STATE OF RHODE ISLAND AND PROVIDENCE PLANTATIONS

CRANSTON, RITT **RHODE ISLAND TRAFFIC TRIBUNAL**

STATE OF RHODE ISLAND	:	
	:	
v.	:	**C.A. No. T15-0046**
	:	**15202500848**
THOMAS MARTUCCI	:	

DECISION

PER CURIAM: Before this Panel on November 18, 2015—Administrative Magistrate DiSandro III (Chair), Judge Almeida, and Magistrate Noonan, sitting—is Thomas Martucci's (Appellant) appeal from a preliminary order issued by Chief Magistrate Guglietta (Hearing Magistrate), 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.

Facts and Travel

On October 31, 2015, Officer Allen of the East Greenwich Police Department (Officer) charged the Appellant with the aforementioned violation of the motor vehicle code. The Appellant contested the charge and the matter proceeded to a first appearance on November 17, 2015, to determine if a preliminary license suspension would be ordered pursuant to § 31-27-2.1(c).

At the hearing, counsel for the Appellant argued that the sworn report provided by the Officer did not accurately inform Appellant of his rights. (Tr. at 1.) Specifically, counsel argued that Paragraph five (5) of the report informed the Appellant that his license would be "immediately suspended" upon refusal of the chemical test. Id. Counsel argued that this

language of "immediately suspended" does not correctly reflect the law, and thus, is misleading. Counsel maintained that this ambiguity prejudiced his client's decision to refuse the breathalyzer.

The Hearing Magistrate disagreed with counsel's argument, stating "I don't necessarily support the arguments that [Paragraph five] is misleading." Id. at 2. Accordingly, the Hearing Magistrate entered the order of preliminary suspension and placed the matter down for pre-trial. Counsel noted that this very issue—alleged ambiguity in Paragraph five's language of "immediately suspended"—was scheduled to be heard the following day by this Tribunal's appeals panel in another case. Id. at 1. The Hearing Magistrate acknowledged the parallel arguments and allowed counsel to consolidate Appellant's appeal with the corresponding case.[1] Id. at 2. Counsel requested that the Hearing Magistrate stay the order of preliminary license suspension. The Hearing Magistrate denied the stay and 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;

[1] Appellant's appeal was heard in conjunction with the appeal of Raymond Montaquila. See State of Rhode Island v. Raymond Montaquila, T15-0041 (2015).

"(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 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 Hearing Magistrate's order that a preliminary suspension issue was in violation of constitutional and statutory provisions. Specifically, Appellant argues that the language of the sworn report is erroneous, prejudicial, and in direct contradiction of the language of the "Refusal to Submit to a Chemical Test" statute, § 31-27-2.1. Before we reach the central issue at hand, the appeal of an interlocutory order, for purposes of discussion, this Panel will interpret the language of § 31-27-2.1.

§ 31-27-2.1

Appellant argues that the report submitted did not accurately inform the Appellant that prior to the issuance of a preliminary suspension the sworn report must not only be received by the Magistrate, but reviewed by the Magistrate to ensure that it complies with the statutory requirements of § 31-27-2.1. Appellant argues that only after review may a judge or magistrate issue a preliminary suspension. Furthermore, Appellant argues that the sworn report erroneously indicated that the Appellant's license would automatically be suspended. Appellant argues that this certainty is inaccurate, in direct contrast to § 31-27-2.1, and prejudiced Appellant's decision in refusing the breathalyzer test.

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

> "If a person, having been placed under arrest, refuses . . . to submit to the tests . . . a judge or magistrate . . . upon receipt of a report of a law enforcement officer that he or she had reasonable grounds to believe the arrested person had been driving a motor vehicle within this state under the influence of intoxicating liquor . . . that the person had been informed of his or her rights . . . that the person had been informed of the penalties incurred as a result of noncompliance with this section; and that the person had refused to submit to the tests . . . shall promptly order that the person's operator's license or privilege to operate a motor vehicle in this state be immediately suspended." See § 31-27-2.1(b) (emphasis added).

A close look at the statute does not indicate, as Appellant suggests, that the Magistrate must conduct a thorough review of the sworn report to ensure statutory compliance prior to issuing an order of suspension. Rather, § 31-27-2.1 clearly indicates that upon receipt of a report by law enforcement, and a determination that the requisite factors are met, a judge or magistrate shall promptly suspend the driver's license of the individual. Id. This Panel concedes that upon receipt of a report by law enforcement a judge or magistrate will examine the report to ensure it is not deficient on its face. However, to read into § 31-27-2.1 the added condition that a judge or

magistrate must conduct a thorough review of the report to ensure statutory compliance prior to issuing a suspension adds a requirement that is not found in the plain language of the statute. The statute indicates that only upon suspension of a driver's license will the individual be afforded an opportunity for a hearing. See § 31-27-2.1(c) ("Upon suspending . . . a license . . . the traffic tribunal or district court . . . shall afford the person an opportunity for a hearing.") Upon a hearing, and only after issuance of the preliminary order of suspension, the judge will then review the affidavit to ensure that it complies with the statutory requirements set forth in § 31-27-2.1(c). If the statutory requirements are met, then a judge or magistrate shall affirm the preliminary suspension and impose penalties, including the duration of the license suspension, based on the individual's prior driving record. Id. Yet, this review and assessment of statutory compliance occurs subsequent to the preliminary suspension. See Levesque v. Rhode Island Dep't of Transp., 626 A.2d 1286, 1288 (R.I. 1993) (stating "[license] suspension occurs prior to a hearing, and thereafter the motorist is to be given a hearing as soon as possible"); see also State v. Robinson, 972 A.2d 150, 152-53 (R.I. 2009) (stating "[i]f the report satisfies the requirements set forth in subsection (b) of § 31–27–2.1, the judge must immediately suspend the license of the driver to whom reference is made in the report. Thereafter, under subsection (c) of § 31–27–2.1, a hearing is available").

Our Supreme Court has, on several occasions, faced this same issue—whether license suspension is an automatic penalty that accompanies a chemical test refusal—and has determined that a refusal charge is divided into "two distinct [procedural] parts." See Link, 633 A.2d at 1349. The first part is a "pre-hearing procedure initiated by an arrested driver's refusal to submit to a chemical test." Id. This procedure, under § 31-27-2.1, is automatic suspension of the individual's driver's license provided there exist the requisite criteria. Id.; see also Robinson,

972 A.2d at 153 (stating "the judge must immediately suspend. . . .") The second procedural part is a Rhode Island Traffic Tribunal ("RITT") hearing to determine whether the automatic driver's license suspension should be sustained or dismissed. Id.

This Panel has likewise faced this same issue and has continuously followed the distinct two-step procedure set forth in Link. See Town of Smithfield v. Badoui Sleiman, T12-0022 (2013) (citing Town of West Warwick v. Sarhan, T11-0046). Appellant now submits that we veer from this path and determine the language of the sworn report to be erroneous and misleading. To cure this deficiency Appellant would have this Panel insert the caveat "can be suspended" into the sworn report rather than the current caution of "would be immediately suspended." However, to do so would be in contrast to the plain language of § 11-37-2.1, and in extension, the legislative intent in enacting the statute. Section 31-27-2.1 plainly states that "upon receipt of a report . . . a judge or magistrate shall promptly order that the person's operator's license . . . be immediately suspended." See § 31-27-2.1 (b) (emphasis added). The statute does not use the language "could" as Appellant asserts, nor does the statute afford a judge or magistrate freedom to use discretion. It is well-established that when the language of a statute is clear and unambiguous, a court must interpret the statute literally and must give the words of the statute their plain and ordinary meanings. See DeMarco v. Travelers Insurance Co., 26 A.3d 585, 616 (R.I. 2011). Therefore, in reading § 31-27-2.1, it is clear that the General Assembly expressed its intent that a judge or magistrate "shall" promptly order a suspension, when certain factors are met, with no margin for discretion. See Sec. 31-27-2.1 (b). We decline to waiver from the unambiguous language of § 11-37-2.1 and the clear path constructed by our Supreme Court in Link.

Interlocutory Order

Despite the preceding statutory interpretation and analysis, at the core, this Panel is faced with the appeal of an order of preliminary suspension. The Hearing Magistrate issued the order, and the Appellant appealed the order.

Interlocutory orders are those that are provisional or temporary, or that decide some intermediate point or matter but are not a final decision of the whole matter." See Coit v. Tillinghast, 91 A.3d 838, 843 (R.I. 2014) (citing Simpson v. Vose, 702 A.2d 1176, 1177 (R.I.1997) (mem.)). Generally, interlocutory orders are not subject to review unless the order or decree falls within one of the exceptions in § 9-24-7,[2] or alternatively, a court will review interlocutory orders "before the case is finally terminated in order to prevent clearly imminent and irreparable harm." Id.; see also Jennings v. Nationwide Insurance Co., 669 A.2d 534, 535 (R.I. 1996) (stating "[t]his court will take appeals as of right only from final judgments.") Moreover, "[i]nterlocutory orders are reviewable only by way of writ of certiorari." See Dale v. Dale, 37 A.3d 124, 124 (R.I.2012) (mem.).

The order presently before this Panel is not appealable. The order does not grant or continue an injunction, or order a receiver, or a sale of real or personal property. See § 9-24-7. Nor does the order at hand possess such an element of finality that action is called for, before the case is finally terminated, in order to prevent clearly imminent and irreparable harm. See Town of Lincoln v. Cournoyer, 118 R.I. 644, 648, 375 A.2d 410, 412-13 (1977). Rather, the order issues a preliminary license suspension, as called for, pursuant to § 31-27-2.1 (b). This Panel

[2] General Laws 1956 § 9-24-7 provides as follows:

> "Whenever, upon a hearing in the [S]uperior [C]ourt, an injunction shall be granted or continued, or a receiver appointed, or a sale of real or personal property ordered, by an interlocutory order or judgment, or a new trial is ordered or denied after a trial by jury, an appeal may be taken from such order or judgment to the [S]upreme [C]ourt in like manner as from a final judgment, and the appeal shall take precedence in the [S]upreme [C]ourt."

finds no precedent to support Appellant's proposition that a preliminary order of suspension is equivalent to a final judgment. See Martino v. Ronci, 667 A.2d 287, 288 (R.I. 1995) (stating "[A] 'final judgment' is one that completely terminates the litigation between the parties") (internal citations omitted). Nor does this Panel intend to set erroneous precedent by permitting an appeal of a preliminary order of suspension. This Panel firmly holds that a preliminary order of suspension, generally, cannot be appealed.

Even if this order could be appealed, the proper method for reviewing an interlocutory order has not been followed. See Pier House Inn, Inc. v. 421 Corp., Inc., 689 A.2d 1069, 1070 (R.I. 1997) ("A petition for certiorari, filed in accordance with Rule 13 of the Supreme Court Rules of Appellate Procedure, is the proper method for reviewing an interlocutory order.") The Appellant did not petition for certiorari but rather filed a direct appeal from the Hearing Magistrate's interlocutory order. Consequently, this appeal is not properly before this Panel.

Based on the record before us, this Panel is satisfied that the order entered is an interlocutory order and cannot be appealed. The order does not possess the requisite elements of finality and potential for irreparable harm to warrant our immediate review. Moreover, the Appellant has failed to seek review in accordance with Rule 13 of the Rhode Island Supreme Court Rules of Appellate Procedure. Therefore, this appeal is denied and dismissed.

Conclusion

This Panel has reviewed the entire record before it. Having done so, the members of this Panel are satisfied that the Hearing Magistrate's decision to issue a preliminary license suspension was supported by the reliable, probative, and substantial evidence of record. This Panel is also satisfied that the Hearing Magistrate's decision was not clearly erroneous and not otherwise affected by error of law. Substantial rights of Appellant have not been prejudiced. Accordingly, Appellant's appeal is denied, and the case is remanded back to the Hearing Magistrate for orders consistent with this decision.

ENTERED:

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Administrative Magistrate Domenic A. DiSandro, III (Chair)

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Judge Lillian M. Almeida

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Magistrate William T. Noonan

DATE: _____