STATE OF RHODE ISLAND AND PROVIDENCE PLANTATIONS

PROVIDENCE, Sc. DISTRICT COURT

SIXTH DIVISION

STATE OF RHODE ISLAND

V. AA. No. 03-134

ZACHARY FLANDERS

DECISION

GONNELLA, J. In this appeal the state claims a trial judge of the Traffic Tribunal committed reversible error when she (1) suppressed, as hearsay, testimony by a state trooper that a group of youths told him the defendant had a gun just prior to the stop of defendant's vehicle, (2) found that the police lacked reasonable suspicion to stop defendant's vehicle, (3) found that the police did not have reasonable cause to believe defendant was operating his vehicle while under the influence of alcohol and, therefore, could not lawfully ask defendant to submit to a chemical test, and (4) denied the state's request for a continuance so it could obtain the testimony of a Department of Health witness.

This court finds that the testimony of the state trooper was improperly suppressed and, if admitted, would have supplied the necessary reasonable suspicion to stop the vehicle. This court also concludes, however, that the trial judge's finding that the police did not have reasonable grounds to believe that the defendant was operating the vehicle under the influence of alcohol was supported by competent evidence and should not be reversed on appeal. And finally, this court rules that the trial judge's decision to deny the request for a continuance was not an abuse of discretion. Accordingly, this court denies and dismisses the state's appeal.

FACTS AND PROCEDURAL HISTORY

On January 11, 2003, at approximately 2:20 in the morning, two Rhode Island State Troopers, William Jamieson and John Conway (troopers), were on vehicular patrol in the Elmwood Avenue area by Route 10 in Providence. Near the On Ramp to Route 10, the troopers observed defendant's vehicle stopped in the right hand lane of travel. They observed defendant leaning out of the driver's side window and gesturing with his arms towards a group of youths on the sidewalk. As the troopers approached the defendant noticed them and abruptly left the area proceeding on to the Route 10 On Ramp. The youths then approached the troopers' vehicle and told the troopers that the defendant had a gun. At that point, the troopers left

the youths in pursuit of the defendant and located his vehicle on the On Ramp traveling at approximately 10 mph, which was unusually slow in their opinion. After activating their lights, the troopers conducted an investigatory stop and defendant pulled his vehicle over to the right hand side of the road without incident. When the troopers approached they asked defendant to exit the vehicle and conducted a pat down search for weapons. No weapons were found on defendant. During this entire traffic stop, the defendant and the troopers were being video taped by a camera located in the troopers' vehicle. The troopers asked defendant where he was going and defendant responded to his home in East Greenwich. During this exchange the troopers testified that they noticed defendant was disheveled, had blood-shot watery eyes, had slurred speech, and he had a moderate smell of alcohol coming from his breath. The troopers asked the defendant to perform three separate field sobriety tests; based upon their observations and the results of the field sobriety tests, defendant was placed under arrest for driving under the influence of alcohol or drugs. An inventory search of defendant's trunk revealed several bottles of what appeared to be alcohol. He was read his rights at the scene and later at the station and after two telephone calls refused to take a chemical test.

Defendant was charged in the Traffic Tribunal with Refusal to Submit to a Chemical Test under the provisions of R.I.G.L. § 31-27-2.1[1] and with Transportation of an Alcoholic Beverage by a Minor, R.I.G.L. § 3-8-9.

At the trial, the judge excluded the trooper's testimony that the youths had told him defendant had a gun on the grounds that it was hearsay and was offered for the truth of the matter being asserted. As a result, she found that the stop of the defendant's vehicle was unlawful. The trial judge, however, allowed the state to put on the rest of its case regarding the refusal charge and received into evidence the troopers' testimony about the observations of defendant and the results of the field sobriety tests performed[2]. She also independently viewed the video tape of the arrest and went to the scene of the stop as a view. After hearing all of this evidence, the trial judge ruled that the state had failed to prove that the troopers had reasonable grounds to believe that defendant had operated his vehicle while under the influence of alcohol and therefore could not lawfully request defendant to submit to a chemical test of his breath. Because of this finding, the trial judge granted defendant's motion to dismiss.

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[1] The defendant was also charged in the district court with driving under the influence pursuant to R.I.G.L. § 31-27-2 but was found not guilty after trial.

[2] The troopers testified that they gave defendant the horizontal gaze nystagmus (HGN) test which defendant failed but the trial judge suppressed the results of the test. The state has not made any claim either to the Appeals Panel or to this court that the trial judge's ruling on this issue was in error.

The trial judge also denied a request by the state for a two week continuance of the trial on the "transportation of an alcoholic beverage by a minor" charge so the state could procure the testimony of a Department of Health witness. The state claimed this witness was needed to establish a chain of custody of the bottles found in defendant's trunk and to establish by means of a toxicology report that the contents of these bottles contained an alcoholic beverage. The state argued that because of The Station fire the Department of Health witness was unavailable to testify since all available manpower at the Department was being used to identify the persons who died in this tragic fire. The state took exception to the court's denial of its request for a continuance and elected not to present any evidence regarding the nature of the liquid in the bottles at the trial. As a result, the trial judge found that the state had failed to prove by clear and convincing evidence that the bottles contained an alcoholic beverage and granted the defendant's motion to dismiss this charge, as well.

The Appeals Panel affirmed the trial judge's decision on all issues. With respect to the stop, the Appeals Panel found that the statement by the youths to the troopers about the gun was an uncorroborated anonymous tip which could not be used to establish reasonable suspicion for the stop. Furthermore, the Appeals Panel found that the trial judge's decision that the

state had failed to establish the requisite reasonable grounds that defendant had been operating his vehicle while under the influence of alcohol was supported by competent evidence in the record. And finally, the Appeals Panel found that the trial judge's denial of the state's request for a continuance was not an abuse of discretion since the state had available other testimony to prove that the liquid in the bottles contained an alcoholic beverage.

The state took a timely appeal to this court from the Appeals Panel's decision.

STANDARD OF REVIEW

The District Court has jurisdiction to hear appeals from the Appeals Panel of the Traffic Tribunal pursuant to R.I.G.L. § 31-41.1-9. The District Court's jurisdiction is limited, however, by R.I.G.L. § 31-41.1-9 (d) which provides:

> *(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 [sic] 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.

The District Court, therefore, lacks the authority to assess witnesses' credibility or to substitute its judgment for that of the Appeals Panel concerning the weight of the evidence on questions of fact. *Link v. State*, 633 A.2d 1345 (R.I. 1993). The District Court is limited to a determination of whether the Appeals Panel's decision is supported by competent evidence. *Marran v. State*, 672 A.2d 875 (R.I. 1996). Thus, the District Court may reverse a decision of the Appeals Panel only where the decision "is clearly erroneous in light of the reliable, probative, and substantial evidence", or where it is so arbitrary and capricious that it is characterized as an abuse of discretion. *Costa v. The Registry of Motor Vehicles*, 543 A.2d 1307, 1309 (R.I. 1988). In short, the District Court is not entitled to substitute its judgment for that of the Appeals Panel on questions of fact "even in a case in which the court 'might be inclined to view the evidence differently and draw inferences different from the agency.'" *Johnston Ambulance Surgical Ass'n, Inc. v. Nolan*, 755 A.2d 799, 805 (R.I. 2000) (citations omitted). In

reviewing a finding of the existence of probable cause, however, this court will use a *de novo* standard of review. *State v. Keohane*, Jr., 814 A.2d. 327 (R.I. 2003), *citing*, *State v. Abdullah*, 730 A.2d. 1074 (R.I. 1999). In so doing this court will "...give deference to the findings of the trial justice and shall not overturn his findings unless they are clearly erroneous." *In re John N.*, 463 A.2d. 174, 176 (R.I. 1983).

THE STOP

The state claims that the trial judge's decision to exclude, as hearsay, the testimony of the trooper, that the youths told them that defendant had a gun, was wrong as a matter of law since it was not being offered to prove the truth of the matter asserted but was rather being offered to establish the basis upon which the troopers stopped defendant's vehicle. The state's argument on this issue is well taken. Police officers are allowed to use reliable hearsay information in determining whether probable cause or reasonable suspicion exists for a stop, an arrest or a search or seizure.[3] It is well settled that reliable hearsay may be used in order to establish probable cause for the purpose of either an arrest or the issuance of a warrant. *See, e.g., Spinelli v.*

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[3] In *Terry v. Ohio*, 392 U.S. 1, 88 S.Ct. 1868, 20 L. Ed.2d 889 (1968), the United States Supreme Court held that a brief investigatory stop of a person on a street on less than probable cause to arrest where the police have an "articulable suspicion" the defendant is engaging or is about to engage in criminal activity is permissible under the fourth amendment. This "Terry type stop" was extended to automobiles in *United States v. Brignoni-Ponce*, 422 U.S. 873, 95 S.Ct. 2574, 45 L.Ed.2d 607 (1975).

United States, 393 U.S. 410, 89 S.Ct. 584, 21 L.Ed.2d 637 (1969); *McCray v. Illinois*, 386 U.S. 300, 87 S.Ct. 1056, 18 L.Ed.2d 62 (1967); *United States v. Ventresca*, 380 U.S. 102, 85 S.Ct. 741, 13 L.Ed.2d 684 (1965); *Rugendorf v. United States*, 376 U.S. 528, 84 S.Ct. 825, 11 L.Ed.2d 887 (1964); *Jones v. United States*, 362 U.S. 257, 80 S.Ct. 725, 4 L.Ed.2d 697 (1960); *State v. Gomes,* 764 A.2d 125 (R.I. 2001).

It is unusual for a police officer to have personally observed all of the information upon which he or she relies to make an investigatory stop, an arrest or a search of someone or something. In fact, more often than not a police office acts upon hearsay information which is received from other sources such as fellow officers, radio broadcasts, complaining citizens, BCI reports, or teletype warrants from other jurisdictions. *See, e.g., United States v. Hensley*, 469 U.S. 221, 83 L.Ed 2d 604, 105 S.Ct. 675 (1985) (flyer); *Whiteley v. Warden Wyo. State Penitentiary*, 401 U.S. 560, 28 L.Ed 2d 306, 91 S.Ct 1031 (1971) (police radio bulletin); *State v. Keeby,* 268 A.2d 652 (Conn. 1970) (teletype); *Gomes, supra.* (radio broadcast). Thus, when a defendant contests a stop or an arrest, a reviewing court in order to discharge its constitutional obligations under the fourth amendment, must be permitted to hear all of the information the police officer relied upon in making the stop or arrest so the court can determine if "[t]he facts and circumstances

within the police officer's knowledge and of which he has reasonably trustworthy information are sufficient to warrant a reasonable person's belief that a crime has been committed and that the person to be arrested has committed the crime" *State v. Jenison*, 442 A.2d 866, 873-74 (R.I. 1982). The trial judge was in error when she failed to hear and consider, on the issue of the constitutionality of the stop, the testimony of the troopers that the youths had told them the defendant had a gun. The hearsay nature of this testimony goes to the issue of whether the police officers acted upon "reasonably trustworthy information" and, therefore, had reasonable suspicion to stop the vehicle, and should have been admitted for that purpose. *State v. Brown*, 468 A.2d 914 (R.I. 1983) (Hearsay testimony admissible on issue of probable cause).

The Appeals Panel affirmed the trial judge's ruling to suppress the troopers' testimony but on different grounds. The Appeals Panel concluded that the information gained from the youths was an uncorroborated anonymous tip and incapable of providing the "reasonable trustworthy information" needed to establish reasonable suspicion for the stop. *See, Alabama v. White*, 496 U.S. 325, 110 S.Ct. 2412, 110 L.Ed. 2d 301 (1990); *State v. Bjerke*, 697 A.2d 1069 (R.I. 1997). This finding was also error. An anonymous tip by its very words describes information received by the

police under circumstances where the police do not know the identity of the tipster and are unable to evaluate the tipster's credibility or the reliability of the information being provided. Here, the troopers knew who was providing the information about the gun and also knew, from the troopers' own observations of the interaction between defendant and the youths, that the youths were in a position to observe whether the defendant had a gun and were, therefore, providing reliable information. This information, together with the circumstance under which it was received, made it prudent for the troopers to investigate further and to make an investigatory stop of defendant.

In *State v. Rattenni,* 117 R.I. 221, 366 A.2d 539 (1976), police officers received a tip from a reliable informant that the defendant was driving a vehicle and was in possession of a gun. Upon making an investigatory stop of the defendant's car, the police officer found and seized, in plain view, a gun. In upholding the stop, the Rhode Island Supreme Court said the tip from the reliable informant was sufficient to warrant a brief investigatory stop of the defendant's vehicle. *Id.* The Court opined: "When the officers received information of a man carrying a gun in his car, and a car meeting the given description was spotted, it was their duty to investigate .... Good police work required no less" *Id.* at 223-24 (citations omitted).

Thus, under the totality of the circumstances of this case, this court finds that it was reasonable for the troopers to rely upon the statement of the youths that the defendant had a gun and to undertake an investigatory stop of defendant's vehicle. *Terry, supra; Rattenni, supra.*

The findings and conclusions by the trial judge and the Appeals Panel to the contrary was error.

THE REFUSAL

During the course of the investigatory stop of defendant, evidence and information in plain view came to the attention of the troopers that the defendant had been operating the vehicle while under the influence of alcohol. *Bejerke, supra* (Observations by officers of intoxication of motorist during investigatory stop are made in plain view). This information came in the form of observations of the defendant's appearance, his clothing, his speech and the odor of alcohol on his breath. Now the investigatory stop began to focus on whether the defendant had violated the drunk driving laws of this state and not whether he was in lawful possession of a firearm. So long as the new information is gained lawfully, it is constitutionally permissible for the investigation to switch to a new and different crime than the original reason for the stop. *Bejerke, supra* (Original stop for suspended registration, later arrest for drunk driving). And if the stop continues to be

reasonable under the fourth amendment, the new information can be used to establish reasonable (probable) cause for the arrest of the defendant on the new offense of drunk driving. *Id.*

In this case the state was afforded a full and complete hearing on the issue of whether the facts and circumstances which came to the troopers' attention after the initial stop added up to reasonable cause to believe that the defendant had operated his vehicle while under the influence of alcohol. The troopers were allowed to testify at the trial to all of the facts and circumstances which led them to their belief that the defendant had been operating his vehicle while under the influence of alcohol. The trial judge listened carefully to the troopers' testimony on both direct and cross examination, observed their demeanor while testifying, watched the video tape of the stop and arrest several times, and even went out to the scene for a view. Based upon all this information the trial judge concluded that the troopers lacked the requisite reasonable grounds to believe that the defendant had been operating his vehicle while under the influence of alcohol. That finding meant that (1) the troopers lacked probable (reasonable) cause to arrest the defendant for drunk driving, (2) the troopers could not lawfully request the defendant to take a chemical test of his blood

or breath under §31-27-2.1[4], and (3) the defendant could not be found guilty of refusing to take a chemical test under § 31-27-2.1. The trial judge granted defendant's motion to dismiss the charge of refusing to submit to a chemical test.

On appeal to both the Appeals Panel and to this court the state argues that the trial judge applied the wrong standard when she found insufficient evidence of driving under the influence. The state claims that a police officer needs only reasonable suspicion to stop a vehicle and reasonable grounds to believe a defendant has operated his vehicle while under the influence of alcohol or drugs in order to lawfully request a defendant to take a chemical test. The state points to references in the trial judge's decision where she uses reasonable suspicion interchangeably with reasonable grounds.

The state is correct that reasonable suspicion is all that is necessary for an investigatory stop, *Terry, supra*, while reasonable grounds is needed to request a chemical test under R.I.G.L. § 31-27-2.1. The problem with the state's argument is, assuming that the trial judge applied the wrong standard

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[4] R.I.G.L. § 31-27-2.1, the refusal statute, requires the chemical test to 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...." (emphasis added)

in ruling on the legality of the stop, the error is harmless to the state[5]. In this case, the initial reason for the stop of defendant's car was to investigate whether the defendant was in unlawful possession of a gun. That purpose has no evidentiary relevance to the issue of whether the defendant had been operating his vehicle while under the influence of alcohol. Therefore, the improper suppression of evidence relating to the stop or the improper application of the wrong standard to the stop is irrelevant to the issue of whether the defendant had a right to refuse to submit to a chemical test.

The state can only complain if it was not given a full opportunity to develop all of the facts to support the troopers' decision to request the defendant to take a chemical test. On this issue the state was afforded a full and complete hearing. Also, it matters not to the state if the judge used the reasonable suspicion standard or the reasonable grounds standard when she found that the state failed to prove that the troopers had the proper quantum of evidence of intoxication to lawfully request the defendant to take a chemical test. Since the reasonable suspicion standard is a lesser standard than reasonable grounds, then the failure by the state to prove even

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[5] This court is unwilling to find that the trial judge actually applied the wrong standard to the refusal charge. In her decision she clearly states: "This court must determine whether or not the trooper had reasonable grounds to believe that the motorist had been operating a motor vehicle while under the influence, and upon arrest, refused to submit to a chemical test...." Tr. at 392.

reasonable suspicion of intoxication would *a fortiori* support the same finding under the correct but more stringent standard of reasonable grounds.

After listening to all of the evidence on the issue, examining the video of the stop, judging the credibility of witnesses and making findings of fact, the trial judge found that there was not enough evidence of intoxication to lawfully permit the troopers to request the defendant to submit to a chemical test under § 31-27-2.1. Neither the Appeals Panel nor this court is allowed to substitute its judgment on that issue for that of the trial judge's, so long as her decision is supported by competent evidence in the record. This court finds that there is more than enough credible evidence in the record to support the trial judge's decision on this issue, that the court did not misconceive or overlook evidence in her decision, and her decision was not otherwise clearly erroneous or affected by error of law. This court will not disturb the trial judge's decision to grant the defendant's motion to dismiss the refusal charge or the Appeals Panel's decision to affirm that decision on appeal.

THE REQUEST FOR A CONTINUANCE

The state requested a continuance of the trial on the charge of "transportation of an alcoholic beverage by a minor" for the reason that a witness from the Department of Health was unavailable to testify because of

the manpower commitment the Department of Health had made to the Station fire and the attempts to identify the victims. The state's request for a continuance was made near the end of the trial.[6] The trial judge denied the continuance, in part because she knew that the state did not need a toxicology report or a witness from the Department of Health in order to prove the liquid in the bottles was alcohol and, also, in part because she knew the witness would not be available for an additional two weeks. The Traffic Tribunal had, in the past, accepted as clear and convincing proof, the testimony of police officers that based upon their training and experience and observations of the container and the liquid, in their opinion the liquid in the bottles was an alcoholic beverage. The state took exception to the court's denial of its request for a continuance and elected not to present any testimony from the troopers regarding their opinion that the liquid in the bottles was alcohol. The court, at the conclusion of the state's case, found that the state failed to prove that the liquid in the bottles was an alcoholic beverage and granted the defendant's motion to dismiss that charge. The state, on appeal, concedes that the Department of Health person was not essential to prove the identity of the liquid but claims, nevertheless, that it

[6] The trial took seven trial days over a two week period.

was an abuse of discretion to deny the continuance because it prevented the state from producing the best evidence on this issue.

The request for a continuance is left to the sound discretion of the trial judge and will not be disturbed on appeal absent an abuse of that discretion. *See, State v. Davis*, 726 A.2d 13 (R.I. 1998); *State v. Dias*, 118 R.I. 499, 374 A.2d 1028 (1997). "There are no mechanical tests for deciding when the denial of a continuance is so arbitrary as to violate due process. The answer must be found in the facts and circumstances of each case, 'particularly in the reason presented to the trial justice at the time the request is denied.' " *State v. Franco*, 437 A.2d 1362, 1365 (R.I.1981), *quoting, State v. Leonardo,* 375 A.2d 1388, 1390 (R.I. 1977).

The transcript in this case is replete with references where the trial judge attempted in the middle of the trial to balance the state's request for the two week continuance and its reasons for the continuance, together with the motorist's right to a prompt hearing, and the court's busy calendar. After much deliberation, the court was willing to grant the state a one week continuance to secure the witness from the Department of Health. The state rejected this offer and then decided to rest without any further testimony or proof on this issue. The state had available the troopers to testify to their opinion that the liquid in the bottles was alcohol. This testimony would have

provided the proof necessary on that issue to enable the court to sustain the charge of "transportation of an alcoholic beverage by a minor" against defendant. The denial of the request for a continuance, therefore, did not deprive the state from proving the charge against defendant but merely deprived the state from producing a toxicology report and establishing a chain of custody. This court cannot say that under these circumstances the trial judge abused her discretion.

For all of these reasons the state's appeal is denied and dismissed.