STATE OF RHODE ISLAND AND PROVIDENCE PLANTATIONS

CRANSTON, RITT **RHODE ISLAND TRAFFIC TRINBUNAL**

STATE OF RHODE ISLAND	**:**	
	:	
v.	**:**	**C.A. No. T15-0040**
	:	**15502502655**
JAMES HARRINGTON	**:**	

DECISION

PER CURIAM: Before this Panel on April 20, 2016—Chief Magistrate Guglietta (Chair), Administrative Magistrate DiSandro III, and Judge Parker, sitting—is James Harrington's (Appellant) appeal from a decision of Magistrate Goulart (Trial Magistrate), sustaining the charged violation of G.L. 1956 § 13-27-2.1, "Refusal to Submit to Chemical Test." The Appellant appeared before this Panel pro se. Jurisdiction is pursuant to G.L. 1956 § 31-41.1-8.

Facts and Travel

On August 20, 2015, Sergeant Joel Mulligan of the North Kingstown Police Department (Sergeant Mulligan), charged the Appellant with the aforementioned violation of the motor vehicle code. The Appellant contested the charge and the matter proceeded to trial on October 9, 2015. The trial proceeded for two days, concluding on October 21, 2015.

At trial, the State called its first witness, Sergeant Mulligan. Sergeant Mulligan stated that he had worked for the North Kingstown Police Department for eighteen years. (10/9/15, Tr. at 11.) Sergeant Mulligan went on to describe his roles and responsibilities as Sergeant and his training in regards to driving under the influence (DUI) investigations. Id. at 12. He stated that he has conducted approximately fifty to sixty DUI investigations during his time as a law enforcement officer. Id.

After testifying to his roles and experience, Sergeant Mulligan recalled the events that occurred on the night of August 20, 2015. Id. at 13. Sergeant Mulligan testified that at approximately 8:20 p.m., he was on patrol when he observed a car traveling east on Frenchtown Road. Id. Sergeant Mulligan watched as the vehicle "cross[ed] over the clearly marked fog line." Id. at 14. Sergeant Mulligan conducted a motor vehicle stop and approached the vehicle. Id. Sergeant Mulligan identified the driver as the Appellant and advised the Appellant of the reason for the motor vehicle stop. Id. at 15. While speaking with the Appellant, Sergeant Mulligan "smelled an odor of alcohol emanating from [the Appellant]," so he asked the Appellant whether he had consumed alcohol that night. Id. The Appellant admitted that he "had a couple of beers." Id. At this point, Sergeant Mulligan ended the conversation with Appellant and called another officer, Officer George Tansey (Officer Tansey), to take over the investigation. Id. Sergeant Mulligan indicated that he summoned another officer "so as to not get tied up in [Appellant's] investigation" because he was the "shift supervisor." Id. Sergeant Mulligan estimated that it took about five minutes for Officer Tansey to arrive. Id. at 16. Sergeant Mulligan advised Officer Tansey of his observations, including Appellant's traffic violation, and his suspicion that Appellant was operating under the influence of alcohol. Id.

On cross-examination, Appellant questioned Sergeant Mulligan about the exact location of the traffic stop, asking "[y]ou stated that you pulled me over in North Kingstown[?]" Id. at 18. Sergeant Mulligan answered affirmatively, and Appellant insisted, "Frenchtown Road is in East Greenwich." Id. Sergeant Mulligan explained, "[w]e were in in North Kingstown at the time of the violations . . . and where you were stopped was right down the street . . . in North Kingstown." Id. at 20. Appellant rejected Sergeant Mulligan's explanation and maintained that his vehicle was stopped in East Greenwich. Id. Next, Appellant questioned Sergeant Mulligan

about details from the affidavit, specifically details indicating that Appellant stumbled and had trouble getting out of his vehicle and details relating to the standardized field sobriety tests. Id. at 22. However, because Sergeant Mulligan was not the officer who conducted the tests, he was incapable of answering Appellant's questions. Id. at 24-26.

After Appellant concluded his questioning, the Trial Magistrate posed a series of questions to Sergeant Mulligan, for clarification purposes. Id. at 28. Sergeant Mulligan clarified that the traffic stop occurred approximately one hundred feet or less from the Stop & Shop on Frenchtown Road. Id. Sergeant Mulligan added that the traffic violation occurred within a half mile or less of that location. Id. at 29.

At the conclusion of Sergeant Mulligan's testimony, the State called its next witness, Officer Tansey. Id. at 31. Officer Tansey testified that he had worked for the North Kingstown Police Department for approximately nine years, during which his responsibilities included responding to routine calls and patrols. Id. He testified that he had received training in relation to DUI investigations while he attended the Rhode Island Municipal Police Academy. Id. at 32. Officer Tansey stated that some of the factors that he was trained to look for include: bloodshot, watery eyes, slurred or mumbled speech, and an odor of alcohol on a driver's breath. Id. at 33. He stated that he was also trained to conduct standardized field sobriety tests including the horizontal gaze nystagmus, the walk and turn, and the one leg stand test. Id. Officer Tansey testified that he has conducted approximately one hundred (100) DUI investigations, resulting in approximately forty (40) arrests. Id. at 34.

Officer Tansey then recounted that on August 20, 2015, he was on patrol and was being supervised by Sergeant Mulligan. Id. He explained that Sergeant Mulligan called out a stop over the radio and asked that Officer Tansey assist him with a driver who was potentially under

the influence of alcohol. Id. at 35. Officer Tansey arrived on the scene and observed a stopped motor vehicle in front of Sergeant Mulligan's cruiser. Id. at 35. After conversing with Sergeant Mulligan about the motor vehicle stop, Officer Tansey approached the Appellant and noticed that the Appellant had blood shot, watery eyes, slurred, mumbled speech, and the scent of alcohol on his breath. Id. at 36. Officer Tansey asked Appellant where he was coming from, and if he had anything to drink that night. Id. at 38. Appellant responded that he was coming from "McShane's in Providence" and "had consumed a few beers while he was there." Id. at 38. Officer Tansey then testified that when he asked Appellant to step out of the vehicle, Appellant "had to use the car door to essentially brace himself" and used the side of the car to walk to the back of the vehicle. Id. at 39. The State asked Officer Tansey whether this action could have been attributable to age, and whether age was a factor considered in the DUI investigation. Id. Officer Tansey responded that age "was not a consideration." Id.

After asking Appellant to step out of his vehicle, Officer Tansey conducted the horizontal gaze nystagmus test. Id. at 40. Officer Tansey asked Appellant to submit to the walk and turn and the one leg stand test, but Appellant stated he "wouldn't be able to complete the tests" due to surgery he had on his knee. Id. At this point, Officer Tansey asked Appellant to submit to a preliminary breath test but Appellant refused. Id. The Officer informed Appellant that he was being placed under arrest for suspicion of operating a vehicle while under the influence of alcohol. Id.

At this point, the State entered the "Rights for Use at the Scene" form into evidence. Officer Tansey explained that he read Appellant these rights in their entirety at the scene. Id. at 53. Afterwards, Appellant was driven to the Police Department and escorted into the processing room where he was read his rights for use at the station. Id. The State then entered the "Rights

for Use at the Station/Hospital" document. Id. Officer Tansey recalled that after the rights were read at the station, Appellant was asked to submit to the chemical breath test. Id. Appellant refused to take the test and signed the refusal form accordingly. Id.

On October 21, 2015, Appellant presented his case-in-chief. Appellant began by calling his first witness, William J. Smith, Jr., (Mr. Smith). Appellant indicated that Mr. Smith picked him up from the police station the night of his arrest. (10/21/15, Tr. at 4.) Appellant asked Mr. Smith whether Appellant's eyes were bloodshot or watery, and whether his speech was slurred when Mr. Smith picked him up from the Station. Id. Mr. Smith replied "no." Id. This concluded Mr. Smith's testimony. On cross-examination, the State asked whether Mr. Smith was with the Appellant when the Appellant was pulled over by the police. Id. at 5. Mr. Smith stated that he was not. Id. The State also asked Mr. Smith whether he was with the Appellant at the time of his arrest or at the time he was taken to the station and offered a chemical test. Id. Mr. Smith responded "no" to both questions. Id.

Appellant then called his second witness, his wife, Debra Harrington, (Mrs. Harrington). Id. at 6. Appellant asked Mrs. Harrington if, on the night in question, he had bloodshot, watery eyes, and slurred and mumbled speech. Id. Mrs. Harrington testified that he did not. Id. On cross-examination, Mrs. Harrington stated that she was not with Appellant when he was pulled over, nor was she with him when he was arrested or when he was brought to the police station. Id.

Appellant then testified on his own behalf. Appellant testified that on August 15, 2015, he was "about to turn onto Route 2 from Scrabbletown Road [when] three vehicles passed [him] at a high rate of speed." Id. at 11. While proceeding on Route 2, Appellant arrived at the intersection on Frenchtown Road and crossed two lanes of traffic to avoid "potential damage to

[his] car from potholes." Id. Appellant stated that as he proceeded down Frenchtown Road, he was "distracted" by looking at the car behind him slow down and speed up. Id. at 14. Appellant further testified that at this point, he was pulled over; the Sergeant asked for his license and registration, and he admitted to drinking three beers earlier in the night. Id. The Appellant also explained that upon being stopped, he immediately notified the officers that he had "bad legs" which would prohibit him from doing any testing. Id. at 15. Appellant continued to explain that he spent three weeks in the hospital for an infection. Id. Appellant recalled that he passed the eye test that night, but refused to take the breathalyzer because he did not know if it was sterile or not and did not want to risk another serious infection. Id. Appellant testified that a blood test was offered, but he rejected it, citing invasion of privacy concerns. Id.

On cross-examination, the State established that Appellant was operating his motor vehicle on August 20, 2015, on Frenchtown Road when he was pulled over by North Kingstown Police. Id. at 18-19. Appellant also admitted to drinking earlier that night and refusing the preliminary breath test at the scene. Id. at 19. However, when the State asked whether Appellant was asked to submit to a chemical test at the station, he stated that he did not recall being asked to take a chemical test. Id. 19-20.

After hearing the arguments presented, the Trial Magistrate found that Officer Tansey had "more than enough probable cause to arrest [Appellant.]" Id. at 29. The Trial Magistrate found that based on the observations of Officer Tansey and the Appellant's statements, probable cause was already established, and therefore, the portable breath test device was unnecessary. Id. Consequently, the charge of § 31-27-2.3, "Revocation of license upon refusal to submit to a preliminary breath test" was dismissed. Id. The Trial Magistrate also dismissed § 31-15-11, "Laned roadways." In dismissing the laned roadway violation, the Trial Magistrate reasoned that

there was no evidence establishing that Appellant's operation of his vehicle was unsafe. Id. at 29-30. However, the Trial Magistrate noted that Sergeant Mulligan's observations did establish a sufficient reasonable suspicion to stop the Appellant and investigate. Id. at 30.

Finally, the Trial Magistrate turned to the final charge, § 31-27-2.1, "Refusal to Submit to Chemical Test." Id. at 30. The Trial Magistrate explained that he was satisfied, by the evidence presented and the testimony of Officer Tansey, that Appellant had refused the chemical test. Id. The Trial Magistrate found the testimony of Officer Tansey and the Sergeant to be credible. Id. at 31. Specifically, the Trial Magistrate stated that "[t]hey were absolutely credible witnesses worthy of my belief." Id. As such, the Trial Magistrate was satisfied that Officer Tansey had reasonable grounds to believe that Appellant was operating a motor vehicle while under the influence of alcohol. Id. Therefore, the Trial Magistrate sustained the charge of § 31-27-2.1. Id. at 32. Aggrieved by the Trial Magistrate's decision, the 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, 633A.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 clearly erroneous in view of the reliable, probative, and substantial evidence on the whole record. Specifically, Appellant maintains that Officer Tansey and Sergeant Mulligan were not credible; that the traffic violation occurred in East Greenwich and not North Kingstown; and that the Trial Magistrate erred in his findings. [1]

[1] On the day of the appeal, Appellant presented this Panel a sheet of a paper on which he listed twenty separate arguments. Appellant intended that these arguments be considered on appeal. This Panel has considered the arguments, most of which are so lacking in merit to not require discussion. However, for purposes of thoroughness, Appellant's arguments are listed as follows:

Credibility

Appellant argues that the testimony of Officer Tansey and Sergeant Mulligan was not credible. Separately, Appellant argues that the traffic violation occurred in East Greenwich and not North Kingstown. Sergeant Mulligan testified that the violation occurred in North Kingstown. Therefore, because Appellant's argument stems from the testimony of Sergeant Mulligan, we address this claim in conjunction with our assessment of credibility.

In Link, our Supreme Court made it clear that 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, 633 A.2d at 1348 (citing Liberty Mutual Insurance Co. v. Janes, 586 A.2d 536, 537 (R.I. 1991)). As the members of this Panel did not have an opportunity to view the live trial testimony of the witnesses, it would be impermissible to second guess the Trial Magistrate's impressions as he observed the witness, listened to their testimony and determined what to accept and what to disregard. Environmental Scientific Corp., 621 A.2d at 206.

"(1) Judge accepted testimony that was wrong; (2) Judge was doing AG's job; (3) Judge allowed testimony of street light from officer; (4) Judge took word of officer who admitted a 40% fail rate; (5) Judge accepted testimony from Mulligan about test; (6) original violation changed from crossing 2 lanes of traffic to crossing fog lines; (7) Judge prompted witnesses; (8) Judge stated Carroll Doctrine was not legal; (9) Judge accepted ok for police not to wash hands for breathalyzer and not show it to me with top on; (10) Judge accepted testimony that led to charge; (11) Judge had private meeting with police; (12) Judge wouldn't look at map for town and county lines, insisting that Frenchtown Road was all in North Kingstown. Map clearly shows that most of Frenchtown road is, in fact, in East Greenwich; (13) Judge stated that illegal activities by police had nothing to do with charges; (14) Judge put in testimony opinion on police; (15) Judge said he was absolutely certain violation and stop was in North Kingstown without checking; (16) Judge refused to see medical records; (17) Judge stated wrong facts about road; (18) Judge stated that street light conditions at stop had no relevance; (19) Judge threatened if I saw Appeal Board I would be in worse shape than I am at this point; (20) Judge let Mr. Garcia at sidebar."

At trial, the Trial Magistrate determined that Officer Tansey and Sergeant Mulligan "were absolutely credible witnesses worthy of my belief." (10/21/15, Tr. at 31.) The Trial Magistrate expounded,

> "I accept the testimony of Officer Tansey and Sergeant Mulligan as credible . . . I am satisfied that Officer Tansey has reasonable grounds to believe that [Appellant was] operating a motor vehicle while under the influence. Because of that, [Appellant is] obligated to take the chemical test, which [Appellant] refused." Id.

In regards to Appellant's argument that Sergeant Mulligan erroneously testified that the violation occurred in North Kingstown rather than Appellant's recollection of East Greenwich, the Trial Magistrate, again, credited Sergeant Mulligan's testimony. Id. at 25. Relying on the testimony of Sergeant Mulligan, the Trial Magistrate stated, "I am absolutely certain—no doubt in my mind—that the violation and the stop occurred in the Town of North Kingstown." Id.

We decline to depart from the Trial Magistrate's judgment concerning the credibility of Officer Tansey and Sergeant Mulligan. Therefore, we defer to the Trial Magistrate's findings in determining that the violation occurred in North Kingstown and that both Officer Tansey and Sergeant Mulligan were credible witnesses. See Link, 633 A.2d at 1348.

Sufficiency of Findings

The Appellant claims that the Trial Magistrate erred by sustaining the charged violation, § 31-27-2.1. In order to determine whether the Trial Magistrate was erroneous, we must consider whether Officer Tansey had reasonable grounds to believe that the Appellant was operating his vehicle while under the influence of alcohol. See State v. Jenkins, 673 A.2d 1094, 1097 (R.I. 1996).

Section 31-27-2.1 sets forth, in pertinent part,

> "[a]ny 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 [and the tests] shall be administered at the direction of a law enforcement officer having reasonable grounds to believe such person to have been driving a motor vehicle within this state while under the influence of intoxicating liquor. . . ." Sec. 31-27-2.1 (emphasis added).

Therefore, based on § 31-27-2.1, if Officer Tansey had reasonable grounds to suspect that Appellant was operating under the influence, then the Appellant was required to submit to a chemical test. See id. This reasonable suspicion must be based upon specific and articulable facts from which reasonable inferences could be drawn. See Jenkins, 673 A.2d at 1097 (finding that the state is not required to establish that there existed probable cause for the police to stop a vehicle and conduct a DUI investigation, the state must only establish reasonable suspicion).

The record before this Panel clearly reflects that Sergeant Mulligan and Officer Tansey had reason to believe that the Appellant was driving under the influence. Sergeant Mulligan observed Appellant's vehicle cross over the fog line, and conducted a traffic stop. Upon stopping the vehicle, Sergeant Mulligan smelled alcohol coming emitting from the Appellant. (10/9/15, Tr. at 14-15.) Thereafter, the Appellant admitted to Sergeant Mulligan that he had been drinking that night. Id. at 15 (Appellant admitting that he "had a couple of beers"). Officer Tansey described the Appellant as having "bloodshot, watery eyes, slurred, mumbled speech." Id. at 36. Additionally, Officer Tansey stated that the Appellant had to "brace himself" as he was exiting and walking to the back of his vehicle. Id. at 39. These specific and articulable facts, combined, satisfy the reasonable suspicion requirement. See Jenkins, 673 A.2d at 1097. Therefore, we affirm the Trial Magistrate's determination that Sergeant Mulligan and Officer Tansey had reasonable suspicion to believe that the Appellant was driving under the influence and, therefore, properly requested that the Appellant submit to a breathalyzer.

Miscellaneous Arguments

On the day of his Appeal, Appellant presented this Panel with twenty miscellaneous arguments. See supra, note 1. This Panel has considered the arguments, the majority of which concern the discretion of the Trial Magistrate, and will not be overturned where the record is devoid of an abuse of discretion. See Janes, 586 A.2d at 537. However, we pause to address Appellant's argument that the Trial Magistrate exceeded neutrality by questioning the witnesses.

Our Supreme Court has recognized that it is within the ambit of a trial justice's discretion to question a witness when he or she deems it necessary and proper to do so. See State v. Evans, 618 A.2d 1283, 1284 (R.I. 1993) (citing State v. Giordano, 440 A.2d 742, 745 (R.I. 1982)). When a trial justice chooses to engage in questioning a witness, he or she should do so "only if his or her question or questions will elicit the truth and will clarify matters that may be otherwise confusing in the minds of the jurors." Evans, 618 A.2d at 1284. Therefore, "the parameters of judicial interrogation are narrowly confined to clarification of justifiably confusing matters for the [fact finder]." See State v. Nelson, 982 A.2d 602, 617 (R.I. 2009).

After Appellant's cross-examination of Sergeant Mulligan, the Trial Magistrate posed a limited amount of questions to Sergeant Mulligan, including "[a]nd you were proceeding east?" and "the violations occurred in that general vicinity of the location immediately before Stop & Shop?" (10/09/2015, Tr. at 28). We do not believe that the Trial Magistrate erred in posing these questions. Based on the record, it is evident that the Trial Magistrate asked these questions for clarification purposes. The questions do not "elicit inflammatory information" nor do the questions serve "as an extension of the direct and cross-examination." See Nelson, 982 A.2d at 618. Rather, the questions are within the acceptable limits of judicial interrogation in order to

clarify a confusing matter. Id. at 617. Consequently, Appellant's argument that the Trial Magistrate exceeded a position of neutrality by asking such questions, is unfounded.

After a thorough review of the record, this Panel does not find the Trial Magistrate's decision to be clearly erroneous in view of the reliable, probative, and substantial evidence on the whole record. Nor do we believe that the Trial Magistrate abused his discretion. Link, 633 A.2d at 1348. Rather, the Trial Magistrate's decision to sustain the charged violation, § 31-27-2.1, was supported by legally competent evidence.

Conclusion

This Panel has reviewed the entire record before it. For all the reasons stated above, the members of this Panel are satisfied that the Trial Magistrate's decision was not an abuse of discretion, affected by error of law, or in violation of statutory provisions. The decision was supported by reliable, probative, and substantial evidence on the whole record. Substantial rights of the Appellant have not been prejudiced. Accordingly, Appellant's appeal is denied, and the charged violation is sustained.

ENTERED:

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Chief Magistrate William R. Guglietta (Chair)

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Administrative Magistrate Domenic A. DiSandro III

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Associate Judge Edward C. Parker

DATE:_____