STATE OF RHODE ISLAND AND PROVIDENCE PLANTATIONS

PROVIDENCE, S.C.	**RHODE ISLAND TRAFFIC TRIBUNAL**	
STATE OF RHODE ISLAND	:	
v.	: **C.A. No. T10-0029**	
JAMES ESTEY, JR.	:	

DECISION

PER CURIAM: Before this Panel on June 9, 2010—Magistrate Goulart (Chair, presiding), Administrative Magistrate Cruise, and Judge Ciullo, sitting—is James Estey, Jr.'s (Appellant) appeal from Magistrate Noonan's decision, sustaining the charged violations of G.L. 1956 §§ 31-27-2.1, "Refusal to submit to a chemical test," and 31-14-3, "Conditions requiring reduced speed." The Appellant was represented by counsel before this Panel. Jurisdiction is pursuant to § 31-41.1-8.

Facts and Travel

Late in the evening of March 3, 2010, Officer James Vible (Officer) of the Warwick Police Department observed the Appellant's vehicle exceed the posted speed limit and straddle two lanes. The Officer affected a traffic stop and noted that the Appellant exhibited indicia of alcohol consumption. After witnessing Appellant fail the field sobriety tests, Officer Vible charged him with the aforementioned violation of the motor vehicle code. The Appellant contested the charge, and the matter proceeded to trial.

Officer Vible commenced his trial testimony by describing at length his professional training and experience with respect to DUI-related traffic stops and the administration of standardized filed sobriety tests. He has been with the Warwick Police Department for six years after graduating from the Rhode Island Municipal Police Academy. (Tr. at 19-20.) While at the

DUI infractions. (Tr. at 21.) As part of his training, he learned to administer field sobriety tests, including the horizontal gaze nystgamus (HGN), the walk-and-turn, and the one-leg stand test. (Tr. at 21.)

Directing the Court's attention to the night in question, the Officer testified that around 10:30 p.m., he was on duty in a marked cruiser in the parking lot of the Ski Market on Greenwich Avenue in Warwick. (Tr. at 24.) The Officer noted that there was a light rain-snow mix falling. At that time, he observed a vehicle traveling southbound on Greenwich Avenue at a high rate of speed. The Officer estimated that the vehicle was traveling between 70 and 75 miles per hour in a 35 mile per hour zone. (Tr. at 25.) Further, he observed that the vehicle was straddling the two southbound lanes. The Officer then proceeded to follow the vehicle and watched as the vehicle took a 90 degree turn onto East Avenue at a speed of approximately 35 miles per hour. After observing the vehicle cross the white lane on East Avenue, Officer Vible activated his siren and initiated a traffic stop. (Tr. at 27-28.)

The Officer approached the vehicle and identified the Appellant as the operator. (Tr. at 28.) First, Officer Vible informed the Appellant that he was pulled over for his excessive speed and erratic driving. The Appellant informed the Officer that he had just come from Boston Billiards and that he had consumed "a couple drinks." (Tr. at 29.) At that time, the Officer noted that the Appellant's "eyes were glassy," that he "fumbled while retrieving his driver's license," and that his breath had a "moderate odor of an intoxicating beverage emanating from [it]." (Tr. at 29-30.) Further, Officer Vible asked the Appellant where he was driving. The Appellant told the Officer that he was driving to his home on Janet Court. (Tr. at 30.) The Officer noted that the Appellant was driving in the opposite direction of Janet Court at the time of his arrest. (Tr. at 30.)

After making these initial observations, Officer Vible asked the Appellant to step out of his vehicle so that the Officer could conduct the standard field sobriety tests. He noted that the Appellant had difficulty exiting the vehicle. (Tr. at 30.) While explaining the walk-and-turn test, the Appellant lost his balance. The Appellant then proceeded to fail the test after receiving extensive instruction from Officer Vible. Specifically, the Appellant began to walk backward in a heel-to-toe fashion instead of executing a turn during the walk-and-turn. The trial magistrate noted this peculiarity as "really bizarre." (Tr. at 216.) After the walk-and-turn, the Officer administered the one-leg stand. The Appellant exhibited two clues that led the Officer to conclude that the Appellant had failed the test. (Tr. at 35-36.) Based on the Appellant's traffic infractions and his failure of the field sobriety tests, Officer Vible placed him under arrest for suspicion of driving while under the influence of alcohol and/or drugs. (Tr. at 37.)

Once the Appellant had been secured in Officer Vible's cruiser, the Officer asked his backup to bring the Appellant's belongings back to the station. She informed the Officer that there were two bottles of pills in the Appellant's vehicle, one prescribed and one over the counter. (Tr. at 38.) At this time, the Officer read the Appellant his "Rights for Use at Scene" from the pre-printed department card. Next, Officer Vible brought the Appellant to the Warwick Police Station and read him his "Rights for Use at Station" form in its entirety. (Tr. at 40-41.) Following procedure, the Appellant was apprised of his right to make a confidential telephone call. After making his call, the Appellant was instructed to sit next to the Intoxilyzer 5000 while the Officer filled out an intoxication report. (Tr. at 42-43.) The Appellant reiterated that he had consumed "two glasses of Pinot Noir" while playing pool at Boston Billiards. Further, the Appellant disclosed that he was regularly taking anxiety medication. Following the mandatory

15 minute waiting period, Officer Vible requested that the Appellant submit to the chemical test. The Appellant agreed and produced test results of .061 and .062. (Tr. at 44-45.)

After consulting with Lieutenant Furtado, the officer in charge, Officer Vible told the Appellant that he was going to be brought to the hospital for a blood test. (Tr. at 46-47.) Despite initially refusing, the Appellant eventually agreed to go to the hospital. At the hospital, the Officer again read the Appellant his "Rights for Use at Station" directly from the standard department card. The Appellant was given another opportunity to make a confidential phone call, which he refused. Further, the Appellant refused to submit to the chemical test and signed his name to the "Rights for Use at Station" form indicating his refusal. (Tr. at 49.)

Following the trial, the court sustained the charged violations of §§ 31-27-2.1 and 31-14-3. (Tr. at 213-14.) The trial magistrate found Officer Vible to be "exceedingly credible" and adopted his testimony as findings of fact. (Tr. at 214.) The court was satisfied by clear and convincing evidence that the Officer had reasonable grounds to believe that the Appellant was driving under the influence of alcohol and/or drugs based on numerous physical indicia of alcohol consumption, the Appellant's inability to pass multiple field sobriety tests, and his location relative to his home. Further, the trial magistrate made a factual finding that the Officer effectively apprised the Appellant of his rights pursuant to § 31-27-2.1 and that the Appellant understood the consequences of a refusal when he decided not to submit to a second chemical test. (Tr. at 216-19.) Additionally, the trial magistrate found that the Officer's credible trial testimony established a violation of § 31-14-3, "Conditions requiring reduced speed." The magistrate relied on the Officer's training in estimating a vehicle's speed and the fact that the Appellant was approaching a hill crest to make this determination. (Tr. at 213.) Ultimately, the

magistrate sustained the charged violations of §§ 31-27-2.1 and 31-14-3. It is from this decision that Appellant now appeals. Forthwith is the Panel's decision.

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 on questions of fact. The appeals panel may affirm the decision of the judge or magistrate, may remand the case for further proceedings, or may 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 following unlawful procedure;
> (4) Affected by another error of law;
> (5) Clearly erroneous in view of the reliable, probative, and substantial evidence on the whole record; or
> (6) Arbitrary, capricious, or characterized by abuse of discretion or clearly unwarranted exercise of discretion."

In reviewing a hearing judge'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 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 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 conclusions on appeal. See Janes, 586 A.2d at 537.

Analysis

On appeal, Appellant argues that the trial magistrate's decision was characterized by error of law and that the magistrate made erroneous factual determinations. Specifically, Appellant alleges that his due process safeguards were violated because the "Rights for Use at Station" form only advises a suspected drunk or impaired driver that he or she must submit to one chemical test. Further, Appellant argues that he should have been apprised as to why he was being subjected to a second chemical test to determine the presence of drugs or controlled substances. Next, Appellant asserts that Officer Vible did not have reasonable grounds to believe that he was driving under the influence of drugs or controlled substances. The Appellant contends that the trial magistrate erred when he ruled that the State's failure to preserve allegedly exculpatory evidence did not violate the Appellant's due process rights. Finally, Appellant argues that the trial magistrate erred when he credited Officer Vible's trial testimony. This Panel will address each argument in turn.

I
Due Process

Appellant argues that the "Rights for Use at Station" form is constitutionally defective because it informs a suspected impaired driver that he or she must submit to only one chemical test. Appellant asserts that the language of the form should be changed to track the statutory language of § 31-27-2.1, thus assuring procedural and substantive due process. Further, Appellant contends that the "Rights for Use at Station" form does not comply with constitutional

safeguards to provide suspected impaired drivers with sufficient information to make a knowing, intelligent, and voluntary decision about whether to submit to a chemical test.

The language of § 31-27-2.1 is clear and unambiguous: "Any person who operates a motor vehicle within this state shall be deemed to have given his or her consent to chemical **tests** of his or her breath, blood, and/or urine for the purpose of determining the chemical content of his or her body fluids or breath." The statute continues, "No more than two (2) complete tests, one (1) for the presence of intoxicating liquor and one (1) for the presence of toluene or controlled substance, as defined in § 21-28-1.02(7), shall be administered . . . ." (Emphasis added.) The "Rights for Use at Station" and "Rights for Use at Scene" forms used by Rhode Island police departments reflect the current statutory language of § 31-27-2.1. See State of Rhode Island v. Christopher Morissette and related cases, T07-0041 (2007) (noting that the current "Rights for Use at Station" and "Rights for Use at Scene" cards reflect statutory changes made by P.L. 2006, ch. 232 § 1 (eff. June 28, 2006) and P.L. 2006, ch. 246, Art. X, § 1 (eff. July 1, 2006). Further, the forms apprise suspected impaired drivers of their Miranda rights, their right to be examined by a physician of their choice, their right to refuse to submit to a breathalyzer examination, and the penalties incurred by a refusal to submit to a chemical test pursuant to § 31-27-3. Id.

Appellant contends that the "Rights for Use at Station" form is constitutionally invalid because it fails to inform an arrestee that he or she may be required to submit to more than one chemical test. As noted above, § 31-27-2.1 mandates that any person who operates a motor vehicle in the State of Rhode Island gives his or her implied consent to submit to multiple chemical tests when a police officer has reasonable grounds to suspect the individual is driving under the influence of alcohol and/or drugs. There is no statutory or constitutional requirement

that a suspected impaired driver be told that he or she may be subject to multiple chemical tests. See §§ 31-27-2.1, 31-27-3. The "Rights for Use at Station" form reads, "You are suspected of driving a motor vehicle while under the influence of intoxicating liquor and/or drugs. I request you submit to a chemical test." The singular article "a" is used because the form is read before a single chemical test for either alcohol or drugs is administered.

Here, Officer Vible correctly read the Appellant his "Rights for Use at Station" form before administering the breathalyzer test at the Warwick Police Station. He reread the Appellant the "Rights for Use at Station" form at Kent County Hospital, indicating that the driver was still suspected of operating a motor vehicle under the influence of intoxicating liquor and/or drugs. See State v. Hojeilly, T09-0014 (2009) (holding that a single reading of the "Rights for Use at Station" form is sufficient to apprise a suspected impaired driver of his or her rights when a police officer seeks to administer two chemical tests); see also Voss v. Iowa Dept. of Transp., Motor Vehicle Div., 621 N.W.2d 208, 212-13 (Iowa 2001) (noting that no useful purpose would be served by a rigid requirement that Iowa's implied consent advisory be reread when multiple chemical tests are requested). Appellant inaccurately asserted that the police did not have a right to subject him to multiple tests. Further, he was fully apprised of the consequences of refusing to submit to the second chemical test for drugs and willingly refused to submit. Accordingly, this Panel is satisfied that none of Appellant's constitutional rights were violated during his time at the Warwick Police Station or at Kent County Hospital. Thus, the Magistrate's decision did not prejudice substantial rights of the Appellant.

II
Reasonable Grounds for Drug Test

Appellant asserts that there is no reliable, probative, or substantial evidence to support Officer Vible's determination that the Appellant was under the influence of a controlled substance at the time of his arrest. Appellant argues that a literal reading of § 31-27-2.1 indicates that a police officer must have reasonable grounds that are distinct from the observance of any indicia of alcohol consumption to suspect that an impaired motorist is operating a vehicle under the influence of drugs or a controlled substance. Appellant contends that he exhibited no indications of drug use that would warrant an independent chemical test.

It is well settled in Rhode Island that a police officer has reasonable grounds to suspect that an individual is operating a motor vehicle under the influence of alcohol and/or drugs when he or she drives in an erratic manner and exhibits tangible indicia of alcohol consumption or chemical impairment through his or her speech, physical appearance, and performance on field sobriety tests. See State v. Perry, 731 A.2d 720, 723 (R.I. 1999) (holding that probable cause exists where the facts and circumstances known to a police officer or of which he or she has reasonably trustworthy information are sufficient to cause a person of reasonable caution to believe that a crime has been committed). Here, Officer Vible observed the Appellant operating his motor vehicle at approximately twice the posted speed limit during inclement weather. (Tr. at 25.) After effecting a traffic stop, Officer Vible observed the Appellant to have "glassy eyes" and noted that the Appellant was driving in the opposite direction of his intended destination, namely his own home. (Tr. at 29-30.) The Appellant failed both the walk-and-turn and one-leg stand field sobriety tests, exhibiting particularly odd behavior during the walk-and-turn. (Tr. at 29-30.) Officer Vible also learned that there were two bottles of pills in the Appellant's vehicle. (Tr. at 38.) Given the totality of the circumstances, this Panel is satisfied that Officer Vible had

reasonable grounds to suspect that the Appellant was operating a motor vehicle under the influence of alcohol and/or drugs. See Perry, 731 A.2d at 723.

At the Warwick Police Station Officer Vible administered a breathalyzer test to determine Appellant's blood alcohol content. After ruling out alcohol intoxication as the reason for Appellant's impaired driving, Officer Vible proceeded to request that the Appellant submit to a second chemical test to determine what if any prescription or illicit drugs the Appellant had ingested to facilitate his degree of impairment. The presence of pills in the Appellant's vehicle, coupled with his odd performance on the filed sobriety tests and the fact that he was oblivious to the location of his own residence, gave the Officer reasonable grounds to suspect that the Appellant was operating a motor vehicle under the influence of drugs or a controlled substance. See Perry, 731 A.2d at 723. Therefore, Officer Vible's request that Appellant submit to a second chemical test for the presence of drugs was both reasonable and justified. (Tr. at 219.) Accordingly, the decision of the trial magistrate was supported by reliable, probative, and substantial evidence

III
Preservation of Exculpatory Evidence

Additionally, Appellant contends that his due process rights were violated as a result of the State's failure to provide in response to discovery the initial recorded statements of Officer Vible's narrative or his initial written narrative report. Appellant urges that this suppression of evidence had a material bearing on questions of his guilt or punishment. See Brady v. Maryland, 373 U.S. 83, 87 (1963).

Appellant cites the "tripartite test" adopted by the Rhode Island Supreme Court in State v. Garcia, 643 A.2d 180, 185 (R.I. 1994) as an appropriate guide for our analysis. In order to

prevail on a due process violation under this test, a defendant must demonstrate that where potential exculpatory evidence has been lost or destroyed (1) the evidence possessed exculpatory value that was apparent before the evidence was destroyed, (2) the defendant would be unable to obtain comparable evidence by other reasonable means; and (3) the failure to preserve the exculpatory evidence amounted to bad faith on the part of the state. Id.

Here, it is admitted that Appellant received a copy of Officer Vible's final narrative report. This document differs only slightly from Officer Vible's initial narrative report as it reflects grammatical corrections and revisions indicating the type of medications that the Appellant was regularly taking at the time of his arrest. Appellant has given no indication that Officer Vible's initial narrative report or recorded statements would exonerate the Appellant or cast any doubt on the reliability of the Officer's credible trial testimony. See State v. Werner, 851 A.2d 1093, 1105 (R.I. 2004) (holding that an original surveillance tape that would not have exonerated the defendant or provided evidence with which to cast doubt upon the reliability of an eyewitness identification was not exculpatory evidence). Further, this Panel recognizes that police officers regularly destroy field notes and that there has been no evidentiary showing that Officer Vible destroyed his initial narrative report in bad faith. Id. As the trial judge stated:

> "I'm not troubled by the discrepancies in this testimony and [Officer Vible's] report. Um, inevitably, I've been doing this 15 years, there are discrepancies. [A]ny errors or omissions [the Officer] corrected quite candidly and frankly, unhesitatingly told us when he was wrong, unhesitatingly told us when he couldn't remember. I found his testimony to be credible." (Tr. at 214).

Accordingly, the Appellant suffered no due process violation. Thus, the decision of the trial magistrate did not substantially prejudice the due process rights of the Appellant.

IV
Officer Vible's Testimony

Finally, Appellant asserts that the trial magistrate erred in crediting the trial testimony of Officer Vible. Appellant suggests that Officer Vible did not have reasonable grounds to suspect that Appellant was operating a motor vehicle under the influence of drugs because the Officer relied on the same indicia he used to determine that the Appellant was operating a motor vehicle under the influence of alcohol and/or drugs.

This argument is unavailing. Officer Vible concluded that the Appellant was driving under the influence of alcohol and/or drugs after observing numerous indicia of impairment. The Appellant admitted that he had been drinking alcohol on the night in question and told the Officer that he was regularly taking prescription medication. Furthermore, the Officer observed as Appellant committed traffic violations, including erratic driving and operating his vehicle above the posted speed limit. These facts, coupled with the Appellant's performance on the field sobriety tests and his demeanor on the night in question, motivated Officer Vible's reasonable conclusion.

Further, as set forth in Link, our Supreme Court has made clear that this Panel "lacks the authority to assess witness credibility or to substitute its judgments for that of the hearing magistrate concerning the weight of the evidence on questions of fact." Link, 633 A.2d at 1348 (citing Liberty Mut. Ins. Co. v. Janes, 586 A.2d 536, 537 (R.I. 1991)). This Panel is satisfied that the trial magistrate's finding that Officer Vible was "exceedingly credible" is not affected by any error. Therefore, the members of this Panel conclude that the trial magistrate's decision to sustain the charged violations is supported by legally competent evidence and is unaffected by error of law or abuse of discretion.

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 or clearly erroneous in light of the reliable, probative, and substantial record evidence. Substantial rights of the Appellant have not been prejudiced. Accordingly, Appellant's appeal is denied, and the charged violations are sustained.