasonable grounds to believe that he was driving (or had driven). In the instant case, the Trial Magistrate found that Patrolman Bouffard did in fact have such a reasonable belief, a finding that was grounded on two alternative theories: *the first,* that he *was* operating when he was sitting in the driver's seat of his vehicle while its engine was running in the parking lot of South County Commons; *and the second,* that Mr. DiOrio *had* driven from the location of the D'Angelo's shop to South County Commons. The Appeals Panel found that each of these findings was supported by the facts of record and the applicable law.

I agree that the Trial Magistrate committed no error, based on the second theory — *i.e.,* that the officer had reasonable grounds to believe that Mr. DiOrio had driven *from* the D'Angelo's shop *to* South County Commons while under the influence. It is, in my view, well-supported in fact and law, particularly in light of our Supreme Court's decision in *Perry*. As a result, I shall not undertake an analysis of the propriety of the alternative finding, that Appellant was "operating" his vehicle when the officer first spotted him.

The State failed to present any witnesses who could testify that they saw Mr. DiOrio driving (from D'Angelo's to South County Commons). Concededly, the lack of such a witness is generally fatal to a prosecution for misdemeanor drunk driving; however, it is not necessarily fatal to the prosecution of a civil refusal charge. The difference in outcomes is attributable to an ancient rule of law which applies in criminal cases but not in civil — *the corpus delicti* rule; and the case containing the most extensive elucidation of the *corpus delicti* rule as it exists in Rhode Island is *State v. Halstead,* 414 A.2d 1138, 1141-45 (R.I.1980), a 1980 decision of our Supreme Court.

In *Halstead*, the Rhode Island Court explained:

> Only after the state has introduced some independent evidence of corpus delicti evidence that the crime

> alleged has been committed by someone may it introduce the confession of an accused. The state need not, however, prove corpus delicti beyond a reasonable doubt prior to introducing an extra-judicial confession. [*State v. Wilbur,* 115 R.I. 7] 14, [339 A.2d 730] 734 [(1975)]; *State v. Boswell,* 73 R.I. 358, 363, 56 A.2d 196, 198 (1947). The independent evidence need only be such that if believed, it would indicate that the crime charged had been committed by someone. *See State v. Wilbur,* 115 R.I. at 14, 339 A.2d at 734. Once a confession is admitted, it may be considered as corroborating evidence to prove corpus delicti beyond a reasonable doubt. *State v. Wheeler,* 92 R.I. 389, 391, 169 A.2d 7, 9 (1961).

Id., at 1143-44 (more complete citation inserted). However, the *corpus delicti* rule applies only to criminal cases. and first-offense refusal is a civil violation. The rule, therefore, is wholly inapplicable in first-offense refusal cases. Indeed, we can see this clearly in the case cited by the appeals panel — *State v. Charles Perry.* In *Perry* (discussed *ante,* at 9-10) the Court found reasonable suspicion had been shown largely on the basis of hearsay — the statement of the other motorist as well as Mr. Perry's admission that he had been driving.[15] I find no hint in the Court's opinion that the result would have been otherwise had his admission been the sole evidence that Mr. Perry had been driving. And there is no doctrinal reason why it should be otherwise.

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[15] Of course, under the Rhode Island Rule of Evidence, admissions are fully admissible, being viewed as non-hearsay. *See* R.I. Rule Evid. 801(d)(2).

When he evaluated whether Officer Bouffard had possessed, at the moment when he asked Mr. DiOrio to submit to a chemical test,[16] reasonable suspicion to believe that Mr. DiOrio had operated his motor vehicle while under the influence, the Trial Magistrate had the right to rely upon the following facts and circumstances known to him: *first*, that the Officer had gone to South County Commons looking for a particular car (with particular license plates) which had been the subject of a report from a citizen indicating that the driver might be operating under the influence; *second*, that he found the car at South County Commons; *third*, that when he approached the car, it had its lights on and the engine was running; *fourth*, that the Officer saw a sub sandwich on the front seat; *fifth*, that he spoke to the sole occupant, who was sitting in the driver's seat, who said he had just come from playing tennis in Smithfield and had stopped at D'Angelo's; *sixth*, that the man had a reddish face, slurred speech, had bloodshot, watery eyes; and *finally*, that he detected the odor of alcohol emanating from the vehicle.

On the basis of this quantum and quality of information, there

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[16] The Rhode Island Supreme Court has specifically declared that the question of whether the officer possessed reasonable grounds to believe that that the defendant had been operating under the influence must be answered by evaluating the facts and circumstances known to the officer up to the moment the defendant is asked to submit to a chemical. *See State v. Pacheco,* 161 A.3d 1166, 1174 (R.I. 2017).

can be no question but that, as of the moment he asked Mr. DiOrio to take the breathalyzer test, Officer Bouffard had reasonable grounds to believe that Appellant had operated the vehicle in the immediate past. He admitted he had driven; and there is no bar to these admissions being utilized in the reasonable-grounds analysis. That is the teaching of *Perry*. I therefore find that the Appeals Panel's ruling (that the State proved that the officer had reasonable suspicion that Mr. DiOrio had been driving under the influence) was neither clearly erroneous nor contrary to law.

B

Alleged Failure of Proof — Reasonable Suspicion for the Stop

1

Reasonableness of the Officer's Actions

We may now proceed to evaluate the merits of Mr. DiOrio's second claim of error: whether the Appeals Panel erred in deciding that Officer Bouffard possessed reasonable suspicion to stop Mr. DiOrio. For the reasons I shall now explain, I have concluded that its decision is neither clearly erroneous nor contrary to law.

We begin this inquiry from the questionable[17] assumption that, from the moment the Officer approached him, Mr. DiOrio was subjected

[17] *See* discussion *ante*, at 23, n.8.

to a "stop" within the meaning of the Fourth Amendment, as interpreted by *Terry v. Ohio* and its progeny. And so we must ask — what did the officer know at that juncture?

Well, the Officer knew that he had gone to South County Commons looking for a particular car (with particular license plates) which had been the subject of a recent report from a citizen, an employee of the D'Angelo's sandwich shop, indicating that the driver might be operating under the influence and that the operator may have left the shop without paying for his sandwich, which certainly could be viewed as theft or shoplifting. This report possessed much greater inherent reliability than that which precipitated the stop of the Messrs. Navarette.

Thus, Officer Bouffard's knowledge was based on a statement given by a private citizen to his dispatch officer. And though Officer Bouffard may not have known that person's name, and though the dispatcher may or may not have obtained it (for we do not know whether it was revealed), the caller was hardly an anonymous tipster, as that term is generally understood. Sandwich shops are small; they are not retail Goliaths. No Rhode Islander would confuse a sub shop with, shall we say, a large department store, with regard to the number of workers

they employ. The Officer could well have assumed that, if the caller's name was not yet known, it would be shortly. At the moment, he or she was merely "innominate" — *i.e.,* unnamed.[18] As a result, the officer was not, in my estimation, required to view the caller's report with the same degree of caution and suspicion which would have been appropriate for a purely anonymous tipster. It could be viewed as reasonably trustworthy; moreover, the Officer had a substantial basis for relying upon it. And so, I cannot find that the Appeals Panel erred in finding that Officer Bouffard possessed reasonable suspicion to believe Mr. DiOrio was involved in criminal activity.

2

Failure to Validate the Tip at Trial

Finally, Appellant, relying on our opinion in *Richard DiPrete v. State of Rhode Island,* A.A. 10-173, (Dist.Ct. 9/29/2011), argues that the State failed to prove, or validate, the telephone call from D'Angelo's that

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[18] *See United States v. Torres,* 534 F.3d 207, 213 (3rd Cir. 2008). In *Torres,* a cabbie called 9-1-1 to report he was following a vehicle, which he described, carrying a Hispanic man who had flashed a gun at a man trying to sell roses. *Torres*, 534 F.3d at 208. The car was stopped by police and a gun located; thereafter, Mr. Torres was indicted for possession of a firearm by a convicted felon. *Torres*, 534 F.3d at 209. The District Court granted a motion to suppress and the Government appealed. *Id.* The Third Circuit reversed, finding reasonable suspicion.

precipitated his stop by Patrolman Bouffard.[19] But, notwithstanding the fact that Mr. DiOrio has correctly cited *DiPrete*, I have concluded that I cannot rely upon its holding as I resolve the instant case. Quite frankly, it appears to me that the viability of the validation requirement espoused by this Court in *DiPrete* must now be questioned.

In *DiPrete,* we held that a state trooper who stopped a vehicle in downtown Providence based on a civilian's report did so on the basis of reasonable suspicion; however, we also found that the State's failure to validate that tip at trial, by presenting the testimony of the dispatcher or other percipient witness, was fatal to its case. Accordingly, we recommended reversal of the Appellant's conviction; and that recommendation was adopted by the Court as its Decision.

At the time, we were quite confident that the requirement of in-court validation of the tip, which we traced back to the arrest cases — *Whitely, Duffy* and *Smith, ante* — was also applicable to *Terry*-stop cases. But, conceding that, in Rhode Island, validation is still required for arrests based on probable cause,[20] I am no longer sanguine about the

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[19] As of the date of this opinion, the *DiPrete* decision may be found at https://www.courts.ri.gov/Courts/districtcourt/Appeals/decisions/10-173.pdf.

[20] Under the guidance of *Duffy* and *Smith*, discussed *ante,* at 31-33.

vitality of this doctrine, at least as it concerns *Terry*-stops predicated upon reasonable suspicion — not after *Navarette*.

In *Navarette* there clearly was no validation of the tip at trial. *See People v. Navarette*, 2012 WL 4842651, at *1–*3 (5th Cal.App.2012). The officer who received the call, who worked in Humboldt County, was never called as a witness. The stop was made in Mendocino County. But despite this fact, the U.S. Supreme Court upheld the trial court's refusal to grant the defendants' motion to suppress. *Id*. at *2.[21] Accordingly, I cannot find that the requirement of formal trial validation is still in effect; it appears to be sufficient that the information received in the phone call from D'Angelo's met the "reasonably trustworthy" standard. Consequently, I cannot find that the Appeals Panel's decision was contrary to law.

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[21] Under California's search and seizure jurisprudence the principle that the tip must be substantiated by the testimony of the officer who received it is known, according to the Appellate Court's opinion in *Navarette*, as the *Harvey-Madden* Rule (after *People v. Harvey,* 156 Cal.App.2d 516, 522-24 (1958) (concurring opinion) and *People v. Madden,* 2 Cal.3d 1017 (1970)). *People v. Navarette, id*., at *1, n.2. Before trial, the Navarettes pressed a *Harvey-Madden* Rule argument in connection with their motion to suppress; the denial of the motion was upheld by the Court of Appeals, on the theory that sufficient corroboration to the call was supplied by the testimony of the Mendocino County dispatchers and the fact that information in the tip was confirmed when the officer observed the vehicle matching the information given in the tip.

V
Conclusion

Upon careful review of the evidence presented and the pertinent law, I recommend that this Court find that the decision rendered by the Appeals Panel of the Traffic Tribunal in this case was neither clearly erroneous nor contrary to law. Accordingly, I recommend that the decision rendered by the Appeals Panel in Mr. DiOrio's case be AFFIRMED.

/s/
Joseph P. Ippolito
MAGISTRATE

December 19, 2019