STATE OF RHODE ISLAND & PROVIDENCE PLANTATIONS

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

George Fayad	**:**	
	:	
v.	**:**	**A.A. No. 13 - 103**
	:	
State of Rhode Island	**:**	
(RITT Appellate 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 & 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 28th day of January, 2014.

By Order:

_____/s/_____
Stephen C. Waluk
Chief Clerk

Enter:

_____/s/_____
Jeanne E. LaFazia
Chief Judge

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

George Fayad	:	
	:	
v.	:	**A.A. No. 2013-103**
	:	**(T13-0003)**
State of Rhode Island	:	**(07-415-018551)**
(RITT Appellate 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. George Fayad urges that an appellate panel of the Rhode Island Traffic Tribunal (RITT) erred when it affirmed a trial magistrate's decision finding him guilty of refusal to submit to a chemical test — a civil traffic violation defined in Gen. Laws 1956 § 31-27-2.1. Jurisdiction for the instant appeal is vested in the District Court by Gen. Laws 1956 § 31-41.1-9; the applicable standard of review is found in Gen. Laws 1956 § 31-41.1-9(d). This matter has been referred to me for the making of findings and recommendations pursuant to Gen. Laws 1956 § 8-8-8.1.

In his appeal Mr. Fayad presents two reasons why the appellate panel's

decision affirming his conviction should be set aside: first, that the testimony of the key prosecution witness — Lieutenant Jared Salinaro of the North Smithfield Police Department — was "incredible;"[1] second, the panel erred when it sustained the trial magistrate's finding that the arresting officer had reasonable grounds to believe Mr. Fayad had operated while under the influence of intoxicating liquor.[2] After a review of the entire record, and for the reasons stated below, I have concluded that the decision rendered by the appellate panel in this case is supported by reliable, probative, and substantial evidence of record and is not clearly erroneous; nor is it affected by error of law. I therefore recommend that the decision of the panel be AFFIRMED.

I

FACTS & TRAVEL OF THE CASE

The facts of the incident which led to the charge of refusal to submit to a chemical test being brought against Mr. Fayad are fully and fairly stated (with appropriate citations to the trial transcript) in the decision of the appellate panel, which shall be quoted extensively below. But at this juncture I shall present my own summary of the facts and travel of this case.

In the early morning of July 24, 2012 Lieutenant Jared Salinaro — an

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1 Appellant's Complaint, at 2-4.

2 Appellant's Complaint, at 4-6.

eleven year veteran of the North Smithfield Police Department who has made more than twenty drunk-driving arrests — stopped a vehicle because, after nearly hitting his marked police cruiser, it failed to keep within its lane of travel, straying across both the fog line and the lane-marker line. Trial Tr. I, at 13-14, 15-18.

When Lieutenant Salinaro spoke to the motorist, Mr. George Fayad, he accused the officer of cutting him off. Trial Tr. I, at 19. The Lieutenant noticed certain indicia of alcohol use — such as the odor associated with the ingestion of alcohol on his breath; glassy, watery eyes; slurred speech; and difficulty finding his driving documents. Trial Tr. I, at 19-20. Mr. Fayad admitted having two drinks earlier in the evening. Trial Tr. I, at 20.

The motorist took, and in the opinion of Lieutenant Salinaro, failed certain field sobriety tests. Trial Tr. I, at 21-22, 31-38. Mr. Fayad first took the horizontal-gaze nystagmus test. Then, he took the so-called "walk-and-turn" test, which has eight clues, and the detection of two is deemed to constitute a failure. Trial Tr. I, at 9. The Lieutenant identified five clues exhibited by Mr. Fayad. Trial Tr. I, at 33-36.

Appellant also took the "one-leg stand" test, which has six clues and again, the observation of two clues signifies a failure. Trial Tr. I, at 10-11, 36. Lieutenant Salinaro was able to observe two clues in the manner Appellant performed the test before Mr. Fayad aborted it. Trial Tr. I, at 37.

At this point Lieutenant Salinaro concluded that Mr. Fayad was impaired by alcohol consumption and unable to properly operate a motor vehicle. Trial Tr. I, at 38. He was given his "Rights For Use at the Scene" and arrested. Trial Tr. I, at 40-42. Appellant was transported to the police station by another officer, Lieutenant Gregory Landry. Trial Tr. I, at 42. At the police station, he was given his "Rights For Use at the Station." Trial Tr. I, at 42-44. When requested, Mr. Fayad refused to take a chemical-breath test. Trial Tr. I, at 44. He also declined the opportunity to make a telephone call. Trial Tr. I, at 44.

At his arraignment before the Traffic Tribunal on August 16, 2012, Mr. Fayad entered a not guilty plea to the charge. See Docket Sheet, Summons No. 07-415-018551. The presiding magistrate issued a preliminary license suspension.[3]

The case proceeded to trial on January 16, 2013 before Traffic Tribunal Administrative Magistrate R. David Cruise. The primary witness for the State was Lieutenant Jared Salinaro, whose testimony (mainly on direct-examination) was the source of the narrative presented above. Trial Tr. I, at 6 et seq. A second officer — Lieutenant Gregory Landry — testified as to his limited participation. Trial Tr. I, at 130 et seq. At the close of the evidence, Mr. Fayad moved to dismiss the refusal charge, but the Court denied his motion. Trial Tr. I, at 138-146.

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[3] See Order of Magistrate A. Goulart dated August 16, 2012 contained in RITT file; see also RITT Rule of Proc. 33.

Mr. Fayad then took the stand, and began his testimony by giving his background — as to his place of employment, his residence and his marital status. Trial Tr. I, at 146-49. He explained that he has an equilibrium problem caused by Meniere's Disease. Trial Tr. I, at 150. Regarding the evening in question, Mr. Fayad testified that after a choir practice at the Beneficent Church in Providence, he had dinner at a restaurant — Bravo's — with a friend. Trial Tr. I, at 152-54. They drank a bottle of wine — of which, Mr. Fayad consumed about 2½ glasses, in about 2½ hours. Trial Tr. I, at 156-57.

Mr. Fayad denied he was intoxicated or impaired when he left the restaurant at about a quarter to one in the morning. Trial Tr. I, at 157-60. He stated that he had no trouble presenting his license and registration to the officer. Trial Tr. I, at 161-62. And he maintained that he had no trouble exiting his vehicle and did not have to hold on to the car for balance. Trial Tr. I, at 162-63.

Regarding the walk-and-turn field sobriety test, Mr. Fayad denied he walked off the line. Trial Tr. I, at 164. He maintained that he completed the test successfully, in accordance with the officer's instructions. Trial Tr. I, at 166. He said he stopped performing the one-legged stand test because he "knew that my equilibrium problem would not allow me to keep my leg up in the air." Id.

Finally, on cross-examination, Mr. Fayad admitted that his equilibrium problem doesn't cause watery, bloodshot eyes, or cause an odor of alcohol to

emanate from his person, or mumbled speech. Trial Tr. I, at 168-69. And, he further conceded that he was not on medication for his equilibrium problem. Trial Tr. I, at 171. On the other hand, Mr. Fayad testified he had no memory of telling the officer that he was in fact taking medication for his equilibrium problem. Trial Tr. I, at 171. Similarly, he testified he did not recall telling the officer he had chicken picata for dinner — though that's the officer recorded and that's what he did have to eat. Id.

The trial then ended with closing arguments. Trial Tr. I, at 178 et seq.

Two days later, on January 18, 2013, Magistrate Cruise rendered his decision. He began by undertaking an extremely thorough review of the testimony given by the several witnesses in the case regarding the facts of the stop of Mr. Fayad, up to and including the moment when Lieutenant Salinaro placed him under arrest. See Trial Tr. II, at 2-10. He then found —

> Based on the totality of the circumstances, I believe there was sufficient probable cause to believe, at this point, Mr. Fayad was intoxicated. Would a reasonable and prudent person believe based on the set of circumstances that Mr. Fayad was intoxicated? I believe the answer is yes.

Trial Tr. II, at 13. And then, after reviewing the evidence touching upon the other three elements of a refusal case,[4] the trial magistrate found — to a standard of

[4] See Trial Tr. II, at 11, 14. As explained in Part III, infra at 14, these are — (2) that the motorist refused to take a chemical test, (3) that he was informed of his rights to an independent examination under Gen. Laws 1956 § 31-27-3, and (4) that he was

clear and convincing evidence — that Mr. Fayad was guilty of refusal to submit to a chemical test. Trial Tr. II, at 15.[5]

The matter was heard by an appellate panel composed of Chief Magistrate William Guglietta (Chair), Magistrate Domenic DiSandro, and Magistrate Alan R. Goulart on March 13, 2013. In its June 5, 2012 decision, the panel rejected both of Appellant Fayad's assertions of error.

First, the appellate panel decided, relying on State v. Jenkins, 673 A.2d 1094 (R.I. 1996) and State v. Keohane, 814 A.2d 327, 330 (R.I. 2003), that Officer Salinaro did have reasonable grounds to ask Mr. Fayad to submit to a chemical test.[6] The panel enumerated the items in the record that supported this finding —

> In this case, the trial judge found by clear and convincing evidence that the Officer had reasonable grounds to request Appellant to submit to a chemical test. (1/18/13, Tr. at 13.) He reasoned that Officer Salinaro considered the totality of the circumstances, including the Officer's observation that the Appellant's tires crossed the white lines, the odor of alcohol, the Appellant's bloodshot eyes,

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informed of the penalties he would incur by refusing. Appellant has not questioned the proof on these elements of the offense.

[5] The trial magistrate sentenced Mr. Fayad to pay a fine of $200, to perform 10 hours of community service, to suffer an 8-month license suspension (retroactive to August 16, 2012), to attend DWI school, and to pay the highway assessment fee, the Department of Health fee, and court costs. Trial Tr. II, at 17. He also found Mr. Fayad guilty of two additional charges contained on summons no. 07-415-018308 — Laned roadway violation and Interval between vehicles — and imposed the fine prescribed by statute ($85.00) as to each. Trial Tr. II, at 15-17.

[6] Decision of Panel, at 5-6.

> the Appellant's admission to consuming two alcoholic beverages prior to operating the vehicle, the Appellant's difficulty with locating the documents requested by the officer, and the failed field sobriety tests. (1/18/13, Tr. at 11-13.) The trial magistrate also noted that the Appellant came dangerously close to the Officer's marked police cruiser before switching into the next lane. (1/18/13, Tr. at 15.)

Decision of Panel, at 5-6. It therefore held that the trial magistrate's finding was supported by the reliable, probative and substantial evidence of record.[7]

Second, the panel rejected Mr. Fayad's assertion that the officer's testimony was incredible.[8] Citing Link v. State, 633 A.2d 1345, 1348 (R.I. 1993) and Environmental Scientific Corporation v. Durfee, 621 A.2d 200, 208 (R.I. 1993),[9] the panel noted its inability to assess the credibility of the witnesses as the trial judge can.[10]

Nine days later, on June 14, 2013, Mr. Fayad filed an appeal to the Sixth Division District Court. A conference was held before the undersigned on August 13, 2013 and a briefing schedule was set. Appellant Fayad, relying on his Complaint, declined to present an additional memorandum; the Appellee State of Rhode Island has submitted a memorandum.

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[7] Decision of Panel, at 6.

[8] Decision of Panel, at 6-7.

[9] Both Link and Environmental Scientific rely on Liberty Mutual Insurance Co. v. Janes, 586 A.2d 536 (R.I. 1991).

[10] Decision of Panel, at 6-7.

II

STANDARD OF REVIEW

The standard of review which this Court must employ is enumerated in Gen. Laws 1956 § 31-41.1.-9(d), which provides as follows:

> (d) Standard of review. The judge of the district court shall not substitute his or her judgment for that of the appeals panel as to the weight of the evidence on questions of fact. The district court judge may affirm the decision of the appeals panel, or may remand the case for further proceedings or reverse or modify the decision if the substantial rights of the appellant have been prejudicial because the appeals panel's findings, inferences, conclusions or decisions are:
> (1) In violation of constitutional or statutory provisions;
> (2) In excess of the statutory authority of the appeals panel;
> (3) Made upon unlawful procedure;
> (4) Affected by other error of law;
> (5) Clearly erroneous in view of the reliable, probative, and substantial evidence on the whole record; or
> (6) Arbitrary or capricious or characterized by abuse of discretion or clearly unwarranted exercise of discretion.

This standard of review is a duplicate of that found in Gen. Laws 1956 § 42-35-15(g), the State Administrative Procedures Act ("APA"). Accordingly, we are able to rely on cases interpreting the APA standard as guideposts in the RITT 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.' "[11] And our Supreme Court has noted that in

[11] Guarino v. Department of Social Welfare, 122 R.I. 583, 584, 410 A.2d 425

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."[12]

III

APPLICABLE LAW

A

The Refusal Statute

1. Theory of the Charge — Distinctions Between a Refusal Charge and a DWI Charge.

Any discussion of the civil offense of refusal to submit to a chemical test must begin by distinguishing it from the criminal charge of drunk driving, for although factually related in many cases, they are conceptually discrete.

Drunk driving is a criminal offense against the public health and welfare. Our Supreme Court declared in State v. Locke, 418 A.2d 843, 849 (R.I. 1980) that the statute that criminalizes drunk driving is a valid exercise of the police power, since it outlaws conduct that "affects the lives, conduct, and general welfare of the people of the state." Locke, 418 A.2d at 849.[13] The goal of the legislation is to

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(1980)(citing Gen. Laws 1956 § 42-35-15[g][5]).

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

[13] Citing People v. Brown, 174 Colo. 513, 522-23, 485 P.2d 500, 505 (1971).

reduce the "carnage"[14] perpetrated on our highways by "drivers who in drinking become a menace to themselves and to the public."[15] In sum, like the charge of reckless driving, it proscribes dangerous conduct on the highways.

On the other hand, the civil charge of refusal[16] has its origins in the implied consent law — which provides that, by operating a motor vehicle in Rhode Island, a driver impliedly promises to submit to a chemical test designed to measure the amount of alcohol in his or her blood whenever a police officer has reasonable grounds to believe he or she has driven while under the influence of liquor.[17] And

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[14] Citing DiSalvo v. Williamson, 106 R.I. 303, 305-06, 259 A.2d 671, 673 (1963).

[15] Citing Campbell v. Superior Court, 106 Ariz. 542, 546, 479 P.2d 685, 689 (1971).

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

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

[17] The implied consent law is stated in the same statute as the charge of refusal — § 31-27-2.1 — in subsection (a):

a motorist who reneges on his or her implied statutory promise to take such a test may be charged with the civil offense of refusal and suffer the penalties enumerated in the statute.[18]

In Locke, supra, the Supreme Court called suspensions under our implied-consent law "a nonviolent method of extracting consent to the minimal intrusion necessary to obtain evidence of intoxication"[19] and "critical to attainment of the goal of making the highways safe by removing drivers who are under the influence."[20] And as such, the implied-consent law has been upheld as a

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

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

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

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

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

"regulation rationally related to legitimate state interests."[21] And so, at its essence, a refusal charge is an offense against the state's scheme for monitoring (and thereby limiting) the alcohol intake of motorists on its highways. In theory — though certainly not in fact — it is akin to a charge of failing to obtain a safety inspection for one's vehicle when such an inspection is due.

The validity of the refusal charge does not depend on subsequent proof of intoxication. Indeed, the defendant's actual intoxication vel non is immaterial in a refusal case. This was the teaching of State v. Bruno, 709 A.2d 1048 (R.I. 1998), in which the trial judge acquitted Mr. Bruno because he presented a medical opinion that the behavior and other personal characteristics he exhibited during the car-stop was entirely attributable to a non-alcoholic cause.[22] Nevertheless, the Supreme Court reinstated the charge, holding that — so long as the State proves that the motorist provided an officer with indicia of intoxication sufficient to satisfy the reasonable-grounds standard — the court must affirm the violation.[23]

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[21] Locke, 418 A.2d at 850 citing McGue v. Sillas, 82 Cal. App. 3d 799, 805, 147 Cal. Rptr. 354, 357 (1978). Accordingly, the Supreme Court found that Mr. Locke's consent to giving breath samples was not involuntary. Locke, id.

[22] Bruno, 709 A.2d at 1049. The alternate cause was medication. Id. It may be noted that Mr. Fayad presented no such proof.

[23] Bruno, 709 A.2d at 1049-50. In other words, the cause of the indicia is irrelevant.

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

The four elements of a charge of refusal which must be proven at a trial are enumerated in the statute. In plain language, they are — one, that the officer had reasonable grounds to believe that the motorist had driven while intoxicated; two, that the motorist, having been placed in custody, refused to submit to a chemical test; three, that the motorist was advised of his rights to an independent test; and four, that the motorist was advised of the penalties that are incurred for a refusal.[24]

Both of the arguments Appellant has presented in this appeal relate to the first element. So it is upon this part of the law that we will concentrate our attention. Let us begin by setting out this element once again:

> … (1) the law enforcement officer making the sworn report had reasonable grounds to believe that the arrested person had been driving a motor vehicle within this state while under the influence of intoxicating liquor, toluene, or any controlled substance, as defined in chapter 28 of title 21, or any combination of these …

The language of the statute is unambiguous, except for the standard of evidence that must be present — "reasonable-grounds."

The "reasonable-grounds" standard is, to my knowledge, not seen elsewhere in Rhode Island law, so applying this test could have been problematic, had not the Rhode Island Supreme Court declared it to be equivalent to the

[24] See 31-27-2.1(c), supra at 11 n. 16.

"reasonable-suspicion" standard, which is well-known in fourth amendment litigation."[25]

But while we know the standard of evidence to be utilized, its application will never be perfunctory, there being no bright-line rule regarding the quality or quantity of the evidence must be mustered to satisfy the reasonable-grounds test; instead, a judgment must be made in each case on the basis of the totality of the circumstances present therein. We are fortunate, therefore, to have at our disposal a number of cases decided by our Supreme Court which have performed this exercise. We shall review these cases now.

I believe we may profitably commence with State v. Bjerke, 697 A.2d 1069 (R.I. 1997). In Bjerke the initial stop was justified on alternative grounds — the investigation of a criminal offense. Nevertheless, the Supreme Court paused to note the factors present in the case upon which reasonable grounds may be discerned:

> The defendant's commission of a criminal misdemeanor alone gave the officer probable cause to stop and detain him, and then from that point on, any evidence obtained pursuant to that lawful stop, such as the odor of alcohol, the slurred speech, and bloodshot eyes, would in effect be in plain view of the arresting officer and would support an arrest for suspicion of driving while under the influence. (Emphasis added).

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

Bjerke, supra, 697 A.2d at 1072. Accordingly, from Bjerke, we may draw that emitting the odor of alcohol, slurred speech and bloodshot eyes are accepted as indicia of intoxication.

Next, we may examine State v. Bruno, supra at 12. In Bruno, multiple indicia of the consumption of alcohol were exhibited. Among these were swerving and speeding, evidence of vomit in the vehicle, the odor of alcohol, slurred speech, and appearing confused.[26] Bruno, supra at 1049.

Finally, in evaluating the sufficiency of this finding of reasonable-suspicion we may consider State v. Perry, 731 A.2d 720, 723 (R.I. 1999). On the issue of driving under the influence, the Court noted front-end damage to the car, the smell of alcohol, bloodshot eyes, and stumbling. Perry, 731 A.2d at 722. Although no field tests were administered, the Supreme Court nevertheless upheld the trial court's finding that reasonable grounds were present. Perry, 731 A.2d at 722-23.

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

[26] Bruno, supra, 709 A.2d at 1048.

panel err when it upheld Mr. Fayad's conviction for refusal to submit to a chemical test?

V

ANALYSIS

As summarized above, Mr. Fayad's complaint presents two grounds upon which he asserts that the panel erred in affirming his conviction for refusal to submit to a chemical test — first, Officer Salinaro's testimony was not credible; second, Officer Salinaro did not have reasonable grounds to conclude Mr. Fayad had been driving under the influence. In essence, Appellant is arguing that the trial magistrate erred by finding Lieutenant Salinaro's testimony to be credible but, even if one does believe him, the evidence he presented was insufficient to meet the reasonable-grounds standard established in § 31-27-2.1(c)(1). But both arguments cannot be evaluated until we first determine whether the facts as found by the panel are supported by the written record certified to this Court. We shall do so at this juncture.

A. Is the Panel's Determination of the Operative Facts in this Case Supported by the Record?

In its June 5, 2013 Decision the RITT appellate panel found the following to be the significant facts of record regarding the traffic stop which resulted in the arrest of Mr. Fayad —

> On July 24, 2012, Lieutenant Jared Salinaro ("Officer

Salinaro" or "Officer") of the North Smithfield Police Department charged the Appellant with a violation of § 31-27-2.1, "Refusal to submit to a chemical test." The Appellant contested the charge, and the matter proceeded to trial on January 16, 2013.

On July 24, 2012, at approximately 1:23 a.m., Officer Salinaro was on uniformed patrol in a marked cruiser traveling northbound 146. (1/16/13, Tr. at 15.) At that time, Officer Salinaro observed, in his rearview mirror, a vehicle traveling at a high rate of speed in his direction. (1/16/13, Tr. at 16.) The vehicle proceeded to approach the Officer at a high rate of speed until it was one foot away from the Officer's vehicle, when it swerved into the left lane and passed the Officer. (1/16/13, Tr. at 17.) Officer Salinaro then observed Appellant's vehicle swerve into the left lane and back into the right lane of travel. (1/16/13, Tr. at 18.)

Subsequently, Officer Salinaro initiated a traffic stop and identified the vehicle's operator as George Fayad. (1/16/13, Tr. at 18-19.) Upon approaching the vehicle, Officer Salinaro detected a slight odor of alcohol on the Appellant, glassed over watery eyes, and slurred speech. (1/16/13, Tr. at 20.) When asked by Officer Salinaro whether he had consumed alcohol, Appellant responded that he had had two glasses of wine earlier in the evening. Id. In his testimony, Officer Salinaro also acknowledged that Appellant had difficulty locating his driver's license and registration. Id.

The Officer requested that Appellant submit to a field sobriety test, to which the Appellant consented. (1/16/13, Tr. at 21.) At trial, Officer Salinaro testified that he was properly trained in field sobriety tests and has professional experience in DUI investigations, having participated in more than twenty DUI arrests. (1/16/13, Tr. at 14.) Before the tests were administered, the Appellant notified Officer Salinaro that he had an equilibrium problem, but reassured the Officer that it should not affect his performance. (1/16/13, Tr. at 32.)

After administering the sobriety tests and concluding that the Appellant was intoxicated, Officer Salinaro took Appellant into custody and transported him to the police station. (1/16/13, Tr. at 39.) Before transporting Appellant to the police station, Officer Salinaro advised him of his rights by reading the "Rights For Use at the Scene" card. Id. In the police station's processing room, Officer Salinaro advised Appellant of his rights by reading the "Rights For Use at the Station" form. (1/16/13, Tr. at 42.) Officer Salinaro then

> asked the Appellant to submit to a chemical breath test. (1/16/13, Tr. at 44.) The Appellant refused the request. Id. Thereafter, Officer Salinaro asked the Appellant if he would like to make a phone call. Id. Appellant declined this offer. Id.

See Decision of RITT Appellate Panel, June 5, 2013, at 1-3. Officer Salinaro issued a traffic citation to Mr. Fayad for the civil offense of refusal to submit to a chemical test. After reading the entire file including the complete transcript of the proceedings on January 16, 2013 and January 18, 2013, I find that the facts recited by the panel are a fair summary of the trial Magistrate Cruise presided over.

But of course, like any summary, mine included, the appellate panel's recitation does not contain every fact brought out at the trial. Many of these items, though not all, were elicited from Lieutenant Salinaro during cross-examination and, therefore, are not disputed by the prosecution. I shall enumerate some of them here because, to a large extent, they constitute the factual basis for Appellant's assertions of error.

For example — **1.** On direct examination, Lieutenant Salinaro acknowledged that the street and city were omitted from the Sworn Report he prepared in the case. Trial Tr. I, at 48. **2.** On cross-examination, the officer conceded that he did not explain the particulars of the field tests before he asked Mr. Fayad if he had any medical issues that would affect the test — and Mr. Fayad responded that he had an equilibrium problem that would not affect the tests. Trial Tr. I, at 54-56. **3.** Officer Salinaro described Mr. Fayad as being compliant,

cooperative, and respectful. Trial Tr. I, at 33. **4.** Lieutenant Salinaro clarified that what he termed Mr. Fayad's "slurred" speech was "mumbled, but understandable." Trial Tr. I, at 56. **5.** His eyes were "moderately" bloodshot and he had a "moderate" odor of alcohol. Trial Tr. I, at 57-58. **6.** And, Mr. Fayad did not "hold on" to the car when he exited or otherwise exhibit an inability to walk, although he did lean against the bumper when he went to the rear of his vehicle. Trial Tr. I, at 71-72, 74. **7.** Officer Salinaro conceded that the time on the Rights For Use at Station card — 1:38 a.m. — was wrong, as was the time of offense on the summons — again, 1:38. Trial Tr. I, at 101, 112.

B. Did the Panel Err in Affirming the Trial Magistrate's Finding that the Testimony Given by Officer Salinaro Was Credible?

Appellant urges[27] that the testimony of Lieutenant Salinaro was not credible because he indicated — in documents[28] prepared in connection with the case —

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[27] In his complaint, Appellant Fayad presents the issue of the temporal inaccuracies in a most ominous light —

> In addition, Lieutenant Salinaro would have the Court believe that not only did he read the Rights For Use at the Scene at 1:38 a.m., but he also read the Constitutional Rights at 1:38 a.m. (Trial Tr. 108), and then, once back at the North Smithfield Police Station, he read Mr. Fayad his Rights For Use at Station 1:38 a.m. (Trial Tr. 101-02), and also that Mr. Fayad refused the chemical test at 1:38 a.m. (Trial Tr. 129).

Appellant's Complaint, at 3. In so stating Appellant neglects to mention that Lieutenant Salinaro frankly acknowledged the time errors during his testimony. See e.g., Trial Tr. I, at 112. It was therefore questionable to imply that the officer was intentionally attempting to mislead the Court.

[28] E.g., State's Exhibit No. 2.

that several things all happened at the same time, 1:38 a.m., which was, quite simply, impossible.[29] But notwithstanding the revelation of these errors, the trial magistrate found Lieutenant Salinaro's testimony to be credible.

It is of course the special role of the trier of fact to make decisions regarding the credibility of witnesses. The trial magistrate had the opportunity to view and hear Lieutenant Salinaro first-hand, as he gave extensive testimony in this case. While the trial magistrate could have decided that the inaccuracies Appellant has pointed to regarding the times at which certain events occurred diminished his credibility, he did not — and he was under no legal obligation to make such a finding.[30] The magistrate may have been persuaded that Officer Salinaro's frank concession of the errors on the documents salvaged his credibility; or, he may have been satisfied by the officer's explanation of how such computing errors may have occurred. Trial Tr. I, at 114-121. In any event, the decision of a trial magistrate on a point of fact must be decided on the basis of all the evidence before him or her, not on the basis of one factor, as the Appellant urges. Therefore, there is no legal basis for this Court to find that the appellate panel

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[29] Appellant's Complaint, at 2-4.

[30] The timing of the events in question is not an element of the civil offense of refusal, although the sequence is, at least as to some matters. For example, a fair reading of the statute would seem to require that the motorist be under arrest when he is requested to submit to a chemical test. See Gen. Laws 1956 § 31-27-2.1(c)(2), supra at 11 n. 16.

erred in failing to find that the trial magistrate erred in crediting the testimony of Lieutenant Salinaro.

C. Did the Panel Err in Affirming the Trial Magistrate's Finding That Officer Salinaro Had Reasonable Grounds to Believe Mr. Fayad Had Been Driving Under the Influence?

Mr. Fayad also urges that the State failed to prove the first element of a refusal case because Lieutenant Salinaro did not have reasonable grounds to believe that he "… had been driving a motor vehicle within this state while under the influence of intoxicating liquor …."[31] He does so by individually examining the items the State presented as indicia of intoxication and arguing that their persuasive power was diminished by circumstances present.

For instance, he reminds the Court that Lieutenant Salinaro stated Mr. Fayad's eyes were only mildly bloodshot and he exhibited only a moderate odor of alcohol.[32] And he attributes his loss of balance while standing at the rear of the car to his equilibrium problem.[33] Appellant also urges that the field sobriety tests (the walk-and-turn and the one-legged stand) were improperly conducted and were therefore of no probative value.[34] In particular, he argues that Officer

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31 See Gen. Laws 1956 § 31-27-2.1(c)(1) and Appellant's Complaint, at 4-6.

32 Appellant's Complaint, at 4.

33 Id.

34 Appellant's Complaint, at 5.

Salinaro should have explained the tests before asking Mr. Fayad if he had any medical issues that would affect the results.[35]

The State urges that the testimony of the officer regarding his observations did "clearly establish by clear and convincing evidence that Lieutenant Salinaro had reasonable grounds to believe that the defendant had operated his vehicle while under the influence of alcohol …."[36]

Let us now examine the evidence and evaluate it against the reasonable-grounds standard.

In all, the State presented six indicia that Mr. Fayad had operated under the influence: (1) he had admitted to the consumption of alcohol, (2) he had glassy, watery, and moderately bloodshot eyes, (3) his speech was slurred, or at least mumbled, (4) he emitted a moderate odor of alcohol, (5) his driving — i.e., passing the officer's vehicle too closely, and (6) his failure to properly execute two field sobriety tests.[37] To put it simply, the officer had knowledge that Mr. Fayad

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[35] Id.

[36] State's Memorandum of Law, at 4 (Emphasis in original).

[37] Appellant asserts that his unsteadiness at the rear of the vehicle was entirely attributable to a medical condition affecting his equilibrium. Appellant's Complaint, at 4. In this regard we must bear in mind the Supreme Court's teaching in State v. Bruno — that an innocent explanation for the motorist's demeanor or actions is never the issue in a refusal case, though it may be in a drunk-driving case. Bruno, supra at 13, 709 A.2d at 1050. So long as the State has proven the officer had reasonable grounds to believe the motorist was driving under the influence, the refusal charge must be

had driven dangerously, that he had consumed alcohol, and that his consumption of alcohol was affecting his appearance and his ability to perform physical tasks (i.e., the two field tests that, in the opinion of Lieutenant Salinaro, he failed).[38] And so, I believe these facts are sufficient — when measured against the standards established in prior Supreme Court decisions, particularly the Perry case — to allow this Court to find that the appellate panel's finding that Officer Salinaro possessed "reasonable grounds" to believe Mr. Fayad had driven under the influence of liquor was not clearly erroneous and was in fact supported by the reliable, probative, and substantial evidence of record.[39]

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sustained. Id. Moreover, the trial magistrate was not required to accept Mr. Fayad's testimony on this point — unsupported as it was by an expert medical opinion.

[38] Appellant argues that the officer failed to show that he adhered to the established protocol regarding the two field sobriety tests about which he testified at some length, the walk-and-turn and the one-leg stand (N.B. — the trial magistrate did not allow testimony regarding the horizontal-gaze nystagmus [HGN] test, which has not yet been accepted in Rhode Island). In large part, this arises from the officer's inability to name all the clues on the tests. I believe this failure on the officer's part was not fatal to the probative value of the tests in this refusal case. He was able to identify most of the clues — more than two as to each test — and the observation of two clues is sufficient to constitute a failure.

[39] Before concluding, I will take the opportunity to state my belief that the Superior Court decision cited by Appellant — State v. Scalisi, N3-2007-0180A, (Super.Ct. 1/23/2009) — is inapposite, not only because it is a criminal case of drunk-driving, but because it is a written decision on the ultimate issue of guilt or innocence, in which the trial justice found that, because of the officer's deviation from proper procedures in the administration of the field sobriety tests, the State had not proven beyond a reasonable doubt that the defendant had been driving under the influence, which is the sine qua non of a DUI charge. Scalisi, supra, slip op. at 3.

VI

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 that the Traffic Tribunal appellate panel issued in this matter be AFFIRMED.

/s/
Joseph P. Ippolito
MAGISTRATE

JANUARY 28, 2014