STATE OF RHODE ISLAND & PROVIDENCE PLANTATIONS

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

Joan DiOrio	:	
	:	
v.	:	**A.A. No. 13 - 148**
	:	
State of Rhode Island	:	
(RITT Appeals Panel)	:	

O R D E R

This matter is before the Court pursuant to § 8-8-8.1 of the General Laws for review of the Findings and Recommendations of the Magistrate.

After a de novo review of the record and the memoranda of counsel, the Court finds that the Findings & Recommendations of the Magistrate are supported by the record, and are an appropriate disposition of the facts and the law applicable thereto.

It is, therefore, ORDERED, ADJUDGED AND DECREED,

that the Findings and Recommendations of the Magistrate are adopted by reference as the Decision of the Court and the decision of the Appeals Panel is AFFIRMED.

Entered as an Order of this Court at Providence on this 15th day of April, 2014.

By Order:

/s/
Stephen C. Waluk
Chief Clerk

Enter:

/s/
Jeanne E. LaFazia
Chief Judge

STATE OF RHODE ISLAND & PROVIDENCE PLANTATIONS

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

Joan DiOrio	:	
	:	
v.	:	**A.A. No. 2013-148**
	:	**(T12-0078)**
State of Rhode Island	:	**(12-502-503217, 12-502-503218)**
(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. On September 14, 2012, at about 11:30 p.m., the North Kingstown Police Department received a tip advising that a dark colored vehicle with its hazard lights engaged was being driven erratically as it proceeded southbound on Route 4. When Officer Thomas Menec of the town's police department located the vehicle he observed it to cross the dotted white lines and drift into the breakdown lane. He stopped the vehicle and then, perceiving the operator to be exhibiting the customary signs of alcohol consumption, began to investigate whether the operator — the Appellant, Ms. Joan DiOrio — was guilty of drunk driving. But after the operator declined to perform field sobriety tests, she was

taken into custody. She was charged with two civil traffic violations: "Refusal to Submit to a Chemical Test," as defined in Gen. Laws 1956 § 31-27-2.1, and a "Laned Roadway" violation, as defined in Gen. Laws 1956 § 31-25-11. The case proceeded to trial in November of 2012 before a Magistrate of the Rhode Island Traffic Tribunal (RITT) and Ms. DiOrio was found guilty. Later, an appeals panel of the Traffic Tribunal affirmed her conviction, overruling the assertions of error she had presented regarding what she urged were three erroneous findings made by the trial magistrate.

The instant case constitutes Ms. DiOrio's attempt to set aside the appeals panel's decision. Jurisdiction for the instant appeal is vested in the District Court by Gen. Laws 1956 § 31-41.1-9; the applicable standard of review is found in Gen. Laws 1956 § 31-41.1-9(d). This matter has been referred to me for the making of findings and recommendations pursuant to Gen. Laws 1956 § 8-8-8.1. For the reasons stated herein, I shall recommend to the Court that the decision of the appeals panel be AFFIRMED.

I
FACTS AND TRAVEL OF THE CASE

The facts of the incident which led to the charge of refusal to submit to a chemical test being lodged against Ms. DiOrio are fully and fairly stated (with

appropriate citations to the trial transcript) in the decision of the appeals panel. I shall begin to quote from the appeals panel's narrative at the point when Officer Thomas Menec — an eleven-year veteran of the North Kingstown Police Department who had made scores of drunk-driving arrests — stopped the vehicle:

> … Officer Menec initiated a traffic stop and identified the vehicle's operator as Joan DiOrio. (11/16/12, Tr. at 22-23) Before approaching the Appellant's vehicle, Officer Menec approached a second vehicle that stopped behind his police car. (11/16/12, Tr. at 43) The operator of the second vehicle informed the officer that he/she was the person who placed the 911 call to report Appellant's erratic driving. (11/16/12, Tr. at 47) Officer Menec then excused the second vehicle and continued on to Appellant's vehicle. Id. Upon approaching Appellant's vehicle, Officer Menec detected an odor of alcohol emanating from the vehicle and noted Appellant's bloodshot watery eyes. (11/16/12, Tr. at 24-25) When asked by Officer Menec whether she had consumed alcohol, Appellant responded that she had had one or two glasses of wine earlier in the evening. (11/16/12, Tr. at 25)
>
> After Officer Menec entered Appellant's information into his computer, he then summoned Officer Todd Duchala ("Officer Duchala") to the scene for assistance. (11/16/12, Tr. at 26) As soon as Officer Duchala arrived to the scene, both officers approached Appellant's vehicle. Id. Officer Menec requested that the Appellant submit to a field sobriety test, to which the Appellant consented. Id. At trial Officer Menec testified that he was properly trained in field sobriety tests and has professional experience in DUI investigations, having participated in about a dozen DUI investigations and DUI arrests per year. (11/16/12, Tr. at 15-17)
>
> As the Appellant exited her vehicle, Officer Menec observed that she swayed and leaned against the car for balance. (11/16/12, Tr. at 27) As Officer Menec began to explain the standard field sobriety tests to Appellant, she refused to take the test. Id.[1] …

[1] Decision of Appeals Panel, at 2.

At this point, Ms. DiOrio was arrested for suspicion of drunk driving and read her "Rights For Use at the Scene."[2] Then, she was transported to the North Kingstown Police Headquarters.[3] Once there, she given was her "Rights For Use at Station and was allowed to make a number of telephone calls.[4] When asked to consent to a chemical test for the presence of alcohol in her breath, she declined.[5]

After her arraignment, Ms. DiOrio entered not guilty pleas to both charges.[6] The case proceeded to trial on November 16, 2012 before Magistrate Domenic DiSandro. The first witness for the State was Officer Menec, who gave testimony consistent with the foregoing narrative.[7] Next, the court heard from Officer Duchala.[8] The State and defense then rested.[9] After closing arguments,[10] the trial ended for the day.[11]

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[2] Decision of Appeals Panel, at 2 citing Trial Transcript I, at 28.

[3] Decision of Appeals Panel, at 2 citing Trial Transcript I, at 33.

[4] Decision of Appeals Panel, at 3 citing Trial Transcript I, at 33.

[5] Decision of Appeals Panel, at 3 citing Trial Transcript I, at 34.

[6] See Docket Sheet, Summons No. 12-302-500514.

[7] Trial Tr. I, at 13 et seq.

[8] Trial Tr. I, at 228 et seq.

[9] Trial Tr. I, at 258-59.

[10] Trial Tr. I, at 259-65 (defense) and 265-70 (prosecution).

[11] Trial Tr. I, at 270-71.

On November 21, 2012, Magistrate DiSandro rendered his decision.[12] He began by undertaking a thorough review of the testimony given by the witnesses in the case.[13] He then announced his evaluation of the State's case against Ms. DiOrio —

> … With reference to General Law 31-27-2.1, refusal to submit to chemical breath test, this court accepts the testimony of Menec and Duchala as credible, clear and convincing. This court finds that reasonable suspicion existed to stop DiOrio's vehicle based upon Menec's observation of it drift from the travel lane to the passing lane, drift back from the passing lane into the travel lane back into the breakdown lane and then drift back into the travel lane and then partially re-enter the passing lane. This Court also accepts Menec's opinion that DiOrio had operated her vehicle while under the influence of alcohol, based on the totality of circumstances that Menec observed upon making contact with DiOrio. These observaions included DiOrio's physical characteristics, bloodshot, watery eyes, a strong odor of alcohol on her person, her swaying and being unstable on her feet when exiting her vehicle, her using her vehicle for balance when exiting her vehicle and her admission to consuming one or two wines previous at dinner. …[14]

He then found that Ms. DiOrio was given her rights (both sets) correctly.[15] And he concluded she was afforded her right to make confidential telephone calls.[16]

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[12] See Trial Tr. II, passim.

[13] Trial Tr. II, at 2-25.

[14] Trial Tr. II, at 27-28.

[15] Trial Tr. II, at 28-29.

[16] Trial Tr. II, at 29.

Finally, he found that the State proved Ms. DiOrio refused to submit to a chemical test.[17]

The matter was heard by an appeals panel composed of Judge Alan Goulart (Chair), Judge Lillian Almeida, and Magistrate William Noonan on March 20, 2013. Before the appeals panel, Appellant presented three assertions of error. First, that the State had not proven that she was the operator of the vehicle; second, that the officer did not have probable cause to believe she was operating under the influence; and, third, Officer Menec lacked probable cause to arrest her at the time of the stop. In its August 22, 2013 decision, the appeals panel rejected Ms. DiOrio's assertions of error.

The appeals panel began its response to these claims of error by referencing the first element of § 31-27-2.1 — which requires the officer to have possessed "reasonable grounds" to believe the operator had been driving under the influence.[18] Then, the panel explained that "reasonable grounds" was equivalent to the standard known within Fourth Amendment jurisprudence — "reasonable

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[17] Trial Tr. II, at 29-30. The trial magistrate sentenced Ms. DiOrio to pay a fine of $300.00, to perform 30 hours of community service, to suffer an 8-month license suspension, to attend DWI school, and to pay the highway assessment fee, the Department of Health fee, and court costs. Trial Tr. II, at 34-35. He also found Ms. DiOrio guilty of the Laned Roadway violation — and imposed the fine prescribed by statute ($85.00). Trial Tr. II, at 27, 35.

[18] Decision of Appeals Panel, at 5.

suspicion."[19] The appeals panel then noted that the trial magistrate found Officer Menec did in fact have reasonable suspicion to stop the vehicle.[20] The appeals panel then considered Appellant's three claims of error.

The panel regarded her assertion of error —that the State did not prove she was the driver — was simply baseless.[21] As to her second claim of error, the appeals panel found that the officer did have reasonable suspicion to believe she had driven while under the influence; it cited the factors the trial magistrate had at his disposal in making that finding.[22] As to her third claim of error, the panel noted, citing State v. Jenkins,[23] that reasonable suspicion is the standard by which stops are evaluate.[24] The panel recounted the evidence on this point and upheld the stop. Accordingly, the appeals panel upheld Ms. DiOrio's adjudication on the charge of refusal.[25]

Nine days later, on September 3, 2013, Ms. DiOrio filed an appeal to the Sixth Division District Court. A conference was held before the undersigned on

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

[20] Decision of Appeals Panel, at 6.

[21] Decision of Appeals Panel, at 6-7.

[22] Decision of Appeals Panel, at 6.

[23] 673 A.2d 1094 (R.I. 1996).

[24] Decision of Appeals Panel, at 5.

[25] Decision of Appeals Panel, at 8.

October 16, 2013 and a briefing schedule was set. Both parties have submitted memoranda which ably relate their respective viewpoints. I have found both to be most helpful in resolving the instant case.

II
STANDARD OF REVIEW

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

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

This standard of review is a duplicate of that found in Gen. Laws 1956 § 42-35-15(g), the State Administrative Procedures Act ("APA"). Accordingly, we are able to rely on cases interpreting the APA standard as guideposts in this process.

Under the APA standard, the District Court "* * * may not substitute its

judgment for that of the agency and must affirm the decision of the agency unless its findings are 'clearly erroneous.'"[26] And our Supreme Court has noted that in refusal cases reviewing courts lack "the authority to assess witness credibility or to substitute its judgment for that of the hearing judge concerning the weight of the evidence on questions of fact."[27] This Court's review, like the Traffic Tribunal appeals panel, "is confined to a reading of the record to determine whether the judge's decision is supported by legally competent evidence or is affected by an error of law."[28]

III

APPLICABLE LAW

A

THE REFUSAL STATUTE

1

Theory — Distinctions Between Refusal and DWI Charges.

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

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26 Guarino v. Department of Social Welfare, 122 R.I. 583, 584, 410 A.2d 425 (1980) citing Gen. Laws 1956 § 42-35-15(g)(5). See also Link v. State, 633 A.2d 1345, 1348 (R.I. 1993)

27 Link v. State, 633 A.2d 1345, 1348 (R.I. 1993) citing Liberty Mutual Insurance Co. v. Janes, 586 A.2d 536, 537 (R.I. 1991).

28 Link v. State, 633 A.2d 1345, 1348 (R.I. 1993) citing Environmental Scientific Corporation v. Durfee, 621 A.2d 200, 208 (R.I. 1993).

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,[29] that the statute that criminalizes drunk driving is a valid exercise of the police power, the goal of which is to reduce the "carnage"[30] perpetrated on our highways by "drivers who in drinking become a menace to themselves and to the public."[31] In sum, like the charge of reckless driving, it proscribes dangerous conduct on the highways.

On the other hand, the civil charge of refusal[32] has its origins in the implied consent law — which provides that, by operating a motor vehicle in Rhode Island,

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[29] 418 A.2d 843, 849 (R.I. 1980).

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

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

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

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

a driver impliedly promises to submit to a chemical test designed to measure the amount of alcohol in his or her blood whenever a police officer has reasonable grounds to believe he or she has driven while under the influence of liquor.[33] And 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.[34]

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

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> noncompliance with this section; the traffic tribunal judge shall sustain the violation. The traffic tribunal judge shall then impose the penalties set forth in subsection (b) of this section.

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

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

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

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

necessary to obtain evidence of intoxication"[35] and "critical to attainment of the goal of making the highways safe by removing drivers who are under the influence."[36] And so, at its essence, a refusal charge is an offense against our State's scheme for identifying (and eliminating) drunk and unsafe drivers on our highways. In theory — though certainly not in fact — a refusal charge is akin to a charge of failing to obtain a safety inspection for one's vehicle (which is a feature of the State's effort to identify and eliminate unsafe vehicles on our roads).

The validity of a refusal charge does not depend on subsequent proof of intoxication. Indeed, the defendant's actual intoxication vel non is immaterial in a refusal case. This was the teaching of State v. Bruno,[37] in which the trial judge acquitted Mr. Bruno because he presented a medical opinion that the behavior and personal attributes he exhibited during the car-stop were entirely attributable to a non-alcoholic cause.[38] Nevertheless, the Supreme Court reinstated the charge, holding that — so long as the State proves that the motorist provided an officer

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

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

37 709 A.2d 1048 (R.I. 1998).

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

with indicia of intoxication sufficient to satisfy the reasonable-grounds standard — the Court must affirm the violation.[39]

In my view, it is this aspect of refusal law — that the metaphysical reality of what the motorist did or did not do is immaterial — that is most jarring to the uninitiated; a refusal case is not a "light" version of a drunk-driving charge. Indeed, they derive from entirely different legal fonts.[40] Instead, we focus on an issue — the question of reasonable grounds — that in all other parts of penal law is merely a preliminary question, not the ultimate question.

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

The four elements of a charge of refusal which must be proven at trial are enumerated in the statute. In plain language, they are — one, that the officer had reasonable grounds to believe that the motorist had driven while intoxicated; two, that the motorist, having been placed in custody, refused to submit to a chemical test; three, that the motorist was advised of his rights to an independent test; and four, that the motorist was advised of the penalties that are incurred for a refusal.[41]

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[39] Bruno, 709 A.2d at 1049-50.

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

[41] See 31-27-2.1(c), supra at 10 n. 32.

Since both of the arguments Appellant has presented in this appeal relate to the first element, 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 …
> (Emphasis added)

The Appellant's first three arguments relate to the phrase "arrested person," the last to the phrase "reasonable grounds."

The language of the statute is unambiguous, except for the standard of evidence that must be present — "reasonable grounds." The "reasonable-grounds" standard could have been problematic, had not the Rhode Island Supreme Court declared it to be equivalent to the "reasonable-suspicion" standard, which is well-known in fourth amendment litigation."[42]

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

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[42] 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).

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.[43] 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).[44]

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

Next, we may examine State v. Bruno, supra, in which multiple indicia of the consumption of alcohol were exhibited. Among these were swerving and

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[43] 697 A.2d at 1069 (R.I. 1997).

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

speeding, evidence of vomit in the vehicle, the odor of alcohol, slurred speech, and appearing confused.[45]

Finally, in evaluating the sufficiency of this finding of reasonable-suspicion we may consider State v. Perry.[46] 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.[47] And although no field tests were administered, the Court ruled that reasonable grounds were present.[48]

IV
ISSUE

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

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

[46] 731 A.2d 720, 723 (R.I. 1999).

[47] Perry, 731 A.2d at 722.

[48] Perry, 731 A.2d at 722-23.

V

ANALYSIS

THE APPEALS PANEL DID NOT ERR IN AFFIRMING THE TRIAL MAGISTRATE'S FINDING THAT OFFICER MENEC HAD REASONABLE GROUNDS TO BELIEVE MS. DIORIO HAD BEEN DRIVING UNDER THE INFLUENCE

In her memorandum, Ms. DiOrio presents two arguments in support of her appeal --- (1) Officer Menec did not have reasonable suspicion to stop her vehicle;[49] (2) Officer Menec did not have probable cause to arrest Ms. DiOrio.[50] We shall address each of these arguments in turn.

A

Officer Menec's Stop of Ms. DiOrio's Vehicle Was Legal, Even If the Officer Did Not Have Reasonable Suspicion to Believe It Was Being Operated By a Motorist Under the Influence.

In support of her first argument, Appellant urges that "… Officer Menec's sole basis for stopping [her] was initially based on an anonymous tip and he observed a traffic violation after following her."[51] She argues this information did not satisfy the reasonable-suspicion standard because the tip was not verified.[52] But the instant case need not turn on the strength vel non of the anonymous tip.[53]

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[49] Appellant's Memorandum, at 4-6.

[50] Appellant's Memorandum, at 6-13.

[51] Appellant's Memorandum, at 6.

[52] Appellant's Memorandum, at 6.

[53] See DiPrete v. State of Rhode Island, A.A. 10-173, (Dist.Ct. 9/29/2011) in

In fact, the record does not support the factual premise behind Appellant's argument.

Officer Menec testified that he stopped the DiOrio vehicle, not because of the tip, but because she committed a "Laned Roadway" violation, which the officer observed and described in his testimony.[54] If believed, and the trial magistrate did credit it, this testimony was sufficient to justify the stop, because traffic stops are deemed categorically reasonable under the Fourth Amendment if the police officer has probable cause to believe the motorist has committed a

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which we engaged in an extensive discussion of the law surrounding anonymous tips. DiPrete, slip op. at 27-32. The leading decisions in Rhode island regarding the probative value of anonymous tips regarding the reasonable-suspicion standard for a car stop are State v. Keohane, 814 A.2d 327, 329 (R.I. 2003) and State v. Casas, 900 A.2d 1120 (R.I. 2006). Both of these cases involve drug stops.

The United States Supreme Court was asked by the Commonwealth of Virginia to establish a separate rule for anonymous tips regarding drunk drivers but its request for certiorari was denied. Virginia v. Harris, 130 S. Ct. 10, 11-12 (2009)(Mem.)(Virginia sought certiorari from a decision of its Supreme Court requiring officers to make observations corroborating anonymous DUI tips; Roberts, C.J. and Scalia, J. file opinion dissenting from Court's denial of certiorari — criticizing what they call the "one free swerve" rule). In Harris, Chief Justice Roberts notes that a number of state supreme courts have upheld investigative stops of alleged drunk drivers even when the police officer did not observe any traffic violations before the stop. Harris, 130 S.Ct. at 11, n. 2.

[54] Trial Tr. I, at 20, 68-70.

traffic violation — even a civil traffic offense.[55] In sum, after the officer observed the laned roadway violation, the anonymous tip became irrelevant.[56]

B

Officer Menec's Arrest of Ms. DiOrio Was Legal.

The appeals panel summarized the trial magistrate's findings on the issue of "reasonable grounds" as follows —

> The trial judge further found, by clear and convincing evidence, that the Officer had reasonable suspicion to stop the Appellant's vehicle and believe that the Appellant was intoxicated. (11/21/12, Tr. at 28.) In coming to this conclusion, the trial judge considered the following: Officer Menec's observation that the Appellant drifted back and forth between lanes and eventually into the breakdown lane, the strong odor of alcohol on her person, her bloodshot watery eyes, the Appellant's admission to consuming one or two alcoholic drinks prior to operating the vehicle, her swaying and being unstable on her feet when exiting her vehicle, and her using her vehicle for balance when exiting the vehicle. Id.[57]

In my view, this is a fair summary of the more expansive factual findings made by the trial magistrate.

In all, the State presented five indicia that Ms. DiOrio had operated under the influence: (1) she had admitted to the consumption of alcohol, (2) she

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[55] United States v. Whren, 517 U.S. 806, 809-10, 116 S.Ct. 1769, 1772, 135 L.Ed.2d 89 (1996); see also State v. Bjerke, 697 A.2d 1069, 1072 (R.I. 1997).

[56] See Bjerke, supra, 697 A.2d at 1072.

[57] Decision of Appeals Panel, at 3-4.

had watery, and bloodshot eyes, (3) she emitted a strong odor of alcohol, (4) she swayed as she exited her motor vehicle, and (5) her driving — i.e., that she was unable to keep the car within a lane. In my view, to this list we may add the fact that she was driving with her hazard lights flashing. Taken together, I believe these facts are sufficient — when measured against the standards established in prior Rhode Island Supreme Court decisions, especially the Perry case — to allow this Court to find that the appeals panel's finding that Officer Menec possessed "reasonable grounds" to believe Ms. DiOrio had driven under the influence of liquor was not clearly erroneous and was in fact supported by substantial evidence of record.

However, Appellant urges that a further question (a tougher question) must be asked. Appellant cites two District Court decisions — State v. Resmini, A.A. No. 01-99 (Dist.Ct. 2003) and State v. Flanders, A.A. No. 03-134 (Dist.Ct.) — for the proposition that the prosecution in a refusal case must prove that the officer had probable cause to arrest the motorist. However, she cites no case from the Rhode Island Supreme Court for this holding. In fact, I believe the Supreme Court has directed that proving that the officer had probable cause to arrest the motorist (for suspicion of drunk driving) is not an element of a refusal case. For

this principle, I believe I can cite our Supreme Court's opinion in State v. Jenkins (1966).[58]

In Jenkins, the Court affirmed the Appellant's adjudication for refusal, holding that the officer possessed (1) reasonable-suspicion to justify the stop under the fourth amendment and (2) reasonable grounds (the equivalent of reasonable-suspicion), pursuant to § 31-27-2.1, to believe that Ms. Jenkins had driven while under the influence — thereby justifying the officer's request that she submit to a chemical test.[59] Justice Murray, writing for the Court, specifically commented that the issue of probable cause "… was unrelated to and irrelevant in the AAC trial …."[60] Thus, we must find that the issue of probable cause for arrest is immaterial in a prosecution for refusal.[61]

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58 673 A.2d 1094 (R.I. 1996).

59 Jenkins, 673 A.2d at 1097.

60 Id. Accordingly, the Court rejected Ms. Jenkins' argument that a District Court finding of no probable cause (in the DUI prosecution) would not preclude the prosecution for refusal. Id. Finally the Court's reference to the "AAC" denotes the Administrative Adjudication Court, which had jurisdiction over refusal cases at that time.

61 We may pause to note that in subsequent cases the Court has addressed the issues of reasonable-suspicion for the stop and reasonable grounds to request the motorist to submit to a chemical test, but not the issue of probable cause for arrest. See State v. Bruno, 709 A.2d 1048, 1050 (R.I. 1998) and State v. Perry, 731 A.2d 720, 723 (1999).

And whether Officer Menec had probable cause to arrest Ms. DiOrio is only an issue (material or immaterial) if we close our eyes to the fact that Officer Menec had learned, through the RILETS system, that the motorist's license had been suspended;[62] of course, driving while one's license is suspended is a criminal offense pursuant to Gen. Laws 1956 § 31-11-18. So, Officer Menec, who undoubtedly possessed probable cause on this petty misdemeanor offense, was fully authorized to arrest Ms. DiOrio.[63]

But even if we do put blinders on, and focus only on the drunk driving charge, I believe the probable-cause standard was indeed satisfied. In State v. Berker (1978)[64] the Rhode Island Supreme Court quoted the following definition of probable cause to arrest given by the United States Supreme Court in Draper v. United States (1959)[65] —

> … probable cause … to arrest within the meaning of the fourth amendment exists where the facts and circumstances within the knowledge of the arresting officer are sufficient in themselves to

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[62] Trial Tr. I, at 57-58, 115-16, 150.

[63] Accordingly, the officer told Ms. DiOrio she was being arrested for suspicion of drunk driving and driving on a suspended license. Trial Tr. I, at 150. And she was, in fact, charged with this offense. Trial Tr. I, at 41. See also Perry, supra, 731 A.2d at 723 n. 1 (arrest for leaving the scene of an accident).

[64] 120 R.I. 849, 391 A.2d 107 (1978).

[65] 358 U.S. 307, 79 S.Ct. 329, 3 L.Ed.2d 327 (1959).

> warrant a man of reasonable caution to believe that an offense has been or is being committed by the person arrested …[66]

In my view, the same six factors cited above on the issue of reasonable-suspicion suffice to satisfy the higher test of probable cause. As a result, had she been arrested solely on suspicion of drunk driving, that arrest would have been legal.

VI
CONCLUSION

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

/s/
Joseph P. Ippolito
MAGISTRATE

APRIL 15, 2014

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[66] Berker, 120 R.I. at 855, 391 A.2d at 111, citing Draper, 358 U.S. at 313, 79 S.Ct. at 333, 3 L.Ed.2d at 332, quoting Carroll v. United States, 267 U.S. 132, 162, 45 S.Ct. 280, 288, 69 L.Ed. 2d 543, 555 (1924).