STATE OF RHODE ISLAND AND PROVIDENCE PLANTATIONS

CRANSTON, RITT **RHODE ISLAND TRAFFIC TRIBUNAL**

STATE OF RHODE ISLAND	**:**	
	:	
v.	**:**	**C.A. No. T15-0036**
	:	**15001505201**
BRYAN E. MENGE	**:**	

DECISION

PER CURIAM: Before this Panel on January 27, 2016—Administrative Magistrate DiSandro III (Chair), Magistrate Abbate, and Judge Parker, sitting—is Bryan Menge's (Appellant) appeal from a decision of Rhode Island Traffic Tribunal Magistrate Goulart (Trial Magistrate), sustaining the charged violation of G.L. 1956 § 31-27-2.1, "Refusal to Submit to Chemical Test." The Appellant appeared before this Panel pro se. Jurisdiction is pursuant to § 31-41.1-8.

Facts and Travel

On February 26, 2015, Trooper Kane of the Rhode Island State Police (Trooper Kane), charged Appellant with the aforementioned violation of the motor vehicle code. Appellant contested the charge, and the matter proceeded to trial on September 23, 2015. The trial continued for a period of four days: September 23, 2015; September 30, 2015; October 5, 2015; October 9, 2015.

Prior to trial, as a preliminary matter, Appellant moved to dismiss the charged violation, § 31-27-2.1. (9/23/15, Tr. at 5-6.) Appellant argued that he was also charged with "Driving under Influence of Liquor or Drugs" pursuant to § 31-27-2, a violation arising out of the same occurrence, and therefore the two charges needed to be brought before the Traffic Tribunal together as mandated by the Rhode Island Traffic Tribunal Rules of Procedure. Id. at 6-7.; see

also Traffic Trib. R. P. 32 (c) (stating "[a]ll other charges that are brought arising out of the same transaction or occurrence that constitute the probable cause for the request that the defendant submit to a chemical test shall be brought before the traffic tribunal together with the charged violation of G.L. 1956 § 31-27.2.1"). The Trial Magistrate explained that the Traffic Tribunal does not have jurisdiction to hear Appellant's "Driving under Influence of Liquor or Drugs" (DUI) charge. (9/23/15, Tr. at 8.) The Trial Magistrate further clarified that the procedure of the DUI charge is irrelevant in relation to the refusal charge before the Court. Id. at 11. Accordingly, the Trial Magistrate denied Appellant's motion to dismiss. Id. at 14. Appellant then requested a jury trial. Id. at 16. The Trial Magistrate found that the request was "clearly designed to frustrate the clear administration of justice in this case" and denied the motion; thereafter, the trial commenced. Id. 16.

At trial, Trooper Kane began by describing his training as a law enforcement officer, specifically in relation to DUI investigations. Id. at 24. Trooper Kane testified that he was trained in the administration of Standard Field Sobriety Tests (SFSTs), and explained in detail the methods and aspects of each test. Id. at 24-30. Trooper Kane also described the observations he was taught to make while administering the tests; observations that include: odor, mannerisms, speech, and overall interaction with the individual. Id. at 31. Trooper Kane stated that he had personally administered more than fifty tests and had assisted in the administration of approximately one hundred or more tests. Id. at 32.

Trooper Kane then recalled the events of February 26, 2015. Id. at 34. Trooper Kane testified that at approximately 2:00 a.m., he and his partner, Trooper Cloud, were on patrol in Hope Valley, Exeter. Id. While on patrol, the Hope Valley barracks received a call from an employee of the Cornerstone Pub in Exeter, Rhode Island. Id. at 35. The caller indicated that a

suspicious vehicle had been parked in the parking lot of the Pub for a lengthy period of time. Id. The caller stated that the vehicle should not have been in the parking lot because the Pub was closed for the evening. Id. The Troopers advised the barracks that they were available and would proceed to the Pub. Id.

Upon arrival at the Pub, Trooper Kane observed one vehicle in the parking lot, a white van with its hazard lights on. Id. The Troopers got out of their vehicle to investigate the white van. Id. at 37. Trooper Kane testified that the van was running, there were keys in the ignition, and there was a male subject located in the driver's seat, asleep. Id. at 37-38. Trooper Kane approached the driver's side window and knocked on the window two to three times. Id. at 39. The male subject sitting in the driver's seat, later identified as the Appellant, awoke and rolled down the window. Id. at 40. Trooper Kane recalled asking the Appellant, "how are you?" and then asking "what are you doing here?" The Appellant responded, "I'm home; I'm parked in my driveway." Id. Trooper Kane recalled "a strong odor of an alcoholic beverage emanating from the interior of the vehicle . . . [and] definitely a slurred speech." Id. at 46. Trooper Kane asked the Appellant where he had been earlier in the evening and the Appellant replied: "I went to a bar, I had a couple of drinks; I went to another bar, I had a couple of drinks . . . [I] went to Twisted Pizza and [I] had a couple of drinks . . . I pulled over here because I felt that I had too much to drink, so I stopped my car and got off the road." Id. at 50. Trooper Kane then requested that the Appellant step out of the vehicle and asked the Appellant to submit to a SFST. Id. at 51.

Trooper Kane testified that he first administered the horizontal gaze nystagmus test to the Appellant, and the Appellant failed the test. Id. at 54. Trooper Kane next administered the walk and turn test to the Appellant; again, Appellant failed the test. Id. at 55. Lastly, Trooper Kane administered the one-leg stand test to the Appellant, and the Appellant failed this test. Id. at 58.

After the third failed SFST, and based on his observations, Trooper Kane informed Appellant that he was being placed under arrest for operating a vehicle under the influence of alcohol. Id. at 60-61. Trooper Kane read the Appellant his "rights for use at the scene" and then transported Appellant to the barracks. While being transported to the barracks, Appellant stated "I think this is illegal; you can't do this to me; I was too drunk to drive; I was tired; so I pulled over; I was parked on private property . . . ." Id. at 66-67. Trooper Kane concluded his testimony by stating that upon arrival at the barracks, Appellant was read his "rights for use at the station" and asked to submit to a chemical test. Id. at 71. The Appellant verbally refused the chemical test and then declined to sign the refusal form. Id.

The Appellant began his cross-examination of Trooper Kane by asking "what time did [dispatch tell you] about the suspicious vehicle?" Id. at 79. Trooper Kane could not recall the exact time that he received the information from dispatch, but he was sure that he arrived at the parking lot of the Pub "minutes after the call went out." Id. at 80. The Appellant then questioned Trooper Kane's recollection of Appellant's slurred speech, stating "you mentioned . . . I had slurred speech. Have you ever seen anybody have a stroke or any kind of medical illness?" Id. at 104. Trooper Kane responded that it is possible that Appellant could have had a stroke, causing the slurred speech, but noted that on the prisoner intake form that Appellant filled out at the barracks Appellant denied having any medical conditions. Id. at 105. The Appellant then questioned Trooper Kane regarding his personal observations of the vehicle. Id. at 116. The Appellant asked "you, personally, didn't stop that vehicle or in any way see the driver of that vehicle driving that vehicle on the roadways in Rhode Island that evening?" Id. To which Trooper Kane responded "[n]o." Id. Trooper Kane later clarified, "[i]n order to have an interaction with you, there doesn't have to be a violation. We were responding to a call for a

suspicious vehicle and were investigating . . . ." Id. at 121. At the conclusion of the Appellant's cross-examination, the State rested, and the Appellant moved to dismiss the case arguing that Trooper Kane did not have probable cause to arrest him. Id. at 127. The Trial Magistrate denied Appellant's motion, stating,

> "[t]he probable cause which led him to believe you were operating a motor vehicle while under the influence . . . [was] the nature of your speech, your failure on the standardized field sobriety test, your relative confusion as to where you were, your admissions that you had been drinking alcohol and pulled over at that location because you had too much to drink . . . [h]e had probable cause." Id. at 128-29.

The trial continued on September 30, 2015, when Appellant presented his case-in-chief. (9/30/15, Tr. at 2.) Appellant called Trooper Cloud as a witness. Id. at 24. The Appellant questioned Trooper Cloud regarding his experience as a law enforcement officer and his training in administering SFSTs. Id. at 24-38. The Trial Magistrate interrupted the Appellant's questioning, stating that Trooper Cloud's training and experience were not relevant because Trooper Cloud did not conduct the SFST of the Appellant, nor did Trooper Cloud make the arrest or ask the Appellant to submit to the breathalyzer test. Id. at 40. The Appellant questioned Trooper Cloud about his personal recollection of the events of February 26, 2015. Id. at 40-75. Trooper Cloud could not recall the particular circumstances of the investigation and subsequent arrest; however, he stated "[i]f I observed anything different than Trooper Kane, there would be a supplemental narrative." Id. at 76. At the conclusion of Trooper Cloud's testimony, the trial was continued until October 5, 2015.

On October 5, 2015, Rhode Island State Police Troopers Robles and Bautista testified regarding their assistance in the investigation. The Troopers had been dispatched to the Pub and arrived shortly after Trooper Kane and Trooper Cloud. (10/5/15, Tr. at 24.) Trooper Robles

testified first, corroborating the testimony of Trooper Kane and Trooper Cloud. Id. at 26. Trooper Robles recalled receiving a report from dispatch that there was a "white van parked at the Corner Stone Pub . . . an employee at the Pub saw the vehicle, thought it was suspicious and wanted [the police] to check the area." Id. Trooper Robles testified that the Appellant was arrested and secured in Trooper Kane's police cruiser by the time he arrived at the Pub. Id. at 53. At the conclusion of Trooper Robles' testimony, Trooper Bautista testified. Id. at 57. Trooper Bautista corroborated the testimony of the three Troopers who had testified prior to him. Id. at 57-89. At the conclusion of Trooper Bautista's testimony, Appellant moved to strike any testimony of Trooper Kane that conflicted with the testimony of the other Troopers. Id. at 93. The Trial Magistrate denied Appellant's motion, stating "[t]here's no basis to strike the testimony." Id. at 95. The trial was continued to October 9, 2015, for closing arguments with the understanding that Appellant would refrain from filing any further motions. Id. at 112.

On October 9, 2015, prior to closing arguments, Appellant filed a motion, stating "I cannot be denied my right to file motions . . . I did not acknowledge that [I wouldn't file a motion]." (10/9/15, Tr. at 4.); cf. (10/5/15, Tr. at 112) (Appellant stating, "I won't file [another motion], I wouldn't, honest"). The Appellant then moved to recuse the Trial Magistrate from the case. (10/9/15, Tr. at 4.) The Trial Magistrate denied Appellant's request. Id. at 5.

In his closing argument, Appellant claimed that the Rhode Island State Police had a duty of care to determine if he had a medical emergency, such as a stroke, while in his vehicle. Id. at 13. Appellant argued that the testimony of Trooper Kane regarding Appellant's blood shot eyes, slurred speech, and odor, pointed to the conclusion that Appellant had a stroke. Id. at 15. The Appellant further argued that the police had no legitimate reason to be at the Pub, and therefore, the Troopers were trespassing. Id. at 24. In contrast, Appellant insisted that he had "every right"

to be on the property. Id. at 36. Appellant maintained that Trooper Kane's testimony was false and that Trooper Kane committed "fraud upon the court" because he intentionally lied to the Trial Magistrate. Id. at 27. Lastly, Appellant argued that the testimony of Trooper Kane was inconsistent with the testimony of the other Troopers, and as a result, the State did not meet its burden of clear and convincing evidence. Id. at 73.

After hearing the testimony presented, the Trial Magistrate found the testimony of Trooper Kane to be "highly credible." Id. at 87. The Trial Magistrate recounted the testimony of Trooper Kane and determined that based on Trooper Kane's observations, he "had, in fact, probable cause to make an arrest for driving under the influence." Id. at 93. The Trial Magistrate noted "[Appellant] specifically said he was operating the motor vehicle and pulled over because he was too drunk to drive home. He was also confused as to his location. If Trooper Kane did anything but arrest [Appellant] for operating while under the influence, he would not have been doing his job." Id. at 96. The Trial Magistrate concluded: "I'm satisfied by clear and convincing evidence . . . that Trooper Kane had reasonable grounds to believe that [Appellant] was operating his vehicle while under the influence. . . [and] I'm satisfied as it relates to the other three elements of the refusal charge." Id. at 97.

As such, the Trial Magistrate sustained the charged violation, § 31-27-2.1, "Refusal to Submit to Chemical Test." The Trial Magistrate imposed a license suspension of eight months, retroactive to the date of the preliminary suspension. Id. at 99. The Trial Magistrate entered a fine of two hundred dollars ($200.00), ten hours of community service, alcohol treatment program attendance, the highway assessment fee, and all court costs. Id. at 99. Aggrieved by the Trial Magistrate's decision, Appellant timely filed this appeal.

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 prejudicial 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 Ins. 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 Envtl. 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 contends that the Trial Magistrate's decision was in violation of constitutional and statutory provisions and clearly erroneous in view of the reliable, probative, and substantial evidence on the whole record. Appellant makes numerous arguments most of which are so lacking in merit as not to require discussion. Appellant does, however, articulate six contentions of meaning which this Panel will address in turn.[1]

First, Appellant maintains that Trooper Kane did not actually see him operating the vehicle; therefore, Trooper Kane did not have probable cause to arrest Appellant for operating a motor vehicle under the influence of alcohol. Second, Appellant argues that his Fourth Amendment right to be free from unreasonable searches and seizures was violated when Trooper Kane approached Appellant's vehicle to conduct an investigation as to the vehicle's presence in the parking lot. Third, Appellant contends that the appeal before this Panel violates the constitutional provision of double jeopardy because he was previously prosecuted, and acquitted, in the District Court of Rhode Island for the same offense. Fourth, Appellant maintains that he has a constitutionally protected property interest in his driver's license and the suspension of his license erroneously deprived him of that interest without due process of law. Fifth, Appellant argues that his rights pursuant to § 31-27-3 were violated. Sixth, Appellant maintains that the State failed to meet its burden of clear and convincing evidence.

[1] This Panel acknowledges that approximately two months after his appeal was heard, Appellant filed a "[m]otion to add recently decided case law, additional pertinent past case law and claims of error in support of Appellant's appeal." This Panel will not address the arguments set forth in the Motion as it is untimely. See Traffic Trib. R. P. § 24 (c) ("[a] written motion, other than one which may be heard ex parte . . . shall be served not later than five (5) days before the time specified for the hearing").

I

Permissible Inference

Appellant maintains that Trooper Kane did not actually see him operating the vehicle; therefore, Trooper Kane did not have probable cause to arrest Appellant for operating a motor vehicle under the influence of alcohol. Appellant's argument misinterprets the law and erroneously conflates probable cause with reasonable suspicion.

Section 31-27-2.1 authorizes a police officer to direct a suspect to submit to a breathalyzer test if the officer has "reasonable grounds" to believe that the suspect has been driving a motor vehicle within this state while under the influence of alcohol. See § 31–27–2.1; see also State v. Bruno, 709 A.2d 1048, 1050 (R.I. 1998) (holding that reasonable suspicion was the appropriate standard upon which to satisfy the requirement of a violation of § 31–27–2.1). In determining whether the officer had reasonable suspicion, it is permissible for the trial justice to "draw inferences from the testimony of witnesses, and such inferences, if reasonable, are entitled on review to the same weight as other factual determinations." DeSimone Electric, Inc. v. CMG, Inc., 901 A.2d 613, 621 (R.I. 2006). Operation of a motor vehicle is one such inference that can be properly drawn based on a police officer's observations. See State v. Perry, 731 A.2d 720 (R.I. 2000) (finding that although the arresting officer did not see the defendant operate his motor vehicle, the officer had reasonable suspicion to believe that defendant had operated the vehicle while under influence of intoxicating liquor, and thus, the officer was authorized to direct defendant to submit to a breathalyzer test).

The facts of this case are similar to those in Perry in that Trooper Kane did not see Appellant operate his motor vehicle. (9/23/15, Tr. at 116.) The question then becomes whether Trooper Kane had reasonable suspicion to believe Appellant had operated his motor vehicle

while under the influence of alcohol. The Trial Magistrate determined that Trooper Kane had "reasonable and articulable suspicion" to believe that Appellant had operated the vehicle while under the influence of alcohol. (10/9/15, Tr. at 91-92.) The Trial Magistrate stated, "[Appellant] indicated that he went to various bars and had a couple of drinks. That he pulled over in the [Pub parking lot] because he had too much to drink. Therefore, suggesting to the Trooper that he was both driving while under the influence, and in fact, operating the motor vehicle." Id. at 92.

We conclude that the Trial Magistrate properly drew the inference that Trooper Kane had reasonable suspicion to believe that Appellant had operated his vehicle while under the influence of alcohol. The record demonstrates that Trooper Kane observed Appellant's vehicle parked outside the Pub. (9/23/15, Tr. at 35-36.) Appellant was sitting in the driver's seat of the vehicle and the ignition was running. Id. at 37-38. Trooper Kane spoke with the Appellant and the Appellant stated that he had driven to the parking lot of the Cornerstone Pub because "[he] knew [that he] had too much, so [he] pulled in here so [he] could sleep." Id. at 46. The facts presented clearly satisfy the "reasonable suspicion" standard required to administer a breathalyzer test pursuant to § 31-27-2.1, and therefore, the Trial Magistrate did not err in sustaining the charge.

II

Fourth Amendment Search and Seizure

Defendant argues that his right to be free from unreasonable searches and seizures was violated by Trooper Kane's investigation. Specifically, Appellant maintains that his vehicle was unlawfully searched without a warrant and the Troopers had no right to be on the premises.

We note that the record is devoid of any evidence suggesting that Appellant's vehicle was searched unlawfully. In fact, there is no evidence indicating that Appellant's vehicle was searched at all. We can only infer, based on the record, that Appellant's vehicle was searched

incident to Appellant's arrest. Regardless, the Trial Magistrate's decision was based on grounds unrelated to a search, and therefore, any search that may have been conducted is irrelevant in respect to the charged violation, § 31-27-2.1. Consequently, we address these arguments only briefly.

Appellant's argument that the Troopers needed a warrant in order to conduct their investigation because his vehicle is "an office and home away from home" willfully ignores decades of cases that distinguish between an automobile and a home or office. See Carroll v. United States, 267 U.S. 132 (1925) (holding that automobiles and other conveyances may be searched without a warrant in circumstances that would not justify the search without a warrant of a house or an office); see also Cooper v. California, 386 U.S. 58 (1967) (finding that the mobility of a car may make the search of a car without a warrant reasonable "although the result might be the opposite in a search of a home"); South Dakota v. Opperman, 428 U.S. 364, 367 (1976) (reiterating that the mobility of automobiles "creates circumstances of such exigency that, as a practical necessity, rigorous enforcement of the warrant requirement is impossible"). Based on this precedent, we find Appellant's argument that his vehicle is "an office and home away from home" to be without merit.

In respect to Appellant's contention that the Troopers had no right to be on the premises, we defer to the Trial Magistrate's statement, "[Appellant] has no right to challenge the officer's ability to be in that parking lot. They had every right to be in that parking lot and an obligation to be in the parking lot, based on the call. He has no standing to challenge that, whatsoever." (10/9/15, Tr. at 90.) We agree that the Troopers had an obligation to be in the Pub parking lot. Oftentimes, "municipal and state police are called upon to perform 'community caretaking functions' that have nothing to do with the apprehension and conviction of alleged criminals."

State v. Cook, 440 A.2d 137, 139 (R.I. 1982) (citing Cady v. Dombrowski, 413 U.S. 433 (1973)). Such actions are "not to ferret out potential criminal activity," but rather, to "investigate and inquire into a situation where an officer has reasonable grounds to suspect that something is sufficiently amiss." See State v. Roussell, 770 A.2d 858, 860 (R.I. 2001) (holding that a trooper's "community caretaking function" justified his investigation of a suspicious vehicle, not only to protect his own safety, but also the safety of other drivers on the highway).

Here, the record clearly reflects that the Troopers were performing their community caretaking duties by investigating a report of a suspicious vehicle. (9/23/15, Tr. at 35.) The investigation started off as a community caretaking function, evidenced by Trooper Kane's initial questions to the Appellant: "[h]ow are you?" "[w]hat are you doing here?" "[d]o you know where you are?" Id. at 40-41. Trooper Kane testified that he "wanted to make sure [the Appellant] was okay." Id. at 40. During Trooper Kane's conversation with the Appellant he noticed "a strong odor of alcoholic beverage emanating from the interior of [Appellant's] vehicle . . . definitely a slurred speech [and] an element of what appeared to be a confused state." Id. at 46. These observations properly transformed Trooper Kane's community caretaking duties into an investigation for driving under the influence of alcohol. See Roussell, 770 A.2d at 860-61 (finding that although the trooper's initial investigation into a possible emergency turned into an arrest of defendant for driving under the influence, his actions were justified in accordance with his "community caretaking functions"). We, again, defer to the Trial Magistrate in stating, "[i]f Trooper Kane did anything but arrest [Appellant] for operating while under the influence . . . [h]e would have been derelict in the performance of his job." (10/9/15, Tr. at 96.)

III

Double Jeopardy

Appellant asserts that double jeopardy considerations barred the prosecution of this case at the Rhode Island Traffic Tribunal because Appellant had previously been prosecuted for the same offense at the District Court of Rhode Island. This argument fails.

The Double Jeopardy Clause of our Constitution protects against a second prosecution for the same offense after acquittal or conviction. See State v. Grayhurst, 852 A.2d 491, 500 (R.I. 2004) (citing State v. Rodriguez, 822 A.2d 894, 905 n. 13 (R.I. 2003)). It also protects against "multiple punishments for the same offense." Id. A double jeopardy situation arises when the state "charges a defendant with two crimes arising from the 'same act or transaction' and neither crime charged requires proof of an element that the other does not." See State v. Davis, 120 R.I. 82, 86, 384 A.2d 1061, 1064 (1978) (quoting Blockburger v. United States, 284 U.S. 299, 304, (1932)).

We reject Appellant's contention that the State placed him in double jeopardy when it prosecuted him for both §§ 31-27-2.1 and 31-27-2. Driving under the influence of liquor, in violation of § 31-27-2, does not include the element of refusing a breathalyzer test. Refusing a breathalyzer test, in violation of § 31-27-2.1, does not include the element of driving under the influence of liquor. See State v. Hart, 694 A.2d 681, 682 (R.I. 1997) (holding that the civil penalty imposed for defendant's refusal to submit to a breathalyzer test did not bar his criminal prosecution for driving under the influence). In Hart, our Supreme Court was faced with the same argument that Appellant makes here—that double jeopardy prohibits the prosecution of both §§ 31-27-2.1 and 31-27-2. Id. at 681. The Court stated, "[i]t is clear that refusing a breathalyzer test and driving under the influence of liquor are wholly distinct and separate

offenses as each requires proof of one or more elements which the other does not." Id. Therefore, the Court determined that the defendant could be prosecuted for both violations—the refusal to submit to a chemical test and driving under the influence.

We decline to depart from the clear ruling of our Supreme Court in Hart. As such, Appellant's adjudication for the charge of § 31-27-2.1 in the Traffic Tribunal subsequent to an adjudication in our District Court for the charge of § 31-27-2 does not violate the prohibition against double jeopardy.

IV

License Suspension

Appellant asserts that he has a constitutional right to possess a driver's license. Specifically, Appellant argues that his interest in having a license to operate a motor vehicle is a "protectable property interest" and therefore cannot be taken from him without the due process of law.

Appellant correctly notes that he has a property interest in a driver's license sufficient to invoke the protections of the due process clause. See Levesque v. R.I. Dept. of Transp., 626 A.2d 1286, 1290 (R.I. 1993) (stating "the due process clause of the Fourteenth Amendment, which requires notice and the opportunity to be heard before a person can be deprived of a property right, applies to the suspension or revocation of a driver's license"). However, Appellant fails to recognize that the State's compelling interest in highway safety justifies the procedure of imposing preliminary suspensions of driver's licenses as long as the due process requirements of notice and an opportunity to be heard are satisfied. Id. at 1290 (stating "summary suspension of a driver's license for refusal to submit to a breathalyzer test is not a violation of due process"); see also State v. Locke, 418 A.2d 843 (R.I. 1980) (due process is not

violated where statute provides for an administrative hearing at which the defendant had the right to be heard on the issue of his license suspension). Appellant was afforded an administrative hearing; thereafter, the preliminary suspension of his driver's license was effectuated. Appellant was then afforded a trial that extended four days, numerous preliminary hearings on motions, and the appeal currently before this Panel. It is clear to this Panel that Appellant has been afforded his opportunity to be heard on his license suspension and has unquestionably exercised that right. Consequently, Appellant's due process rights have not been violated, and his driver's license was properly suspended as a penalty of refusing to submit to the breathalyzer test. Levesque, 626 A.2d at 1289 ("license suspension is a necessary penalty for refusal to submit to a breathalyzer test").

This analysis is consistent with the decision set forth by the United States Supreme Court in Mackey v. Montrym, 443 U.S. 1 (1979). Appellant primarily relies on Mackey to support his argument that the license suspension infringed upon his constitutional right to possess a driver's license. However, this reliance is misplaced as Mackey hinders Appellant's argument. The Mackey Court held that a Massachusetts statute mandating suspension of driver's licenses for licensees who refused to take a breathalyzer test did not violate the due process clause of the Fourteenth Amendment. Id. at 10. We follow the precedent set in Mackey and adopted by our Supreme Court in Levesque in holding that Appellant's right to possess a driver's license has not been violated. Additionally, we take this time to reiterate that there is no fundamental constitutional right to drive on the highways of this State. See Locke, 418 A.2d at 850. It is a right subject to reasonable control and regulation rationally related to legitimate state interests. The refusal statute is one such reasonable regulation. Id. (stating "threatened [license]

suspension under the statute is critical to attainment of the goal of making the highways safe by removing drivers who are under the influence").

V

Immediacy Requirement of § 31-27-3

Appellant contends that the Trial Magistrate erred in sustaining the charged violation, § 31-27-2.1, because Trooper Kane was not in substantial compliance with the mandate of § 31-27-3 that the arresting officer shall inform the defendant of his right to contact a physician "immediately after his arrest . . . and afford him a reasonable opportunity to exercise such right." See § 31-27-3. [2] After disputing the credibility of Trooper Kane, Appellant relies on Trooper Kane's testimony that he was read his "rights for use at the scene" form at 2:38 a.m. in making the assertion that because he was not afforded an opportunity to be examined by a physician of his choosing until 3:01 a.m., the immediacy requirement of § 31-27-3 was not properly effectuated. Appellant insists that this twenty-three minute lapse of time between the recitation of the form and his opportunity to contact a physician violated his right to be "immediately examined" and requires reversal.

We are not persuaded by Appellant's argument. The Trial Magistrate, in making his decision, found that Trooper Kane was in compliance with the mandates of the statute, stating "I'm certainly satisfied, beyond any doubt whatsoever that he was informed of his right to be examined by a physician of his choice." (10/9/15, Tr. at 95.) We agree with the Trial Magistrate

[2] Section 31-27-3, "Right of person charged with operating under influence to physical examination," sets forth, in pertinent part: "[a] person arrested and charged with operating a motor vehicle while under the influence of narcotic drugs or intoxicating liquor. . . 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 . . ." (emphasis added).

that Appellant was informed of his right "immediately" within the fair meaning of that word as used in the statute. Moreover, twenty-three minutes is not such an unreasonable length of time that the Trial Magistrate would have been warranted in ruling as a matter of law that Appellant had not been "immediately" informed of his right under the statute. See State v. Poole, 97 R.I. 215, 197 A.2d 163 (1964) (where defendant had been notified of his right to contact a physician for examination about ten minutes after his arrest and given an opportunity to call a doctor within forty-five minutes after the arrest, the trial judge did not err in finding that the statute was properly effectuated); see also State v. Lefebvre, 78 R.I. 259, 263, 81 A.2d 348, 349 (1951) (internal citation omitted) (defining "immediately" as "within such convenient time as is reasonably requisite, or may be reasonably necessary, under the circumstances, to do the thing required; without unnecessary, unreasonable, or inexcusable delay, under all the circumstances"). Consequently, Appellant's argument that the Trial Magistrate erred in sustaining the charged violation, § 31-27-2.1, because he was not "immediately" informed of his rights pursuant to § 31-27-3, lacks merit.

VI

Sufficiency of Findings

Appellant argues that the State failed to meet its burden of clear and convincing evidence. In addition, Appellant contends that the Trial Magistrate's decision to sustain the charged violation was error and inconsistent with the precedent established by this Panel.

Appellant relies on this Panel's decision in State v. Stephen Day, T13-0011(2013), to support his contention that the Trial Magistrate's decision was erroneous. The facts and circumstances presented to this Panel in Day were wholly distinct from those in Appellant's case. In Day, we based our decision that the State failed to meet its burden on the fact that the

"rights for use at the scene" form had not been submitted into evidence. Id. We found that the police officer's "bare assertion" that the form had been read to Day, without the actual introduction of the form, was insufficient to sustain the charged violation and required reversal. Id.

Here, the State submitted into evidence the "rights for use at the scene" form. (9/23/15, Tr. at 61-62.) Trooper Kane's testimony exceeded the "bare assertion" of the officer's testimony in Day. As such, Appellant's argument that because this Panel overturned the Trial Magistrate in Day, we should therefore overturn the Trial Magistrate in this case stretches our decision in Day past its intended bounds and makes a comparison that is unsubstantiated.

Appellant's argument that the State failed to meet its burden of clear and convincing evidence is unsupported. The Trial Magistrate was satisfied that the State had met its burden, and having reviewed the record in its entirety, we are inclined to agree. Based on the record, this Panel is satisfied that the Trial Magistrate's decision sustaining the charged violation, § 31-27-2.1, was supported by legally competent evidence. See Link, 633 A.2d at 1348 (internal citation omitted) (stating "[t]he 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"). We are satisfied that the Trial Magistrate did not abuse his discretion, nor was the decision in violation of constitutional or statutory provisions, or clearly erroneous in view of the reliable, probative, and substantial evidence on the whole record.

Conclusion

This Panel has reviewed the entire record before it. Having done so, the members of this Panel find that the Trial Magistrate's decision is supported by reliable, probative, and substantial evidence on the whole record, and is not in violation of constitutional provisions. Substantial rights of the Appellant have not been prejudiced. Accordingly, Appellant's appeal is denied, and the charged violation sustained.

ENTERED:

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Administrative Magistrate Domenic A. DiSandro III (Chair)

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Magistrate Joseph A. Abbate

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Judge Edward C. Parker

DATE: _____