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

Richard Dion	:	
	:	**A.A. No. 2009 - 151**
v.	:	**A.A. No. 2010 - 246**
	:	
State of Rhode Island	:	

O R D E R

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

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

It is, therefore, ORDERED, ADJUDGED AND DECREED,

that the Findings & Recommendations of the Magistrate are adopted by reference as the Decision of the Court and the decision of the appellate panel of the Traffic Tribunal is AFFIRMED.

Entered as an Order of this Court at Providence on this 17th day of August, 2011.

By Order:

___/s/_____
Melvin Enright
Acting Chief Clerk

Enter:

___/s/_____
Jeanne E. LaFazia
Chief Judge

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

Richard Dion	**:**	**A.A. No. 2009-151**
	:	**(T08-0106)**
v.	**:**	**(07-102-10479)**
	:	**A.A. No. 2010-246**
State of Rhode Island	**:**	**(T10-0089)**
(RITT Appellate Panel)	**:**	

F I N D I N G S & R E C O M M E N D A T I O N S

Ippolito, M. In this case Mr. Richard Dion 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 Gen. Laws 1956 § 8-8-8.1. Jurisdiction for the instant appeal is vested in the District Court by Gen. Laws 1956 § 31-41.1-9; the applicable standard of review may be found in Gen. Laws 1956 § 31-41.1-9(d).

In his appeal Mr. Dion asserts that the decision of the panel should be set aside because his right to an independent medical examination, as provided by Gen. Laws 1956 § 31-27-3, was 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 well-stated (with citations to the trial transcript) in the decision of the appellate panel. See Decision of RITT Appellate Panel, August 7, 2009, at 1-6. Given the nature of the appellant's assertions of error below, much of the circumstances of his arrest are not material to this appeal and will not be discussed in depth.

Bristol Police Officer Russell Wood — a two-year veteran of the Bristol Police Department with 75 or more DUI stops — testified that he first noticed Mr. Dion's vehicle at about 12:20 a.m. on April 28, 2008 because it was traveling southbound in Thames Street's northbound travel lane. (Trial Transcript I,[1] at 4, 9, 11). It turned onto Church Street and then onto Hope Street — which it did without using its turn signals. (Trial Transcript, at 12). On Hope Street it straddled the center line for about 400 feet. Id. At this point Officer Wood activated his emergency lights and attempted to stop the vehicle. Id. The vehicle did not stop, but veered into and onto the curb and traveled south on Hope Street for several hundred feet before stopping. Id.

Officer Wood's trial testimony was abbreviated because counsel entered into a significant stipulation, the elements of which were enumerated thusly by the panel:

> … the parties stipulated as to the following: that Officer Wood had reasonable suspicion, based upon specific and articulable facts, to stop Appellee's vehicle for investigative purposes; that the arrest of Appellee was based on probable cause; that Officer Wood had reasonable grounds to believe that Appellee had been driving his motor vehicle in the State of Rhode Island under the influence of intoxicating liquor; that Appellee was informed of his right to an independent physical examination in accordance

[1] Trial Transcript I refers to the proceedings on July 16, 2008; Trial Transcript II refers to the proceedings on August 6, 2008.

> with G.L. 1956 § 31-27-3; and that Appellee was informed of his "Rights for Use at Scene" and, upon being transported to the Bristol Police Department, his "Rights for Use at Station." (Tr. 7/16/08 at 15-16.)

Decision of Panel, Bristol v. R. Dion, T08-106, 8/7/09, at 2-3, [footnote omitted]. See also Trial Transcript I, at 14-15. Thereafter, Officer Wood's testimony resumed.

He testified that he read the Rights For Use At the Station Form to appellant several times. (Trial Transcript I, at 17). Mr. Dion declined to use the telephone and refused to submit to a chemical test. Id. Officer Wood then notified Mr. Dion of his right to an independent medical examination as provided by Gen. Laws 1956 § 31-27-3. (Trial Transcript I, at 18). Appellant attempted to contact his personal physician by phone for about one half hour, but was unsuccessful. (Trial Transcript I, at 19).

At his juncture appellant requested to be taken to a hospital. What happened next was described by the panel:

> Officer Wood handcuffed Appellee and transported him to Newport Hospital, where he was subsequently admitted and examined by a Dr. Penza. (Tr. 7/16/08 at 20.) Officer Wood testified that he was not present in the room where Appellee's physical examination was conducted and could not hear what Appellee was saying to the physician, but that he could see both Dr. Penza and Appellee through a glass window in the examination room door. Id.
>
> Following the examination, Dr. Penza informed Officer Wood that Appellee had independently requested a blood alcohol test. Id. After approximately ten minutes, a phlebotomist entered the examination room to extract the blood sample. Id. Officer Wood indicated that he was not in the examination room as Appellee's blood was drawn, but that he continued to observe Appellee through the glass. Id. While Officer Wood maintained that he had no contact with the blood sample, he testified that he approached Dr. Penza as the sample was being obtained and asked that the sample be preserved in the event that the Bristol Police Department decided to seize the blood at a later time for investigative purposes. (Tr. 7/16/08 at 21.) According to Officer Wood, Dr. Penza stated that the lab would hold Appellee's blood for approximately twenty days, pursuant to Newport Hospital policy. (Tr. 7/16/08 at 27.)

> On cross-examination by counsel for Appellee, Officer Wood was asked whether he obtained a written release from Appellee prior to speaking with Dr. Penza regarding Appellee's "confidential medical information." (Tr. 7/16/08 at 24.) Officer Wood responded in the negative, stating that it was his understanding of the State Police's blood sample protocol that law enforcement officers were permitted to ask hospital personnel to preserve blood evidence, without a written release, pursuant to an ongoing DUI investigation. (Tr. 7/16/08 at 24, 28.) Officer Wood also clarified that he never ordered Dr. Penza to retain Appellee's blood; rather, he requested that she do so, and Dr. Penza agreed. (Tr. 7/16/08 at 28.)

Decision of Panel, Bristol v. R. Dion, T08-106, 8/7/09, at 4-5.[2] Officer Wood charged Mr. Dion in summons number 07-102-10479 with refusal to submit to a chemical test and four lesser charges: "right half of road," "laned roadway violation," "turn signal required," and "safety belt use."

Mr. Dion was arraigned at the Traffic Tribunal (RITT) on May 12, 2008. His trial before Magistrate Dominic DiSandro began on July 16, 2008 and concluded on August 6, 2008 — when the trial magistrate rendered his decision. The trial magistrate sustained the lesser violations, but dismissed the refusal charge.

Magistrate DiSandro found that Officer Wood transported Mr. Dion to Newport Hospital for his examination. Specifically, he found that the officer observed Dr. Penza examining Mr. Dion and that the doctor subsequently informed the officer that appellant had requested a blood test. Trial Transcript II, at 4. He also found that Officer Wood asked the doctor to "hold the sample in case the police department wished to use it for prosecution." Trial Transcript II, at 5.

Magistrate DiSandro explained that, in his view, § 31-27-3 gives the arrested party " … the right to be examined by a physician of his choice and at his own expense for the

---

[2] In my view, the foregoing is a fair and accurate synopsis of the Officer's testimony. rng the events that transpired at the Hospital.

purpose of gathering professional medical opinion and appropriate medical lab work to defend against the DUI violation or the refusal to submit violation." Trial Transcript II, at 8 (Emphasis added). He called the independent medical examination " … perhaps the most important and effective means for an arrested party charged with a DUI or refusal to contradict the direct testimony, of the arresting officer in a proper defense." Trial Transcript II, at 8-9 (Emphasis added). However, the magistrate rejected the idea that it is per se improper for the independent examination to be done while the defendant is in custody. Trial Transcript II, at 9.

Applying the facts to the law, Magistrate DiSandro concluded that Mr. Dion was not afforded a "reasonable opportunity" to exercise his right to an independent medical examination under § 31-27-3. Specifically, he indicated he was "very troubled" by the fact that Officer Wood spoke to the doctor "relative to Dion's physical condition" and that this action was improper. Trial Transcript II, at 9-10. He called Officer Wood's "most egregious behavior" the fact that he "commandeered that blood sample by instructing Dr. Penza to seize and hold the sample for possible police prosecution." Trial Transcript II, at 9-10.

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

The matter was heard by an appellate panel comprised of Magistrate Alan Goulart (Chair), Chief Magistrate Guglietta, and Judge Ciullo on December 10, 2008. Before the panel, the State asserted that the trial magistrate committed error by dismissing the refusal charge due to a § 31-27-3 violation. In response, Mr. Dion argued that Magistrate DiSandro's finding of a § 31-27-3 violation was correct and the trial magistrate's dismissal of the refusal case should be upheld.

In its subsequently issued opinion, the panel decided:

(a) that Mr. Dion's blood was drawn and tested, not at the direction or under the supervision of the Bristol Police Department, but pursuant to Newport Hospital's established blood testing protocols. [Decision of Panel, at 9];

(b) that Mr. Dion was not prejudiced — because the results of the blood test were not admitted. [Decision of Panel, at 9];

(c) that, in conclusion, Mr. Dion was both notified of his right to an independent medical examination and afforded the opportunity to exercise that right [Decision of Panel, at 9-10].

At the conclusion of the December 10, 2008 oral argument, the panel announced orally that it was reversing the dismissal of the refusal charge and remanding the case to the trial magistrate for sentencing. Fearing the immediate imposition of sanctions, Mr. Dion proceeded to the Sixth Division District Court just five days later — on December 15, 2008 — and filed an appeal, which was denominated A.A. No. 2009-151. At the same time, he also requested a stay of the imposition of sanctions pending the publication of the panel's written decision, which was granted by this Court. The appellate panel's formal written decision was not issued until August 7, 2009.

Subsequently, on December 1, 2010, over Mr. Dion's objection, Magistrate DiSandro issued a judgment sustaining the refusal charge and imposing sanctions. Mr. Dion immediately instituted a second appeal before the panel, which was denominated C.A. No. T10-0089. The second appeal was heard before the appellate panel on December 8, 2010. At the conclusion of the hearing, the panel rejected Mr. Dion's supplemental arguments. The next day, Mr. Dion filed a second complaint in the Sixth Division District Court. On this occasion, the panel issued its formal written opinion denying Mr. Dion's appeal most

expeditiously; and, after it was published on December 24, 2010, Mr. Dion filed a third complaint for review — denominated A.A. No. 2010-246 — on December 30, 2010.

Without doubt, the case is now ready for decision.

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,

[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)).

the panel) as to the weight of the evidence on questions of fact.[4] 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 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

---

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

> 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)(Emphasis added).

B. SECTION 31-27-3 (RIGHT TO A CONFIDENTIAL MEDICAL EXAMINATION).

A second section which must be considered in the resolution in this case is Gen. Laws 1956 § 31-27-3, which grants DUI arrestees the right to an independent medical examination:

> **31-27-3. Right of person charged with operating under influence to physical examination. —** 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). 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 those detained on drunk driving charges.

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 reversed the decision of the trial magistrate and instituted Mr. Dion's conviction for refusal to submit to a chemical test?

V. ANALYSIS

IS THE APPELLATE PANEL'S DECISION TO SET ASIDE THE DISMISSAL OF MR. DION'S REFUSAL CHARGE BECAUSE HIS RIGHT TO AN INDEPENDENT MEDICAL EXAMINATION WAS NOT ABRIDGED CLEARLY ERRONEOUS?

Mr. Dion asserts that his right to an independent medical examination as provided in Gen. Laws 1956 § 31-27-3 was abridged by the Bristol Police Department. We shall now consider three questions:

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

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

3. Assuming Section 31-27-3 Is Applicable To Refusal Cases and Was Violated in the Instant Case, Was There Prejudice?

A. IS SECTION 31-27-3 APPLICABLE TO REFUSAL CHARGES?

As seen above, § 31-27-3 is limited by its plain language to drunk driving cases. How then 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. Even when viewed in tandem, 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 cites a previous panel decision, State v. Steven Kent, No. T04-0014 (R.I.T.T. 7/14/04), for the proposition that a violation of a defendant's right under § 31-27-3 can be grounds to dismiss a refusal case. See Appellant's Memorandum of Law, at 3-4. He then argues that Officer Wood's actions constituted a clear violation of § 31-27-3. See Appellant's Memorandum of Law, at 4. 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 involving principles of statutory construction, one involving simple logic.

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.

> It is a well-settled principle of statutory construction in this jurisdiction that when a statute has a plain, clear, and unambiguous meaning, no interpretation of the statute is required and the court is bound to construe the statute in accordance with the plain and ordinary meaning set forth therein. See, e.g., O'Neil v.Code Commission for Occupational Safety & Health, 534 A.2d 606 (R.I.1987); Moore v. Rhode Island Share & Deposit Indemnity Corp., 495 A.2d 1003 (R.I.1985).

Krupa v. Murray, 557 A.2d 868, 869 (R.I. 1989). 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).[6]

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. Proof that the indicia which supported the officer's suspicions of drunkenness were later revealed to be caused by totally innocent factors constitutes no defense in a refusal prosecution.

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 were caused by factors other than the

[6] 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 provision 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 § 31-27-3.

consumption of alcohol. Accordingly, the results of an independent medical examination would not be deemed material in a refusal prosecution.[7] 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 still serves an important function. 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.

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 Wood clearly fulfilled. For these reasons I conclude that the State had no duty to afford Mr. Dion an opportunity to arrange an independent medical examination. Accordingly, I find appellant's rights under § 31-27-3 were not abridged.

B. 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. Dion with a "reasonable opportunity" to obtain an independent medical examination. Assuming § 31-27-3 to be fully applicable to refusal cases, the appellate panel held that it

[7] Recall that in this case the panel noted that the results were not entered into evidence; moreover, according to Officer Wood, the blood was never seized. Trial Transcript I, at 36.

was not violated by the Bristol Police during Mr. Dion's detention. On this point I must concur with the panel.

Firstly, in denying Mr. Dion'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 — expressed a desire for such an examination to be arranged. Decision of Panel, at 9-10. In response, Officer Wood allowed him to use the telephone for about 30 minutes in an effort to contact his physician. Some might argue that this license was sufficient per se to satisfy the provisions of § 31-27-3. 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 or that an officer must aid the arrestee beyond permitting calls to be made.

Secondly, the panel reasoned that the test taken at Newport Hospital was not accomplished under the supervision or direction of the Bristol Police. Decision of Panel, at 9. Citing two criminal cases — State v. Collins, 679 A.2d 862, 865 (R.I. 1996), and State v. Lussier, 511 A.2d 958, 961 (R.I. 1986) — the panel agreed with the State that the Rhode Island Supreme Court has declared a "bright-line" distinction between those tests

done as a result of hospital actions and those done for the police. Decision of Panel, at 8-9.

In sum, I believe both of these arguments have merit;[8] accordingly, even if § 31-27-3 applies in cases of refusal to submit to a chemical test-first offense, I am satisfied that Mr. Dion's rights were not violated and the appellate panel did not err in overruling his appeal on this ground.

C. ASSUMING SECTION 31-27-3 IS APPLICABLE TO REFUSAL CASES AND WAS VIOLATED IN THE INSTANT CASE, WAS THERE PREJUDICE?

Assuming the Supreme Court did find § 31-27-3 is applicable to refusal cases, I believe it would require prejudice be shown before it allowed the extreme remedy of dismissal to be imposed. It has taken this view in cases where prosecutorial misconduct is alleged, State v. Carcieri, 730 A.2d 11, 16 (R.I. 1999), and in cases where a breach of a defendant's right to a phone call is alleged, State v. Veltri, 764 A.2d 163, 167-68 (R.I. 2001). I believe it would follow suit in this situation.

Has prejudice been shown here? I believe not. The police never seized the blood that was taken from Mr. Dion at Newport Hospital; neither were the test results obtained. The doctor merely told Officer Wood he was going to draw blood — which, after all, is why Mr. Dion had been taken to the hospital. As the panel found, the police clearly did not interfere with the hospital's efforts. At most, even viewing the facts from

---

[8] A third argument presented by appellant was not discussed by the appellate panel. This was his reliance on State v. Steven Kent, No. T04-0014 (R.I.T.T. 7/14/04), a case in which a prior appellate panel reversed a refusal conviction, finding that the police, by refusing to release the defendant, interfered with his right to an independent examination under Gen. Laws 1956 § 31-27-3. Of course, the defendant's bail status relates only to his status as a drunk driving detainee, not his status as a refusal defendant. In my view, this case shows the anomalies that will inevitably result when

appellant's perspective, one could only say that Officer Wood attempted to monitor the hospital's practices. Accordingly, I find no prejudice was shown by appellant.

ADDENDUM — THE SUPPLEMENTAL APPEAL — A.A. NO. 10-246

I shall now address the issues raised in the second appeal — A.A. No. 10-246. I conclude that they are without merit. They shall be considered seriatim.

His first argument is that the State had no right to appeal from the decision of the trial magistrate. As a preliminary matter, no objection was made at or after the time of the initial appeal. And, this issue was not included in his Memorandum of Law filed in conjunction with the filing of his appeal to the Sixth Division District Court. And so, by application of the "raise or waive" rule, the issue was not preserved for appeal and no error can now be found. See State v. Nelson, 982 A.2d 602, 616(R.I. 2009). Nor do I believe the "plain error" rule applies in this case, as it does not focus on a fundamental constitutional right. See Rhode Island Depositors Economic Protection Corporation v. Riganese, 714 A.2d 1190, 1196-97 (R.I. 1998). Instead, as can be seen in the case cited by appellant, these issues are resolved on the basis of statutes and court rules. See State v. Robinson, 972 A.2d 150 (R.I. 2009). Accordingly, I recommend affirmance of the panel's refusal to find error on this issue.

In its December 24, 2010 opinion regarding Mr. Dion's second appeal, the appellate panel also refused to find the trial magistrate was without jurisdiction to impose sentence pursuant to its remand. As was explained above, Mr. Dion took an appeal from the panel's initial oral decision reversing the trial magistrate and reinstating the refusal charge. The panel, in its second opinion, adopts the view that Mr. Dion's first appeal (A.A. No. 09-151) was

---

one interchanges the rights and procedures that apply in criminal cases with those

taken prematurely. I disagree, and believe it was proper for the District Court to accept the filing of the appeal, since it appeared that sanctions were to be imposed without waiting for the release of the written opinion. Moreover, pursuant to Gen. Laws 1956 § 31-41.1-9(a), "any person who is aggrieved by a determination of an appeals panel may appeal the determination …" to the District Court. Certainly, once sanctions are imposed, or a dismissal set aside, the affected party can be considered aggrieved.

Whether or not appellant's initial appeal was filed prematurely, the appeal was fully pending before the District Court when he was sentenced — since the panel's first written opinion had been published on August 7, 2009. Accordingly, it can well be posited that the RITT — as a whole — was without authority to act in the case on December 1, 2010 [the date of sentencing] because the initial appeal was then fully pending before the District Court.[9] Accordingly, I believe that the instant case should be remanded to the RITT for referral to the trial magistrate for further proceedings consistent with this opinion.[10] Upon entry of a judgment, resentencing may occur.

Thirdly, in an argument somewhat contrary to his second, appellant asserts error in the delay in his sentencing. Because I believe re-sentencing should occur, I find this issue to be moot. Nevertheless, it cannot be left unsaid that the sentencing occurred over Mr. Dion's objection. Since the time of the appellate panel's first oral decision in December of 2008, Mr. Dion had repeatedly entreated the RITT and this Court for orders staying the imposition of

---

that apply to civil violations.

[9] In any event, the magistrate acted pursuant to the specific direction of the panel and no error can be ascribed to him.

[10] Given the stipulation to all other elements of the case against Mr. Dion, and in light of this Court's affirmance of the panel's ruling decision of § 31-27-3, it would appear that a judgment of conviction must enter.

sentence. Moreover, the case had been pending, since December of 2008, in the District Court. Quite simply, it seems to me he lacks standing to complain in good faith that his sentencing was delayed.

Finally, while all issues in both appeals are resolved by the publication of this opinion and the accompanying order of the Court, I believe in closing a few comments should be offered, given the unique travel of this case. In my view, the origins of the post-appeal litigation that occurred in this case —at the RITT and here in the District Court — can be traced to the RITT appellate panel's practice of rendering a decision at the end of oral argument. Of course, one would not expect that announcing an oral decision — to be followed by a formal opinion — would engender great difficulties — other than eliminating all mystery from the publication of its written decision. But, to my understanding, the panel has been doing more: it has been endeavoring to enforce its ore tenus decisions prior to the issuance of its written decisions.[11] That appellants like Mr.

---

[11] Some might view this practice — allowing sanctions to be imposed before the final judgment is entered in conjunction with a formal opinion — as fundamentally unfair, leaving litigants in limbo, suffering penalties without the opportunity for review. By the time a formal opinion is issued, a six-month (minimum) license suspension in a refusal case might well be entirely served out. Also, this protocol would seem to undercut the legislature's policy of providing automatic stays for all RITT appeals pending before the panel and the District Court for more than thirty days. See Gen. Laws 1956 § 31-41.1-8(i)(appeals before the panel) and Gen. Laws 1956 § 31-41.1-9(f)(appeals before the District Court). It would also seem to run afoul of the mandate that the panel act through written decisions and orders. See Gen. Laws 1956 § 31-41.1-8(c).

Of course, it is not unprecedented for an appellate court to issue an order and issue a full opinion thereafter. Our Supreme Court — our constitutional court, which holds plenary authority regarding the administration of justice — has done so on a number of occasions, in cases involving matters of great import and urgency. See e.g. In re Advisory Opinion to the Governor (DEPCO), Kayrouz v. Rhode island Depositors Economic Protection Corp., 593 A.2d 943, 946 (R.I. 1991)(Supreme Court issued order answering four questions on May 28, 2991, formal opinion on

Dion would endeavor to forestall the imposition of sanctions until the appellate panel's final decision is published is, to my mind, entirely understandable and foreseeable. This is a circumstance that future panels may wish to consider.

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.

/s/
Joseph P. Ippolito
MAGISTRATE

AUGUST 17, 2011

June 24, 1991). But, the adoption of such a practice in less momentous cases would seem to be of questionable necessity.