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

Nabeil Sarhan	:	
	:	
v.	:	**A.A. No. 12 - 094**
	:	
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 10th day of October, 2012.

By Order:

___/s/_____
Stephen C. Waluk
Chief Clerk

Enter:

__/s/_____
Jeanne E. LaFazia
Chief Judge

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

Nabeil Sarhan	**:**	
	:	
v.	**:**	**A.A. No. 2012-094**
	:	**(T11-0046)**
State of Rhode Island	**:**	**(11-204-501169)**
(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. Nabeil Sarhan urges that an appellate panel of the Rhode Island Traffic Tribunal (RITT) erred when it affirmed a trial magistrate's decision finding him guilty of a civil violation — refusal to submit to a chemical test — which is 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 is found in Gen. Laws 1956 § 31-41.1-9(d).

In his appeal Mr. Sarhan presents a number of reasons why the decision of

the appellate panel should be set aside. First, that the purported sworn report submitted to the RITT by the West Warwick Police Department was defective in its form if not in its content; second, the panel erred when it sustained the trial magistrate's finding that the arresting officer had reasonable grounds to believe appellant had operated while under the influence of intoxicating liquor; and third and finally, the panel failed to recognize that he was denied his right to a confidential phone call while in custody at the West Warwick Police Station. Appellant's Complaint, at 2-5. After a review of the entire record, and for the reasons stated below, I have concluded that the decision rendered by the appellate panel in this case is supported by reliable, probative and substantial evidence of record and was not clearly erroneous; nor is it affected by error of law. 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 appellate panel. See Decision of RITT Appellate Panel, April 5, 2012, at 1-3; they may be summarized here as follows.

On April 13, 2011, at about 6:00 p.m., Officer Thomas Nye, an eight-year veteran of the West Warwick Police Department who had effectuated 20-30 drunk driving arrests, responded, at the direction of dispatch, to the scene of an accident

— the intersection of Main Street and Cowessett Avenue. (Trial Tr. at 9-11, 14-16). When he arrived, he observed the aftermath of a three-car accident. (Trial Tr. at 16-17). He spoke to Mr. Sarhan, the operator of a gray BMW sport-utility vehicle, who stated the accident occurred because he did not see that the vehicle ahead of him had stopped in sufficient time to halt his vehicle — since he was going too fast. (Trial Tr. at 16-18, 37). The Appellant also advised Officer Nye that he had consumed alcohol at a local restaurant. (Trial Tr. at 29-30). Officer Nye noticed Mr. Sarhan's eyes to be watery, his breath to contain a slight odor of alcohol, and his speech to be slurred. (Trial Tr. at 19, 45-46). He also observed Mr. Sarhan to be stumbling as he approached his vehicle to get his license and registration. (Trial Tr. at 20). Mr. Sarhan told the officer he had not been injured in the accident. (Trial Tr. at 21). He admitted that he was coming from a local bar, where he had two or three drinks. (Trial Tr. at 24-25).

At this juncture, Officer Nye asked Mr. Sarhan to perform standardized field sobriety tests and he agreed. (Trial Tr. at 22, 29). He told the officer he had no problems with his eyes or legs that would prevent his taking the tests. (Trial Tr. at 23). He did not ask about other issues — back or inner-ear problems, for instance. (Trial Tr. at 60-62). In any event, Mr. Sarhan did repeatedly indicate he wanted — and needed — his glasses (Trial Tr. at 46-48). Officer Nye instructed Mr. Sarhan on the procedure to perform the tests. (Trial Tr. at 24). He did three

— including the one-legged stand and the walk-and-turn tests. (Trial Tr. at 24-27). Officer Nye concluded the Appellant was intoxicated to such a degree that it rendered him incapable of safely operating a motor vehicle. (Trial Tr. at 35-36).

Officer Nye then placed Mr. Sarhan under arrest, read him the "Rights For Use at Scene," and transported him to the West Warwick Police Station. (Trial Tr. at 29-32).

At the station, Officer Nye was present when Officer Stephen Blais, a certified Breathalyzer operator, read Mr. Sarhan his "Rights For Use At Station," and asked him to submit to a breathalyzer test. (Trial Tr. at 33, 66). Mr. Sarhan refused to take the test and declined to use the telephone on the desk. (Trial Tr. at 68-70, 74). Officer Nye composed a report regarding Mr. Sarhan's arrest which was signed by him and Officer Blais. (Trial Tr. at 34, 56). It was not sworn to by either officer. (Trial Tr. at 72, 75-76). Officer Nye issued a traffic citation to Mr. Sarhan enumerating two charges — (1) failure to maintain control of a vehicle and (2) refusal to submit to a chemical test.[1]

At his arraignment before the Traffic Tribunal on June 2, 2011, Mr. Sarhan entered not guilty pleas to both charges. See Docket Sheet, Summons No. 11-204-501169. The presiding magistrate declined to issue a license suspension. Id. See also RITT Rule of Proc. 33. The reason for this decision is not evident on the

written record.

The case was tried on July 20, 2011 before Traffic Tribunal Magistrate William Noonan. Officers Nye and Blais testified in conformity with the narrative presented above. At the close of the evidence, Mr. Sarhan moved to dismiss the refusal charge, but the Court reserved decision. (Trial Tr. at 82-87). Mr. Sarhan then testified, indicating that at the time of the accident he was coming from the Ivy Garden (formerly Evelyn's), where he had two scotches. (Trial Tr. at 92-93). Admitting he hit the car ahead of him, he attributed the accident to the fact that people were braking and accelerating suddenly and that the roads were slick (Trial Tr. at 95). He related the extent of his poor eyesight; and resolutely maintained that he told the officer he needed his glasses. (Trial Tr. at 95-99, 102). But, he conceded he told the officer he could perform the field sobriety tests. (Trial Tr. at 111). He maintained he was never told he could make a confidential phone call and, as a result, declined to use the telephone — until much later, when he called to arrange a ride. (Trial Tr. at 107).

He opined that he was not intoxicated when approached by the officer. (Trial Tr. at 106).

After the close of the evidence, the trial magistrate sustained the refusal charge, finding that: (1) there was no showing of prejudice from the fact that Mr.

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[1] A criminal summons for drunk driving was also issued. (Trial Tr. at 35).

Sarhan was not told he had a right to a "confidential" phone call; quite simply, the Court found disingenuous his testimony that he did not make a call for this reason (Trial Tr. at 121-22); (2) the trial magistrate found the fact that the report prepared by Officer Nye was not properly sworn to be entirely immaterial (Trial Tr. at 128); and (3) Officer Nye had reasonable grounds to conclude Appellant was operating his motor vehicle under the influence. (Trial Tr. at 134). The trial magistrate also sustained the lesser charge of failure to maintain control of a motor vehicle. (Trial Tr. at 121-22). Mr. Sarhan filed an appeal to the RITT appellate panel with regard to his refusal conviction but not his conviction for failure to maintain control.

The matter was heard by an appellate panel comprised of Chief Magistrate William Guglietta (Chair), Judge Lillian Almeida, and Magistrate Domenic DiSandro on October 19, 2011. In its April 5, 2012 decision, the panel rejected each of Appellant Sarhan's three assertions of error.

First, a majority of the appellate panel decided, relying on Link v. State, 633 A.2d 1345, 1349 (R.I. 1993), that the creation of a sworn report is not an element of proof in the trial of a refusal case but is necessary only for the issuance of a pre-trial suspension. Decision of Panel, at 5-6 citing Gen. Laws 1956 § 31-27-2.1(c). In concluding its comments on this issue, the panel held that the officer's testimony "… serves an evidentiary and procedural purpose equivalent to that of a sworn report." Decision of Panel, at 6. Thus, it held, the requirements of § 31-27-

2.1(c) were met. Id. It should be noted that one member of the panel, insistent that the plain language of § 31-27-2.1(c) requires proof that a sworn report was created, dissented from this ruling.

Second, the members of the panel unanimously declared themselves satisfied that Officer Nye had reasonable grounds to believe Appellant had been driving under the influence of alcohol. It did so, however, without itemizing the evidence and testimony of records which provided this assurance. Decision of Panel, at 6-7.

Third, the panel unanimously endorsed the trial judge's decision that the State had complied with the requirement that the motorist be notified of his right to a confidential phone call pursuant to § 12-7-20 by reading him the "Rights For Use at Station." Decision of Panel, at 7-8. The appellate panel found completely unpersuasive Mr. Sarhan's assertion that he had declined to make a phone call because he was unsure it would be a confidential call. Decision of Panel, at 11-13.

On April 11, 2012, Mr. Sarhan filed an appeal in the Sixth Division District Court. A conference was held before the undersigned on May 15, 2012 and a briefing schedule was set. Appellant Sarhan, relying on his complaint, declined to present a memorandum; the Appellee State of Rhode Island has submitted a memorandum.

II. STANDARD OF REVIEW

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

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

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

Under the APA standard, the District Court "* * * may not substitute its judgment for that of the agency and must affirm the decision of the agency unless its findings are 'clearly erroneous.' "[2] The Court will not substitute its judgment for that of the agency (here, the panel) as to the weight of the evidence on

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

questions of fact.[3] Stated differently, the findings of the panel will be upheld even though a reasonable mind might have reached a contrary result.[4]

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. * * *

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:

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

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

> … 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. … (Emphasis added).

Gen. Laws 1956 § 31-27-2.1(c).

Noting the presence in the statute of the phrase – "reasonable grounds" – the Rhode Island Supreme Court interpreted this standard to be the equivalent of "reasonable-suspicion." The Court stated simply, "* * * [I]t is clear that reasonable suspicion is the proper standard for evaluating the lawfulness of the stop." State v. Jenkins, 673 A.2d 1094, 1097 (R.I. 1996). On most occasions an alcohol-related traffic offense (i.e., driving under the influence or refusal) results after a motorist has been stopped for the violation of a lesser (non-alcoholic related) traffic offense.[5] Such stops have been found to comport with the mandate of the fourth

[5] See Gen. Laws 1956 § 31-27-12 (requiring officer who observes traffic violation to issue summons). In Rhode Island, most minor traffic offenses are civil violations. See Gen. Laws 1956 § 31-27-13(a).

amendment that searches and seizures be reasonable. See Whren v. United States, 517 U.S. 808, 810 (1996)(cited in State v. Bjerke, 697 A.2d 1060, 1072 (1997)). After the stop, the procedures necessary to sustain a refusal charge [usually beginning with the administration of field sobriety tests] may be commenced when an officer has reasonable-suspicion to believe that a person has been driving under the influence. See State v. Bjerke, 697 A.2d 1060 (1997); State v. Perry, 731 A.2d 720 (1999). At the same time, the officer's acquisition of "reasonable suspicion" [that the motorist was operating under the influence] becomes the first element to be proven in a refusal case. See Gen. Laws 1956 § 31-27-2.1(c). Thus, the Court has pronounced that in alcohol cases, reasonable suspicion is the standard which, if present, empowers the arresting/charging officer to take two crucial actions in alcohol cases: (1) the initial stop and (2) the request of the motorist to take a chemical test. The Court confirmed that the reasonable-suspicion test carries this dual role in State v. Perry, 731 A.2d 720, 723 (1999).

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

A third 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.

Although, by its terms, the right established in § 12-7-20 applies only to persons arrested under 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, the Rhode Island Supreme Court, in State v. Quattrucci, 39 A.2d 1036, 1041-42 (R.I. 2012), held that the right to a phone call provided under section 12-7-20 does indeed apply in the context of a civil violation proceeding.

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

V. ANALYSIS

As summarized above, Mr. Sarhan's complaint presents three grounds upon which he asserts his conviction for refusal to submit to a chemical test must be vacated. Two of these claims of error arise from two phrases in the first element of proof of a refusal case — that the State must demonstrate that "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 …." Gen. Laws 1956 § 31-27-2.1(c)(1)(Emphasis added). We shall first address the issue of the sworn report. Thereafter, we shall evaluate Mr. Sarhan's argument that the officer did not, in fact, have reasonable grounds to believe he had been driving under the influence. Finally, we shall consider Appellant's claim that his right to a confidential phone call under § 12-7-20 was abrogated.

A. DID THE PANEL ERR IN FINDING THE STATE WAS NOT REQUIRED TO PROVE THAT OFFICER NYE'S REPORT HAD BEEN "SWORN TO"?

Relying on the plain language of subdivision 31-27-2.1(c)(1), Mr. Sarhan urges that the State must prove that the officer — the same officer who had reasonable grounds to believe the motorist had been driving under the influence — made a sworn report of the incident; he asserts that Officer Nye never made a sworn report. As a result, he argues that the first element of a refusal case was not

proven at his trial and his conviction for refusal must be overturned. Appellant's Complaint, at 2-3, 6-7. The State demurs — adopting a broader or contextual reading of section 2.1 — and argues that proof of the sworn report is unnecessary. State's Memorandum, at 3-4. Therefore, it urges affirmance.

This question presents issues of law and fact. But, since a significant issue of statutory construction is implicated, I shall put that to one side and, in the first instance, address the validity of the factual premise upon which Appellant relies — that Officer Nye failed to create a "sworn report."

1. The Factual Predicate.

Factually, there is no doubt that Officer Nye created a report. He testified that he signed the report; Officer Blais co-signed it. It was, thereafter, purportedly notarized, although it was never sworn to. Such is the undisputed testimony. Armed with this testimony, Mr. Sarhan argues that the report was not properly notarized and therefore it may not be considered legally "sworn."

To respond to Appellant's argument, we must pose the question: What is a "sworn report?" Black's Law Dictionary does not define the term, but defines the analogous term, "sworn statement," to be — "A statement given under oath; an affidavit." BLACK'S LAW DICTIONARY, (9th ed. 2009) at 1539. In addition to administering the oath to the statement-giver, the notary or other officer signs a "jurat" — "a certificate of the fact that the witness appeared before [the notary],

and was sworn to the truth of what he or she stated." United States v. Julian, 162 U.S. 324, 325 16 S.Ct. 801, 802 (1896)(addressing duties of U.S. Commissioners). In this case, Officer Nye prepared a report but he never took an oath as to its truth. Because this was not done in the instant case, I must agree with Mr. Sarhan — Officer Nye's report cannot be considered a "sworn report."[6]

2. The Positions of the Parties and the Opinions Below.

With this finding in hand, we may turn to the legal question before us — Is the failure of Officer Nye (and the West Warwick police collectively) to create a sworn report fatal to the State's case? We begin by recounting the positions of the parties and the opinions below.

As stated above, Appellant's argument has its origins in the language of the refusal statute which states that "the officer making the sworn report" must have reasonable grounds to believe the motorist had been driving under the influence. See Gen. Laws 1956 § 31-27-2.1(c)(1). He asserts that the State must show that a sworn report was created; otherwise, a failure of proof must be declared and the charge must be dismissed. Certainly, the plain language of the statute would suggest the existence of such a requirement.

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[6] Neither may an unsworn report be considered an "affidavit." See Scarborough v. Wright, 871 A.2d 937, 938-39 (R.I. 2005)("An affidavit is a written statement that has been sworn to by the affiant before a person authorized to administer oaths.").

On the other hand, the State asks us to read the statute as a whole. The State urges that — if we do so — we will conclude that the report is relevant only to the question of the issuance vel non of the preliminary suspension under subsection (b) and is immaterial to the trial of the general issue under subsection (c). In adopting this approach the members of the appellate panel placed great reliance on the Supreme Court's opinion in Link v. State, 633 A.2d 1345 (R.I. 1993). Decision of Panel, at 4-6.

In Link, the Court affirmed the appellate panel's ruling reinstating a refusal charge that had been dismissed because the sworn report inaccurately stated the amount of a fee that would be assessed upon conviction. Link, 633 A.2d at 1349. The Court explained that the prosecution of refusal cases under § 31-27-2.1 is bifurcated into "two distinct parts." Link, supra, at 1349. And, once the preliminary suspension has entered — "the role of the sworn report ends." Link, supra, at 1349. Lastly, the Court declared that the outcome of the refusal trial (under subsection[c]) is "based on whatever evidence is adduced at the hearing and [is] not dependent on the validity of the (officer's) sworn report." Link, supra, at 1349. Relying on these sweeping statements, the majority of the appellate panel found that the making of a "sworn report" was not an element of proof at trial under subsection (c) and rejected the Appellant's assertion of error accordingly.

The dissenting magistrate, while acknowledging the teaching of Link, maintained nonetheless that the clear and unambiguous text of subdivision 31-27-2.1(c)(1) requires proof that a "sworn report" was created and this phrase must be accorded due weight and its plain and ordinary meaning. Decision of Panel, at 9-13 (Dissenting opinion).

3. The Legal Question — Resolution.

Undeniably, each of the appellate panel opinions has merit: the majority follows case precedent; the dissent gives effect to the text of the statute. Because they adopt different approaches they are not in direct conflict, except on the ultimate question. Much of what is stated in each opinion is unassailable. Accordingly, we need not repeat their analyses here. The question which faces this Court is simply — Which approach shall we adopt?

After due consideration of both positions, I find myself inclined toward the majority's contextual analysis. I reach this result not because I find any great weaknesses in the dissent's approach but because I simply can find no justification for failing to apply in this case the Supreme Court's commanding statements in Link — that the report is completely immaterial to the verdict in a refusal trial.[7]

[7] I might identify one potential point of weakness in Appellant's argument — which, admittedly, arises only by inference. It is an assumption of the dissenting opinion that the failure to swear to a report is a more grievous infirmity than creating an inadequate sworn report — i.e., one that contains an error as to the penalties (as in

The rulings of the Supreme Court are binding on the trial courts of the Rhode Island judiciary, including the District Court, unless they can be distinguished and until they are, if ever, overruled.[8] In the first place, I believe there is no basis to distinguish the Court's holding in Link — viz., that the sworn report is immaterial to the refusal trial. Secondly, viewing the question as simply as one can, an issue that is immaterial does not become material because the defendant shows there would have been a failure of proof. Therefore, notwithstanding the text of the statute, which would seem to require otherwise, I believe this Court is constrained to find that the officer's failure to create a sworn report is not fatal to the State's effort to secure a conviction for refusal to submit to a chemical test against Mr. Sarhan. It follows therefore that the trial magistrate was correct to sustain the charge of refusal notwithstanding the State's failure to

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Link) or which contains insufficient facts to show the officer possessed grounds to request a chemical test. On this basis the dissent distinguishes Link. But is it really true that a defect in form is more serious than a defect in substance? I believe this question is unsettled, especially in light of one recent case — State v. Huguenin, 662 A.2d 708 (R.I. 1995), in which a search warrant which was inadvertently not signed by the judge was deemed valid. Huguenin, 662 A.2d at 711. The outcome of this question — if deemed material — may well depend on whether the Supreme Court views the officers' failure to create a proper sworn report to be devious or innocent. Compare Huguenin, supra, with Lisi v. Resmini, 603 A.2d 321, 323-24 (R.I. 1992)(submission of false notarization deemed grounds for suspension from practice of law).

[8] See University of Rhode Island v. Department of Employment and Training, Board of Review, 691 A.2d 552, 555 (R.I. 1997).

prove the existence of a sworn report. And the appellate panel correctly upheld the trial magistrate's verdict. I shall therefore recommend affirmance of the decision of the panel on this issue.[9]

B. DID THE PANEL ERR IN FINDING THE TROOPER HAD REASONABLE GROUNDS TO BELIEVE MR. SARHAN HAD BEEN OPERATING UNDER THE INFLUENCE?

Mr. Sarhan also urges that the State failed to prove the first element of a refusal case because Officer Nye did not have reasonable grounds to believe that he "… had been driving a motor vehicle within this state while under the influence of intoxicating liquor …." See Gen. Laws 1956 § 31-27-2.1(c)(1) and

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[9] Although I have concluded that the creation vel non of a sworn report is immaterial at the trial on the merits, I feel obliged to offer a few comments on the propriety vel non procedure followed by members of law enforcement in this case.

It appears that an officer purported to notarize Officer Nye's report in his absence and without administering the oath — which is, of course, the hallmark of the creation of an affidavit or sworn report. Consequently, a document with a false jurat was presented to the Traffic Tribunal. This is conduct which has caused attorneys to be suspended from the practice of law. See Lisi v. Resmini, 603 A.2d 321, 323-24 (R.I. 1992). And, if done with fraudulent intent, making a false notarization may also be a crime. See Gen. Laws 1956 § 42-30-16. Finally, presenting a false notarization may constitute contempt of court.

For these reasons, I believe the procedure followed in this case by the officers regarding the "sworn report" is troubling — requiring attention by appropriate authorities. Because the Department of the Attorney General is a party to this litigation and aware of all the pertinent facts, I need not make a formal referral. I trust the Department shall, sua sponte, undertake the education of the law enforcement community so that recurrences of the conduct seen here may be avoided.

Appellant's Complaint, at 3-5. He asserts that the officer's testimony regarding Mr. Sarhan's alleged failure to successfully complete the field sobriety tests was attributable to the fact that he had misplaced his glasses after the accident. Appellant's Complaint, at 3-5. The State urges that its proof was "more than adequate" to support a finding that Mr. Sarhan had been driving under the influence. State's Memorandum, at 5. Because the appellate panel's treatment of this issue was perfunctory, I must undertake my own analysis of the question.

Of course, there is no bright-line rule regarding the quality or quantity of facts which must be mustered to meet the test of reasonable grounds; instead, a judgment must be made in each case on the basis of the totality of the circumstances present therein. To this end, I reviewed the refusal cases previously decided by the Rhode Island Supreme Court in order to examine the quality and quantum of the indicia of reasonable suspicion (reasonable grounds) contained therein; next, I compared the indicia of reasonable grounds in the precedents to the indicia present here. Having done so, I am more than satisfied that the State's proof cleared this hurdle. I shall now elaborate on the steps of this analysis.

1. Reasonable Grounds on the Element of Driving While Under the Influence.

In considering the prior cases which have addressed the quantum and quality of evidence necessary to form reasonable grounds (alternatively called the "reasonable-suspicion" standard), I believe we may profitably commence with State v. Bjerke, 697 A.2d 1069 (RI 1997). In Bjerke the initial stop was justified on alternative grounds — the investigation of a criminal offense. Nevertheless, the Supreme Court paused to note the factors present in the case upon which reasonable grounds may be discerned:

> The defendant's commission of a criminal misdemeanor alone gave the officer probable cause to stop and detain him, and then from that point on, any evidence obtained pursuant to that lawful stop, such as the odor of alcohol, the slurred speech, and bloodshot eyes, would in effect be in plain view of the arresting officer and would support an arrest for suspicion of driving while under the influence. (Emphasis added).

Bjerke, supra, 697 A.2d at 1072. Accordingly, from Bjerke, we may draw that emitting the odor of alcohol, slurred speech and bloodshot eyes are accepted as indicia of intoxication.

Next, we may examine State v. Bruno, 709 A.2d 1048 (RI 1998). In Bruno, multiple indicia of the consumption of alcohol were exhibited. Among these were swerving and speeding, evidence of vomit in the vehicle, the odor of alcohol, slurred speech, and appearing confused. Bruno, supra at 1049.

Finally, in evaluating the sufficiency of this finding of reasonable-suspicion we may consider State v. Perry, 731 A.2d 720, 723 (R.I. 1999), in which the operation component of the element reasonable grounds [to believe the motorist was driving under the influence] was found to have been satisfied where (1) a citizen identified Mr. Perry's car as having been involved in a hit-and-run accident and Mr. Perry made an inculpatory statement. On the issue of operation under the influence, the Court noted front-end damage, the smell of alcohol, bloodshot eyes, and stumbling. Perry, 731 A.2d at 722. No field tests were administered. Id. On this basis, the Supreme Court upheld the trial court's finding that reasonable grounds were present. Perry, 731 A.2d at 723.

2. Comparing the Indicia In the Instant Case to the Precedents.

All in all, the State presented six indicia that Mr. Sarhan had operated under the influence: (1) he had admitted to the consumption of alcohol, (2) he had watery eyes (3) his speech to be slurred, (4) he emitted the slight odor of alcohol, (5) his admission that the accident resulted because he was going too fast to stop, and (6) his failure to properly execute the field sobriety tests.[10] I believe

[10] Appellant asserts that his performance on the field sobriety tests was entirely explicable by his need for his glasses. Appellant's Complaint, at 4-5. But even if this argument was fully accepted, it would only vitiate the probative value of the field tests on the issue of reasonable suspicion. I believe there were reasonable grounds absent the inclusion of the field tests in the evidence assembled on this point.

In this regard we must bear in mind the Supreme Court's teaching in State v.

these facts are sufficient — when measured against the standards established in prior Supreme Court decisions, especially the Perry case — to allow this Court to find that the appellate panel's finding that Officer Nye possessed "reasonable grounds" to believe Mr. Sarhan had driven under the influence of liquor was not clearly erroneous and was in fact supported by substantial evidence of record.

C. 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?

For the reasons that follow, I conclude that this question also must be answered in the negative.

Ruling before the Supreme Court's decision in Quattrucci, supra, was issued, the trial judge determined that Mr. Sarhan's right to a confidential phone call was indeed violated. He nonetheless declined to dismiss the case on this basis because he found a lack of prejudice, citing State v. Carcieri, 730 A.2d 11 (R.I. 1999). The appeals panel, relying on Carcieri, affirmed.[11] Decision

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Bruno — that an innocent explanation for the motorist's demeanor or actions is never the issue in a refusal case, though it may be in a drunk driving case. Bruno, supra, 709 A.2d at 1050. So long as the State has proven the officer had reasonable grounds to believe the motorist was driving under the influence, the refusal charge must be sustained. Id.

[11] The decision the panel rendered in this case made no reference to Quattrucci, though it was issued 27 days after the Supreme Court's decision was published.

of Panel, at 11-12. It too centered on the absence of a showing of prejudice. Id.

After a review of the Supreme Court's teaching in Quattrucci, I believe it supports affirmance of the appellate panel on this issue. The Court in Quattrucci emphasized that the right enunciated in section 12-7-20 "… only attaches when the purpose of the call is to speak to an attorney or to arrange for bail." 39 A.3d at 1043. Mr. Sarhan never spoke to an attorney and he did not need bail — he was apparently released to appear pursuant to a summons. He used the phone to speak to his wife, to request her to respond to the police station to pick him up. Therefore, under Quattrucci, his rights under § 12-7-20 were not violated.

The State also urges that, under a pre-Quattrucci analysis, dismissal would have been an excessive and unwarranted remedy because Mr. Sarhan cannot demonstrate prejudice. See State's Memorandum of Law, at 5-7. 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. Sarhan cannot show prejudice because he made no call for any protected purpose.

VI. CONCLUSION

Upon careful review of the evidence, I recommend that this Court find that the decision of the appellate panel was made upon lawful procedure and was not affected by error of law. Gen. Laws 1956 § 31-41.1-9. Furthermore, said decision is not clearly erroneous in view of the reliable, probative and substantial evidence on the whole record. Gen. Laws 1956 § 31-41.1-9. Accordingly, I recommend that the decision that the Traffic Tribunal appellate panel issued in this matter be AFFIRMED.

/s/
Joseph P. Ippolito
MAGISTRATE

OCTOBER 10, 2012