STATE OF RHODE ISLAND AND PROVIDENCE PLANTATIONS

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

STATE OF RHODE ISLAND	:	
	:	
v.	:	**C.A. No. T08-0045**
	:	
MARK SOULLIERE	:	

AMENDED DECISION

PER CURIAM: Before this Panel on May 28, 2008, Judge Almeida (Chair), Judge Parker, and Judge Ciullo sitting, is Mark Soulliere's (Appellant) appeal from Magistrate Noonan's decision, 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 G.L. 1956 § 31-41.1-8.

Facts and Travel

On January 22, 2008, at approximately 1:05 a.m., Appellant was arrested by Officer Yakey of the Burrillville Police Department. Officer Yakey subsequently cited Appellant for refusing to submit to a chemical breath test and other violations not presented for appeal. The Appellant contested the charges, and the matter proceeded to trial.

At trial, Officer Yakey testified that prior to arresting Appellant, he was conducting a patrol in a marked police cruiser on Wallum Lake Road in Burrillville. (Tr. at 7.) Officer Yakey testified that he observed a vehicle approaching his location "at a high rate of speed." (Tr. at 8.) At that time, Officer Yakey activated his cruiser's calibrated radar unit and recorded the vehicle's speed at 71 m.p.h. in a posted 40 m.p.h. zone. (Tr. at 8-10.) Accordingly, the Officer activated his emergency lights, turned

around, and began to pursue the vehicle. (Tr. at 11.) Upon initiating a traffic stop, Officer Yakey approached the vehicle and observed the operator. He subsequently identified Appellant at trial as the operator of the vehicle. Id.

Upon speaking with Appellant, Officer Yakey detected "a strong odor of alcohol on his breath." (Tr. at 13.) The Officer also noted that Appellant's "eyes were watery [and] severely bloodshot." Id. The Appellant's speech was also "thick-tongued." (Tr. at 32.) Upon further questioning, Appellant told Officer Yakey that he had consumed five beers. (Tr. at 16.) Based on the Officer's observations, he requested that Appellant submit to a battery of field sobriety tests. Id. The Appellant consented. (Tr. at 17.)

As Officer Yakey began to administer the first field sobriety tests, Appellant became uncooperative. Id. Accordingly, Officer Yakey arrested Appellant on suspicion of driving under the influence of alcohol. Id. The Officer then transported Appellant to the Burrillville Police Department. (Tr. at 18.) Officer Yakey testified that "about halfway back to the station, [he] realized that [he] did not read [Appellant] his rights for use at the scene." (Tr. at 21.) Nevertheless, Officer Yakey continued to transport Appellant to the station. Before the Officer took Appellant out of the cruiser and into the police station, he read Appellant his rights from a card entitled "Rights for Use at Scene." (Tr. at 22-23.)

At the station, Officer Yakey read Appellant his rights from a card entitled "Rights for Use at Station." (Tr. at 24.) The Appellant subsequently was requested to submit to a chemical breath test. (Tr. at 27.) The Appellant refused to take the test and was cited for violating § 31-27-2.1.

Following trial, the trial magistrate sustained Appellant's violation of § 31-27-2.1. The Appellant has filed a timely appeal of the trial magistrate's decision. Forthwith is this 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."

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 (R.I. 1993). The Appeals Panel is "limited to a determination of whether the hearing justice's decision is supported by legally competent evidence." Marran v. State, 672 A.2d 875, 876 (R.I. 1996) (citing Link, 633 A.2d at 1348). The Panel may reverse a decision of a hearing judge where the decision is "clearly erroneous in view of the reliable, probative, and substantial evidence contained in the whole record." Costa v. Registry of Motor Vehicles, 543 A.2d 1307, 1309 (R.I. 1988).

Analysis

On appeal, Appellant argued that Officer Yakey violated G.L. 1956 § 31-27-3, "Right of person charged with operating under the influence to physical examination," because he failed to inform Appellant of his right to an independent medical examination "immediately" upon his arrest. The Appellant argued that the statutory requirement of informing a suspected motorist of this right "immediately" upon his arrest was violated when Officer Yakey read Appellant his rights for use at scene outside the Burrilville Police Station and not immediately upon his arrest.

Counsel for the State urged this Panel sustain Appellant's violation of § 31-27-2.1 and follow the Supreme Court's interpretation of the word "immediately" in State v. Lefebvre, 78 R.I. 259, 81 A.2d 348 (1951). In Lefebvre, the Court held that the word "immediately" was to be interpreted in a broad relative sense to determine whether a motorist's rights have been violated relative to his advisement upon arrest. Id. at 262. The motorist in Lefebvre was suspected of driving under the influence of alcohol following the crash of his ice cream truck. The motorist was advised of his right to an independent medical examination at the scene of the accident and then again at the office of the State's doctor who conducted a medical examination. The doctor determined that he was unfit to operate a motor vehicle due his intoxication from drinking "a 'quart of wine' and also three glasses of port wine." Id. at 261. The Lefebvre Court upheld the motorist's conviction for driving under the influence of alcohol and held that:

> Upon consideration we cannot say that in view of all the facts and circumstances of the present case such decision was clearly wrong if the word 'immediately' is given the meaning hereinbefore set out. It appears from the evidence that the accident happened in the open country and not in a closely built-up district or in a city. In order to carry out their duties the state police obviously had to

> travel some appreciable distance and some time necessarily elapsed before the examination could be completed and the defendant afforded a reasonable opportunity to call a doctor of his own choice. There is no indication that time was unreasonably or unnecessarily wasted. Id. at 262-263.

Upon a review of § 31-27-3 and Lefebvre, this Panel concludes that Lefebvre is distinguishable from the facts of the instant case. The motorist in Lefebvre was informed of his right to an independent medical examination at the scene of the accident and also at the office of the State's medical examiner. In contrast, Appellant was not informed of this right until after he was arrested and transported to the Burrillville Police Station. Furthermore, the State failed to introduce evidence to explain why the Officer did not "immediately" inform Appellant of his right to an independent examination. Consequently, this Panel concludes that Officer Yakey unreasonably and unnecessarily waited until his arrival at the Burrillville Police Station to inform Appellant of his rights.

Section 31-27-3 provides that upon arrest, "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) Under the facts of the instant case, there were no exigent circumstances, nor was there any special reason for failing to inform Appellant immediately of his right to a physical examination upon arrest. Indeed, the record indicates the contrary, namely that time was "unreasonably [and] unnecessarily wasted." See id. at 262-263. Accordingly, this Panel grants Appellant's appeal and dismisses the charge against him.

Conclusion

Upon a review of the entire record, this Panel concludes that the trial magistrate's decision was clearly erroneous and was affected by error of law. Substantial rights of the

Appellant have been prejudiced. Accordingly, this Panel dismisses the violation charged against Appellant and grants his appeal.

ENTERED:

Judge Lillian M. Almeida (Chair)

Judge Edward C. Parker

Ciullo, J., dissenting: I dissent in the instant matter because Appellant has failed to demonstrate any prejudice resulting from the initial advisement of his rights at the Burrillville Police Station. Furthermore, were any statements to have been made by Appellant before his advisement of rights, such statements would be subject to the exclusionary rule as fruit of the poisonous tree. See State v. Burns, 431 A.2d 1199 (R.I. 1981). The Appellant did not make any statements to Officer Yakey between his arrest and the advisement of his rights of the Burrilville Police Station. Accordingly, Appellant was unable to show any prejudice which resulted from the short delay between his arrest and advisement of rights. For these reasons, and the "broader relative" interpretation of the word "immediately" in Lefebvre, 78 R.I. at 262, 81 A.2d at 350, I would have sustained Appellant's violation of § 31-27-2.1.

Judge Albert R. Ciullo