STATE OF RHODE ISLAND & PROVIDENCE PLANTATIONS

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

Joshua Kolator	:	
	:	
v.	:	**A.A. No. 13 - 016**
	:	
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 13th day of March, 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

Joshua Kolator	:	
	:	
v.	:	**A.A. No. 2013-016**
	:	**(T12-0070)**
State of Rhode Island	:	**(12-302-500514)**
(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 April 27, 2012, Mr. Joshua Kolator was operating a motorcycle in the Town of Middletown when he was involved in an accident with a mini-van containing a small child and his mother. Members of the Middletown Police Department responded and, after a brief investigation, charged Mr. Kolator with Refusal to Submit to a Chemical Test, a civil traffic violation 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 October of 2012 before a Magistrate of the Rhode Island Traffic Tribunal (RITT) and Mr. Kolator was found guilty. Later, an appeals panel of the Traffic Tribunal affirmed his conviction.

The instant case constitutes Mr. Kolator'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 Mr. Kolator 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 Michael Maruska — a five-year veteran of the Middletown Police Department who had made scores of drunk-driving arrests — arrived at the scene of an accident between a mini-van and a motorcycle just after 4:00 p.m. on the afternoon of April 27, 2012 at the intersection of Aquidneck and Newport Avenues:

> … Officer Maruska then testified that upon arrival at the scene, he observed a mini-van in the middle of the roadway. (Tr. at 49.) He also observed the Appellant sitting on the grass with other people tending to Appellant due to the injuries he sustained. Id.
>
> Officer Maruska further testified that Appellant was slurring his speech, had difficulty in organizing his sentences, had bloodshot eyes, and had a strong odor of alcohol coming from him. (Tr. at 52.)

> Appellant was then treated by the paramedics and placed on a stretcher for transportation to Newport Hospital for full medical attention. (Tr. at 60-61.) Officer Maruska proceeded by questioning the Appellant while they were in the back of the rescue. (Tr. at 62.) It was at this point when Appellant notified the officer that he had two beers prior to the accident. Id. As they entered the back of the rescue, Officer Maruska also performed a field sobriety test. (Tr. at 63.) He then observed that the Appellant failed the test and had an odor of alcohol coming from his breath as well as bloodshot and watery eyes. (Tr. at 64-65.)
>
> Soon after, Officer Maruska placed the Appellant into custody and read him his rights for use at the scene. (Tr. at 65.) Once Appellant was transported to Newport Hospital, Officer Maruska read him his "Rights For Use at Hospital" and then offered the Appellant a confidential phone call, which Appellant refused. (Tr. at 67-68.) The officer then offered Appellant a blood test which the Appellant refused to take. (Tr. at 69.) …[1]

At this point, Mr. Kolator was cited for refusal to submit to a chemical test and a laned-roadway violation.

At his arraignment before the Traffic Tribunal on May 9, 2012, Mr. Kolator entered not guilty pleas to both charges.[2] The case proceeded to trial on September 20, 2012 before Magistrate Alan Goulart. The first witness for the State was Ms. Lauren Lennahan, the driver of the other vehicle, who identified Mr. Kolator and described the accident and its aftermath.[3] Then, Officer Michael Maruska took the stand and gave testimony consistent with the foregoing

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1 Decision of Appeals Panel, at 2-3.

2 See Docket Sheet, Summons No. 12-302-500514.

3 Trial Tr. I, at 7 et seq.

narrative.[4] The State and defense then rested.[5] After closing arguments, the trial ended for the day.[6]

On October 15, 2012, Magistrate Goulart rendered his decision.[7] He began by undertaking an extremely thorough review of the testimony given by the witnesses in the case regarding the facts of the incident, up to and including the moment when Officer Maruska read him the rights for use at the hospital at Newport Hospital.[8] He then found (consistent with Officer Maruska's testimony, inconsistent with Ms. Lennahan's), that Mr. Kolator was not arrested immediately upon the arrival of the police —

> … I find as a fact, that Ms. Lennahan was just absolutely mistaken when she indicated that it was her belief that the Defendant was placed into custody immediately upon the arrival of the police. The officer in this matter clearly states that Mr. Kolator was never handcuffed. That certainly makes sense to me. It is my belief that Ms. Lennahan was mistaken as it relates to her belief that the Defendant was cuffed immediately upon the police arriving. I believe -- I find as a fact that never occurred, certainly not at the scene, not in the hospital -- excuse me, not in the rescue, and I don't know when and if it ever occurred, but certainly, I believe Officer Maruska when he testified it certainly didn't occur in his presence….[9]

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4 Trial Tr. I, at 43 et seq.

5 Trial Tr. I, at 93.

6 Trial Tr. I, at 116.

7 See Trial Tr. II, passim.

8 Trial Tr. II, at 3-9.

9 Trial Tr. II, at 9.

He then made findings as to when Mr. Kolator was in fact arrested, citing with approval the testimony given by Officer Maruska —

> … Officer Maruska indicates that after he made those observations on the scene and in the ambulance, he then read Mr. Kolator his rights for use at the scene in the ambulance; that was while the ambulance was still in Middletown. He was placed into custody at that time. …[10]

And then, after reviewing the evidence touching upon the four elements of a refusal case,[11] the trial magistrate found — relying on State ex rel. Town of Portsmouth v. Hagan[12] — that the Middletown officer had the authority to enter Newport with his prisoner and finish his investigation there.[13] He also found, to a standard of clear and convincing evidence, that Mr. Kolator was guilty of refusal to submit to a chemical test.[14]

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10 Trial Tr. II, at 12.

11 See Trial Tr. II, at 11. As explained in Part III-A, infra at 12, these are — (1) that the law enforcement officer making the sworn report had reasonable grounds to believe the defendant had operated a motor vehicle while under the influence, (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 informed of the penalties he would incur by refusing. Appellant has not questioned the proof on the latter three elements of the offense.

12 819 A.2d 1256 (R.I.2003).

13 Trial Tr. II, at 15.

14 Trial Tr. II, at 11-12, 16. The trial magistrate sentenced Mr. Kolator to pay a fine of $200, to perform 10 hours of community service, to suffer a 9-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 20. He also

The matter was heard by an appeals panel composed of Judge Albert Ciullo (Chair), Administrative Magistrate R. David Cruise, and Magistrate William Noonan on December 5, 2012. In its January 11, 2013 decision, the appeals panel rejected Mr. Kolator's assertions of error.

First, the appeals panel decided, applying the test (for-arrest) from State v. Bailey,[15] that the trial magistrate's finding — that Mr. Kolator was arrested in the ambulance — was supported by the evidence of record.[16] Next, acknowledging that its review does not include making findings of credibility, the appeals panel determined that the verdict was supported by legally competent evidence and had been proven to a standard of clear and convincing evidence.[17] It also determined that — at the moment of arrest in the ambulance — Officer Maruska did have reasonable grounds to believe Mr. Kolator had driven under the influence.[18] Accordingly, it affirmed his conviction for refusal to submit to a chemical test.[19]

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found Mr. Kolator guilty of the Laned Roadway violation — and imposed the fine prescribed by statute ($85.00). Trial Tr. II, at 18.

15 417 A.2d 915 (R.I. 1980).

16 Decision of Appeals Panel, at 4-6.

17 Decision of Appeals Panel, at 6-7 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). (Note – Both Link and Environmental Scientific rely on Liberty Mutual Insurance Co. v. Janes, 586 A.2d 536 [R.I. 1991]).

18 Decision of Appeals Panel, at 7-9, relying primarily on State v. Jenkins, 673 A.2d 1094 (R.I. 1996) and State v. Keohane, 814 A.2d 327 (R.I. 2003).

19 Decision of Appeals Panel, at 10.

Nine days later, on January 18, 2013, Mr. Kolator filed an appeal to the Sixth Division District Court. A conference was held before the undersigned on March 26, 2013 and a briefing schedule was set. Both parties have submitted memoranda which ably and eloquently 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.' "[20] 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."[21]

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 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,[22] that the statute that criminalizes drunk driving is a valid exercise of the police power, since it outlaws conduct that "affects the

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[20] 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).

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

[22] 418 A.2d 843, 849 (R.I. 1980).

lives, conduct, and general welfare of the people of the state."[23] The goal of the legislation is to reduce the "carnage"[24] perpetrated on our highways by "drivers who in drinking become a menace to themselves and to the public."[25] In sum, like the charge of reckless driving, it proscribes dangerous conduct on the highways.

On the other hand, the civil charge of refusal[26] 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

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[23] Locke, 418 A.2d at 849 citing People v. Brown, 174 Colo. 513, 522-23, 485 P.2d 500, 505 (1971).

[24] Locke, 418 A.2d at 850 citing DiSalvo v. Williamson, 106 R.I. 303, 305-06, 259 A.2d 671, 673 (1963).

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

[26] 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.

grounds to believe he or she has driven while under the influence of liquor.[27] 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 and suffer the penalties enumerated in the statute.[28]

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"[29] and "critical to attainment of the goal of making the highways safe by removing drivers who are under the

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[27] 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.

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

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

influence."[30] And as such, the implied-consent law has been upheld as a "regulation rationally related to legitimate state interests."[31] 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,[32] 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.[33] 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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30 Locke, 418 A.2d at 850 citing Brown, supra, 174 Colo. at 523, 485 P.2d at 505.

31 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.

32 709 A.2d 1048 (R.I. 1998).

33 Bruno, 709 A.2d at 1049. The alternate cause proffered was prescribed medication. Id. It may be noted that Mr. Kolator did not proffer any such alternative explanation for his behavior and condition; he did not, for instance, present an expert opinion that his condition was caused, not by intoxication, but by the fact that he had been injured in the accident.

with indicia of intoxication sufficient to satisfy the reasonable-grounds standard — the Court must affirm the violation.[34]

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.[35]

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."

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

[35] See 31-27-2.1(c), supra at 9 n. 26.

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."[36]

But while we know the standard of evidence to be utilized, its application will never be perfunctory, for there is no bright-line rule regarding the quality or quantity of the evidence that must be mustered to satisfy the reasonable-grounds test; instead, a judgment must be made in each case on the basis of the totality of the circumstances present therein. We are fortunate, 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.[37] 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

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[36] 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).

[37] 697 A.2d at 1069 (R.I. 1997).

> 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).[38]

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

Next, we may examine State v. Bruno, supra, in which multiple indicia of the consumption of alcohol were exhibited. Among these were swerving and speeding, evidence of vomit in the vehicle, the odor of alcohol, slurred speech, and appearing confused.[39]

Finally, in evaluating the sufficiency of this finding of reasonable-suspicion we may consider State v. Perry.[40] 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.[41] And although no field tests were administered, the Court ruled that reasonable grounds were present.[42]

B

THE LAW OF ARREST IN RHODE ISLAND

Curiously, although sections within the General Laws tell us how an arrest

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38 Bjerke, 697 A.2d at 1072.

39 Bruno, 709 A.2d at 1049.

40 731 A.2d 720, 723 (R.I. 1999).

41 Perry, 731 A.2d at 722.

is made and under what circumstances an arrest is authorized, no provision contains a concise definition of the term "arrest." Similarly, although many case decisions teach us how to apply a four-part test for determining whether a particular individual is, in fact and law, "under arrest," neither can such a definition be found in any reported decision of our Supreme Court.[43]

Without local guidance, we are therefore free to invoke the following definition from Blackstone's Commentaries, which I present with its accompaniment —

> The apprehending or restraining of one's person, in order to be forthcoming to answer alleged or suspected crime. To this arrest all persons whatsoever are, without distinction, equally liable to all criminal cases: but no man is to be arrested, unless charged with such a crime as will at least justify holding him to bail, when taken. (Emphasis added)[44]

The definition in the first sentence is no surprise — arrest is an apprehension for the purpose of having the arrestee answer to a charge. And the second sentence, which we shall revisit, tells us that one can only be arrested for a criminal case.

1

Statutory Provisions

We may start our enumeration with Gen. Laws 1956 § 12-7-7, entitled

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

[43] See State v. Jiminez, 33 A.3d 724 (R.I. 2002).

[44] 4 William Blackstone, Commentaries, *286 (1769).

"Methods of arrest" which states:

> An arrest is made by the restraint of the person to be arrested or by his or her submission of his or her person to the custody of the person making the arrest.

Arrests following this methodology are authorized by two statutes found in Chapter 12-7 of the General Laws, entitled "Arrest." They are Gen. Laws 1956 § 12-7-4, for felonies, and Gen. Laws 1956 § 12-7-3, which allows officers to make arrests without warrants in misdemeanor cases, under certain conditions. It provides:

> A peace officer may, without a warrant, arrest a person if the officer has reasonable cause to believe that the person is committing or has committed a misdemeanor or a petty misdemeanor, and the officer has reasonable ground to believe that person cannot be arrested later or may cause injury to himself or herself or others or loss or damage to property unless immediately arrested.

As we can see, the statute, broadened in 1971, permits a warrantless arrest for a misdemeanor or a petty misdemeanor — but only if the officer has reason to believe either (1) the person could not be arrested later or (2) the person will cause personal injury or property damage.

2

Case Law

We must also examine the question from a case law perspective, a more intricate inquiry. Although the making of an arrest was originally viewed as an issue

within the exclusive province of the law of criminal procedure, such issues now seen to be subject to Fourth Amendment considerations.[45] And this linkage operates at a fundamental level. We can see this in a recent case which enumerates the factors by which we may determine whether a person is "under arrest" — State v. Jimenez (2011):[46]

> It is a fundamental principle that '[a] person is seized or under arrest for Fourth Amendment purposes if, in view of all the circumstances, a reasonable person would believe that he or she was not free to leave.' " State v. Vieira, 913 A.2d 1015, 1020 (R.I.2007) (quoting State v. Diaz, 654 A.2d 1195, 1204 (R.I.1995)). This Court has stated that the following four factors may be considered in making this determination: "(1) the extent to which the person's freedom [was] curtailed; (2) the degree of force employed by the police; (3) the belief of a reasonable, innocent person in identical circumstances; and (4) whether the person had the option of not accompanying the police." Id.; see also State v. Briggs, 756 A.2d 731, 737 (R.I.2000).[47]

Within this excerpt the most prominent feature is undoubtedly the four-part test for determining whether a particular individual is under arrest at a given moment.[48]

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[45] The Fourth Amendment provides — "The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated … ."

[46] 33 A.3d 724 (R.I. 2011).

[47] Jimenez, 33 A.3d at 732. This is a restatement of the test contained in State v. Bailey, supra.

[48] But we should not overlook the preliminary question which the Court posed — Was the person "seized?" And, what is a "seizure" within the meaning of the Fourth Amendment? 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, 100 S.Ct. 1870, 1877 (1980). The test

On the other hand, traffic stops — which have been equated with Terry stops[49] — are deemed categorically reasonable under the Fourth Amendment if the police officer has probable cause to believe the motorist has committed a traffic violation — even a civil traffic offense.[50]

C

LAW OF EXTRA-TERRITORIAL AUTHORITY OF POLICE OFFICERS

Anyone attempting to acquire an overview of Rhode Island law regarding the authority of municipal police officers to act outside their city or town of employment would do well to begin with the following excerpt from our Supreme Court's decision in State v. Ceraso:[51]

> In the absence of a statutory or judicially recognized exception, the authority of a local police department is limited to its own jurisdiction. See Page v. Staples, 13 R.I. 306 (1881). There are two exceptions to the general rule. First, when the police are in "hot pursuit" of a suspect, they may cross into another jurisdiction pursuant to § 12-7-19. Second, in emergency situations, it may be necessary and appropriate for the police

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employed to answer this question is whether, under the circumstances, "… a reasonable person would have believed that he was not free to leave." Mendenhall, 446 U.S. at 554, 100 S.Ct. at 1877; Florida v. Royer, 460 U.S. 491, 501-02, 103 S.Ct. 1319, 1326 (1983).

[49] They have been equated as to their briefness, although conceptually they are very much distinguishable.

[50] United States v. Whren, 517 U.S. 806, 809-10, 116 S.Ct. 1769, 1772, 135 L.Ed.2d 89 (1996). An interesting question which is still unresolved is whether a vehicle may be stopped if the officer has only "reasonable suspicion" of the commission of a traffic violation.

[51] 812 A.2d 829 (R.I. 2002).

> from one jurisdiction to exercise authority in another jurisdiction. See § 45-42-1; State v. Locke, 418 A.2d 843, 847 (R.I. 1980); Cioci v. Santos, 99 R.I. 308, 315, 207 A.2d 300, 304 (1965).[52]

From this quotation we may glean two central precepts regarding the territorial authority of police officers — first, absent a statutorily or judicially created exception, the rule in Rhode Island is now, as it has been for many years,[53] that municipal police officers have no authority to act outside their home jurisdictions; second, that there were in 2002 (when Ceraso was decided[54]) only two statutory exceptions to this rule: [1] a provision which allows, under certain circumstances, an officer to follow a motorist into another city or town in order to make an arrest[55] and [2] a statute which allows the police chief of one municipality to transfer one or more officers to assist in another municipality during the course of an emergency.[56] Both of the statutory exceptions are clearly inapplicable to the

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52 Ceraso, 812 A.2d at 833.

53 See Page v. Staples, 13 R.I. 306, 307-08 (1881). The Court in Page cites two such exceptions: [1] an officer with custody of a prisoner under a writ of habeas corpus may travel through other jurisdictions to get to the place where the writ is returnable, and [2] an officer whose prisoner has escaped may retake the prisoner in another jurisdiction if in "fresh pursuit." Id.

54 In Ceraso, the Court noted, with apparent approval, the recent enactment of a law that would soon be providing a third legal basis for municipal officers to exercise authority extraterritorially — municipal agreements. Ceraso, 812 A.2d at 836 n. 3. See Gen. Laws 1956 § 45-42-2.

55 Gen. Laws 1956 § 12-7-19.

56 Gen. Laws 1956 § 45-42-1. The Supreme Court proceeded to evaluate the

instant case, and so we shall give them no further comment. Instead, we may concentrate our attention on exceptions created by judicial decision.

In my view three such decisions are plausibly pertinent to the instant case. The first is Cioci v. Santos[57]— an action for false imprisonment. Mr. Cioci urged, relying on Page v. Staples, supra, that his detention by members of the Cumberland Police Department, even if initially lawful, became illegal when he was taken by ambulance to the Memorial Hospital in Pawtucket and, later, to the Chapin Hospital in Providence.[58] Although the Court did not reach the issue of the legality of the movement of the plaintiff, it found without hesitation "… that the dictates of public policy require also that police officers who have a citizen in their lawful custody be not deterred from acting to protect the well-being of such person … ."[59]

The second decision which must be considered is State v. Locke,[60] 418 A.2d 843 (R.I. 1980), an appeal from a conviction for drunk driving brought against Mr. Locke by the Charlestown Police. Mr. Locke argued, relying on Page v. Staples, supra, that the breathalyzer results should be suppressed because they

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applicability of each provision, ultimately deciding that § 45-42-1 sanctioned the officer's arrest of Mr. Ceraso. Ceraso, 812 A.2d at 833-36.

57 99 R.I. 308, 207 A.2d 300 (1965).

58 Cioci, 99 R.I. at 314.

59 Cioci, 99 R.I. at 315.

were illegally obtained — in Westerly, at the Westerly Police station, where he had been taken because Charlestown did not yet have a breathalyzer machine of its own.[61] The Supreme Court distinguished Page v. Staples and declared that the Cioci case "controls the issue before us."[62] The Court found Mr. Locke's trip to Westerly was "justified" and that the need to have the test given "without delay" did constitute an "emergency" — i.e., the police had to decide whether the motorist was "a potentially dangerous operator who had to be removed from the highway."[63]

The third case is State ex rel. Town of Portsmouth v. Hagan,[64] which the Town brought to the Supreme Court by way of writ of certiorari, seeking to overturn the suppression of breathalyzer results and certain other items of evidence — on the ground that the Portsmouth Police had no authority to transport Mr. Hagan to the Middletown Police station in order use the Breathalyzer there, since Portsmouth's had malfunctioned.[65] After reviewing Page v. Staples, supra, State v. Ceraso,[66] a case construing and applying Gen. Laws 1956

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60 418 A.2d 843 (R.I. 1980).

61 Locke, 418 A.2d at 846.

62 Locke, 418 A.2d at 847.

63 Locke, 418 A.2d at 848.

64 819 A.2d 1256 (R.I. 2003).

65 Hagan, 819 A.2d at 1256-58.

66 812 A.2d 829 (R.I. 2002).

§ 45-42-1, which allows police chiefs to transfer officers in an emergency, Cioci v. Santos, supra, State v. Locke, supra, and State ex rel. Town of Middletown v. Kinder,[67] in which the Court applied Gen. Laws 1956 § 12-7-19, which allows municipal officers to make extraterritorial arrests of persons whom they have followed in close pursuit, the Court decided to sanction the actions of the Portsmouth Police.[68]

The Court specifically noted two factors that influenced its decision in Hagan. First, the legitimacy of the purpose for the transfer was unassailable, since it had been previously recognized in Locke.[69] Secondly, the Court focused on the fact that Mr. Hagan was already in lawful custody before he was transported.[70] Accordingly, the order of suppression was quashed.[71]

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 Mr. Kolator's conviction for refusal to submit to a chemical test?

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67 769 A.2d 614 (R.I. 2001).

68 Hagan, 819 A.2d at 1261.

69 Hagan, 819 A.2d at 1259-60.

70 Hagan, 819 A.2d at 1260-61.

V
ANALYSIS

Mr. Kolator's approach in this appeal is somewhat unusual — he argues the case in the alternative, depending on when it is found that he was arrested: first, assuming he was arrested before he entered the ambulance, he asserts he was arrested prematurely — before the members of the Middletown Police Department developed probable cause;[72] second, assuming he was arrested just after he entered the ambulance, the arresting officer was still without probable cause to arrest Mr. Kolator; [73] and third, if Mr. Kolator is not deemed to have been arrested until he arrived at Newport Hospital his arrest was illegal (i.e., extra-territorial).[74] Fourth, on an unrelated point, he urges that the officer who cited him did not have reasonable grounds to believe that Mr. Kolator had driven his motor vehicle while under the influence.[75]

To address the first three issues individually, in seriatim, would be needlessly repetitive. Collectively, they require us to answer but one question — Is the appeals panel's finding that Mr. Kolator was arrested in Middletown while in the ambulance supported by the reliable, probative, and substantial evidence of

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71 Hagan, 819 A.2d at 1261.

72 Appellant's Memorandum, at 5-8.

73 Appellant's Memorandum, at 8-10.

74 Appellant's Memorandum, at 10-15.

record or is it clearly erroneous?

A

THE APPEALS PANEL'S DETERMINATION OF THE MOMENT OF ARREST IS SUPPORTED BY THE EVIDENCE OF RECORD

Of the full narrative presented by the appeals panel within the Facts and Travel portion of its January 13, 2013 decision, the following portion is pertinent to the question of his arrest —

> … Appellant was then treated by the paramedics and placed on a stretcher for transportation to Newport Hospital for full medical attention. (Tr. at 60-61.) Officer Maruska proceeded by questioning the Appellant while they were in the back of the rescue. (Tr. at 62.) It was at this point when Appellant notified the officer that he had two beers prior to the accident. Id. As they entered the back of the rescue, Officer Maruska also performed a field sobriety test. (Tr. at 63.) He then observed that the Appellant failed the test and had an odor of alcohol coming from his breath as well as bloodshot and watery eyes. (Tr. at 64-65.)
>
> Soon after, Officer Maruska placed the Appellant into custody and read him his rights for use at the scene. (Tr. at 65.) …[76]

This narrative was essentially repeated in the Analysis portion of the opinion.[77] The appeals panel then made the following conclusion of fact and law —

> … Officer Maruska placed the Appellant in custody and read him his rights for use at scene while in the rescue vehicle. (Tr. at 65.)
>
> Moreover, the trial magistrate made a factual finding that a legally valid arrest was effectuated when the Appellant was in the ambulance and the ambulance was still in Middletown. (Decision Tr.

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[75] Appellant's Memorandum, at 15-16.

[76] Decision of Appeals Panel, at 2.

[77] Decision of Appeals Panel, at 5.

> at 12.) In rendering his decision, the trial judge clearly stated: "Officer Maruska … then read Mr. Kolator his rights for use at the scene in the ambulance; that while the ambulance was still in Middletown. He was placed into custody at that time." Id. After the arrest, Officer Maruska read the Appellant his "Rights for Use at the Station/Hospital" card pursuant to § 31-27-3. Thus, this Panel is satisfied that the trial magistrate's factual findings regarding Appellant's time and manner of arrest are supported by credible and competent evidence and not characterized by abuse of discretion or error of law.[78]

Thus, the trial magistrate believed Officer Maruska and did not give credence to Ms. Lennahan's testimony on this point — even though the officer did not mention he arrested Mr. Kolator in the ambulance in the written report he made on the case.[79] Nevertheless, as the fact-finder, who saw and heard the witnesses first-hand, it was within his province to do so. This Court, like the appeals panel, "lacks the authority to assess witness credibility or to substitute its judgment for that of the hearing judge concerning the weight of evidence on questions of fact."[80]

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78 Decision of Appeals Panel, at 5.

79 In his argument on this point, Appellant urges that Ms. Lennahan was right and Officer Maruska wrong. Appellant's Memorandum, at 8-9. He does not argue, in the alternative, that Officer Maruska's actions in the ambulance, even if believed, would not satisfy the four-part test for arrest enumerated in Bailey, supra (or more recently in Jiminez, supra). If Officer Maruska's testimony is believed, it would seem that he took all reasonable steps to convey Appellant's change in status to him without interfering in the work of the ambulance staff.

80 Link, supra, at 1348.

B

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

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

> In sustaining the violation, the trial magistrate held the officer's observation of Appellant's motorcycle lying on the ground, Appellant's slurred speech, bloodshot eyes, and the strong odor of alcohol coming from him constituted reasonable grounds for Officer Maruska to believe that Appellant had driven his vehicle under the influence of alcohol. (Decision Tr. at 6-7.); See Jenkins, 673 A.2d 1097. Additionally, the testimony given by Ms. Lennahan which indicated that Appellant was operating his motorcycle is competent evidence to conclude that Appellant was, in fact, operating a motor vehicle that evening. [State v.] Lusi, 625 A.2d [1350], at 1356 [R.I. 1993]. Lastly, the trial magistrate noted that Officer Maruska was trained in DUI investigation and familiar with the characteristics of intoxication, indicating Officer Maruska's ability to properly identify Appellant as intoxicated. (Decision Tr. at 5-6.) Therefore, Officer Maruska did have reasonable grounds to believe that Appellant had operated a motor vehicle under the influence of alcohol.[81] (Abbreviated citation completed)

In my view, this is a fair summary of the more expansive factual findings made by the trial magistrate.[82]

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[81] Decision of Appeals Panel, at 8-9.

[82] In his extensive summary, the trial magistrate made the following findings of fact pertinent to the issue of whether the officer had reasonable grounds to believe Mr. Kolator had been driving under the influence —

> … When he approached the Defendant, he was slurring his speech; his eyes were bloodshot. He noticed a laceration on his face, the Defendant's face. He had difficulty – he, being the Defendant, had

In all, the State presented five indicia that Mr. Kolator had operated under the influence: (1) he had admitted to the consumption of alcohol, (2) he had watery, and bloodshot eyes, (3) his speech was slurred, (4) he emitted a strong odor of alcohol, and (5) his driving — i.e., that his motorcycle had left the roadway prior to the accident. And so, 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 Maruska possessed "reasonable grounds" to believe

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> difficulty organizing his sentences, and there was an odor of alcohol, which he indicated was strong, coming from the Defendant. The paramedics arrived. He was placed in the rescue and treated. Initially, he was treated while he was still in the grassy area. Eventually, he was placed on a stretcher and taken by ambulance to the Newport Police – police hospital – Newport Hospital. While in the ambulance, the officer, Officer Maruska made additional observations of the Defendant. He determined that he was under the influence. He was satisfied that he had sufficient evidence to establish probable cause, that the defendant was operating under the influence …

Trial Tr. II, at 7. After describing the events at Newport Hospital, he added —

> Other observations of the Defendant by the officer in the rescue were, again, the odor of alcohol coming from him, his eyes being bloodshot and watery, and the Defendant indicated that, for the record, he had only had two beers. On cross-examination Officer Maruska admitted that the Defendant had suffered a head injury. That his speech was slurred. He had trouble putting thoughts together. …

Trial Tr. II, at 8. Based on these observations, the trial magistrate found that Officer Maruska had probable cause to arrest Mr. Kolator for drunk driving and, regarding the refusal charge, reasonable grounds to believe the Appellant had been operating under the influence. Trial Tr. II, at 12-13.

Mr. Kolator had driven under the influence of liquor was not clearly erroneous and was in fact supported by substantial evidence of record.

C

THE APPEALS PANEL DID NOT ERR IN AFFIRMING THE TRIAL MAGISTRATE'S FINDING THAT THE ACTIONS OF THE MIDDLETOWN POLICE WERE NOT BARRED BY THE TERRITORIAL LIMITS ON THEIR AUTHORITY

Mr. Kolator urges that his arrest in Newport by Middletown officers was unlawful. We need not tarry long addressing this argument since we have already determined that the appeals panel did not err when it affirmed the trial magistrate's finding that Mr. Kolator was arrested in Middletown. And so, the issue of extraterritorial arrest is certainly not worthy of further comment.

But, in a subtle way, Appellant also questions the right of the Middletown Police to merely gather evidence at the hospital in Newport, which they unquestionably did;[83] after all, it was there that Mr. Kolator actually refused to submit to a chemical test. And so, we must answer the question — Were Officer Maruska's efforts to gather evidence in Newport lawful?

In my view, this is also not a difficult issue to resolve. Let us undertake to pose the questions that the Supreme Court has declared significant in this area. First, why was Mr. Kolator transported? The record is clear on this point; he was transported by the rescue personnel for medical reasons. Thus, the Cioci case is

[83] Appellant's Memorandum, at 12.

perfectly apt.[84] Second, what was Mr. Kolator's status? He was an arrestee, and the Court has repeatedly stated that that it is more amenable to post-arrest extraterritorial transport than to such a trip made made pre-arrest. And so, for these reasons, I believe the Supreme Court would not hesitate to put its imprimatur on the actions of the Middletown Police at Newport Hospital. Put simply, if the transport was legal, the evidence gathering must be as well.

[84] The Appellant's insinuation that Cioci is distinguishable because the police transported Mr. Cioci, is wrong factually and, I believe, legally. Appellant's Memorandum, at 14. Mr. Cioci was transported to Memorial Hospital by ambulance. He was later transported to the Chapin Hospital, seemingly by the police.

Secondly, I cannot conceive that the Supreme Court, as a policy matter, would find an arrestee being transported to a medical facility by a police car preferable to being transported in an ambulance staffed by trained rescue personnel.

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

MARCH 13, 2014