STATE OF RHODE ISLAND AND PROVIDENCE PLANTATIONS

CRANSTON, RITT **RHODE ISLAND TRAFFIC TRIBUNAL**

STATE OF RHODE ISLAND	**:**	
	:	
v.	**:**	**C.A. No. T18-0024**
	:	**18503501857**
DAVID DIORIO	**:**	

DECISION

PER CURIAM: Before this Panel on January 30, 2019—Chief Magistrate DiSandro (Chair), Associate Judge Almeida, and Magistrate Noonan, sitting—is David DiOrio's (Appellant) appeal from a decision of Magistrate Alan R. Goulart (Trial Magistrate) of the Rhode Island Traffic Tribunal, sustaining the charged violation of G.L. 1956 § 31-27-2.1, "Refusal to submit to chemical test." The Appellant appeared before this Panel represented by counsel. Jurisdiction is pursuant to § 31-41.1-8.

I

Facts and Travel

On October 23, 2018, Patrolman Thomas Bouffard (Patrolman Bouffard) of the South Kingstown Police Department responded to a call from dispatch reporting a possible theft and intoxicated driver. (Tr. at 8:21-9:7, December 5, 2018.) Based upon the information relayed by dispatch, Patrolman Bouffard located the described vehicle in a parking lot in South County Commons, and identified the driver as Appellant. *Id.* at 9:21-10:6; 11:4-24. Patrolman Bouffard subsequently charged Appellant with the above-mentioned violation. *See* Summons No. 18503501857.

Appellant pled not guilty to the charged violation, and the matter proceeded to trial on December 5, 2018, and December 17, 2018. Patrolman Bouffard was the only witness to testify at Appellant's trial. First, Patrolman Bouffard testified as to his experience and training in observing individuals driving under the influence (DUI). At the time of trial, Patrolman Bouffard had been a South Kingstown Police Officer for three years, and "trained at the Rhode Island Municipal Police in DUI and [standardized field sobriety tests]." (Tr. at 4:17-24; 5:28-23, December 5, 2018.) During his police training, Patrolman Bouffard learned how to administer the "horizontal gaze nystagmus, walk and turn[,] and one-leg stand" field sobriety tests, and performed these tests on both intoxicated and sober subjects. *Id.* at 6:3-12. He was also trained to identify physical indicators of impairment, including "reddish face, red, bloodshot watery eyes, [ ] unsteady [ ] feet or a staggered gait, any odor of an alcoholic beverage emanating from their person or breath[,]" and slurred speech. *Id.* at 7:7-19. Moreover, Patrolman Bouffard has conducted field sobriety tests while on duty "[b]etween 30 and 40" times, fifteen of which resulted in arrests for DUI. *Id.* at 6:24-7:7.

Next, Patrolman Bouffard recalled the events of the night in question. While on routine patrol on October 23, 2018, Patrolman Bouffard received a call from dispatch at 7:11 p.m. reporting that "a white male approximately 40 to 50 years of age, wearing a pink shirt, left [D'Angelo's] in a white SUV, bearing Rhode Island registration UE 752," and "may have been intoxicated and . . . may not have paid for his food."[1] *Id.* at 8:21-9:18. Based on the registration information provided by dispatch, Patrolman Bouffard located an address "out of South County Commons," and drove toward that direction—about three or four miles away. *Id.* at 9:21-10:6.

[1] A D'Angelo's employee completed a witness statement regarding this incident. (Tr. 41:14-19, December 5, 2018.) However, the witness did not appear at trial to testify, so the witness statement was not entered into evidence. Moreover, it is not clear whether this employee is the same employee who provided the information to dispatch.

Patrolman Bouffard further testified that the nature of the dispatch was "[a] subject not paying for food and possibly intoxicated, leaving D'Angelo's[,]" but the "main concern was not paying for the food."[2] *Id.* at 40:1-6.

Shortly thereafter, Patrolman Bouffard located the vehicle "parked in a parking lot behind Shogun in the South County Commons." *Id.* at 10:18-20. Upon arrival, Patrolman Bouffard observed that Appellant sat in the driver's seat, the vehicle's lights were on, and the engine was running. *Id.* at 10:21-11:24. After approaching the vehicle, Patrolman Bouffard also noticed that Appellant had "a reddish face, slurred speech, severely bloodshot, watery eyes[,] [a]nd there was a strong odor of an alcoholic beverage emanating from the vehicle." *Id.* at 12:15-19.

Patrolman Bouffard testified that Appellant informed him that he was coming from playing tennis in Smithfield and had just come from D'Angelo's. *Id.* at 12:20-13:4. Subsequently, Patrolman Bouffard asked Appellant to exit the vehicle, at which point "[Appellant] appeared unsteady on his feet[,]" so Patrolman Bouffard "asked [Appellant] if he would consent to standardized field sobriety tests, which he did." *Id.* at 123:13-20. Patrolman Bouffard also asked Appellant if he had any medical issues which would prevent him from performing those tests, and Appellant replied that "he had a left ankle injury and that it would be hard for him to walk a straight line." *Id.* at 13:21-14:2. However, Patrolman Bouffard did not observe Appellant walk with a limp and Appellant did not complain of any pain. *Id.* at 14:3-8.

Thereafter, Patrolman Bouffard administered three standardized field sobriety tests to Appellant: the horizontal gaze nystagmus test, the walk and turn test, and the one-leg stand test. *Id.* at 14:17-19; 16:20-17:1; *Id.* at 20:2-14. Patrolman Bouffard testified in detail as to his observations of Appellant during these tests. During the horizontal gaze nystagmus test,

[2] Toward the end of his encounter with Appellant, Patrolman Bouffard learned that Appellant had, in fact, paid for his food at D'Angelo's. *Id.* at 40:14-24.

"[Appellant] was swaying back and forth," and Patrolman Bouffard had to "instruct [Appellant] not to move his head and only to follow [ ] the stimulus with his eyes." *Id.* at 16:9-19. Similarly, during the walk and turn test, Appellant "stepped off the line[,] broke heel to toe contact[,] used his arms for balance[,] and he took the wrong number of steps." *Id.* at 19:12-15. Lastly, while performing the one-leg stand test, Appellant "put his foot down for balance. . . . He used his arms for balance and he swayed back and forth." *Id.* at 22:17-20. This indicated to Patrolman Bouffard "[a] level of impairment over .08." *Id.* at 22:21-24. Based upon his training, experience, and observations of Appellant, Officer Bouffard determined that Appellant "was over the legal limit to be operating a motor vehicle." *Id.* at 23:1-9.

Subsequently, Patrolman Bouffard placed Appellant under arrest for suspicion of DUI, placed him in the police cruiser, and read Appellant his rights for use at the scene. *Id.* at 23:12-19. Patrolman Bouffard then transported Appellant to the police station, and read Appellant his rights for use once more at the station. *Id.* at 24:17-19. After Appellant made a confidential phone call, Patrolman Bouffard asked Appellant to submit to a chemical test. *Id.* at 25:17-24. However, Appellant "circled the 'refuse' section at the bottom of the form and he signed his name." *Id.* at 26:2-4.

After hearing all the testimony and evidence presented, the Trial Magistrate recounted the facts asserted by Patrolman Bouffard and stated his findings of fact on the record. (Tr. at 6:1-9:24, December 17, 2018.) The Trial Magistrate accepted "[Patrolman Bouffard]'s testimony as completely credible." *Id.* at 15:18-21. Furthermore, the Trial Magistrate stated: "I'm satisfied, based on the testimony of [Patrolman Bouffard] as well as all the exhibits which have been entered in full, that the State has, in fact, met its burden of proving each one of those four elements [of the charge]." *Id.* at 15:14-18. In doing so, the Trial Magistrate found that

Patrolman Bouffard, "irrespective of the fact that he never saw [Appellant] drive the vehicle[,] . . . had reasonable grounds to believe [Appellant] had been operating a motor vehicle while under the influence." *Id.* at 11:3-6; 16:6-9. As such, the Trial Magistrate sustained the charged violation and imposed a $200 fine, 10 hours of community service, and a 30 day license suspension. *Id.* at 19:15-20. Appellant subsequently filed this timely appeal. Forthwith is this Panel's decision.

II

Standard of Review

Pursuant to § 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 Mut. 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." *Id.* (citing *Envtl. Sci. 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." *Id.* Otherwise, it must affirm the hearing judge's (or magistrate's) conclusions on appeal. *See Janes*, 586 A.2d at 537.

III

Analysis

On appeal, Appellant asserts that the Trial Magistrate's decision sustaining the charged violation is "[i]n violation of constitutional or statutory provisions;" "[a]ffected by other error of law;" and "[c]learly erroneous in view of the reliable, probative, and substantial evidence on the whole record[.]" Sec. 31-41.1-8(f)(1), (3), and (5). Specifically, Appellant contends that the Trial Magistrate erred because (1) the evidence produced at trial is insufficient to demonstrate that Appellant operated a motor vehicle; and (2) Patrolman Bouffard did not have reasonable grounds to conduct a stop of Appellant's vehicle thereby violating Appellant's Fourth Amendment rights. *See* Appellant's Notice of Appeal, at 2.

A

Operation of a Motor Vehicle

Appellant asserts that the charged violation must be dismissed because Patrolman Bouffard did not observe Appellant "operating" a motor vehicle. *See* Appellant's Notice of Appeal, at 2. Pursuant to § 31-27-2.1, a police officer is authorized to direct a motorist to submit

to a breathalyzer test if the officer has "reasonable grounds" to believe that the motorist has operated 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 is the appropriate standard upon which to satisfy a violation of §31-27-2.1). Section 31-1-17 provides separate and distinct definitions for "operators" and "drivers." *See* § 31-1-17(c)-(d). A driver is "any operator or chauffeur who drives or is in actual physical control of a vehicle," § 31-1-17(c); whereas an "operator" is defined as "every person, other than a chauffeur, who drives or is in actual physical control of a motor vehicle upon a highway or who is exercising control over or steering a vehicle being towed by a motor vehicle." Sec. 31-1-17(d). In reviewing these definitions, the Rhode Island Supreme Court determined that, by its clear and unambiguous language, "[§] 31-1-17 provides for two types of operators: the driver *or* a person who is in actual physical control of the vehicle." *State v. Peters*, 172 A.3d 156, 160 (R.I. 2017) (emphasis added). Accordingly, "in certain circumstances, an operator may be distinct and separate from a driver." *Id.* Therefore, an individual need only be "in actual physical control" of a vehicle in order to be considered "operating" the vehicle. *See id.*

Here, the record reveals legally competent evidence demonstrating that Appellant "operated" a motor vehicle. Although the vehicle was parked, Appellant had "actual physical control" of the vehicle because he sat in the driver's seat with the vehicle's lights on and the engine running. (Tr. 10:21-11:24, December 5, 2018); *State v. Morris*, 666 A.2d 419, 419-20 (R.I. 1995) (holding that an individual "operates" a motor vehicle "when in the vehicle he intentionally does any act or makes use of any mechanical or electrical agency which alone *or in sequence* will set in motion the motor power of the vehicle") (emphasis added). Starting a vehicle's engine *in sequence with* shifting the engine into drive and pressing the gas pedal sets

the vehicle in motion. Therefore, the Appellant was operating the vehicle within the purview of § 31-1-17(d) when Patrolman Bouffard approached Appellant in the South County Commons parking lot. *See id.*

Moreover, even if Appellant could not be considered operating a motor vehicle when Patrolman Bouffard approached him, the evidence is sufficient to establish reasonable grounds to believe that Appellant operated a motor vehicle while under the influence of alcohol. Operation of a motor vehicle may be properly inferred based on an officer's observations. *State v. Perry*, 731 A.2d 720 (R.I. 2000). In *Perry*, the Court found that although the arresting officer did not observe the defendant operate a motor vehicle, the officer had reasonable suspicion to believe that the defendant was operating a motor vehicle while intoxicated. *Id.* There, at the scene of a hit-and-run accident, the driver of the automobile that had been struck gave the responding officer the license plate number and a description of the vehicle that struck his automobile. *Id.* at 722. Subsequently, the officer drove to the address obtained from the registration information and located a vehicle with front-end damage matching the description given by the driver. *Id.* The officer also spoke with the defendant, who exhibited signs of intoxication and told the officer that he "motioned to the other driver to follow him." *Id.* Based upon the facts given to the officer by the first motorist, defendant's statement to the officer, and the officer's observations of intoxication, the Court determined that the trial judge properly drew the inference that the officer formed a reasonable suspicion that the defendant operated a motor vehicle while he was under the influence of alcohol. *Id.* at 723.

The facts in *Perry* are analogous to the case at bar. The record reveals Patrolman Bouffard responded to Appellant's home after receiving a call from dispatch regarding a possible theft by someone who may be intoxicated. Tr. at 9:21-10:6, December 5, 2018; *Perry*, 731 A.2d

at 722. Patrolman Bouffard subsequently located Appellant's vehicle, which matched the information provided by dispatch, in a parking lot near Appellant's home. *See id.* When Patrolman Bouffard approached the vehicle, he observed "a sub on the front passenger seat[,]" and Appellant told Patrolman Bouffard that he came from playing tennis in Smithfield and then from D'Angelo's, which was less than two miles away from Appellant's location. Tr. at 13:5-8, December 5, 2018; *Perry*, 731 A.2d at 722. In addition, Patrolman Bouffard found Appellant sitting in the driver's seat of a running vehicle, and Appellant made no mention of another driver. Tr. at 13:5-08, December 5, 2018; *see also State v. Lawrence*, C.A. T08-0049 (April 23, 2008) (officer had reasonable grounds to believe defendant operated a vehicle because defendant was the registered owner of the vehicle with front-end damage and made no mention of another operator). Further, Patrolman Bouffard observed Appellant exhibiting signs of intoxication and Appellant subsequently failed the standard field sobriety tests that Patrolman Bouffard administered. Tr. at 12:15-19; 23:1-9, December 5, 2018; *Perry*, 731 A.2d at 722. Thus, based on Appellant's statements and Patrolman Bouffard's observations, Patrolman Bouffard had reasonable grounds to believe that Appellant, at the very least, drove intoxicated from D'Angelo's to the South County Commons parking lot. *See Perry*, 731 A.2d at 722.

Consequently, this Panel is satisfied that the Trial Magistrate properly determined that Patrolman Bouffard had reasonable grounds to believe that Appellant operated the vehicle while he was under the influence of alcohol. *DeSimone Electric, Inc. v. CMG, Inc.*, 901 A.2d 613, 621 (R.I. 2006) (a trial judge or magistrate may "draw inferences from the testimony of witnesses, and such inferences, if reasonable, are entitled on review to the same weight as other factual determinations"). The Trial Magistrate stated after the close of evidence:

> "The [Appellant] admitted to having come from tennis, to having come from D'Angelo's. He was sitting in the driver's seat of the

> vehicle. The vehicle was running. The lights were on. It was a short period of time between the time of the dispatch and the time that he had made contact with [Appellant], so to say that the Officer did not or could not have reasonably believed that [Appellant] had operated the motor vehicle he was found i[n]—it's just not logical."

(Tr. at 10:16-11:3, December 17, 2018.) In light of the facts presented, it is clear that the "reasonable suspicion" standard required to administer a breathalyzer test pursuant to § 31-27-2.1 is satisfied, and therefore, the Trial Magistrate did not err in finding that Appellant operated a motor vehicle while under the influence of alcohol. *See* § 31-41.1-8(f)(5).

B

Reasonable Suspicion

Appellant further avers that the Trial Magistrate erred in sustaining the charged violation because Patrolman Bouffard did not have reasonable suspicion to conduct a motor vehicle stop. When initiating a traffic stop, an officer only needs reasonable suspicion to conduct the stop. *State v. Keohane*, 814 A.2d 327, 330 (R.I. 2003). Reasonable suspicion exists when "the detaining authority can 'point to specific and articulable facts which, taken together with rational inferences from those facts, reasonably warrant that intrusion.'" *State v. Bjerke*, 697 A.2d 1069, 1071 (R.I. 1997) (quoting *Terry v. Ohio*, 392 U.U. 1, 21 (1968)). In determining "whether an officer's suspicions are sufficiently reasonable to justify an investigatory stop, the Court must take into account the totality of the circumstances." *Keohane*, 814 A.2d at 330. Factors contributing to a finding of reasonable suspicion of criminal activity include "the location in which the conduct occurred, the time at which the incident occurred, the suspicious conduct or unusual appearance of the suspect, and the personal knowledge and experience of the officer." *State v. Holdsworth*, 798 A.2d 917, 921 (R.I. 2002).

Here, the issue is whether Patrolman Bouffard had reasonable suspicion, in the first instance, to conduct a stop of Appellant's vehicle based upon the information provided by dispatch. First, this Panel notes that Appellant's argument that the information provided by the D'Angelo's employee constitutes an anonymous tip, and must be treated as such, is meritless. The call that dispatch received from the D'Angelo's employee is a report of a crime that may have occurred—a customer not paying for his sandwich—and needed further investigation, not an anonymous tip predicting future criminal activity. *See State v. Amelio*, 962 A.2d 498, 501 (N.J. 2008) ("an ordinary citizen who reports a crime stands in a much different light than an informant because the ordinary citizen acts with an intent to aid the police in law enforcement because of his concern for society and for his own safety") (internal quotations omitted). Therefore, we need not consider whether the call dispatch received satisfies the requirements for reasonable suspicion under an anonymous tip analysis. *See id.* ("'[a] report by a concerned citizen' or a known person is not 'viewed with the same degree of suspicion that applies to a tip by a confidential informant' or an anonymous informant") (quoting *Wildoner v. Borough of Ramsey*, 744 A.2d 1146 (2000) (bracket in original)).

In responding to the call from dispatch, Patrolman Bouffard's "main concern was [Appellant's] not paying for the food[,]" which required further investigation and police assistance. (Tr. at 40:1-6, December 5, 2018.) The report of a possible theft by a person who may have been intoxicated, combined with a detailed description of the Appellant and his vehicle, provided Patrolman Bouffard with "specific and articulable facts, [ ] taken together with rational inferences[,]" to justify a stop of Appellant's vehicle. *See Bjerke*, 697 A.2d at 1071; *Keohane*, 814 A.2d at 330. Certainly, under the totality of the circumstances, it would be rational for Patrolman Bouffard to infer that someone who is intoxicated may be in such a state

that he or she forgot or refused to pay for an item. *Id.* As such, Patrolman Bouffard's approaching Appellant's vehicle in the parking lot was a lawful stop because it was founded on Patrolman Bouffard's reasonable suspicion that Appellant may not have paid for his food at D'Angelo's. *See id.* Thus, whether Patrolman Bouffard had reasonable suspicion to conduct a stop of Appellant's vehicle based *only* on the fact that Appellant may have driven while intoxicated is irrelevant.

Once Patrolman Bouffard had reasonable suspicion to conduct a stop of Appellant's vehicle, "from that point on, any evidence obtained pursuant to that lawful stop, such as the odor of alcohol, the slurred speech, and bloodshot eyes, would in effect be in plain view of the arresting officer and would support an arrest for suspicion of driving while under the influence." *Bjerke*, 697 A.2d at 1072 (citing *State v. Aubin*, 622 A.2d 444 (R.I. 1993)). Indeed, pursuant to the lawful stop, Patrolman Bouffard observed that Appellant had "a reddish face, slurred speech, severely bloodshot eyes, watery eyes. And there was a strong odor of an alcoholic beverage emanating from the vehicle." *Id.* at 12:15-19. These observations taken together with statements from Appellant, as discussed *supra* in this Decision, provided Patrolman Bouffard with more than enough evidence to conclude that Appellant operated a motor vehicle while he was intoxicated. *See Bjerke*, 697 A.2d at 1072. Accordingly, this Panel is satisfied that the Trial Magistrate did not abuse his discretion, and the decision was not in violation of constitutional or statutory provisions, or clearly erroneous in view of the reliable, probative, and substantial evidence on the whole record.

IV

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 was not in violation of constitutional or statutory provisions; affected by other error of law; or clearly erroneous in view of the reliable, probative, and substantial evidence on the whole record. *See* § 31-41.1-8(f). The substantial rights of the Appellant have not been prejudiced. Accordingly, Appellant's appeal is denied, and the charged violation is sustained.

ENTERED:

_____
Chief Magistrate Domenic A. DiSandro, III (Chair)

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Associate Judge Lillian M. Almeida

_____
Magistrate William T. Noonan

DATE: _____