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

Robert Mattley	:	
	:	
v.	:	**A.A. No. 11 - 0060**
	:	
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 26th day of September, 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

Robert Mattley	:	
	:	
v.	:	**A.A. No. 2011-60**
	:	**(T10-0051)**
State of Rhode Island	:	**(10-505-500135)**
(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. Robert Mattley urges that an appeals panel of the Rhode Island Traffic Tribunal erred when it affirmed a trial magistrate's decision finding him guilty of refusal to submit to a chemical test, a civil violation, in violation of Gen. Laws 1956 § 31-27-2.1. This matter has been referred to me for the making of findings and recommendations pursuant to 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. Mattley argues that the decision of the panel should be set aside because the panel failed to recognize that his right to a confidential phone call while in custody at the police station 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 fully and fairly stated (with appropriate citations to the trial transcript) in the decision of the panel. See Decision of RITT Appellate Panel, April 20, 2011, at 1-3; they may be summarized here as follows.[1]

On April 22, 2010 Patrolman Anthony Zoglio — a 4-year veteran of the Richmond Police Department with forty alcohol-related arrests — was on patrol near Nooseneck Hill Road when he observed a vehicle (a red SUV) run a stop sign and then cross into the high-speed lane and then back to the breakdown lane. (Trial Transcript, at 2, 4, 8). He stopped the vehicle, which was being driven by appellant, near Dawley Park. (Trial Transcript, at 9). When he approached the driver, he noticed a smell of alcohol and observed Mr. Mattley to have bloodshot and watery eyes. (Trial Transcript, at 11). He seemed disoriented. Id. Appellant agreed to perform a series of field sobriety tests, which he failed. (Trial Transcript, at 13-14).

At this juncture Officer Zoglio placed Mr. Mattley under arrest for suspicion of driving under the influence. (Trial Transcript, at 15). He was read his "Rights For Use at the Scene" and transported to the Richmond police station. (Trial Transcript, at 16). At the station, Officer Zoglio read Mr. Mattley his "Rights For Use At Station." (Trial Transcript, at 18). Included therein is language indicating that the arrestee has a right to

[1] What follows is a somewhat briefer version of the narrative presented by the panel in its opinion.

contact an attorney and a telephone is available for that purpose. (Trial Transcript, at 21). Mr. Mattley declined to use the telephone and signed the form indicating he was refusing to submit to a chemical test. (Trial Transcript, at 18).

Mr. Mattley was arraigned before the Traffic Tribunal on May 11, 2010. He entered a plea of not guilty. The case proceeded to trial on June 15, 2010 before Chief Magistrate Guglietta. Patrolman Zoglio was the only witness, testifying consistent with the narrative presented above. At the close of the evidence, the Chief Magistrate dismissed the refusal charge. Although he found "overwhelming" evidence that Mr. Mattley was operating under the influence, he concluded dismissal was appropriate because Officer Zoglio never informed him that he had a right to a confidential telephone call.[2] (Trial Transcript, at 435, 36-41). The trial magistrate also dismissed an accompanying laned-roadway violation but sustained a stop sign citation. (Trial Transcript, at 31-32).

The State filed an appeal to the RITT appeals panel. The matter was heard by the panel, comprised of Magistrate William T. Noonan (Chair), Judge Edward Parker and Magistrate Domenic DiSandro on November 23, 2010.

In its April 20, 2011 written opinion, the panel noted the narrowness of the issue before it: the confidentiality vel non of Mr. Mattley's call did not need to be addressed — since no call was made; it merely had to decide the effect of the officer's failure to use the

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[2] Note — it is conceded that appellant was told he had a right to a telephone call. The trial magistrate found that the officer abrogated appellant's right by failing to inform him that he had a right to a confidential phone call.

Also, Mr. Mattley did use the telephone after he had refused the test.

word "confidential" when informing Mr. Mattley of his right to a phone call. Decision of Panel, at 5. Citing State v. Carcieri, a criminal case wherein Gen. Laws 1956 § 12-7-20 was interpreted, the panel noted that prejudice must be shown before a § 12-7-20 violation will justify the harsh remedy of dismissal. Decision of Panel, at 5-6. The panel — declining to speculate on what appellant might have done had the word "confidential" been used — found no prejudice. Decision of Panel, at 6. Moreover, the panel indicated that the Supreme Court in Carcieri approved the language of the "Rights For Use at Station" Form. Decision of Panel, at 6.

On April 27, 2011, appellant filed an appeal in the Sixth Division District Court. At a conference held by the undersigned on August 16, 2011, counsel for appellant and the State agreed to submit the case for review by this Court on the record below and without the necessity of further memoranda.

II. STANDARD OF REVIEW

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

> (d) *Standard of review.* The judge of the district court shall not substitute his or her judgment for that of the appeals panel as to the weight of the evidence on questions of fact. The district court judge may affirm the decision of the appeals panel, or may remand the case for further proceedings or reverse or modify the decision if the substantial rights of the appellant have been prejudicial because the appeals panel's findings, inferences, conclusions or decisions are:
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> (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] 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

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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, 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).

> 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 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 ordered Mr. Mattley's conviction for refusal to submit to a chemical test?

V. ANALYSIS

IS THE PANEL'S DECISION REVERSING THE TRIAL MAGISTRATE'S DECISION TO DISMISS THE REFUSAL CHARGE DUE TO 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: (1) 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), (2) assuming arguendo section 12-7-

[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.

20 does apply in refusal cases, Mr. Mattley's right to a confidential phone call was never breached, and finally (3) 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. Mattley's right to a confidential phone call was not violated, it also held (or at least assumed) that Mr. Mattley and all refusal-first offense defendants are covered by the protections afforded in § 12-7-20. With this latter, legal finding 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-first offense cases,[7] I believe the court will, when given the opportunity, decline to extend § 12-7-20's protections to defendants in refusal cases.

Firstly, proof that a refusal-first offense defendant was given a confidential

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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).

telephone call is not one of the four elements which must be proven — to a standard of clear and convincing evidence — in a refusal case. With the exception of the warnings, where the court has required that certain sanctions outside of section 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-first 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; as to the latter, while refusal-first offense defendants certainly have the right to retain counsel for the defense of a civil violation, our Supreme Court has

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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.

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 arise from different classes: 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 their capacity as a potential refusal-first offense defendant. 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.

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[9] Moreover, defendants charged with civil violations such as refusal to submit to a chemical test — 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).

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 on this case, the RITT panel which was seated in this case found that Mr. Mattley'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 reverse the trial magistrate's decision should likewise be affirmed.

Firstly, there is simply no doubt that Mr. Mattley was given an ample opportunity to call from the station. According to the officer, he was offered the chance to make a call and declined. (Trial Transcript, at 21). Section 12-7-20 does not require a call be made, only that the arrestee be given the opportunity to make a call.

In conclusion, I believe the panel's decision upholding the trial magistrate's finding that Mr. Mattley was given the opportunity to make confidential phone calls 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. Mattley cannot demonstrate prejudice. See State's Memorandum of Law, at 6-7. The panel cited State v. Carcieri, 730 A.2d 11 (RI 1999), for the principle that prosecutorial misconduct will not require dismissal unless there is demonstrable

proof of prejudice or a substantial threat thereof. Carcieri, 730 A.2d at 16 citing United States v. Morrison, 449 U.S. 361, 365 (1981). See also State v. Veltri, 764 A.2d 163, 167-68 (RI 2001). In Carcieri, the Court found a lack of prejudice where the police did not obtain incriminating information and the attorney-client relationship was not invaded — because Mr. Carcieri was not speaking to his attorney. Carcieri, 730 A.2d at 16-17. Applying the Carcieri decision to the facts of the instant case, we are led to the inescapable conclusion that Mr. Mattley cannot show prejudice because he cannot demonstrate — based on this record — that he would have made a call if the word "confidential" had been used and that the outcome of this case would have been different if he had.

In sum, for this third reason as well, 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.

CONCLUSION

Upon careful review of the evidence, I recommend that this Court find that the decision of the appellate panel was made upon lawful procedure and was not affected by error of law. R.I. General Laws § 31-41.1-9. Furthermore, said decision is not clearly erroneous in view of the reliable, probative and substantial evidence on the whole record. R.I. General Laws § 31-41.1-9.

Accordingly, I recommend that the decision rendered by the RITT appellate panel in this case be AFFIRMED.

/s/
Joseph P. Ippolito
MAGISTRATE

September 26, 2011