STATE OF RHODE ISLAND & PROVIDENCE PLANTATIONS

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

Marek Krzaczek :
:
v. : **A.A. No. 2014 - 099**
:
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 18th day of March, 2015.

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

Marek Krzaczek	:	
	:	
v.	:	**A.A. No. 2014-099**
	:	**(T13-0062)**
State of Rhode Island	:	**(13-408-502848)**
(RITT Appeals Panel)	:	

FINDINGS & RECOMMENDATIONS

Ippolito, M. In this case Mr. Marek Krzaczek urges that an appeals panel of the Rhode Island Traffic Tribunal (RITT) erred when it affirmed a trial magistrate's decision finding him guilty of refusal to submit to a chemical test — a civil traffic violation defined in Gen. Laws 1956 § 31-27-2.1. Jurisdiction for the instant appeal is vested in the District Court by Gen. Laws 1956 § 31-41.1-9; the applicable standard of review is found in Gen. Laws 1956 § 31-41.1-9(d). This matter has been referred to me for the making of findings and recommendations

pursuant to Gen. Laws 1956 § 8-8-8.1. For the reasons stated herein, I recommend that the decision rendered by the appeals panel in Mr. Krzaczek's case be AFFIRMED.

I
FACTS AND TRAVEL OF THE CASE
A
The Incident

The facts of the incident which led to the charge of refusal to submit to a chemical test being lodged against Mr. Krzaczek are fully and fairly stated (with appropriate citations to the RITT Trial Transcript) in the decision of the RITT appeals panel. The following portion of the appeals panel's narrative begins just after the point when Officer Emmanuel Mejia, an eight-year veteran of the Pawtucket Police Department who had made more than a score of drunk-driving stops, was dispatched to the intersection of Fountain Street and East Avenue on March 9, 2013 at approximately 6:30 p.m.:

> … When he reported to the scene, he observed a disturbance in which two motorists were pulled over on the side of the road and were arguing. (Tr. at 26, 28.) Officer positively identified the Appellant as one of the motorists involved in the dispute. (Tr. at 26.)
>
> Upon arriving on the scene Officer stated that he first questioned the other motorist, before speaking with the Appellant. (Tr. at 28.) During the conversation Officer explained that

> Appellant described to him the events which led to the confrontation and that while the Appellant was speaking Officer observed a strong odor of alcohol on his breath, glossy eyes, and slurred speech. (Tr. at 29-30.) In response to these observations, Officer testified that he asked Appellant if he had been drinking, and Appellant responded that he had consumed two drinks an hour prior. (Tr. at 30.) Next, Appellant agreed to take the Standardized Field Sobriety Test, and Officer conducted the test on a flat roadway surface. (Tr. at 32.) Three tests were given: the Horizontal Gaze Nystagmus test, the walk and turn test, and the one-legged stand test. Id.
>
> Officer testified that he observed multiple clues of intoxication during the tests. (Tr. at 34.) …[1]

At this point, Mr. Krzaczek was arrested for suspicion of drunk driving, and read his "Rights For Use at the Scene."[2] Mr. Krzaczek was transported to the Pawtucket Police Station, where he was given his "Rights For Use at Station" and allowed to make a confidential telephone call.[3] When he finished his call, he declined to consent to a chemical test of his breath for the presence of alcohol.[4]

B

The Trial

At his RITT arraignment, Mr. Krzaczek entered a plea of not guilty to the

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1 Decision of Appeals Panel, at 2-3.

2 Decision of Appeals Panel, at 3 citing RITT Trial Transcript, at 37-38.

3 Decision of Appeals Panel, at 3 citing RITT Trial Transcript, at 40.

4 Decision of Appeals Panel, at 4; see also RITT Trial Transcript, at 40-42.

civil charge of refusal to submit to a chemical test; the Court ordered a preliminary suspension of his operator's license.[5] His trial, which began on July 10, 2013 and concluded on September 26, 2013, was presided over by Judge Lillian Almeida. The first item addressed by the Court was Mr. Krzaczek's oral motion to dismiss premised on collateral estoppel.[6]

Mr. Krzaczek's argument on this point was straightforward. He asserted that — after a "full hearing"[7] — the District Court judge dismissed the drunk-driving charge because the officer's testimony was "unreliable" and "inconsistent."[8] According to Appellant, this becomes the "law of the case" and works an estoppel in the refusal case.[9]

The Court responded that refusal to submit to a chemical test and driving under the influence are separate and distinct offenses, with different elements; one

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5 See Docket Sheet, Summons No. 13-408-502848 and "Preliminary Order of Suspension." The Court's authority to issue preliminary suspensions is found in Gen. Laws 1956 § 31-27-2.1(b).

6 RITT Trial Transcript, at 5-14.

7 A transcript of the District Court hearing provided by counsel runs to a total of ninety-eight pages. District Court RITT Trial Transcript, State v. Krzaczek, May 15, 2013, passim.

8 RITT Trial Transcript, at 5-6.

9 RITT Trial Transcript, at 6.

is civil, one criminal.[10] Noting the importance of the question, the trial judge denied the motion but granted the defendant the right to renew.[11]

The State's sole witness was the arresting officer, Officer Emmanuel Mejia, whose direct testimony was consistent with the foregoing narrative.[12] The cross-examination conducted by defense counsel was extensive and productive; much time and effort was expended eliciting from the officer admissions that his testimony before the RITT was different from his testimony before the District Court, especially with regard to Mr. Krzaczek's performance on the field sobriety tests.[13] Officer Mejia explained these differences by indicating (repeatedly) that he had failed to sufficiently review his report on this arrest before taking the stand.[14] After redirect and re-cross, and further discussion, the trial ended for the day.[15]

On September 26, 2013, Judge Almeida rendered her bench decision. She

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10 RITT Trial Transcript, at 9-11.

11 RITT Trial Transcript, at 7-9.

12 RITT Trial Transcript, at 19 et seq.

13 The defense's initial cross examination of Officer Mejia runs from page 48 to page 111 in the Trial Transcript; for a representative sample of counsel's focus on the discrepancies in the officer's FST testimony, see RITT Trial Transcript, at 53, 55-56, 59, 65-68.

14 RITT Trial Transcript, at 61, 64, 76, 123.

15 See RITT Trial Transcript, at 111-115 (redirect); 115-127 (recross); 128-146 (defense argument) and 146-47 (prosecution).

began by setting forth the collateral estoppel arguments in favor of dismissal and the manner in which these arguments had been addressed. She stated that Officer Mejia had explained that he had not prepared for the District Court trial[16] and so she further denied Mr. Krzaczek's estoppel arguments — ruling that the RITT was not bound (under principles of issue preclusion) by the District Court's prior determination (in the drunk-driving case) that Officer Mejia's testimony did not have credibility.[17] After this ruling, the prosecution and the defense rested.[18] With this, Judge Almeida proceeded to announce her decision on the case-in-chief.[19]

Turning to the proceedings before her, the trial judge summarized the testimony of Officer Mejia. He began by telling the Court about his education and experience regarding drunk-driving cases.[20] The officer then focused on the events of March 9, 2013, recalling that when he arrived at the scene of the collision he saw two motorists arguing; he then spoke to each of them separately, the other driver first.[21] The trial judge specifically recalled Officer Mejia's testimony that

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16 RITT Trial Transcript, at 155-56.

17 RITT Trial Transcript, at 155-57.

18 RITT Trial Transcript, at 166.

19 RITT Trial Transcript, at 167 et seq.

20 RITT Trial Transcript, at 167-68.

21 RITT Trial Transcript, at 168-69.

when he was speaking to Appellant (from one foot away), he detected that his breath contained a strong odor of alcohol, his eyes were glossy, and his speech was slurred.[22] Officer Mejia then asked Mr. Krzaczek to submit to standardized field sobriety tests (FST's) — and he agreed.[23]

Officer Mejia testified that while he was explaining the walk-and-turn test to Mr. Krzaczek, he noticed that the motorist was "off balance."[24] In addition, Mr. Krzaczek started the test too early, took too many steps, and did not perform the pivot-step correctly.[25] According to Officer Mejia, these facts constituted three clues of intoxication, one more than the two necessary to constitute a failure.[26]

The trial judge next recounted Officer Mejia's testimony regarding the next FST he administered — the one-legged stand. She quoted the officer as saying that there are four possible clues on this test, and the observation of two is regarded as a failure.[27] After observing the officer demonstrate the test, Mr. Krzaczek performed it; and as he did so he put his foot down more than once,

22 RITT Trial Transcript, at 169-70.

23 RITT Trial Transcript, at 170.

24 RITT Trial Transcript, at 170.

25 RITT Trial Transcript, at 171.

26 RITT Trial Transcript, at 171.

27 RITT Trial Transcript, at 171-72.

used his arms for balance, and swayed.[28] As a result, he deemed Mr. Krzazcek to have failed the test and, as a result, he placed Appellant under arrest.[29]

Relying on his testimony, the trial judge found that Officer Mejia read Mr. Krzazcek his "Rights for Use at the Scene" and then transported him to the police station, where he read him his "Rights for Use at the Station."[30] The motorist exercised his right to make a telephone call and then, when requested to submit to a chemical test, he refused.[31] The trial judge quoted Officer Mejia as testifying that, when he refused, he stated — "I had some drinks, I want to fight this in court."[32]

The trial judge acknowledged that, on cross-examination, Officer Mejia admitted that the testimony he gave before her was different from the testimony he gave to the District Court.[33] But, notwithstanding this fact, the trial judge held

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28 RITT Trial Transcript, at 172.

29 RITT Trial Transcript, at 171-72.

30 RITT Trial Transcript, at 172-73. On both occasions Mr. Krzaczek indicated he understood his rights. Id. The trial judge noted that the forms used to inform Appellant of his rights were received into evidence as Exhibits 1 and 2. Id., at 173, 174.

31 RITT Trial Transcript, at 173.

32 RITT Trial Transcript, at 173.

33 RITT Trial Transcript, at 174.

that the elements of the refusal charge had been proven.[34]

C
Proceedings Before the Appeals Panel

Mr. Krzaczek appealed and the matter was heard by an RITT appeals panel composed of Magistrate Alan Goulart (Chair), Judge Edward Parker, and Magistrate Domenic DiSandro on January 29, 2014. Before the appeals panel, Appellant presented three assertions of error — first, that Mr. Krzaczek's acquittal by a judge of the District Court on the related drunk-driving charge required an acquittal on the instant refusal charge; secondly, that the trial judge failed to allow the defense to use the transcript of the District Court trial as impeachment material; and, thirdly, the trial judge erred by finding the testimony of Officer Mejia to have been credible.[35] In its June 3, 2014 decision, the appeals panel rejected each of Mr. Krzaczek's three assertions of error.

The appeals panel first addressed Appellant's assertion that the District

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[34] RITT Trial Transcript, at 174. The trial judge sentenced Mr. Krzaczek to pay a fine of $200.00, to perform 10 hours of community service, to suffer a 6-month license suspension, to attend the so-called DWI School, and to pay the highway assessment, the Department of Health fee, and court costs. RITT Trial Transcript, at 177. All penalties were stayed pending appeal. RITT Trial Transcript, at 175-78.

[35] Decision of Appeals Panel, at 2, 5-7.

Court ruling — that the City had not proven the drunk-driving charge beyond a reasonable doubt —was binding on the Traffic Tribunal.[36] The panel noted that an acquittal in a criminal case does not prove that a defendant is innocent, but only signifies that the prosecution failed to prove its case beyond a reasonable doubt — the criminal standard of proof, which is more demanding than the civil violation standard, clear and convincing evidence.[37] And so, the appeals panel concluded that the District Court acquittal had no estoppel effect in the refusal case.[38]

The appeals panel next addressed Appellant's claim that the trial judge committed error by failing to accord the proper impeachment value to the contents of the District Court transcript.[39] The panel addressed this issue by

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

[37] Decision of Appeals Panel, at 5, citing, among other authorities, State v. Smith, 721 A.2d 847, 848-49 (R.I. 1998) and R.I. Traffic Tribunal Rule 17. See also Gen. Laws 1956 § 31-41.1.-6(a).

[38] Decision of Appeals Panel, at 5-6. The appeals panel invoked federal and Rhode Island case law holding that an acquittal in a criminal case does not preclude a subsequent proceeding to determine whether the defendant violated the terms of his or her probation; in such hearings the court must only be "reasonably satisfied" of the violation. Id., citing State v. Chase, 558 A.2d 120, 123-24 (R.I. 1991) and State v. Studman, 121 R.I. 766, 767, 402 A.2d 1185, 1186 (1979).

[39] Decision of Appeals Panel, at 6.

denying its factual premise, pointing out that the trial judge ruled that the transcript could be used for impeachment purposes.[40]

Finally, Mr. Krzaczek urged that the trial judge erred by crediting the testimony Officer Mejia gave to her notwithstanding the discrepancies between that testimony and his prior District Court testimony.[41] The trial judge did so because she believed the many discrepancies were explained by the officer's statement that he was better prepared to testify before the RITT.[42] The appeals panel found no error, bowing to the rule in Link v. State (R.I. 1993)[43] the appeals panel must give great deference to the trial judge's credibility findings. On the basis of these determinations, the appeals panel upheld Mr. Krzaczek's adjudication on the charge of refusal.[44] Thirty days later, on July 2, 2014, Mr. Krzaczek filed an appeal of this decision in the Sixth Division District Court.

A conference was held before the undersigned on September 16, 2014, and a briefing schedule was set. Both parties have presented the Court with

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[40] Decision of Appeals Panel, at 6 citing RITT Trial Transcript, at 13-14 and 67.

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

[42] Decision of Appeals Panel, at 6-7 citing RITT Trial Transcript, at 30, 141-43, and 174. And see Part II of this opinion, "Standard of Review," post at 11-12.

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

memoranda which ably relate their respective viewpoints.

II

STANDARD OF REVIEW

The standard of review which this Court must employ in this case 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 mirror-image 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

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[44] Decision of Appeals Panel, at 7.

its findings are 'clearly erroneous.'"[45] And our Supreme Court has reminded us that, when handling refusal cases, reviewing courts lack "the authority to assess witness credibility or to substitute its judgment for that of the hearing judge concerning the weight of the evidence on questions of fact."[46] This Court's review, like that of the RITT 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."[47]

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.

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[45] 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).

[46] 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).

[47] 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 the two charges are factually related in many cases, they are discrete, having different elements[48] and arise from different theoretical origins.

Drunk driving is a criminal offense against the public health and welfare. Our Supreme Court declared in State v. Locke,[49] that the statute that criminalizes drunk driving is a valid exercise of the police power, the goal of which is to reduce the "carnage"[50] perpetrated on our highways by "drivers who in drinking become a menace to themselves and to the public."[51] Like, for example, the charge of reckless driving, it directly proscribes dangerous conduct on the highways.

On the other hand, the civil charge of refusal[52] has its origins in the implied-consent law — which provides that, by operating motor vehicles in

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[48] State v. Jenkins, 673 A.2d 1094 (R.I. 1996) and State v. Quattrucci, 39 A.3d 1036, 1041 (R.I. 2012).

[49] 418 A.2d 843, 849 (R.I. 1980).

[50] 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).

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

[52] 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

Rhode Island, motorists (impliedly) promise to submit to a chemical test designed to measure their blood-alcohol content, whenever a police officer has reasonable grounds to believe they have driven while under the influence of liquor.[53] And a motorist who reneges on his or her promise to take such a test may be charged with the civil offense of refusal and suffer the suspension of his or her operator's

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> 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.

[53] 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. * * *

license.[54] Thus, at its essence, a refusal charge punishes the failure to cooperate with (part of) Rhode Island's regulatory scheme for identifying drunk drivers.[55]

As a result, the viability of a refusal charge is not dependent on proof of intoxication.[56] Indeed, the defendant's actual intoxication vel non is immaterial in a refusal case. This was the teaching of State v. Bruno,[57] in which the trial judge acquitted Mr. Bruno because the defense presented a medical opinion that the behavior and personal attributes he exhibited during the car-stop were entirely attributable to a non-alcoholic cause.[58] Notwithstanding this evidence, the Supreme Court reinstated the charge, holding that — so long as the State proves that the motorist provided an officer with indicia of intoxication sufficient to

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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.

[54] In Locke, supra, our Supreme Court called such suspensions "critical to attainment of the goal of making the highways safe by removing drivers who are under the influence." Locke, 418 A.2d at 850 citing Brown, 174 Colo. at 523, 485 P.2d at 505.

[55] 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 from our roads).

[56] State v. Hart, 694 A.2d 681, 682 (R.I. 1997).

[57] 709 A.2d 1048 (R.I. 1998).

[58] Bruno, 709 A.2d at 1049. The alternate cause proffered was the ingestion of prescribed medication. Id.

satisfy the reasonable-grounds standard — the Court must affirm the violation.[59] In my view, it is this aspect of refusal law — that the metaphysical truth of what the motorist did or did not imbibe before driving is immaterial — that is most jarring to the uninitiated;[60] a refusal case is not a "light" version of a drunk-driving charge.

2

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

The four statutory 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.[61] The State must also prove that the stop was legal (i.e.,

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

[60] Another confusing aspect of refusal cases is that we focus on an issue — the question of reasonable grounds — that in all other areas of penal law is merely a preliminary question, not the ultimate question.

[61] See Gen. Laws 1956 § 31-27-2.1(c), ante at 14 n. 52.

supported by reasonable suspicion) and the motorist was notified of the right to make a phone call for the purposes of securing bail.[62]

B
Collateral Estoppel or Issue Preclusion

Before his RITT trial on the civil charge of refusal to submit to a chemical test, Mr. Krzaczek went to trial in the District Court on the related criminal charge of driving under the influence — and was acquitted, because the officer's testimony was found to be lacking. Appellant asked the trial judge to find that the RITT was required to accord precedential deference to the previously rendered District Court ruling.

The doctrine by which a judgment or ruling in a case determines the outcome (in whole or in part) in a subsequent proceeding is known as res judicata.[63] That part of the doctrine — which "makes conclusive in a later action on a different claim the determination of issues that were actually litigated in a prior action …" —

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62 See State v. Perry, 731 A.2d 720, 723 (R.I. 1999) and State v. Bruno, 709 A.2d 1048, 1050 (R.I. 1998)(legality of the stop) and State v. Quattrucci, 39 A.3d 1036, 1040-42 (R.I. 2012)(right to telephone call).

63 As we shall see, "Res Judicata" is the name given to both the doctrine generally and the division of it relating to "claim preclusion." "Collateral estoppel" (or "issue preclusion") constitutes the other half. Foster-Glocester Regional School Committee v. Board of Review of the Department of Labor and Training, 854 A.2d 1008, 1014 n. 2 (R.I. 2004).

is labelled "collateral estoppel" or "issue preclusion."[64] This aspect of res judicata has been recently (and concisely) reiterated by our Supreme Court in Foster-Glocester Regional School Committee v. Board of Review of the Department of Labor and Training (2004) —

> … "Under the doctrine of collateral estoppel, 'an issue of ultimate fact that has been actually litigated and determined cannot be re-litigated between the same parties or their privies in future proceedings.' " George v. Fadiani, 772 A.2d 1065, 1067 (R.I. 2001) (per curiam)(quoting Casco Indemnity Co. v. O'Connor, 755 A.2d 779, 782 (R.I. 2000)). Subject to situations in which application of the doctrine would lead to inequitable results, we have held that courts should apply collateral estoppel [ ] when the case before them meets three requirements: (1) the parties are the same or in privity with the parties of the previous proceeding; (2) a final judgment on the merits has been entered in the previous proceeding; (3) the issue or issues in question are identical in both proceedings. Lee v. Rhode Island Council 94, A.F.S.C.M.E., AFL-CIO, Local 186, 796 A.2d 1080, 1084 (R.I. 2002)(per curiam)(citing Wilkinson v. State Crime Laboratory Commission, 788 A.2d 1129, 1141 (R.I. 2002)).[65]

The Court noted that issue preclusion "may apply even if the claims asserted in the two proceedings are not identical."[66] Procedurally, the burden of proving the merit

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[64] Foster-Glocester Regional School Committee, 854 A.2d at 1014 n. 2, citing E.W. Audet & Sons, Inc. v. Fireman's Fund Insurance Co. of Newark, New Jersey, 635 A.2d 1181, 1186 (R.I. 1994).

[65] Foster-Glocester Regional School Committee, 854 A.2d at 1014 (footnote omitted).

[66] Foster-Glocester Regional School Committee, 854 A.2d at 1014 n. 2. And so, when we analyze the merits of Appellant's invocation of issue preclusion, the

of an application for collateral estoppel is on the party seeking its invocation.[67]

Generally, courts have been reluctant to give preclusive effect to acquittals in criminal cases.[68] This viewpoint is reflected in the second Restatement of the Law of Judgments —

> **§ 85 Effect of Criminal Judgment in Subsequent Civil Action.**
>
> With respect to issues determined in a criminal prosecution:
> …
> (3) A judgment against the prosecuting authority is preclusive against the government only under the conditions stated in §§ 27-29.

And of the five circumstances enumerated in § 28 — in which the Restatement recommends preclusive effect ought not to be given to a prior judgment — two appear particularly pertinent to the instant case;[69] these are the situations in which

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fact that the elements of the criminal charge of drunk driving and the civil charge of refusal to submit to a chemical test differ shall not — per se — be a justification for the trial judge's refusal to invoke the District Court's ruling.

[67] See State v. Pineda, 712 A.2d 858, 861-62 (R.I. 1998) and 47 AM. JUR. 2d Judgments, § 640. Now, in this case, before the RITT, Mr. Krzaczek formally moved to dismiss the refusal charge, invoking the theory that the District Court ruling acquitting him — which was grounded on a finding that Officer Mejia's testimony was not credible — should be given preclusive effect.

[68] See 47 AM. JUR. 2d Judgments, § 652.

[69] In Restatement of Laws (Second) Judgments, § 85, Comment (g), it was noted that, as a result of these two factors, "… it would be a rare case in which an acquittal could result in preclusion against the government in a subsequent civil action."

the party against whom preclusion is sought (1) could not obtain review of the judgment,[70] and (2) had a significantly higher burden of proof in the initial action.[71]

To my knowledge, the Rhode Island Supreme Court has never accorded an acquittal in a criminal case preclusive effect in a later civil case or in the prosecution of a civil violation — although the Court has been requested to do so on several occasions.

In the first case, Knight v. Knight (1942),[72] a suit in equity for divorce based on neglect, the Rhode Island Supreme Court held that the Superior Court[73]

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[70] This has not been recognized as a factor preventing the invocation of estoppel in any Rhode Island cases that I have been able to locate.

[71] The fact that the burden of proof was higher in the initial action was recognized as a circumstance precluding collateral estoppel in Cannone v. New England Tel. and Tel. Co., 471 A.2d 211, 213-14 (R.I. 1984)(Court finds Superior Court properly excluded evidence of Plaintiff Cannone's acquittal at the Administrative Adjudication Division of the Department of Transportation [the second-level predecessor to the RITT] on charge of failure to yield from civil law suit regarding accident where AAD standard of proof was clear and convincing evidence and civil standard is preponderance).

In the Reporter's Note to Comment (g) to § 85, Helvering, Commissioner of Internal Revenue v. Mitchell, 303 U.S. 391, 397-98, 58 S.Ct. 630, 632 (1938) is cited for the principle that the difference in degree of the burden of proof precludes application of the doctrine of res judicata.

[72] 67 R.I. 412, 24 A.2d 612 (1942).

[73] Prior to the passage of the Family Court enabling act, domestic relations matters were heard in the Superior Court. See P.L. 1961, ch. 73, § 20.

justice who heard the case properly declined to give "res judicata" effect to Mr. Knight's acquittal in the District Court to a criminal charge of non-support.[74] The Court specifically noted the higher burden of proof in the criminal charge and the fact that the issues presented in the two cases were not identical.[75]

More than fifty years later, in State v. Jenkins (1996), our Supreme Court was asked to invoke estoppel in a refusal case based on the ruling in the related drunk driving trial.[76] However, the Court held that the District Court record was insufficient to prove a finding more specific than a general acquittal.[77]

Two years later, in State v. Pineda (1998), our Court had another opportunity to consider whether an acquittal in a drunk driving case (based on a lack of compliance with § 31-27-3, relating to the right to an independent examination) would be accorded preclusive effect in the related refusal case.[78] Once again, however, the Court concluded it was unable to reach the issue.[79] The

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[74] Knight, 67 R.I. at 415-16, 24 A.2d at 613.

[75] Id.

[76] 673 A.2d 1094 (R.I. 1996).

[77] Jenkins, 673 A.2d at 1096. The Court also found the request insufficient because it was targeted to an issue — i.e., probable cause to arrest — which was immaterial in the refusal case. Jenkins, 673 A.2d at 1097.

[78] 712 A.2d 858 (R.I. 1998).

[79] Pineda, 712 A.2d at 861-62.

record of the District Court proceeding contained in the Administrative Adjudication Court record was deemed insufficient.[80] Moreover, the Court found the District Court's ruling was marked by error, since it was addressed on a motion for judgment of acquittal and not a motion to dismiss as prescribed by our Supreme Court in State v. McKone (1996).[81]

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[80] Id. The Administrative Adjudication Court (AAC) was the immediate predecessor to the RITT within the Rhode Island judiciary.

[81] 673 A.2d 1068 (R.I.1968) cited in Pineda, 712 A.2d at 861-62. In McKone, our Supreme Court announced that in a non-jury trial — in which the trial judge is a fact-finder — a Rule 29 Motion for Judgment of Acquittal is a nullity. McKone, 673 A.2d at 1072-73. Instead, at the conclusion of the state's case, the trial judge shall pass on a motion to dismiss, in the following manner —

> … when passing upon the motion to dismiss, he or she is required to weigh and evaluate the trial evidence, pass upon the credibility of the trial witnesses, and engage in the inferential process, impartially, not being required to view the inferences in favor of the nonmoving party, and against the moving party. After doing so, if the trial in a criminal case setting concludes that the trial evidence is sufficient to establish guilt beyond a reasonable doubt, he or she denied the defendant's motion to dismiss and, if both sides have rested, enters decision and judgment of conviction thereon. If the evidence is not so sufficient, he or she grants the motion and dismisses the case.

Id. The members of the bench and bar commonly refer to these motions as "McKone" motions.

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

V
ANALYSIS

As he did before the appeals panel, Mr. Krzaczek presents three arguments in support of his effort to set aside his refusal conviction — (1) the doctrine of collateral estoppel required the trial judge to dismiss the refusal case;[82] (2) the Court erred by refusing to consider the impeachment value of the District Court transcript;[83] and, (3) the evidence — in light of the discrepancies in the testimony of Officer Mejia — was insufficiently credible to prove the refusal case to the standard of clear and convincing evidence.[84] We shall address each of these arguments, in turn.

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[82] Appellant's Memorandum, at 13-18.

[83] Appellant's Memorandum, at 18-23.

[84] Appellant's Memorandum, at 23-26.

A

Appellant's Request to the RITT to Invoke Estoppel Based on the District Court's Ruling Was Properly Declined

1

Generally

Mr. Krzaczek urged that the RITT should have given preclusive effect to a prior ruling made by the District Court judge in the related drunk-driving case, in which she held that the testimony of Officer Mejia was not sufficiently credible to prove the case beyond a reasonable doubt.[85] He urges that the panel's failure to do so constituted error.[86]

The appeals panel rejected Appellant's entreaties on this point, emphasizing that the burden of proof in the DUI charge is greater than that for refusal (beyond a reasonable doubt vs. clear and convincing).[87]

So, did the members of the appeals panel have a sound legal basis to reject Appellant's request for the invocation of collateral estoppel? In my view, they had several. And they shall be revealed as we work through the three-part estoppel test

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[85] See District Court Trial Transcript, State v. Krzaczek, May 15, 2013, at 93-98.

[86] Appellant's Memorandum of Law, at 13-18.

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

set forth in Foster-Glocester.[88]

2

Applying the Three-Part Test — Generally

Two of the three elements of the test enunciated in Foster-Glocester are not at issue in the instant appeal. The first element — privity — is apparently satisfied, since the defendant was Mr. Krzaczek in both matters and the City of Pawtucket prosecuted the drunk-driving case on behalf of the State.[89] And the

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88 Foster-Glocester, 854 A.2d at 1014 citing Lee v. Rhode Island Council 94, A.F.S.C.M.E., AFL-CIO, Local 186, 796 A.2d 1080, 1084 (R.I. 2002), quoted ante at 18.

89 The criminal drunk-driving charge leveled against Mr. Krzaczek was prosecuted by the City of Pawtucket, its Police Department, and its solicitor. The instant refusal case has been prosecuted and defended on appeal by the Department of the Attorney General. Moreover, in the instant case the State has not questioned the privity element.

Neither did the State apparently raise the privity issue in two prior cases in which it was asked to give estoppel effect to an acquittal (i.e., Jenkins and Pineda), it did not raise the issue, even though in both cases the criminal prosecution had been handled by a municipality.

And yet, it may be noted that other cases take a contrary view. E.g. Commonwealth, Department of Transportation v. Crawford, 121 Pa. Cmwlth. 613, 616, 550 A.2d 1053, 1054-55 (1988)(Court declines to find privity between the District Attorney [who prosecutes the criminal charge of drunk driving] and the Department of Transportation [which initiates the civil suspension proceeding]) and State v. Hooley, 269 P.3d 949, 952-56 (Okla. Crim. App. 2012)(Court finds no privity between Department of Public Safety [responsible for license suspensions] and the several District Attorneys [responsible for criminal drunk-driving prosecutions]).

second element— that there was a final judgment on the merits — was clearly satisfied, since the Court's dismissal of the drunk-driving charge ended the case. And so, we may now turn to the third (and the only disputed) element of the test — the identity of the issues.

3

The Identity of Question Element

I believe, for several reasons, that the issue before the Traffic Tribunal was not the same as the issue that the District Court decided.

a

The Different Elements

As stated ante in Part III-A of this opinion, the charges of drunk-driving and refusal-to-a-chemical test have different origins and different elements. As we discussed above, the most striking difference between the two charges is that the question of whether the motorist was in fact intoxicated — the ultimate question in a drunk-driving case — is not before the RITT in a refusal case.[90]

Now, Appellant, in his learned memorandum, urges that the issue common

[90] Ante at 16 citing Bruno, 709 A.2d at 1049. See also State v. Hart, 694 A.2d 681, 682 (R.I. 1997).

to both was Officer Mejia's credibility[91] — particularly with regard to his testimony concerning the field sobriety tests given to him.[92] And so, we know what areas of the officer's testimony Mr. Krzaczek believes to be significant. But this fact still begs the questions: — to what issues did his District Court testimony pertain? — and are those issues material in the refusal case?

As I read the transcript of the District Court trial, the District Court judge made only one finding on the McKone motion — that the prosecution had not proven that Mr. Krzaczek had operated under the influence beyond a reasonable doubt.[93] And that question is not before the RITT.

b

The Standard of Proof Difference

And there is another reason why the drunk-driving and refusal cases cannot be deemed to present identical issues. I concur with the appeals panel that the different standards of proof in the two cases make the issues before the two courts different as well. I believe issue preclusion cannot be made available to Mr.

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91 As stated ante, the District Court judge found Officer Mejia's testimony before her was "inconsistent" and "unreliable." Brief of Appellant, at 5, citing District Court Trial Transcript, at 97-98.

92 Brief of Appellant, at 6-7, citing RITT Trial Transcript, at 7-8, 11.

93 District Court Trial Transcript, at 93-98 (particularly at 96-98).

Krzaczek in the manner that he desires because the civil violation standard (clear and convincing evidence) is less demanding than the criminal standard (beyond a reasonable doubt).[94] And the fact that the District Court's ruling came in response to a "motion" and not a "verdict" matters not at all. Mr. Krzaczek's motion to dismiss was a McKone motion; such motions are heard at the close of the State's case in a non-jury trial — the Court weighs credibility and the burden of proof is beyond-a-reasonable-doubt.[95]

The effect of this factor has been recognized by members of our Supreme Court,[96] and in many cases from our sister states.[97] It has also been memorialized

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[94] See Cannone v. New England Tel. and Tel. Co., 471 A.2d 211, 213-14 (R.I. 1984)(Court rules Superior Court properly excluded evidence of acquittal of motorist at Administrative Adjudication Division [predecessor to RITT] on charge of failure to yield from civil law suit regarding accident where AAD standard is clear and convincing evidence and civil standard is preponderance. See generally Parker v. Parker, 103 R.I. 435, 441, 238 A.2d 57, 60-61 (1968) (wherein may be found an explication of the distinctions among the various degrees of proof recognized under Rhode Island law).

[95] State v. McKone, 673 A.2d 1068 (R.I.1996). McKone ended the use of Rule 29 motions for judgment of acquittal in criminal, non-jury cases. Instead, the Court weighs the evidence on a "McKone" motion to dismiss. See exposition of the Court's holding in McKone, ante at 21-22, n. 79. By addressing the issue as a motion to dismiss under McKone the District Court followed the procedure our Supreme Court prescribed as proper in State v. Pineda, 712 A.2d 858, 861-62 (R.I. 1998). See also State v. Berroa, 6 A.3d 1095, 1099-1100 (R.I. 2010).

[96] See Knight, discussed ante at 21, and Pineda, discussed ante at 22 (especially,

in the Restatement (Second) of Judgments.[98]

And so, I believe the State was entitled to proceed on the refusal citation notwithstanding Mr. Krzaczek's acquittal on the drunk-driving complaint.[99]

Pineda, 712 A.2d at 862-63 [Flanders and Lederberg, JJ.,concurring opinion]).

97 See Ditton v. Department of Justice Motor Vehicle Division, 374 Mont. 122, 130-132, 319 P.3d 1268, 1276-77 (2014); Miller v. Epling, 229 W.Va. 574, 579-81, 729 S.E. 2d 896, 901-03 (2012); Commonwealth v. Crawford, 550 A.2d 1053, 1054-55 (Pa.Cmwlth. 1988); and Hooley, ante at 26 n. 89, 269 P.3d at 956-57.

98 Restatement (Second) of Judgments, § 28(4),(1982) provides:

> Although an issue is actually litigated and determined by a valid and final judgment, and the determination is essential to the judgment, relitigation of the issue in a subsequent action between the parties is not precluded in the following circumstances:
>
> …
>
> (4) The party against whom preclusion is sought had a significantly heavier burden of persuasion with respect to the issue in the initial action than in the subsequent action; the burden has shifted to his adversary; or the adversary has a significantly heavier burden than he had in the first action;
>
> … (Emphasis added).

99 If the law were otherwise, every acquittal on a charge of, say, an assault, would preclude a civil suit based on the same conduct, which is not the rule.

Conversely, I do not agree with the appeals panel when it cited the fact that drunk driving and refusal have different elements as a basis for precluding the invocation of issue preclusion. The rule is contrary — the fact that drunk driving and refusal are different charges does not preclude, per se, the invocation of collateral estoppel. Foster-Glocester Regional School Committee, 854 A.2d at 1014 n. 2, quoted ante at 18-19.

4
Other Policy Considerations

Before concluding my comments on this topic, I should like to cite two additional factors which are widely regarded as significant to an evaluation of the merit of a request to invoke the doctrine of collateral estoppel based on a criminal judgment of acquittal.

a
The Absence of the Right to Appeal

The first principle I should like to bring forward now is one which was previously mentioned in passing — the prerequisite for collateral estoppel that the prior judgment was one in which the losing party had a right to appeal. Now, this rule is not an aspect of the requirement that the prior judgment be final but an additional prerequisite to the invocation of collateral estoppel.[100] This principle does not appear to have yet been recognized in Rhode Island jurisprudence.

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[100] Restatement (Second) of Judgments, § 28(4)(1982) provides:

> Although an issue is actually litigated and determined by a valid and final judgment, and the determination is essential to the judgment, relitigation of the issue in a subsequent action between the parties is not precluded in the following circumstances:
>
> (1) The party against whom preclusion is sought could not, as a matter of law, have obtained review of the judgment in the initial action; … (Emphasis added).

Of course, Rhode Island has long recognized the principle that — absent constitutional or statutory authority[101] — the prosecution has no right to appeal in a criminal proceeding.[102] And while our Supreme Court has indicated that it may, pursuant to its supervisory jurisdiction over all inferior Rhode Island courts,[103] consider whether a lower court has acted "without jurisdiction or in excess of jurisdiction"[104] pursuant to a writ of certiorari brought by the State,[105] when doing so it may not reach the merits of the Court's action.[106] It should also be noted that it is not a writ of "strict right."[107]

In the instant case, there is not the merest hint that any ruling made by the District Court judge in the drunk-driving case brought against Mr. Krzaczek

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[101] The only Rhode Island statute authorizing appeals by the State in criminal matters is Gen. Laws 1956 § 9-24-32, which, on its face, does not apply to District Court cases.

[102] See State v. Alexander, 115 R.I. 491, 493, 348 A.2d 368, 370 (1975) citing State v. Beaulieu, 112 R.I. 724, 726, 315 A.2d 434, 435 (1974) and State v. Coleman, 58 R.I. 6, 190 A. 791, 793 (1937).

[103] Coleman, 190 A. at 793-94.

[104] Coleman, 190 A. at 794. The Court in Coleman enumerated Kenney v. State, 5 R.I. 385 and Antoscia v. Superior Court, 38 R.I. 332, 95 A. 848, as two cases in which the Supreme Court had entertained the writ but had ultimately declined to issue it because the lower court had not actually exceeded its authority. Id.

[105] Coleman, 190 A. at 793-94.

[106] Coleman, 190 A. at 794.

exceeded this Court's jurisdiction. Therefore, no review was available to the State, even by certiorari. And so, if the principle espoused in § 28(1) of the Restatement — i.e., that a ruling cannot be given preclusive effect if the adverse party could not obtain review — is accepted into Rhode Island jurisprudence, Mr. Krzaczek's application for invocation of collateral estoppel will necessarily be rejected.

b

The Intention of a Double Process

Finally, we may take cognizance of the rulings of those courts which have denied estoppel effect to acquittals on public policy grounds.[108] These courts begin

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[107] Coleman, 190 A. at 793.

[108] See Meyer v. State, Department of Revenue, Motor Vehicle Division, 143 P.3d 1181, 1186 (Colo. App. 2006)(Court finds previous ruling in drunk-driving case that officer did not possess reasonable suspicion for the stop was not binding in administrative license suspension proceeding on the basis of a statute allowing findings to be made "independent" of any determinations in criminal case) — this ruling has been superseded by a June 30, 2014 decision of the Colorado Supreme Court that found the legality of the stop is not an issue in the license-suspension proceeding. Francen v. Colorado Department of Revenue, Division of Motor Vehicles, 328 P.3d 111, 114 (Colo. 2014); Commonwealth v. Crawford, 121 Pa. Cmwlth. 613, 616-17, 550 A.2d 1053, 1054-55 (1988); Williams v. North Dakota State Highway Commissioner, 417 N.W. 2d 359, 360 (N.D. 1987); Joyner v. Garrett, 279 N.C. 226, 182 S.E.2d 553 (1971).

Conversely, see Hoban v. Rice, 22 Ohio App. 2d 130, 259 N.E. 2d 136, 137-39 (1970)(Conviction of drunk driving does not preclude administrative suspension).

by noting that their state laws authorize the commencement of two separate processes when a motorist is arrested for drunk driving — one criminal and one administrative. The difference between the two has been commented upon by our Supreme Court on many occasions; nevertheless, the Court has not yet indicated whether, under Rhode Island law, each charge was designed to be fully independent of the other.

B
The Trial Judge Did Not Fail to Consider the Impeachment Value of the District Court Transcript

The appeals panel found this assertion of error factually groundless. To the contrary, the panel concluded that the trial judge did in fact allow Mr. Krzaczek to use the District Court transcript as a tool in its impeachment of Officer Mejia.[109] And in my opinion the truth of this finding is undeniable.

The trial judge (in the refusal case) told defense counsel she would permit him to use the District Court transcript for impeachment purposes[110] and she did — defense counsel's cross-examination of Officer Mejia was both extensive and

[109] See Decision of Appeals Panel, at 6.

[110] See Decision of Appeals Panel, at 6 citing RITT Trial Transcript, at 13-14 and 67.

effective.[111] And, in her bench decision, the trial judge specifically commented on the discrepancies between Officer Mejia's District Court testimony and his Traffic Tribunal testimony.[112] So, the impeachment value of the officer's prior District Court testimony was noted and considered. Thus, as he has stated it, Appellant's second assignment of error must be rejected.

And it seems clear to me that, at the end of the day, when you boil this argument down to its essence, Appellant's complaint is that the trial judge did not find these discrepancies to be sufficient to tip the scales of justice in his favor. And this question, the rectitude of her finding that Officer Mejia was a credible witness before her, we shall consider in the next section of this opinion.

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[111] The instances of defense counsel's cross-examination of Officer Mejia are ably catalogued in Appellant's memorandum. See Brief of Appellant Marek Krzaczek, at 8-11, citing RITT Trial Transcript, at 53-70.

[112] RITT Trial Transcript, at 155-56.

C

The Trial Judge's Determination That the State Proved the Refusal Violation By Clear and Convincing Evidence Is Not Clearly Erroneous

Appellant Krzaczek's final argument is that the evidence furnished by the State was not sufficient to constitute proof to the standard of clear and convincing evidence.[113] I believe Appellant's argument must be rejected for two reasons.

1

The Standard

At the beginning of his argument on this point, Appellant reminds us that the prosecution was tasked — by the language of § 31-27-2.1 — with proving that Officer Mejia had "reasonable grounds" to believe that Mr. Krzaczek had driven under the influence of alcohol or drugs.[114] He then cites two Rhode Island civil (false imprisonment[115]) cases for the proposition that the phrase "reasonable grounds" in § 31-27-2.1 is the functional equivalent of "probable cause" — Soares v. Ann & Hope of Rhode Island, Inc. (R.I. 1994)[116] and Cruz v. Johnson (R.I.

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113 See Brief of Appellant Marek Krzaczek, at 8-11.

114 See Brief of Appellant Marek Krzaczek, at 23 citing Gen. Laws § 31-27-2.1.

115 In both of the cited cases the action sounded in tort, for, inter alia, arrest and false imprisonment — brought by persons who alleged that they had been wrongly arrested and held on suspicion of shoplifting by store personnel.

116 See Brief of Appellant Marek Krzaczek, at 23 citing Soares v. Ann & Hope of Rhode Island, Inc., 637 A.2d 339, 345 (R.I. 1994).

2003).[117] But while Appellant's citations are, at least facially, valid, I must nonetheless conclude that this argument is not legally correct. For, while our Supreme Court has stated that "reasonable ground," as used in Gen. Laws 1956 § 12-7-3 (the misdemeanor arrest statute) and the term probable cause (as used in Fourth Amendment arrest theory) are "practically synonymous,"[118] it has definitively ruled otherwise with regard to the term "reasonable grounds" in § 31-27-2.1.

In State v. Perry, 731 A.2d 720, 723 (R.I. 1999),[119] our Supreme Court stated flatly that "reasonable suspicion" was the "appropriate standard" by which to

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117 See Brief of Appellant Marek Krzaczek, at 23 citing Cruz v. Johnson, 823 A.2d 1157, 1161 n.2 (R.I. 2003)(Citing Lucas v. J.C Penney Co., 233 Or. 345, 378 P.2d 717, 724 [1953] for the proposition that reasonable grounds and probable cause are equivalent concepts).

118 The many cases on this point — declaring the terms "probable cause" and "reasonable ground" under § 12-7-3 to be equivalent concepts — all seem to trace back to several cases from the 1960's — Barth v. Flad, 99 R.I. 446, 449, 208 A.2d 533, 535 (1965)(action for false arrest brought against police officer); State v. Mercurio, 96 R.I. 464, 468, 194 A.2d 574, 576 (1963)(brief reference to probable cause standard, citing Wong Sun v. United States, 371 U.S. 471, 83 S.Ct. 407 (1962), then recently decided); and, State v. McWeeney, 100 R.I. 394, 398-99, 216 A.2d 357, 359-60 (1966)(fuller discussion). See also State v. Roach, 106 R.I. 280, 281, 259 A.2d 119, 121 (1969); State v. Haigh, 112 R.I. 740, 743, 315 A.2d 431, 433 (1974), and Johnson v. Palange, 122 R.I. 361, 364-65, 406 A.2d 360, 362 (1979).

119 See State v. Perry, 731 A.2d 720, 723 (R.I. 1999).

determine whether the State has proved a violation of § 31-27-2.1.[120] And so, it is this lesser standard by which the trial judge must determine whether the State has proven its case, not, the greater (and more demanding) probable cause standard. With these parameters in place, we may proceed onward.

2
This Court's Limited Role on Issues of Credibility and the Weight to Be Given Evidence

Appellant urges that the evidence submitted to the RITT in the instant case was not sufficient to prove the charge of refusal to the standard of clear and convincing evidence. To answer this assertion, we must review the evidence presented to the RITT.

In all, the State presented five[121] indicia that Mr. Krzaczek had operated under the influence: (1) he had admitted to the consumption of alcohol,[122] (2) he

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[120] To be clear, the standard of proof in a refusal case is clear and convincing evidence. See Gen. Laws 1956 § 31-41.1-6(a). By the statement above the Court meant only that, to sustain a refusal charge, the State must prove that the officer had reasonable suspicion (or, in the words of the statute, "reasonable grounds") to believe that the motorist had been driving under the influence.

[121] See Decision of Appeals Panel, at 2-3 (quoted ante at 2-3) citing RITT Trial Transcript at 29-32.

[122] See RITT Trial Transcript at 31.

had glossy eyes, [123] (3) he had a strong odor of alcohol on his breath,[124] (4) his speech was slurred, if only "a bit,"[125] and (5) he failed to perform the field tests in a proper manner.[126] 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 (wherein no field tests were done) to allow this Court to determine that the appeals panel's finding that Officer Mejia possessed "reasonable grounds" to believe Mr. Krzaczek had driven under the influence of liquor was not clearly erroneous and was supported by the evidence of record.

Appellant does not deny that this evidence was presented, but asserts that it was not credible, at least to the standard of clear and convincing evidence, in light of the legitimate issues regarding his credibility raised by Appellant. Now, Officer Mejia did not attempt to rehabilitate his credibility by explaining each individual error he made at the District Court trial. Rather he adopted a global approach to this problem — he frankly admitted to the Court that he made a mess of his

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[123] See RITT Trial Transcript at 30.

[124] See RITT Trial Transcript at 30.

[125] See RITT Trial Transcript at 30-31.

[126] See RITT Trial Transcript at 32-37.

District Court testimony by failing to review his report prior to taking the stand.[127] He insisted that his testimony before the RITT, which was based on his original, contemporaneous report, was accurate.[128] The trial judge was apparently very favorably impressed by his candid mea culpa. As a result, she received his RITT testimony on its own merits. Sometimes, nothing is as convincing as a frank admission of abject failure.

But, even if Officer Mejia's credibility had not been resuscitated, we could not grant relief on this point — because, when reviewing the factual determinations of the appellate panel, this Court's role is limited. Indeed, it is doubly limited — our duty in this case is to decide whether the panel was "clearly erroneous" when it found the trial judge's adjudication of Mr. Krzaczek was not "clearly erroneous" — a limited review of a limited review.[129] And our Supreme Court stated in Link, ante, that, if the trial judge's decision is supported by

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127 See RITT Trial Transcript, at 55, 61, 76, and 122-23.

128 See RITT Trial Transcript, at 59-62, 122-23.

129 See Gen. Laws 1956 § 31-41.1-8(f) and Gen. Laws 1956 § 31-41.1-9(d), (the latter quoted ante in "Part II – Standard of Review," at 5). See also Link v. State, 633 A.2d 1345, 1348 (R.I. 1993)(opining, construing prior law — which was also "substantively identical" to the APA procedure — that the District Court' role was merely to review the trial record to determine if the decision was supported by competent evidence).

competent evidence, the panel — and this Court — must affirm. And whatever its infirmities, the testimony of Officer Mejia was certainly "competent evidence," upon which the trial judge had every right to rely. And so, this argument must fail.

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 18, 2015