STATE OF RHODE ISLAND AND PROVIDENCE PLANTATIONS

PROVIDENCE, S.C. **RHODE ISLAND TRAFFIC TRIBUNAL**

STATE OF RHODE ISLAND	:	
	:	
v.	:	**C.A. No. T09-0025**
	:	
ABEL PEDROSO	:	

DECISION

PER CURIAM: Before this Panel on May 13, 2009—Magistrate Cruise (Chair, presiding) and Judge Ciullo and Magistrate DiSandro sitting—is Abel Pedroso's (Appellant) appeal from a decision of Magistrate Noonan, sustaining the charged violation of G.L. 1956 § 31-27-2.1, "Refusal to submit to chemical test."[1] The Appellant was represented by counsel before this Panel. Jurisdiction is pursuant to G.L. 1956 § 31-41.1-8.

Facts and Travel

On January 23, 2007, Trooper Robert Laurelli (Trooper Laurelli) of the Rhode Island State Police charged Appellant with the aforementioned violation of the motor vehicle code. The Appellant contested the charge, and the matter proceeded to trial.

The Court first heard testimony from Richard Minogue (Mr. Minogue), an employee of the Rhode Island Department of Health. Mr. Minogue testified that his duties with the Department of Health include "the certification and recertification of breath testing equipment and breath testing operators." (Tr. at 10.) Mr. Minogue testified that during his employment with the Department of Health, he personally has certified all of the chemical breath testing equipment employed by Rhode Island law enforcement agencies, including the Rhode Island

[1] The Appellant was also charged with violating G.L. 1956 §§ 31-14-2, "Prima facie limits"; 31-15-11, "Laned roadways"; and 31-27-2, "Driving under influence of liquor or drugs."

State Police. (Tr. at 11.) Mr. Minogue described the equipment certification process that he follows every time that a Breathalyzer is certified:

> Technicians "run a solution [containing alcohol] . . . through the instrument to make sure that [it] come[s] within the target value as the Department of Health rules and regulations require. If [the solution] come[s] within the range, [the Department] certif[ies] the instrument. If not, [it] [is] taken out of service." (Tr. at 11-12.)

Mr. Minogue continued by describing the certification paperwork as follows:

> Technicians [then] fill out "a Rhode Island Department of Health Forensic Science Certification sheet. It lists the [police] department, the serial number of the instrument, the make of the instrument and the target values that were obtained with the [alcohol] solution, and it's signed by the inspector—whoever checked the instrument . . . ." (Tr. at 13-14.)

According to Mr. Minogue, if the Breathalyzer equipment produces a reading that is within "plus or minus five percent [of the Department of Health's target values]," the equipment is deemed compliant with the rules and regulations promulgated by the Department. (Tr. at 23.)

Mr. Minogue was then presented with the certification paperwork for the Breathalyzer equipment employed by the Rhode Island State Police at their Lincoln Woods barracks. (Tr. at 24.) Upon inspection of this documentation, Mr. Minogue testified that the equipment had been tested on January 4, 2007 and February 1, 2007 by Albert Giusti (Mr. Giusti) of the Rhode Island Department of Health and was found to be in compliance with the Department's rules and regulations. (Tr. at 24-25.)

Mr. Minogue was also presented with the operator certification of Trooper Laurelli. (Tr. at 32.) The certification sheet reflected that Mr. Minogue personally had recertified Trooper Laurelli in October of 2006, October of 2007, and September of 2008. (Tr. at 33.) The certification sheet also reflected that Trooper Laurelli had been certified as a Breathalyzer

operator on January 24, 2007—the date upon which Trooper Laurelli asked Appellant to submit to a chemical test of his breath. Id.

Counsel for the State then asked Mr. Minogue to describe the procedure by which an arrestee blows into a Breathalyzer machine and a reading of his or her blood alcohol content is produced. Mr. Minogue described this procedure as follows:

> "Normally, [the arrestee will blow into the machine] anywhere between three to six seconds . . . . [The Breathalyzer] will say what the reading is and [a] card will come out with [the] reading on it . . . . [I]f there is any indication . . . [that] any alcohol has been detected at all and it's not a [three to six second breath] sample, it will still print the amount that was detected and it will also print out the highest reading obtained . . . . [This is known as a] deficient sample." (Tr. at 35-36.)

Mr. Minogue further testified that a "deficient sample" card is produced when an arrestee fails to "introduce any air into the [Breathalyzer] at all," and when an arrestee "blow[s] on the side of [his or her] mouth . . . [and] not enough air is [blown] into the [Breathalyzer]." (Tr. at 36.) In addition, a "deficient sample" is produced when an arrestee blows correctly into the machine but "stop[s] short." (Tr. at 36-37.)

On cross-examination by counsel for Appellant, Mr. Minogue testified that the equipment employed by the Rhode Island State Police on the date in question is no longer in service. (Tr. at 38.) He also testified that while this particular Breathalyzer machine had been certified on January 4, 2007, he had no personal knowledge as to whether the machine was in proper working order on January 24, 2007. (Tr. at 39.)

The Court next heard testimony from Captain David Neill (Captain Neill) of the Rhode Island State Police. Captain Neill began his trial testimony by describing his training and experience with respect to DUI-related traffic stops and the administration of standardized field sobriety tests. (Tr. at 48-51.) Then, focusing the Court's attention on the date in question,

Captain Neill testified that at approximately 11:00 p.m., he received a dispatch from the Hope Valley barracks that there was a "drunk driver" traveling northbound on Route 95 in the vicinity of Exit 2. (Tr. at 53.) The dispatcher described the vehicle as a white Cadillac. Id. Approximately one and one-half hours later, Captain Neill received a dispatch from the Lincoln barracks regarding "the possibility of a drunk driver traveling northbound on Route 95 in the vicinity of Exit 18. (Tr. at 54-54.) The description of the vehicle was consistent with the earlier dispatch from the Hope Valley barracks. (Tr. at 55.)

In response to the second dispatch, Captain Neill "took a post" in the vicinity of Thurbers Avenue and observed the suspect vehicle. Id. Captain Neill maneuvered his cruiser behind the vehicle and, using his cruiser's radar unit, recorded the speed of the vehicle as 70 m.p.h. in a posted 55 m.p.h. zone. (Tr. at 56.) He also observed that the vehicle was "traveling in and out of . . . [its] lane of travel." Id. According to Captain Neill, "[t]he [vehicle's] tires had crossed over the right side of [the] lane and the left side of [the] lane." (Tr. at 56-57.) When Captain Neill closed the distance between his cruiser and the vehicle, the vehicle "immediately slowed to . . . approximately forty or forty-five miles per hour." (Tr. at 57.) The suspect vehicle then "sped up to approximately sixty-five [miles per hour] and . . . entered [another travel lane]." (Tr. at 58-59.) At this time, Captain Neill observed the vehicle "almost [strike] the Jersey barrier [located on the right side of the lane] several times, placing the operator's life and [Captain Neill's] [life]" in what he described as "imminent danger." (Tr. at 59.)

Captain Neill testified that the vehicle then made an "abrupt turn from [its] . . . lane of travel . . . onto [Route 195] eastbound . . . ." Id. Captain Neill activated his cruiser's emergency lights and siren in an attempt to initiate a traffic stop of the vehicle. (Tr. at 61.) When it became clear that the operator would not stop, Captain Neill contacted the State Police's Lincoln

barracks and requested assistance. Id. Captain Neill then maneuvered his cruiser to the driver's side of the vehicle "to get the attention of the operator." (Tr. at 62.) In response to this action, the vehicle drove in front of Captain Neill's cruiser and then returned to its original travel lane before coming to a stop on the Washington Bridge. (Tr. at 63.)

Upon making contact with the operator of the vehicle—identified at trial as Appellant—Captain Neill requested his driver's license and vehicle registration. (Tr. at 64.) The Appellant did not comply immediately with Captain Neill's request; instead, he began apologizing to Captain Neill for his actions. Id. When asked to describe Appellant's physical appearance and demeanor, Captain Neill testified that Appellant appeared "disheveled" and that his "eyelids were very heavy." (Tr. at 65.) In addition, Appellant's eyes were "very watery, red and bloodshot," his speech was "slurred" and "slow," and there was a "very strong odor of alcohol emanate[ing] from his breath when he spoke to [Captain Neill]." (Tr. at 65, 67.) Captain Neill noted that Appellant experienced difficulty removing his driver's license from his wallet and handed Captain Neill a document that he said was his vehicle registration but was, in actuality, his insurance documentation. (Tr. at 66.) When Captain Neill informed Appellant that he had presented the incorrect document, Appellant "kind of sat there . . . with a dumbfounded look . . . ." Id. He then retrieved the vehicle registration from his vehicle's glove compartment. Id.

As Captain Neill was making these observations, Troopers Pennington and Laurelli responded to the scene. (Tr. at 67.) Trooper Pennington asked Appellant to exit his vehicle, whereupon Captain Neill observed that Appellant was "swaying" and "having difficulty walking." (Tr. at 68.) Although he could not testify definitively, Captain Neill recalled Trooper Pennington assisting Appellant as he exited his vehicle. Id.

On cross-examination by counsel for Appellant, Captain Neill testified that he did not administer standardized field sobriety tests to Appellant and did not advise him of his "Rights for Use at Scene." (Tr. at 70.) Captain Neill further testified that he was not present when Appellant was asked to submit to a chemical test. (Tr. at 71.)

At the conclusion of Captain Neill's trial testimony, Trooper Laurelli testified as to his professional training and experience conducting DUI-related traffic stops and administering standardized field sobriety tests. (Tr. at 73-81.) Trooper Laurelli then testified that at approximately 12:45 a.m. on the date in question he received a dispatch regarding a "possibly drunk driver" of a white Cadillac on Route 95. (Tr. at 82.) Trooper Laurelli made contact with the operator of the vehicle on Route 195 eastbound on the Washington Bridge, the location of Captain Neill's traffic stop. (Tr. at 83.)

When asked to describe Appellant's physical appearance and demeanor, Trooper Laurelli testified that Appellant "had trouble on his feet and at one point [Trooper Pennington] had to help him to the rear" of his vehicle. (Tr. at 84.) Upon closer inspection, Trooper Laurelli noted that Appellant's eyes were "severely bloodshot," his speech was "slurred," he experienced difficulty "maintaining a good balance on his feet," and there was a "very strong odor of an alcoholic beverage." (Tr. at 85.) Once Appellant had reached the rear of his vehicle, Trooper Laurelli asked him to submit to a battery of standardized field sobriety tests; Appellant consented to the tests. (Tr. at 85-86.) Trooper Laurelli administered the tests in accordance with his professional training and experience, ultimately concluding that Appellant had failed the tests. (Tr. at 86-89.) At this time, Trooper Laurelli, having formed an opinion that Appellant was under the influence of alcohol and incapable of safely operating a motor vehicle, placed

Appellant under arrest. (Tr. at 89-90.) The parties stipulated that Appellant was apprised of his "Rights for Use at Scene" and "Rights for Use at Station" following the arrest. (Tr. at 90.)

Despite the stipulation, Trooper Laurelli testified that he read Appellant his "Rights for Use at Scene" and then transported him to the barracks for processing. (Tr. at 90.) Once at the barracks, Trooper Laurelli placed Appellant in a booking room for observation. (Tr. at 91.) During this observation period, Appellant was apprised of his "Rights for Use at Station," including his right to use a telephone within one hour of arrest. Id. Trooper Laurelli could not recall whether Appellant availed himself of his opportunity to make use of a telephone. Id.

With respect to the circumstances surrounding his request that Appellant submit to a chemical test of his breath, Trooper Laurelli testified that Appellant, upon being advised of his "Rights for Use at Station," signed the "Rights" form to indicate his consent to a chemical test. (Tr. at 91.) When asked about his qualifications to administer a chemical breath test, Trooper Laurelli testified that he had received his initial training at the Rhode Island State Police Academy and had undergone periodic recertification. Id. Trooper Laurelli indicated that he had been recertified by Mr. Giusti and Mr. Minogue of the Rhode Island Department of Health. (Tr. at 91-92.)

Trooper Laurelli then described the procedure by which the chemical test is administered:

> "First, you start the [Breathalyzer] machine. . . . You put a new mouthpiece on the machine. You have a card. You check the appropriate time on the machine . . . [the] actual date and time. If there is a difference, you annotate that. . . . The instructions are given right on the machine. You insert the card, then you request the operator to take the Breathalyzer." (Tr. at 95.)

Trooper Laurelli made clear that he followed this procedure on the date in question when administering a chemical test of Appellant's breath. Id. He continued by testifying that

Appellant "was instructed to grab the mouthpiece with one hand, put his mouth over the mouthpiece and then blow into the machine with a deep lung breath . . . for [s]ix to eight seconds." (Tr. at 95-96.) According to Trooper Laurelli, Appellant "wasn't doing [the test] properly. It came back with a deficient sample . . . ." (Tr. at 96.) Trooper Laurelli elaborated that Appellant had been "instructed how to do it and to give a deep breath, and it was obvious from the way [Appellant] was doing it that he was not [breathing into the machine as directed]." (Tr. at 97.) Although Trooper Laurelli indicated that the Breathalyzer machine "produced a card that stated [that Appellant had produced] a deficient sample," he was not in possession of that card at trial and was unsure of its location. (Tr. at 98.)

After Appellant had produced a "deficient sample," Trooper Laurelli "instructed [Appellant] again [as to] how to properly take the test." (Tr. at 99.) He also informed Appellant that "if he didn't do [the test] properly, it would be grounds for a refusal to submit to the chemical test . . . ." (Tr. at 101.) During the second administration of the test, Appellant failed to blow into the mouthpiece as instructed by Trooper Laurelli, once again producing a "deficient sample." (Tr. at 100.) Thereupon, Trooper Laurelli advised Appellant that he would be charged with a refusal pursuant to § 31-27-2.1. (Tr. at 101-102.)

Following the trial, the trial magistrate sustained the charged violation of § 31-27-2.1. The Appellant, aggrieved by this decision, filed a timely appeal to this Panel. Our decision is rendered below.

Standard of Review

Pursuant to G.L. 1956 § 31-41.1-8, the Appeals Panel of the Rhode Island Traffic Tribunal possesses appellate jurisdiction to review an order of a judge or magistrate of the Rhode Island Traffic Tribunal. Section 31-41.1-8(f) provides in pertinent part:

> The appeals panel shall not substitute its judgment for that of the judge or magistrate as to the weight of the evidence on questions of fact. The appeals panel may affirm the decision of the judge or magistrate, or it may remand the case for further proceedings or reverse or modify the decision if the substantial rights of the appellant have been prejudiced because the judge's findings, inferences, conclusions or decisions are:
>
> (1) In violation of constitutional or statutory provisions;
> (2) In excess of the statutory authority of the judge or magistrate;
> (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.

In reviewing a hearing judge or magistrate's decision pursuant to § 31-41.1-8, this Panel "lacks the authority to assess witness credibility or to substitute its judgment for that of the hearing judge [or magistrate] concerning the weight of the evidence on questions of fact." Link v. State, 633 A.2d 1345, 1348 (R.I. 1993) (citing Liberty Mutual Insurance Co. v. Janes, 586 A.2d 536, 537 (R.I. 1991)). "The review of the Appeals Panel is confined to a reading of the record to determine whether the judge's [or magistrate's] decision is supported by legally competent evidence or is affected by an error of law." Link, 633 A.2d at 1348 (citing Environmental Scientific Corp. v. Durfee, 621 A.2d 200, 208 (R.I. 1993)). "In circumstances in which the Appeals Panel determines that the decision is clearly erroneous in view of the reliable, probative, and substantial evidence on the whole record or is affected by error of law, it may remand, reverse, or modify the decision." Link, 633 A.2d at 1348. Otherwise, it must affirm the hearing judge's [or magistrate's] conclusions on appeal. See Janes, 586 A.2d at 537.

Analysis

On appeal, Appellant argues that the trial magistrate's decision is affected by error of law, clearly erroneous in view of the reliable, probative, and substantial record evidence, and characterized by abuse of discretion. The Appellant has advanced several arguments in support of his appeal, each of which will be addressed in seriatim.

First, Appellant argues that where, as here, an arrestee has consented to a chemical test of his or her breath but has produced a "deficient sample," the State is required to prove to a standard of clear and convincing evidence that the "deficient sample" was the product of the arrestee's failure to follow the Breathalyzer operator's instructions and not the result of inaccurate chemical testing equipment. The Appellant maintains that without proof that the chemical testing equipment that produced the "deficient sample" cards was in compliance with the requirements outlined in § 31-27-2,[2] the charged violation of § 31-27-2.1 cannot be sustained. Next, Appellant contends that the trial magistrate abused his discretion by failing to dismiss the charged violation upon finding that the State had committed a "discovery violation." According to Appellant, the failure of the State to produce, upon Appellant's request, the "breath testing cards" produced by the State Police's Breathalyzer required dismissal of the charged violation of § 31-27-2.1, and the trial magistrate's decision to sustain the charged violation despite the State's conduct amounts to an abuse of his discretion. As his third argument on appeal, Appellant argues that the trial magistrate's decision to sustain the refusal charge is affected by error of law, as the State failed to prove to a standard of clear and convincing

[2] Section 31-27-2 provides that a chemical analysis of an arrestee's breath for the presence of alcohol must be "performed according to methods and with equipment approved by the director of the department of health of the state of Rhode Island and by an authorized individual," on equipment that "[has] been tested for accuracy within thirty (30) days preceding the test by personnel qualified [by the department of health]," and by a "breathalyzer operator[] . . . qualified and certified by the department of health within three hundred sixty-five (365) days of the test."

evidence that Appellant was afforded a "reasonable opportunity" to exercise his right to a physical examination immediately following his arrest pursuant to § 31-27-3. Additionally, Appellant asserts that the trial magistrate's decision is affected by error of law, as the State failed to prove to a standard of clear and convincing evidence that Appellant was advised of his right pursuant to § 12-7-20 to utilize a telephone within one hour of his arrest. Finally, Appellant maintains that the trial magistrate abused his discretion by choosing to admit testimonial evidence regarding the "deficient sample" cards without requiring the State to prove that the originals were unavailable, thus violating the "best evidence rule." It is Appellant's position that dismissal of the refusal charge is an appropriate remedy for the trial magistrate's decision to admit such testimony.

I

The Appellant's first appellate argument is that the State, in order to prove the charged violation of § 31-27-2.1 to a standard of clear and convincing evidence, was required to prove that the "deficient sample" produced by the Breathalyzer equipment was attributable to actions by Appellant designed to undermine the efficacy of the equipment and was not attributable to the equipment itself. In support of this argument, Appellant solely relies on a decision rendered by the Sixth District Court, Newman v. State.

In Newman, the defendant, following an arrest on suspicion of driving while under the influence of alcohol, consented to a chemical test of her breath at the request of law enforcement. Prior to the administration of the test, the defendant was instructed to breathe in deeply and then exhale into the Breathalyzer's mouthpiece. The defendant proceeded to blow into the machine, but she produced a result that was not conclusive. During the second administration of the test, the machine produced a reading of "mouth alcohol"—a reading consistent with a "quick"

exhalation. When the defendant failed to produce a usable reading after four unsuccessful tests, she was charged with refusal to submit to a chemical test pursuant to § 31-27-2.1. The charged violation was sustained following trial and on appeal to this Panel.

In the Sixth District Court, the defendant argued that the charged violation of § 31-27-2.1 could not be sustained absent proof by the State that the Breathalyzer machine, utilized to test the defendant's breath for the presence of alcohol, had been tested for accuracy in accordance with the provisions of § 31-27-2. In reversing this Panel and dismissing the refusal charge, the Newman Court explained that "[i]n the case at bar, the accuracy of the machine [was] of the utmost importance, as the State maintain[ed] that the reading of 'mouth alcohol' was the result of the defendant's efforts to undermine the [efficacy of the] machine." The district court went on to state that "[w]ithout evidence that the Breathalyzer had been certified for accuracy, there [was] no way to determine whether the reading of 'mouth alcohol' [was] due to a malfunctioning apparatus."

In concluding that the failure of the State to proffer evidence of periodic certification of the Breathalyzer equipment was "fatal to [its] case," the Newman Court distinguished the 1974 case of Vinal v. Petit, 112 R.I. 787, 316 A.2d 497 (1974). In Vinal, our Supreme Court held that when an arrestee flatly refuses to submit to a chemical test of his or her breath, it is not necessary for the State to prove that the Department of Health had certified to the competency of the person who would have conducted the Breathalyzer examination had the arrestee agreed to submit to that test. Id. at 789, 316 A.2d at 498. Unlike in Vinal, the Newman Court reasoned that the certification requirement is relevant in situations where "the State contends that . . . the subject agreed to submit [himself or] herself to the breath test, [but] attempted to undermine the test by failing to breathe as instructed." In such situations, "the accuracy of the [Breathalyzer] machine

[has been] called directly in question and, as such, the State is required to comply with the requirements of [§ 31-27-2]."

Even utilizing the Newman analysis, we are satisfied that there was reliable, probative, and substantial evidence before the trial magistrate from which he could have concluded that the chemical testing equipment employed by Trooper Laurelli was in full compliance with § 31-27-2. Both Mr. Minogue and Trooper Laurelli testified at trial that the chemical test of Appellant's breath "had been performed according to methods and with equipment approved by the director of the department of health of the State of Rhode Island and by an authorized individual." Section 31-27-2. In his testimony, Mr. Minogue described the Department of Health's testing methodology, and this testimony was largely corroborated by the testimony of Trooper Laurelli. (Tr. at 35-36, 95.) In addition, Mr. Minogue and Trooper Laurelli testified that the chemical test of Appellant's breath had been performed by an "authorized individual," as both made clear that Trooper Laurelli had been certified and recertified in the use of chemical testing equipment. (Tr. at 33, 91-92.)

The record also reflects that the "[e]quipment used for the conduct of the tests by means of breath analysis [had] been tested for accuracy within thirty days preceding the test by personnel qualified [by the Department of Health], and [the test had been administered by a] breathalyzer operator[] . . . qualified and certified by the department of health within three hundred sixty-five days of the test." Section 31-27-2. Although Mr. Minogue lacked personal knowledge as to whether the Breathalyzer machine employed by the State Police on the date in question was in proper working order, he set forth in his testimony that the equipment had been tested on January 4, 2007 and February 1, 2007 by his co-worker, Mr. Giusti, and found to be in full compliance with the rules and regulations promulgated by the Department of Health. (Tr. at

24-25.) In addition, Mr. Minogue made clear in his trial testimony that Trooper Laurelli had been recertified as a Breathalyzer operator in October of 2007 and that this certification was in full force and effect on the date that Appellant submitted to a chemical test. (Tr. at 33.) Accordingly, the members of this Panel are satisfied that there was legally competent evidence in the record before the trial magistrate that the certification requirements set forth in Newman were satisfied.

II

Next, Appellant argues that the charged violation should have been dismissed at trial due a "discovery violation" committed by the State, and the failure of the trial magistrate to impose the sanction of dismissal constitutes an abuse of his discretion. The Appellant maintains that the failure of the State to produce the "breath testing cards" produced by the State Police Breathalyzer on the date in question—the "breath testing cards" that indicated that Appellant had produced a "deficient sample"—requires dismissal of the refusal charge.

It is well-settled in Rhode Island that dismissal of an action is an appropriate sanction for non-compliance with a discovery order, and that the imposition of this sanction will be reversed only upon a showing of abuse of discretion. See Mumford v. Lewiss, 681 A.2d 914 (R.I. 1996). However, it is equally well-settled that the entry of a final judgment dismissing an action is a severe remedy for non-compliance with a discovery order. See id. Indeed, our Supreme Court has indicated that it would only "affirm a trial justice's use of this type of drastic sanction in the face of a party's persistent failure to comply with discovery obligations." Mumford, 681 A.2d at 916. As the Court explained, in dismissing a case for failure to comply with a discovery order, a hearing justice will have abused his or her discretion where there is no evidence "demonstrating

persistent refusal, defiance or bad faith." Woloohojian v. Bogosian, 828 A.2d 522, 523 (R.I. 2003).

Unlike the defendant in Woloohojian who "repeatedly refused to avail herself of various opportunities to comply with discovery requests[,] . . . failed to respond to three sets of interrogatories, did not produce documents requested, and ignored a court order entered upon plaintiff's motion to compel," the State has not demonstrated a "persistent refusal to provide the requested information despite numerous opportunities to do so . . . ." Id. Although the State failed to account for the "breath testing cards" during pretrial discovery and at trial, dismissal is an inappropriate sanction because there is no evidence before this Panel that the failure of the State to produce the cards "cause[d] inordinate delay, expense, and frustration for all concerned." Id. at 524. Substantial rights of Appellant have not been prejudiced. Accordingly, as the State did not engage in a pattern of "continuous and willful noncompliance with discovery orders," Goulet v. OfficeMax, Inc., 843 A.2d 494 (R.I 2004), the members of this Panel are satisfied that the trial magistrate's decision to sustain the charged violation is not characterized by an abuse of discretion.

III

The Appellant's third appellate argument is that the trial magistrate's decision is affected by error of law because the State failed to prove to a standard of clear and convincing evidence that Appellant was afforded "a reasonable opportunity to exercise [his] right" under § 31-27-3[3] to

[3] Section 31-27-3 reads:

> "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

"be examined at his . . . own expense immediately after [his] arrest by a physician selected by [Appellant]." While Appellant concedes that he was informed by Trooper Laurelli of his right to a medical examination during the recitation of the "Rights for Use at Scene" and "Rights for Use at Station" forms, he maintains that there is no evidence in the record that he was afforded a "reasonable opportunity" to exercise that right.

In State v. Langella, 650 A.2d 478, 479 (R.I. 1994), our Supreme Court held that the defendant had been afforded a "reasonable opportunity" to exercise his rights under § 31-27-3 because "the arresting and the charging officers [read the defendant his "Rights"] both at the scene and later at the station[,] [t]he defendant was asked at the station if he wished to use the telephone to contact . . . his doctor, and the defendant did use the telephone." (Emphasis added.) While the Court's brief per curiam opinion in Langella did not set forth all of the factors that must exist in order to determine whether a "reasonable opportunity" has been afforded to an arrestee, the Court suggested that the "reasonable opportunity" requirement of § 31-27-3 can be satisfied in one of two ways: the arrestee, upon being fully apprised of the right to be examined at his or her own expense and by a physician of his or her choosing, makes a knowing and intelligent decision to seek out an independent medical examination, or the arrestee makes a knowing and intelligent decision to forgo said exam.

Based on this Panel's reading of Langella and the language of § 31-27-3, it is possible for the prosecution to satisfy its burden of proving compliance with § 31-27-3's "reasonable opportunity" requirement where there is no evidence in the record that the arrestee actually availed himself or herself of the right to an independent medical examination. This reading of Langella is consistent with the reality that many individuals arrested on suspicion of DUI and

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trial of the person the prosecution must prove that he or she was so informed and was afforded that opportunity."

confronted with the decision of whether to submit to a chemical test will forgo a medical examination pursuant to § 31-27-3, and no testimony will be adduced at trial regarding the arrestee's exercise of his or her rights under § 31-27-3. Accordingly, while the record before this Panel is silent as to whether Appellant indicated a desire, following recitation of the "Rights for Use at Station" form by Trooper Laurelli, to be examined by a physician of his choosing, we are nevertheless satisfied that Appellant was afforded a "reasonable opportunity" to exercise his rights under § 31-27-3.

IV

The Appellant next asserts that the trial magistrate's decision is affected by error of law, as the State failed to prove to a standard of clear and convincing evidence that Appellant was advised of his right pursuant to § 12-7-20 to utilize a telephone within one hour of his arrest. This argument must fail, as Appellant stipulated at trial that the "Rights for Use at Station" form—including its mention of the arrestee's right to use a telephone—had been read to Appellant by Trooper Laurelli. (Tr. at 90.) Despite his uncertainty as to whether Appellant availed himself of his opportunity to use a telephone, Trooper Laurelli made clear in his trial testimony that the "Rights" form had been read to Appellant once they had arrived at the State Police barracks. (Tr. at 91.) Accordingly, the members of this Panel are satisfied that the trial magistrate's decision is unaffected by error of law, as the record reflects that Appellant was fully apprised of his right to a phone call before Trooper Laurelli requested that he submit to a chemical test.

V

Additionally, Appellant asserts that the trial magistrate's decision to sustain the charged violation is affected by error of law and characterized by abuse of discretion, as several of the State's evidentiary proffers failed to comply with the "best evidence rule" articulated in Rule 1002 of the Rhode Island Rules of Evidence.[4] Specifically, Appellant contends that the State was attempting to prove the contents of a writing—namely, the "breath testing card" produced by the State Police Breathalyzer that yielded a "deficient sample—and was required to produce the original cards or, in the alternative, to prove that "all originals [were] lost or [had] been destroyed." R.I. R. Evid. 1004. The Appellant maintains that the trial magistrate's decision to admit testimonial evidence regarding the "deficient sample" cards without requiring the State to prove that the originals were unavailable constitutes an abuse of his discretion and requires dismissal of the refusal charge.

"[T]he best evidence rule is intended to bar the admission of any evidence which, by its nature, indicates that there is other evidence more direct and conclusive." Glass-Tite Industries, Inc. v. Spector Freight Systems, Inc., 102 R.I. 301, 311, 230 A.2d 254, 260 (1967). As our Supreme Court has explained,

> "the purpose of the best evidence rule is to bar the admission of secondary evidence to prove the contents of a written document without accounting for the loss or absence of the original. It is applicable only when a litigant is attempting to prove the terms of a writing. In such circumstances, the original writing must be produced unless a satisfactory explanation for its absence is given." Proffitt v. Ricci, 463 A.2d 514, 518 (R.I. 1983).

Where the trial justice improperly admits secondary evidence without requiring its proponent to first account for the unavailability of "best evidence," the decision to admit such evidence will be

[4] Rule 1002 of the Rhode Island Rules of Evidence, setting forth the "best evidence rule," reads: "To prove the content of a writing . . . , the original writing is required, except as otherwise provided in these rules or by statute."

treated as a "harmless error" if his or her decision is supported by other legally competent evidence. See Edward R. Marden Corp. v. S. & R. Const. Co., Inc., 112 R.I. 332, 339, 309 A.2d 675, 679 (R.I. 1973) (exhibit which consisted of summary sheet and was not made reasonably contemporaneous with transaction and in legal course of business was improperly admitted in suit by general contractor against subcontractor but such admission was harmless error).

Here, the State was attempting to prove the contents of the "breath testing cards" and failed to prove "that the originals [were] unavailable due to loss, destruction, inaccessibility or other justifiable cause." General Products Co. v. Superior Court, 81 R.I. 458, 462, 104 A.2d 388, 390 (R.I. 1954). As such, the trial magistrate's decision to allow the State to adduce testimonial evidence regarding the contents of the cards constitutes an abuse of his discretion. However, Appellant was not prejudiced thereby because the trial magistrate's decision to allow Trooper Laurelli to testify regarding the "deficient samples" produced by Appellant constitutes "harmless error." The record before this Panel reflects that the trial magistrate's decision to sustain the charged violation of § 31-27-2.1 is amply supported by other legally competent evidence. Accordingly, as the members of this Panel are satisfied that Appellant constructively refused to submit to a chemical test by failing to follow Trooper Laurelli's explicit instructions and that the "deficient samples" produced by the Breathalyzer were due to Appellant's attempts to undermine the efficacy of the breath testing equipment, we conclude that the trial magistrate's decision to allow testimonial evidence in contravention of the "best evidence rule" is harmless error and does not require dismissal of the charged violation of § 31-27-2.1.

Conclusion

This Panel has reviewed the entire record before it. Having done so, the members of this Panel are satisfied that the trial magistrate's decision is not affected by error of law, clearly

erroneous in view of the reliable, probative, and substantial record evidence, or characterized by abuse of discretion. Substantial rights of Appellant have not been prejudiced. Accordingly, Appellant's appeal is denied, and the charged violation is sustained.

ENTERED: