

STATE OF RHODE ISLAND AND PROVIDENCE PLANTATIONS

PROVIDENCE, S.C.

RHODE ISLAND TRAFFIC TRIBUNAL

STATE OF RHODE ISLAND

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C.A. No. T09-0014

v.

MICHELLE HOJEILLY

09 MAY 18 PM 3:50
FILED
STATE OF RHODE ISLAND
TRAFFIC TRIBUNAL

DECISION

PER CURIAM: Before this Panel on April 1, 2009—Magistrate Noonan (Chair, presiding) and Judge Parker and Judge Almeida sitting—is Michelle Hojeilly’s (Appellant) appeal from a decision of Magistrate Goulart, sustaining the charged violation of G.L. 1956 § 31-27-2.1, “Refusal to submit to chemical test.”¹ The Appellant was represented by counsel before this Panel. Jurisdiction is pursuant to G.L. 1956 § 31-41.1-8.

Facts and Travel

On January 24, 2009, Trooper Robert Creamer (Trooper Creamer) of the Rhode Island State Police charged Appellant with the aforementioned violation of the motor vehicle code. The Appellant contested the charge, and the matter proceeded to trial.

The Court first heard testimony from Dawson Hodgson (Mr. Hodgson), a Special Assistant Attorney General for the State of Rhode Island and a percipient witness to the underlying events. Mr. Hodgson testified that on the date in question, at approximately 10:50 p.m., he was traveling southbound on Route 95 in the vicinity of the Massachusetts-Rhode Island border when he observed a “dark-colored” SUV “pull into what appeared to be a snow bank . . .

¹ In addition to the charged violation of § 31-27-2.1, Appellant was charged with violating §§ 31-14-9, “Minimum speed”; 31-15-11, “Laned roadways”; 31-22-22, “Safety belt use”; and 31-33-2, “Failure to file accident report.” Following trial, the charged violation of § 31-33-2 was dismissed. While the charged violations of §§ 31-14-9, 31-15-11 and 31-22-22 were ultimately sustained, they are not presently before this Panel on appeal.

in the median” of the highway. (Tr. at 7.) According to Mr. Hodgson, the vehicle “drifted into the snow bank and suddenly corrected to the right.” Id. The vehicle then drove in the far left lane of Route 95 for “a short period of time” before it “swerved . . . to the left and hit the jersey barrier.” (Tr. at 8.) Mr. Hodgson observed the vehicle swerve into the jersey barrier for a second time and then “overcorrect[.]” Id.

At this time, Mr. Hodgson contacted the Rhode Island State Police and informed the desk trooper that he was following a vehicle whose operator was either in “distress or . . . possibl[y] drunk” (Tr. at 8, 10.) After contacting law enforcement, Mr. Hodgson continued to follow the vehicle on Route 95. (Tr. at 9.) Mr. Hodgson indicated that “during the entire time that [he] followed [the] vehicle, [he] estimated that it hit the barrier at least ten times.” Id.

On cross-examination, Mr. Hodgson testified that he followed the suspect vehicle from Pawtucket to Cranston.² (Tr. at 11.) According to Mr. Hodgson, when the vehicle reached Cranston it “had hit the jersey barrier so frequently that . . . the front left wheel had come off and it was traveling . . . on its rim” (Tr. at 12.) Mr. Hodgson observed a “large cloud of smoke” emanating from the vehicle. Id. Although Mr. Hodgson was unable to testify as to his speed or the speed of the dark-colored SUV, he indicated that the SUV began to travel “excessively slow” after it had become disabled. (Tr. at 14.)

On questioning by the trial magistrate, Mr. Hodgson indicated that the vehicle did not pull over to the side of the roadway on its own; rather, the operator stopped only when two Rhode Island State Police cruisers began to pursue it. (Tr. at 15.) Mr. Hodgson clarified his testimony on cross-examination by stating that “the vehicle, after it became disabled, traveled slower and slower and slower, but never stopped.” (Tr. at 15-16.) It was only when the Rhode

² Traveling on Route 95, Cranston is approximately 14 miles from Pawtucket.

Island State Police became involved that the vehicle “crossed from the furthest left lane to the . . . right lane” (Tr. at 16.)

The Court next heard testimony from Trooper Creamer. Trooper Creamer, a twelve-year veteran of the Rhode Island State Police, began his trial testimony by describing his professional training and experience with respect to DUI-related traffic stops and the administration of standardized field sobriety tests. (Tr. at 18-20.) Then, focusing the Court’s attention on the date in question, Trooper Creamer testified that at approximately 10:50 p.m. he was traveling southbound on Route 146 in the “Providence metro area.” (Tr. at 20-21.) At this time, he was contacted by dispatch and informed that there was a “Chevy SUV that was traveling . . . well below the posted speed limit and that it [had] struck the . . . high speed [jersey] barrier several times.” (Tr. at 21-22.) The dispatcher also informed Trooper Creamer that the vehicle was traveling on its front left rim. (Tr. at 22.)

Trooper Creamer responded to the vicinity of Elmwood Avenue, whereupon he observed that several concerned motorists had activated their emergency lights and were blocking all of the travel lanes of the highway. *Id.* Directly in front of these vehicles, Trooper Creamer observed the SUV described in the dispatch. (Tr. at 22-23.) According to Trooper Creamer, the dark-colored SUV had “parts flying off of it, [and] [was] traveling very slowly all over the highway” (Tr. at 23.)

Once Trooper Creamer had passed the concerned motorists, he activated his cruiser’s emergency lights and sirens and attempted to initiate a traffic stop of the vehicle. *Id.* However, the vehicle failed to stop and continued to travel at what Trooper Creamer described as a “very low, low rate of speed.” *Id.* In order to force the vehicle to a stop, Trooper Creamer maneuvered his cruiser in front of the vehicle and then slowed to a speed of approximately 10 to 15 m.p.h.

Id. The vehicle eventually came to a stop in the right lane of Route 95, in the vicinity of the Route 37 exit. Id.

When asked to describe his observations upon coming into contact with the suspect vehicle, Trooper Creamer testified that the vehicle “had front end damage, . . . was traveling without it’s front driver’s side tire, . . . [with] parts flying off . . .” (Tr. at 24.) Trooper Creamer further testified that “all the airbags had been deployed and . . . there was a white female sitting in the driver’s seat with a . . . blank stare on her face, kind of oblivious to what was going on.”

Id. Trooper Creamer identified Appellant in court as the operator of the SUV. Id.

Once Appellant had been extracted from the vehicle and taken into custody, Trooper Creamer moved her vehicle to the breakdown lane. (Tr. at 25.) He then read Appellant her “Rights for Use at Scene” from the pre-printed card and asked Appellant whether she understood the rights as read; Appellant answered in the affirmative. (Tr. at 27.) Trooper Cynthia Trahan (Trooper Trahan) then conducted an inventory search of Appellant’s vehicle. Id. Trooper Trahan recovered four bottles containing prescription medications and showed these bottles to Trooper Creamer. (Tr. at 29.)

Prior to transporting Appellant to the Rhode Island State Police barracks, Appellant informed Trooper Creamer that she had just left the Emerald Square Mall in North Attleboro, Massachusetts and was traveling to her home in North Dartmouth. Id. The Appellant also indicated to Trooper Creamer that she believed that she was traveling on Route 195. (Tr. at 30.)

When asked to describe Appellant’s physical appearance and demeanor, Trooper Creamer testified that Appellant “seemed dazed” and that her eyes were “glossy, watery, bloodshot.” Id. In addition, Trooper Creamer noted that Appellant appeared “very confused, almost . . . oblivious to what had happened during this whole event.” Id. Trooper Creamer

detected an odor of an alcoholic beverage on Appellant's person. Id. When Trooper Creamer asked Appellant whether she had consumed alcohol, Appellant responded that she had had "two shots prior to leaving the . . . Bertucci's [restaurant] on the first floor" of the Emerald Mall. (Tr. at 30-31.)

While he was transporting Appellant to the State Police barracks, he asked Appellant whether she had consumed any of the prescription medications that Trooper Trahan had discovered in her vehicle. (Tr. at 32.) The Appellant admitted to having taken a Valium, an Ativan, and one other drug,³ but soon began vacillating as to whether she had taken the Valium. Id. The Appellant remained fairly certain that she had taken an Ativan. Id.

Once Appellant had been transported to the barracks, Trooper Creamer asked Appellant whether she would submit to a battery of standardized field sobriety tests; Appellant consented to the tests. (Tr. at 32-39.) Based on his professional training and experience with DUI investigations, Trooper Creamer concluded that Appellant had failed the tests, was under the influence of alcohol and/or drugs, and that she was incapable of safely operating a motor vehicle. (Tr. at 39.) Trooper Creamer then read Appellant her "Rights for Use at Station" in their entirety from the pre-printed form and asked Appellant whether she would submit to a chemical test of her breath. (Tr. at 40.) The Appellant signed the "Rights" form in the area indicating that the rights had been read to her and that she consented to a chemical test upon the request of law enforcement. (Tr. at 41.)

³ Diazepam, commonly known as Valium, is described by its manufacturer as "indicated for the management of anxiety disorders or for the short-term relief of the symptoms of anxiety." The manufacturer's web site indicates that "[s]ince Valium has a central nervous system depressant effect, patients should be advised against the simultaneous ingestion of alcohol. . . . Concomitant use with alcohol is not recommended due to enhancement of the sedative effects." <http://www.rocheusa.com/products/valium/>

Ativan is also used to treat the symptoms of anxiety. The popular online medical web site WebMD indicates that Ativan "may make you dizzy or drowsy or cause blurred vision; use caution engaging in activities requiring alertness or clear vision such as driving or using machinery. Avoid alcoholic beverages." <http://www.webmd.com/drugs/drug-6685-Ativan+Oral.aspx?drugid=6685&drugname=Ativan+Oral>

Prior to submitting to a chemical test, Trooper Creamer asked Appellant whether she would like to avail herself of her statutory right to use a telephone within one hour of arrest. Id. The Appellant declined and indicated to Trooper Creamer that she wanted to take the chemical test. (Tr. at 42.) However, Appellant informed Trooper Creamer that “it was the Ativan causing all [of] these problems.” Id. Trooper Creamer performed a chemical test of Appellant’s breath and, based on his professional training, concluded that Appellant had passed the test. Id.

Approximately five minutes after Appellant passed the chemical test of her breath, Trooper Creamer, suspecting that Appellant had been operating her motor vehicle while under the influence of “narcotics,” asked Appellant whether she would submit to a chemical test of her blood. (Tr. at 42-43, 45.) According to Trooper Creamer, Appellant was advised that “a refusal to submit to a chemical . . . blood test would also . . . result in a refusal charge” pursuant to § 31-27-2.1. (Tr. at 43-44.) The Appellant indicated that she understood and that she would not submit to a blood test. (Tr. at 44.) On questioning by the trial magistrate, Trooper Creamer indicated that he did not re-read the rights and penalties associated with refusal prior to requesting the chemical test of Appellant’s blood. (Tr. at 45.)

Following the trial, the trial magistrate sustained the charged violation of § 31-27-2.1. The Appellant, aggrieved by this decision, filed a timely appeal to this Panel. This Panel’s decision is rendered below.

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 Insurance 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 Environmental 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 argues that the trial magistrate's decision is affected by error of law. Specifically, Appellant contends that Trooper Creamer, prior to requesting that Appellant

submit to a chemical test of her blood “for the presence of toluene or any controlled substance,” was required to repeat his recitation of Appellant’s rights and the penalties incurred as a result of non-compliance. Without an intervening recitation of the rights and penalties between Trooper Creamer’s initial request to submit to a chemical breath test for “the presence of intoxicating liquor” and his subsequent request to submit to a chemical blood test, Appellant maintains that the charged violation of § 31-27-2.1 cannot be sustained.

The Appellant’s argument that § 31-27-2.1 requires two recitations of the rights and penalties associated with refusing to submit to a chemical test—once before the request to submit to a chemical breath test and again before the request to submit to a chemical blood test—is unavailing, as Appellant has cited no rule, case, or statute that requires more than a single recitation. Further, as the rights and penalties associated with refusing to submit to a chemical breath test are the same as the rights and penalties associated with refusing a chemical blood test, a second recitation would impose an additional, unnecessary requirement on law enforcement. Accordingly, as the record reflects that Trooper Creamer read Appellant her “Rights for Use at Station” in their entirety prior to requesting that Appellant submit to a chemical test, (Tr. at 40), and that Appellant signed the “Rights” form to indicate her understanding of the rights contained therein, (Tr. at 41), this Panel is satisfied that the trial magistrate’s decision to sustain the charged violation of § 31-27-2.1 is unaffected by error of law.

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. Substantial rights of Appellant have not been prejudiced. Accordingly, Appellant's appeal is denied, and the charged violation sustained.