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

Kenneth Ribeiro	:	
	:	
v.	:	**A.A. No. 11 - 0167**
	:	
State of Rhode Island	:	

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 12th day of April, 2012.

By Order:

/s/
Melvin Enright
Acting Chief Clerk

Enter:

/s/
Jeanne E. LaFazia
Chief Judge

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

Kenneth Ribeiro	**:**	
	:	
v.	**:**	**A.A. No. 11-167**
	:	**(T11-0036)**
State of Rhode Island	**:**	**(07-409-055592)**
(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. Kenneth Ribeiro urges that an appeals panel of the Rhode Island Traffic Tribunal erred when it affirmed a trial magistrate's verdict finding him guilty of refusal to submit to a chemical test, a civil violation, in violation of Gen. Laws 1956 § 31-27-2.1. This matter has been referred to me for the making of findings and recommendations pursuant to Gen. Laws 1956 § 8-8-8.1. Jurisdiction for the instant appeal is vested in the District Court by Gen. Laws 1956 § 31-41.1-9; the applicable standard of review may be found in Gen. Laws 1956 § 31-41.1-9(d).

In his appeal Mr. Ribeiro presents a single reason why the decision of the

panel should be set aside: that the charge against him should have been dismissed[1] because his case was not scheduled for arraignment within two weeks of the issuance of his citation, as prescribed by Rule 33 of the Traffic Tribunal Rules of Procedure. Appellant's Memorandum of Law, at 3-4.

After a review of the entire record, and for the reasons stated below, I have concluded that the decision of the appellate panel in this case is not clearly erroneous and not affected by error of law; I therefore recommend that the decision of the appellate panel be affirmed.

I. TRAVEL[2] OF THE CASE

The travel of the instant case be synopsized thusly — On April 21, 2011, Officer James Grennan of the Providence Police Department charged Mr. Kenneth Ribeiro with refusal to submit to a chemical test in violation of Gen. Laws 1956 § 31-27-2.1. Officer Grennan scheduled Mr. Ribeiro's arraignment for May 10, 2011. (Arraignment Transcript, at 1). But on May 10, 2011, appellant was

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[1] Mr. Ribeiro first took an appeal from the trial magistrate's denial of his Motion to Dismiss (based on his tardy arraignment). This appeal — assigned number T11-036 by the panel — was not heard immediately, being interlocutory. See Decision of Appellate Panel, at 2 n. 3. Mr. Ribeiro's second appeal to the panel, taken after trial, denominated T11-043. As we shall see, that appeal was not fully perfected and was dismissed.

[2] Given the basis of the Mr. Ribeiro's appeal, a full discussion of the facts of appellant's arrest shall not be necessary. A short outline of the travel of the case shall suffice.

not arraigned — instead, his case was reassigned to May 17, 2011 for arraignment and argument on his Motion to Dismiss. (Arraignment Transcript, at 1).

At that time he entered a plea of not guilty. In support of his Motion to Dismiss Mr. Ribeiro argued that his original arraignment date (May 10, 2011) was beyond the two-week time-limit prescribed for arraignments in refusal cases by Rule 33 of the Traffic Tribunal Rules of Procedure. (Id., at 2-3). He argued that this transgression of Rule 33 required that his case be dismissed. (Id., at 3-5). However, the trial magistrate held that dismissal was not required, notwithstanding the facial violation of Rule 33, absent a showing of prejudice; finding no prejudice, he denied the Motion. (Id., at 11).

The trial began on May 19, 2011 before a magistrate of the Traffic Tribunal. After appellant was found guilty, he filed a second appeal, which was consolidated with his earlier appeal (from the denial of his Motion to Dismiss) for oral argument before an appellate panel comprised of Magistrate William Noonan (Chair), Judge Edward Parker, and Judge Albert Ciullo on September 21, 2011. However, Mr. Ribeiro's appeal from the trial verdict was dismissed because it was not perfected.[3]

On November 4, 2011, the panel issued a written decision in which Mr. Ribeiro's argument was rejected. In brief, the appellate panel held that the two-

[3] This appeal was deemed not perfected because appellant did not present a complete trial transcript, as required by Gen. Laws 1956 § 31-41.1-8. See Decision of Panel, at 1 n.1.

week arraignment time-frame enunciated in Rule 33 is intended to provide the Tribunal with an expedited opportunity to consider whether a preliminary license-suspension should issue, thereby removing a potentially dangerous driver from the public roadways. Decision of Appellate Panel, at 4-5. The panel held that a showing of prejudice would be required before a Rule 33 violation could properly justify the "extreme" remedy of dismissal. Id., at 5.

Applying these principles to Mr. Ribeiro's case, the panel noted appellant had failed to identify any prejudice he had suffered as a result of the violation of Rule 33 — which, the panel commented, was "marginal at best", since his arraignment was scheduled a mere three days after the two-week period had expired. Id. Finally, the panel distinguished a prior decision of the panel in which a refusal case was dismissed on account of a Rule 33 violation — State of Rhode Island v. Ladieu, T10-022 (RITT App. 9/1/10) — because in Ladieu prejudice had been shown. Decision of Appellate Panel, at 5-6. Accordingly, the panel affirmed the trial magistrate's denial of appellant's Rule 33 Motion to Dismiss. Id., at 7.

On November 14, 2011, appellant filed an appeal in the Sixth Division District Court. A conference was held before the undersigned on February 7, 2012 and a briefing schedule was set. Helpful memoranda have been received from Appellant Kenneth Ribeiro and the Appellee State of Rhode Island.

II. STANDARD OF REVIEW

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

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

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

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

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

questions of fact.[5] Stated differently, the findings of the panel will be upheld even though a reasonable mind might have reached a contrary result.[6]

III. APPLICABLE LAW

Mr. Ribeiro was charged with refusal to submit to a chemical test, a civil violation within the jurisdiction of the Rhode Island Traffic Tribunal. See Gen. Laws 1956 § 31-27-2.1. Proceedings before the Traffic Tribunal are governed by its Rules of Procedure, one of which — Rule 33 — is directed toward refusal cases. It states, in pertinent part:

> **33. Refusal to submit to chemical test cases. —** (a) General procedure. The adjudication of summonses which include charges brought for violation of § 31-27-2.1 of the general laws may follow the procedure established by these rules except that arraignment in refusal cases shall be scheduled for two (2) calendar weeks after the date the citation was issued. The judicial review of the officer's report for the possible suspension of license shall be conducted at the arraignment on said charge.
> (b) * * *. (Emphasis added).

Thus, refusal cases are treated like other cases, except that they are directed to be scheduled for arraignment in two weeks. Regarding other cases, the rules do not prescribe a time period for arraignment. See Traffic Tribunal Rule of Proc. 3(b).

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

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

IV. ISSUE

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

V. ANALYSIS

In this appeal Mr. Ribeiro raises a single argument — that the trial magistrate committed error (which the panel compounded) by denying Mr. Ribeiro's Motion to Dismiss. As quoted supra at 6, Rule 33(a) requires arraignments in refusal cases to be scheduled two calendar weeks after the issuance of the citation. Mr. Ribeiro, who was cited on April 21, 2011, was scheduled to be arraigned on May 10, 2011 — three days beyond the prescribed time frame. He therefore argues that Rule 33(a) was plainly violated and he was entitled to a dismissal of the refusal charge for which he had been cited. However, for the reasons that follow, I believe that the trial magistrate did not commit error by denying Mr. Ribeiro's Motion to D ismiss.

A. Rule 33(a) and Its Purpose.

We begin by considering the meaning and purpose of Rule 33(a).

I agree with the appellate panel that the purpose of Rule 33's scheduling mandate is to give the RITT the means to expedite refusal cases — which are the most important within its jurisdiction and which, since they involve allegedly impaired drivers, strongly implicate considerations of highway safety. See State v. Locke, 418 A.2d 843, 847 (R.I. 1980). See also State's Memorandum, at 4. It is particularly vital that refusal arraignments are not delayed, since it is at the arraignment that the Court considers whether to issue a license suspension. See Traffic Tribunal Rule Proc. 33(a). For these reasons, I believe Rule 33(a) has a broad public policy purpose related to highway safety; in my view the rule does not vest individual defendants with an enforceable right to a prompt arraignment akin to the speedy trial right accorded to criminal defendants. See Barker v. Wingo, 407 U.S. 514, 92 S.Ct. 2182, 33 L.Ed. 2d 101 (1972), State v. Oliveira, 961 A.2d 299, 316-19 (2008) and United States Constitution, Amend. VI.[7]

[7] See also State v. Paquette, 117 A.2d 505, 510-11, 368 A.2d 566, 569-70 (1977), construing the right to a speedy trial arising under Rule 48(b) of the Rules of Criminal Procedure, which did not require a showing of prejudice. This rule was subsequently repealed.

It should be noted that the charges of Refusal to Submit to a Chemical Test (Second Offense Within 5 Years) and Refusal to Submit to a Chemical Test (Third Offense or Subsequent Within 5 Years) are misdemeanors. See Gen. Laws 1956 § 31-27-2.1(b)(2) and § 31-27-2.1(b)(3). Accordingly, persons charged with these crimes are undoubtedly entitled to the speedy trial rights afforded by the sixth and fourteenth amendments to the U.S. Constitution.

B. Rule 33(a)'s Scheduling Mandate Is Directory, Not Mandatory.

In weighing the proper construction to be given Rule 33(a), we must also consider whether its scheduling provision must be viewed as mandatory or directory. I believe it is the latter.

When Rhode Island courts consider whether a statutory provision should be read as directory or mandatory, we are governed by the legislature's intention.[8] See State v. Suero, 721 A.2d 426, 428 (R.I. 1998) citing Roadway Express Inc. v. Rhode Island Commission For Human Rights, 416 A.2d 673, 674 (R.I. 1980). And while courts strive to apply the plain meaning of statutes the Rhode Island Supreme Court has noted that this rule has exceptions. For instance, in In re Doe, 440 A.2d 712 (R.I. 1982) the Court noted:

> In situations where a slight delay on the part of a public officer might prejudice private rights or the public interest, it is a general rule of statutory construction that time provisions are construed to be directory.

Doe, 440 A.2d at 716. I believe the principle enunciated in Doe applies in the case at bar. Construing Rule 33 as mandatory and requiring dismissal would

[8] Of course, Rule 33 is not a statute but a rule promulgated by the Chief Judge of the District Court that became effective when approved by the Supreme Court on March 27, 2000. And, as appellant points out in his Memorandum, at 4, Gen. Laws 1956 § 8-6-2 provides that court rules, when approved by the Supreme Court, take precedence over conflicting legislative enactments. As a result, I believe the same rules of construction apply.

have a patently negative effect on the enforcement of laws enacted to promote highway safety and be contrary to the public interest.

Secondarily, I believe the fact that the language of Rule 33(a) is — intentionally — not precise, also supports my belief that the rule should be deemed directory. The rule directs that the arraignment should be scheduled in the second calendar week after the citation is issued. It doesn't say what day the arraignment should be set, just the week.[9] Quite simply, I believe a rule which has that degree of flexibility built-in is not one in which compliance ought to be mandated with draconian fastidiousness.

For these reasons I believe Rule 33's time limitation must be read as directory, not mandatory.

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[9] The Traffic Tribunal employs a system under which the several police departments schedule their arraignments on pre-assigned days of the week. And to reiterate, Rule 33 requires a refusal arraignment to be scheduled "two calendar weeks" in the future — not "two weeks" in the future, not "fourteen days" in the future. In other words, an officer scheduling an arraignment should count two calendar weeks forward, and then schedule the arraignment on his department's arraignment day.

As a result, a refusal arraignment could properly be set anywhere from nine to nineteen days after the incident, depending on the day of the incident and the department's arraignment day. [N.B. — The longest period would apply where a citation is issued on a Sunday and the department handles its arraignments on Fridays.] It may be noted that Mr. Ribeiro's arraignment was set nineteen days after his citation.

C. Dismissal For Rule 33 Violation Requires a Showing of Prejudice.

In the previous two sections of this opinion, I have indicated (1) that Rule 33 does not provide a defendant with an individual right and (2) that its time-limit is directory. Although it is cumulative to do so in light of the foregoing, in this section I shall consider a third basis for upholding the trial magistrate's decision to deny appellant's motion to dismiss — the one adopted by the appellate panel — that he failed to make a showing of prejudice. With this finding I also agree.

The panel rooted its finding that a demonstration of prejudice is a precondition to dismissal for a Rule 33 violation on another rule — Rule 3(d), which provides that "[a]n error or omission in the summons shall not be grounds for dismissal of the complaint … if the error or omission did not mislead the defendant to his or her prejudice." Traffic Tribunal Rule of Proc. 3(d). Applying this rule, the officer's error in scheduling the arraignment beyond the prescribed period does not provide a basis for relief absent a showing of prejudice.

The necessity of proving prejudice has also been seen in Rhode Island case law. We may cite State v. Carcieri, 730 A.2d 11 (R.I. 1999), for the principle that a violation of the right to a confidential telephone call [as provided in Gen. Laws 1956 § 12-7-20] will not require dismissal unless there is

demonstrable proof of prejudice or a substantial threat thereof. Carcieri, 730 A.2d at 16 citing United States v. Morrison, 449 U.S. 361, 365 (1981). See also State v. Veltri, 764 A.2d 163, 167-68 (RI 2001). In Carcieri, the Court found a lack of prejudice where the police did not obtain incriminating information and the attorney-client relationship was not invaded — because Mr. Carcieri was not speaking to his attorney. Carcieri, 730 A.2d at 16-17. Accordingly, since appellant did not demonstrate he was prejudiced by his failure to be arraigned in the prescribed time period,[10] the remedy of dismissal was not justified.

Additionally, I would note that in a series of alcohol-related cases, while not imposing a requirement of prejudice per se, our Supreme Court has declined to vacate convictions in the absence of a showing that an error has had an effect on the outcome in the case. See e.g. State v. Ryll, 648 A.2d 1360, 1361 (R.I. 1994)(Inclusion on rights-form of warning of monetary penalty no longer in effect held not to affect voluntariness of decision to take the test). See also State v. Snyder, 692 A.2d 705 (R.I. 2000)(Order)(Failure to comply with procedure on officers' checklist regarding handling of breathalyzer mouthpiece removal held not to justify suppression of breathalyzer results absent proof violation affected validity of tests). And, most recently, in State v. Lewis T.

[10] Indeed, as the State's attorney commented at Mr. Ribeiro's arraignment, far from suffering prejudice from the delay, he enjoyed the benefit of retaining his driving privileges for an additional week. Arraignment Transcript, at 9.

Quattrucci, 2010-97 M.P. (R.I. Supreme Court 3/8/12), the Supreme Court held that the right to a confidential telephone call afforded by section 12-7-20 of the General Laws does not attach unless the phone call is made for the purposes of arranging bail or seeking the advice of counsel.

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

APRIL 12, 2012