STATE OF RHODE ISLAND & PROVIDENCE PLANTATIONS

PROVIDENCE, Sc. **DISTRICT COURT**

SIXTH DIVISION

Mark Eldridge	:	
	:	
v.	:	**A.A. No. 10 - 0221**
	:	
State of Rhode Island	:	

ORDER

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 14th day of April, 2011.

By Order:

Melvin Enright
Acting Chief Clerk

Melvin J. Enright
Acting Chief Clerk

Enter:

Jeanne E. LaFazia
Chief Judge

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

Mark Eldridge	:	
	:	
v.	:	**A.A. No. 2010-221**
	:	**(T10-0042)**
State of Rhode Island	:	
(RITT Appellate Panel)	:	

FINDINGS & RECOMMENDATIONS

Ippolito, M. In this case Mr. Mark Eldridge urges that an appeals panel of the Rhode Island Traffic Tribunal erred when it reversed a trial magistrate's decision dismissing a charge of refusal to submit to a chemical test — a civil violation defined in Gen. Laws 1956 § 31-27-2.1. This matter has been referred to me for the making of findings and recommendations pursuant to General 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. Eldridge presents two reasons why the decision of the panel should be set aside: first, that the panel failed to recognize that he was deprived of the right to a confidential phone call afforded him by Gen. Laws 1956 § 12-7-20 while held in custody at the Jamestown Police Station; and second, that his right to an independent medical examination as provided by Gen. Laws 1956 § 31-27-3 was also abrogated. After

a review of the entire record, and for the reasons stated below, I have concluded that the decision of the panel in this case is supported by reliable, probative and substantial evidence of record and was not clearly erroneous; I therefore recommend that the decision below be affirmed.

I. FACTS & TRAVEL OF THE CASE

The facts which led to the charge of refusal against appellant are stated (with citations to the trial transcript) in the decision of the appellate panel. See Decision of RITT Appellate Panel, November 1, 2010, at 1-5; they may be summarized here as follows.

On January 24, 2010 at approximately 1:17 A.M., Officer Mark Esposito — a 6-year veteran of the Jamestown Police Department — was on patrol when he observed a vehicle exceeding the speed limit on North Road. (Trial Tr. at 3, 6, 9, and 63). The officer — who was trained to make traffic stops and conduct field sobriety tests — stopped the vehicle. (Trial Tr. at 4, 9).[1] He approached the vehicle, which was being driven by appellant, and observed him to have bloodshot and watery eyes, and to be emitting an odor of alcohol on his breath. (Trial Tr. at 9-10). And although appellant was "mumbling," he could be understood. (Trial Tr. at 32). Mr. Eldridge told the officer he had had a "few drinks" at the Narragansett Café. (Trial Tr. at 10).

Officer Esposito administered field sobriety tests to appellant and concluded he failed the one-legged stand and the walk-and-turn tests. (Trial Tr. at 11-15, 46, 49, 52). The officer testified that, in his opinion, Mr. Eldridge had been driving under the

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1 Officer Esposito was also trained as a breathalyzer operator. (Trial Tr. at 4).

influence of alcohol. (Trial Tr. at 16, 47-55). Mr. Eldridge was then arrested, placed in the cruiser, read his "Rights For Use at Scene," and transported — at about 1:30 A.M. —to the Jamestown Police Station. (Trial Tr. at 14-17, 64). He acknowledged he understood his rights. (Trial Tr. at 17).

At the station, Officer Esposito informed Mr. Eldridge of his "Rights For Use at the Station" and allowed him to use the telephone. (Trial Tr. at 17-18, 67). The Officer was not present for the call and could not hear it. (Trial Tr. at 17). Mr. Eldridge called his wife, who testified that she received his call at about 1:40 A.M. (Trial Tr. at 96). Officer Esposito then asked Mr. Eldridge to submit to a chemical breath test, but he refused. (Trial Tr. at 20). The officer then presented him with citations for refusal to submit to a chemical test and speeding. (Trial Tr. at 18).

At this moment, Mr. Eldridge expressed a desire to use the phone again to contact a justice of the peace so he could be released. (Trial Tr. at 58-59). He was told he could not contact a bail commissioner until he had the fee in hand; but, he was told he could call his wife again — to arrange for the money to be brought down. (Testimony of Esposito — Trial Tr. at 7, 58-60; Testimony of Eldridge — Trial Tr. at 84-85). But before that could be effectuated, at about 2:21 a.m., the officers had to respond to an emergency call of an accident involving serious bodily injury. (Testimony of Esposito — Trial Tr. at 62, 70-71; Testimony of Eldridge — Trial Tr. at 86). As a result, Mr. Eldridge was not released on bail (or a summons to appear) but held until the new shift came on and afforded him another phone call.[2] (Trial Tr. at 68-69, 71). He was released to his wife

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[2] There were two events that occurred during his extended detention. First, his wife

at approximately 7:30 A.M.

Mr. Eldridge was arraigned at the Traffic Tribunal (RITT) on February 12, 2010. His trial before Magistrate William Noonan began on April 4, 2010, resumed on May 5, 2010, and concluded on June 5, 2010 — when the trial magistrate rendered his decision. The trial magistrate dismissed the refusal charge against Mr. Eldridge — finding that he was prejudiced by the failure of the officers to provide him with a second phone call to secure bail money in violation of § 12-7-20. (Trial Tr. at 131).

The State appealed the dismissal of the refusal charge to the RITT appeals panel.

The matter was heard by an appellate panel comprised of Judge Lillian Almeida (Chair), Judge Albert Ciullo and Magistrate Alan Goulart on September 8, 2010. Before the panel, the State asserted that the trial magistrate committed error by dismissing the refusal charge due to a § 12-7-20 violation. In response, Mr. Eldridge argued that Magistrate Noonan's finding of a § 12-7-20 violation was correct. See Memorandum of Respondent (Traffic Tribunal), at 4-7. He noted that he could have been released by the Jamestown Police by means of a Misdemeanor Summons — as authorized by Gen. Laws 1956 § 12-7-12. See Memorandum of Respondent (Traffic Tribunal), at 7-8. Mr. Eldridge also urged that the trial magistrate's dismissal of the refusal case should be upheld because the State failed to prove compliance with Gen. Laws 1956 § 31-27-3. See Memorandum of Respondent (Traffic Tribunal), at 8.

In its subsequently issued opinion, the panel decided that — as to the first issue:

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called at about 3:00 A.M. and spoke to the dispatcher; she was told her husband could not be released yet. (Trial Tr. at 97-98). At about 5:00 A.M. another officer said things were going on and he might well be held until the morning. (Trial Tr. at 90-91).

(a) Section 12-7-20, which is meant to allow for a meaningful exchange between the arrestee and his attorney, applies in civil chemical test refusal cases [Decision of Panel, at 7];

(b) The officer, having reasonable grounds to believe Mr. Eldridge was operating under the influence, notified him of both his "Rights for Use at the Scene" and his "Rights For Use at the Station" and afforded him a confidential phone call. [Decision of Panel, at 7];

(c) Mr. Eldridge then knowingly and voluntarily refused to submit to a breathalyzer test [Decision of Panel, at 7].

Regarding the second issue, the panel held that Mr. Eldridge's argument that Jamestown's failure to afford him a second phone call violated his rights under Gen. Laws 1956 § 31-27-3 [which affords defendants the right to an independent medical examination] was misplaced, since he never expressed the desire to seek a second examination. [Decision of Panel, at 8-10];

At the conclusion of the September 8, 2010 oral argument, the panel announced that the decision of the trial magistrate would be reversed. In response, on September 14, 2010, appellant filed an appeal in the Sixth Division District Court. Subsequently, on October 19, 2010, Magistrate Noonan issued a Judgment sustaining the refusal charge and imposing a six-month license suspension. A stay was issued by this Court on October 20, 2010. After the appellate panel's written decision was issued on November 1, 2010, that stay was vacated on November 5, 2010. Mr. Eldridge filed an amended complaint on November 10, 2010. Memoranda have been received from appellant and

the State.

II. STANDARD OF REVIEW

The standard of review which this Court must employ in the instant appeal 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.' "[3] The Court will not substitute its judgment for that of the agency (here, the panel) as to the weight of the evidence on questions of fact.[4]

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3 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)).

4 Cahoone v. Board of Review of the Dept.of Employment Security, 104 R.I. 503,

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

III. APPLICABLE LAW

A. THE REFUSAL STATUTE.

This case involves a charge of refusal to submit to a chemical test. See Gen. Laws 1956 § 31-27-2.1. The civil offense of refusal is predicated on the implied consent law, which is stated in subsection 31-27-2.1(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. * * * (Emphasis added).

The four elements of a charge of refusal which must be proven at a trial before the Traffic Tribunal are stated later in the statute:

> * * * 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

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246 A.2d 213 (1968).

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

> 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. * * *

Gen. Laws 1956 § 31-27-2.1(c).

B. SECTION 12-7-20 (RIGHT TO A CONFIDENTIAL PHONE CALL).

A second section which must be considered in the resolution in this case is Gen. Laws 1956 § 12-7-20, which grants arrestees the right to a telephone call:

> **12-7-20. Right to use telephone for call to attorney — Bail bondsperson. —** Any person arrested under the provisions of this chapter shall be afforded, as soon after being detained as practicable, not to exceed one hour from the time of detention, the opportunity to make use of a telephone for the purpose of securing an attorney or arranging for bail; provided, that whenever a person who has been detained for an alleged violation of the law relating to drunk driving must be immediately transported to a medical facility for treatment, he or she shall be afforded the use of a telephone as soon as practicable, which may not exceed one hour from the time of detention. The telephone calls afforded by this section shall be carried out in such a manner as to provide confidentiality between the arrestee and the recipient of the call.

Thus, by its terms, the right established in § 12-7-20 applies only to persons arrested under this chapter — *i.e.*, chapter 12-7, which establishes procedures for felony and misdemeanor arrests — and to phone calls made for the purpose of securing an attorney and arranging for bail. While it specifically references the offense of "drunk driving," it is applicable to arrestees for all criminal offenses.

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

V. ANALYSIS

As summarized above, Mr. Eldridge's complaint presents two issues for this Court's consideration. Both arise from his failure to be released from the Jamestown Police Station after he was charged with refusal during the early morning hours of January 24, 2010. He first alleges that his right to a confidential phone call pursuant to Gen. Laws 1956 § 12-7-20 was violated. The second is whether Gen. Laws 1956 § 31-27-3 was violated. These questions shall now be considered.

A. IS THE PANEL'S DECISION AFFIRMING THE TRIAL MAGISTRATE'S DECISION NOT TO DISMISS THE INSTANT CASE BASED ON A BREACH OF APPELLANT'S RIGHT TO A CONFIDENTIAL TELEPHONE CALL PURSUANT TO SECTION 12-7-20 CLEARLY ERRONEOUS?

I believe this question must be answered in the negative for several reasons: first, I believe the right to a confidential phone call found in § 12-7-20 does not apply to those charged with the civil violation[6] — "Refusal to Submit to a Chemical Test" as defined in Gen. Laws 1956 § 31-27-2.1(b)(1), second, assuming *arguendo* §

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[6] 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 rights afforded by Gen. Laws 1956 § 12-7-20.

12-7-10 does apply in refusal cases, Mr. Eldridge's right to a confidential phone call was never breached, and third, even if such a right was indeed violated, the remedy of dismissal would not be appropriate.

1. There is No Right to a Confidential Telephone Call In Refusal Cases.

Although the RITT Panel held — based on the particular facts of the case — that Mr. Eldridge's rights to a confidential phone call were not violated, it also held — as a matter of law — that Mr. Eldridge and all refusal defendants are covered by the protections afforded in § 12-7-20. Decision of Panel, at 7. With this latter, legal principle pronounced by the panel, I must take issue, for four reasons.

Of course, we must acknowledge at the outset that our Supreme Court has not yet addressed whether the provisions of § 12-7-20 are applicable to Refusal-First Offense cases. Accordingly, since we are bereft of guidance, our task becomes one of prediction: we must attempt to anticipate our high court's likely response when the question arrives on its docket. Although there are undoubtedly legal and equitable arguments to be made in favor of the applicability of § 12-7-20 to refusal cases,[7] I believe the Court will, when given the opportunity, decline to extend § 12-7-20's protections to defendants in civil refusal cases.

Firstly, proof that a refusal defendant was given a confidential phone call is

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[7] Such arguments generally spring from an underlying notion that the charges of driving while under the influence and refusal to submit to a chemical test are intertwined. As I shall note below, while true in practical terms, this has not been accepted as a legal principle by the Supreme Court, which views the charges as "separate and distinct." See State v. Hart, 694 A.2d 681, 682 (R.I. 1997).

not one of the four elements which must be proven — to a standard of clear and convincing evidence — in a Refusal-First Offense case. With the exception of the warnings, where the Court has required that certain sanctions outside of § 31-27-2.1 be specified, the Court has not added to the items to be proven in refusal cases.[8] I am therefore reluctant to find the Court would be willing to, in essence, add an element to the offense.

Secondly, § 12-7-20 is found in Title 12, entitled "Criminal Procedure," and Chapter 12-7, entitled "Arrest." Refusal to Submit to a Chemical Test (1st Offense) is not a criminal charge but a civil violation; and even a brief examination of chapter 12-7 reveals that all the sections contained therein deal strictly with criminal procedures, regarding felonies and misdemeanors. Refusal (1st offense) is not a charge for which a defendant is arrested — instead, he or she is arrested for suspicion of drunk driving.

Thirdly, by its own terms, § 12-7-20 grounds the right to a phone call on the arrestee's need to arrange for bail and the arrestee's need to secure an attorney. The former is simply irrelevant in first offense refusal cases — no bail is necessary for no bail can be set on a civil violation; as to the latter, while refusal (1st offense)

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8 In Levesque v. Rhode Island Department of Transportation, 626 A.2d 1286 (R.I. 1993) the Court determined that registration suspension was a refusal penalty about which a motorist considering taking (or refusing) a chemical test must be warned. Thus, the fact that the suspension was subject to an intervening hearing did not, in the Court's view, vitiate the necessity of registration suspension being included with the more direct penalties, such as fines and assessments.

defendants certainly have the right to retain counsel for the defense of a civil violation, our Supreme Court has ruled that a drunk driving arrestee has no right to consult with an attorney[9] prior to deciding whether to take or refuse a chemical test. See Dunn v. Petit, 120 R.I. 486, 493-94, 388 A.2d 809 (R.I. 1978). Thus, any link between § 12-7-20 and the rights and needs of a refusal defendant seems extremely remote.

Finally, while charges of drunk driving under § 31-27-2 and refusal to submit to a chemical test under § 31-27-2.1 are often factually interrelated, the Rhode Island Supreme Court has stated and restated its firm belief that legally the misdemeanor and civil alcohol charges are separate and distinct offenses. See State v. Hart, 694 A.2d 681, 682 (R.I. 1997) and State ex rel. Middletown v. Anthony, 713 A.2d 207, 213 (R.I. 1998). They are not only distinct, they are members of different classes of offense: one (DUI) is a criminal misdemeanor, the other (Refusal – 1st offense) a civil violation. And so, to put it simply, a motorist who is ultimately charged with refusal to submit to a chemical test (1st offense) may have been given a confidential phone call while detained; if so, the right to a phone call adhered to the motorist insofar as he or she was under arrest for drunk driving, not in his or her capacity as a potential Refusal-1st Offense defendant.

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9 Moreover, defendants charged with civil violations such as refusal to submit to a chemical test (first offense) — for which imprisonment is not a possible penalty — have no right to appointed counsel, either under the United States Constitution [amendments 6 and 14] or the Rhode Island Constitution [Art. 1, § 10]. See In re Advisory Opinion to the Governor (Appointed Counsel), 666 A.2d 813, 815 -18 (R.I. 1995).

Accordingly, I do not believe the Supreme Court of Rhode Island will be inclined to transfer a procedural prerequisite from one type of prosecution to another. I must therefore concur with the State and find that the right to a confidential telephone call is inapplicable in a refusal prosecution. Appellee's Memorandum, at 3-4.

2. Substantial Evidence Supports the Panel's Finding That Appellant's Right to a Confidential Telephone Call — If Such a Right Was Indeed Applicable — Was Never Violated.

After reviewing the record, the RITT panel which was seated in this case found that Mr. Eldridge's right to a confidential phone call pursuant to § 12-7-20 was honored. I believe that the panel's finding of compliance with § 12-7-20 was supported by substantial evidence of record and is not clearly erroneous. For the reasons I shall now enumerate, I conclude the panel's decision to affirm the trial magistrate's decision should likewise be affirmed.

Firstly, there is simply no doubt that Mr. Eldridge was given an ample opportunity to call from the station. He called his wife; and he was allowed to do so under confidential circumstances. (Trial Tr. at 17-18, 67).

Mr. Eldridge's argument that he was entitled — § 12-7-20 — to make a second call appears to have no basis in Rhode Island's case law or its statutes. There seems to be no authority for the assertion that § 12-7-20 requires a defendant to be given the opportunity to make multiple calls.

In conclusion, I believe the appellate panel's decision that Mr. Eldridge was given the opportunity to make a confidential phone call in compliance with § 12-7-20

is well-supported by the record and is not clearly erroneous.

3. Even if the Defendant's Right to a Confidential Phone Call Was Violated, Dismissal Is Not Warranted.

The State also urges that, even if appellant's rights under § 12-7-20 were violated, dismissal would have been an excessive and unwarranted remedy because Mr. Eldridge cannot demonstrate prejudice. See Appellee's Memorandum of Law, at 5. The State cites State v. Veltri, 764 A.2d 163, 167-68 (R.I. 1999), for the principle that prosecutorial misconduct will not require dismissal unless there is demonstrable proof of prejudice or a substantial threat thereof. See also State v. Carcieri, 730 A.2d 11, 16 (RI 1999) citing United States v. Morrison, 449 U.S. 361, 365 (1981). Applying the Veltri decision to the facts of the instant case, we are led to the inescapable conclusion that Mr. Eldridge cannot show prejudice because an independent medical examination, whatever its results, would not have constituted a defense to the instant charge of refusal.

In sum, for this third reason as well,[10] I conclude the panel's decision finding § 12-7-20 did not require dismissal of the instant charge to be supported by substantial evidence of record and to be not clearly erroneous.

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[10] It seems appellant is arguing that his extended detention met the prejudice standard because it caused a violation of section 31-27-3. Because this assertion impacts an independent right, I shall address it separately in the next section of my analysis.

B. Is the Panel's Decision Not to Set Aside Mr. Eldridge's Conviction Because His Right to an Independent Medical Examination Was Abridged Clearly Erroneous?

Mr. Eldridge also asserts that his extended detention at the Jamestown Police Station abridged his right to an independent medical examination as provided in § 31-27-3.

1. Section 31-27-3 and the Right to An Independent Examination.

Section 31-27-3 provides in its entirety:

> A person arrested and charged with operating a motor vehicle while under the influence of narcotic drugs or intoxicating liquor, whatever its alcoholic content, shall have the right to be examined at his or her own expense immediately after the person's arrest by a physician selected by the person, and the officer so arresting or so charging the person shall immediately inform the person of this right and afford the person a reasonable opportunity to exercise the right, and at the trial of the person the prosecution must prove that he or she was so informed and was afforded that opportunity. (Emphasis added)

See Gen. Laws 1956 § 31-27-3. Thus, by its plain language, § 31-27-3 requires that (1) a defendant arrested for a drunk driving charge (2) be notified that he or she has a right to an independent medical examination and (3) be given a reasonable opportunity to exercise that right. For purposes of this discussion, I shall call the second requirement the "notice" provision and the third the "substantive" or "opportunity" requirement. To reiterate, the application of § 31-27-3 is limited to drunk driving case detainees.

2. Is Section 31-27-3 Applicable To Refusal Charges?

But, if § 31-27-3 is limited by its plain language to drunk driving cases, how can appellant assert that his alleged failure to receive an opportunity for an

independent medical examination should cause his refusal charge to be dismissed? He does so on the basis of a single provision of the refusal statute, which makes the third element of a refusal case proof that:

> (3) the person had been informed of his or her rights in accordance with § 31-27-3;

Gen. Laws 1956 § 31-27-2.1(c)(3). It would seem that, viewed in tandem, §§ 31-27-2.1(c)(3) and 31-27-3, require only that the State, in a prosecution for refusal to submit to a chemical test, prove only that the motorist was informed that he or she had a right to be examined by a physician of his own choosing and at his own expense. The synthesis of these statutes does not appear to require — in a refusal case — that the State prove that the police afforded the defendant a "reasonable opportunity" to exercise these rights.

But appellant asserts otherwise. He urges that § 31-27-3 "... clearly states that a motorist has the right to be examined immediately after his or her arrest and that the police must afford the person a reasonable opportunity to exercise this right. The refusal statute incorporates R.I.G.L. § 31-27-3." See Appellant's Memorandum of Law, at 9. If he is correct in this assertion, Jamestown had a duty to afford him an opportunity to obtain an independent medical examination. So, we must inquire, are the full mandates of § 31-27-3 — beyond mere notice — applicable in refusal cases? I have concluded this question must be answered in the negative for two reasons: one legal, one logical.

First, by their plain language, §§ 31-27-2.1(c)(3) and 31-27-3 do not support such a construction, as stated above: they merely require notice to be given, not the

opportunity to obtain such an examination. Moreover, in no case of which I am aware has our Supreme Court held that the reference to § 31-27-3 in § 31-27-2.1(c)(3) makes the former fully applicable — regarding all its commands — in refusal cases. Such a holding would mean that § 31-27-3 has been subsumed or poured into § 31-27-2.1(c)(3).[11]

Second, making the opportunity to take an independent medical examination an element in a refusal prosecution would be highly illogical. The results of an independent medical examination — potentially highly probative and persuasive in a drunk driving case — are, as a matter of law, immaterial in a refusal case. The purpose of an independent examination is to enable the defendant to challenge the results of a scientific test which has been offered to demonstrate that defendant had been operating under the influence. In a refusal prosecution, whether the defendant was truly under the influence is never at issue: it is only necessary for the State to show that the officer had reasonable grounds to believe the motorist had been driving under the influence — and that, upon request, the defendant refused the test. That the indicia which supported the officer's suspicions of drunkenness were later revealed to be caused by totally innocent factors is no defense in a refusal prosecution.

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[11] To the contrary, in State v. Langella, 650 A.2d 478, 479 (R.I. 1994), the Supreme Court would not hold that § 31-27-3 was subsumed into § 31-27-2(c)(6), a part of the drunk driving statute. It would be a longer stretch to find that it had been subsumed into the refusal statute, which is not referenced in §31-27-2.

In support of this conclusion we may cite State v. Bruno, 709 A.2d 1048, 1049-50 (R.I. 1998), in which our Supreme Court found that the Administrative Adjudication Court (AAC) trial judge and the AAC appellate panel erred in dismissing a refusal charge that had been lodged against the defendant, Peter Bruno, based on evidence tending to show his erratic driving and other conduct was caused by non-alcoholic factors. Accordingly, the results of an independent medical examination would not be deemed relevant in a refusal prosecution. For this reason, it would be an absurd result to find that the State must prove compliance with a provision whose product would be inadmissible.

So, what is the purpose of the notice requirement? Is it worthless? Or vestigial? No, I believe it carries an important purpose. Like the provision in § 31-27-2.1 requiring that the motorist be informed of the penalties that result from a refusal, this provision provides information that assists the motorist to make an informed decision on whether to take the breathalyzer test. See Appellee's (State's) Memorandum, at 4-5.

Thus, I find the State need not demonstrate that the police complied with § 31-27-3's opportunity mandate in a refusal prosecution, just the notice provision. This duty Officer Esposito clearly fulfilled. For these reasons I conclude that the State had no duty to afford Mr. Eldridge an opportunity to arrange an independent

medical examination. Accordingly, I find appellant's rights under § 31-27-3 were not abridged.[12]

3. Assuming Section 31-27-3 Is Fully Applicable To Refusal Cases, Was There Compliance In the Instant Case?

Given that there is no definitive precedent on this issue, I believe it incumbent upon me to consider the legal alternative — that the State must prove it provided Mr. Eldridge with a "reasonable opportunity" to obtain an independent medical examination. The State argues that — even assuming it is fully applicable in refusal cases — § 31-27-3 was not violated by the Jamestown Police during Mr. Eldridge's detention. In this, I believe the State is very much correct.

Firstly, in denying Mr. Eldridge's claim that his right to an examination had been abridged, the appellate panel focused on the fact that appellant — having been advised of his right to an independent medical examination — never expressed a desire for such an examination to be arranged. Decision of Panel, at 9-10. Thus, the panel took the position that it is the duty of the motorist to request an examination. Decision of Panel, at 9. The panel reasoned that a contrary position — that the police must demonstrate compliance without a request — would render the refusal statute a nullity. Every person charged with drunk driving could sit back and allow time to pass, delaying release, and then claim a § 31-27-3 violation. Decision of Panel, Id.

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12 I agree with the State that Judge Erickson's decision in State v. Moniz — a drunk driving case — is inapposite. As he stated, his decision had no relevance to refusal cases. Transcript, at 13.

Secondly, assuming § 31-27-3 imposes a substantive duty on police in a refusal case, it may also be argued that such a duty was satisfied by Jamestown when its officers allowed appellant to make a single phone call. This position is supported by a Rhode Island Supreme Court decision rendered in 1994. In State v. Langella, 650 A.2d 478 (R.I. 1994), a drunk driving case, the Rhode Island Supreme Court held that a single telephone call made by the defendant, Christopher Langella, just after he received his Rights For Use at the Scene satisfied the duty of the East Greenwich Police Department to provide him with a reasonable opportunity to have an independent medical examination. Langella, 650 A.2d at 479. There was no indication from our Court that multiple calls must be made available to the motorist in order to satisfy the mandates of § 31-27-3.

In sum, I believe both of these arguments have merit; accordingly, even if § 31-27-3 applies in cases of refusal to submit to a chemical test-first offense, I am satisfied that Mr. Eldridge's rights were not violated and the appellate panel did not err in overruling his appeal on this ground.

ADDENDUM — SPEEDING CASE

As indicated above, Mr. Eldridge was also charged with speeding — in violation of Gen. Laws 1956 § 31-14-2 [Prima facie limits]. On this lesser charge he was convicted by Magistrate Noonan and lodged an appeal to the appellate panel. For some reason, counsel submitted separate memoranda on the speeding charge and the appellate panel issued a separate decision on this issue. In that decision Mr. Eldridge's conviction for

speeding was affirmed. Nevertheless, as is the custom in the District Court, I shall address this second issue at this time.

At trial, Officer Esposito testified that the rear view radar he was using revealed that Mr. Eldridge's vehicle was travelling at a speed of 54 miles per hour on North Road, significantly exceeding the posted speed limit of 25 miles per hour. (Trial Tr. at 2-4, 29). He testified he had taken an eight-hour course in the use of radar at the Rhode Island Municipal Police Training Academy, which included training in rear view radar. (Trial Tr. at 7, 30). He described how he checked the calibration of his radar unit about two hours before he stopped Mr. Eldridge. (Trial Tr. at 8-9).

Appellant argues that the appellate panel erred when it upheld the trial magistrate's decision to admit the results of the radar because an insufficient evidentiary foundation regarding the reliability of those results had been presented: specifically, that while Officer Esposito had testified as to his training in the use of radar devices [at the police academy], he had not testified regarding his experience in the use of a radar device. Appellant's Memorandum (Speeding), at 3-4. In support of this assertion of error, he calls our attention to the Rhode Island Supreme Court's decision in State v. Sprague, 113 R.I. 351, 322 A.2d 36 (1974). Appellant's Memorandum (Speeding), at 3-4.

But, according to the State, Mr. Eldridge has misread Sprague; it urges that although the Court mentioned the officer's testimony regarding his radar experience in upholding the admission of the radar results, this does not mean that such testimony was deemed a prerequisite to their admission. The issue under review in Sprague was whether the tuning fork used to calibrate the radar device had to be proven accurate before the

radar results could be admitted: of course, the Court answered no. Sprague, 113 R.I. at 357, 322 A.2d at 39-40.

The RITT appellate panel adopted the State's view of Sprague. It found that the Court's holding did not constitute a bright-line rule requiring that officers in speeding cases must always present testimony regarding their experience in using radar devices. After deciding that the accuracy of the tuning fork did not have to be proven, the Court merely commented that, in addition to presenting testimony on the "operational efficiency" of the radar unit, there was "... testimony setting forth [the officer's] training and experience in the use of a radar unit." Decision of Panel [Speeding], at 4, citing Sprague, 113 R.I. at 357, 322 A.2d at 39-40. As a result, the panel insisted that the Supreme Court in Sprague in no way enunciated a rule that an officer must have a certain amount of experience with radar units. Decision of Panel [Speeding], at 4. Finally, the panel opined that to rule otherwise would mean that any officer's first speeding citation could not be sustained. Accordingly, the appellate panel upheld the admission of Officer Esposito's radar results and affirmed appellant's conviction for speeding. Id.

I agree with the panel's decision. Appellant's position is overly technical, and reliant upon language in Sprague concerning a question that was not central to the issue being examined; it would also lead to an absurd result. Accordingly, I recommend that Mr. Eldridge's conviction for speeding be affirmed.

CONCLUSION

Upon careful review of the evidence, I recommend that this Court find that the decisions of the appellate panel were made upon lawful procedure and were not affected by error of law. Gen. Laws 1956 § 31-41.1-9. Furthermore, said decisions were 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 decisions rendered by the RITT appellate panel in this case be AFFIRMED.

Joseph P. Ippolito
MAGISTRATE

APRIL 14, 2011