STATE OF RHODE ISLAND AND PROVIDENCE PLANTATIONS

CRANSTON, RITT **RHODE ISLAND TRAFFIC TRIBUNAL**

STATE OF RHODE ISLAND	:	
	:	
v.	:	**C.A. No. T13-0005**
	:	**12001529732**
GAIL DION	:	

DECISION

PER CURIAM: Before this Panel on April 10, 2013—Magistrate DiSandro (Chair, presiding), Judge Almeida, and Magistrate Goulart, sitting—is Gail Dion's (Appellant) appeal from a decision of Administrative Magistrate Cruise, sustaining the charged violation of G.L. 1956 § 31-27-2.1, "Refusal to submit to chemical test." The Appellant was represented by counsel before this Panel. Jurisdiction is pursuant to § 31-41.1-8.

Facts and Travel

On June 30, 2012, Trooper Crystal Carvalho (Trooper Carvalho) of the Rhode Island State Police Department charged Appellant with the aforementioned violation of the motor vehicle code. Appellant contested the charge, and the matter proceeded to trial on January 23, 2013. The trial judge sustained the charged violation, and the Appellant filed this appeal.

The trial commenced with Trooper Charles Bergeron's (Trooper Bergeron) testimony that he had been a trooper with the Rhode Island State Police Department for nine years. (Tr. at 6.) Trooper Bergeron continued his trial testimony by describing his professional training and experience in conducting DUI-related traffic stops and administering standardized field sobriety tests. (Tr. at 6-8.) Trooper Bergeron then testified that on June 30, 2012, at approximately 1:42

a.m., he was working his late shift with Trooper Carvalho when he received a 9-1-1 dispatch call. (Tr. at 8-9.)

The dispatcher informed the Trooper that someone had reported a driver traveling in the wrong direction on Route 10 northbound near Pontiac Avenue in Cranston. (Tr. at 9.) After receiving the information from the dispatcher, Trooper Bergeron activated his emergency lights and siren and drove to the location where the traffic violations were witnessed. (Tr. at 9.) As he approached the location of the reported violation on Route 10 in Cranston, he observed a black sports utility vehicle (SUV) in the high speed lane facing the wrong direction and a black two door Toyota also in the high speed lane. Id.

Trooper Bergeron then testified that upon arrival at the scene, he observed that the SUV had extensive damage to the front of the vehicle. (Tr. at 10-11.) As he approached the SUV, he observed that rescue personnel were providing medical attention to the Appellant. (Tr. at 12.) Trooper Bergeron then approached the second vehicle involved in the accident and identified four injured women in the vehicle. Id. One of the passengers was transported to the rescue vehicle and did not have a pulse. (Tr. at 14.) The other passengers were being pulled from the vehicle. (Tr. at 15.)

Trooper Bergeron spoke with two of the passengers of the vehicle, and they identified themselves as Mr. Francis Perry and Mr. Rick Rolle. (Tr. at 17.) Mr. Perry relayed to Trooper Bergeron that Mr. Perry was with the Appellant, prior to the accident, at Fitzpatrick's Bar on Park Avenue in Cranston. Id. Mr. Perry continued by telling the Trooper that he was with both the Appellant and Mr. Rolle at the bar drinking for a number of hours, and the Appellant was unstable as a result of the alcoholic beverages consumed. Id. According to Mr. Perry and Mr. Rolle, they both accompanied the Appellant out into the parking lot to determine if Appellant

was able to safely operate her vehicle. (Tr. at 18.) Once they determined it was safe for her to operate her vehicle, they reassured the Appellant that they would follow her onto the highway. (Tr. at 19.) Mr. Perry further conveyed to the Trooper that they proceeded onto Park Avenue and then made a left turn onto Reservoir Avenue. Id. They then came to a stop at a red traffic light on Reservoir Avenue. Appellant then proceeded to take the exit ramp onto Route 10 instead of the entrance ramp to Route 10 north. (Tr. at 20.)

Trooper Bergeron further testified that upon observing Appellant from about five feet away, the trooper observed that Appellant looked around in discomfort and had bloodshot watery eyes. (Tr. at 13.) Trooper Bergeron did not have an opportunity to speak with the Appellant at the scene of the accident. Id. Appellant was then transported to Rhode Island Hospital for full medical attention. (Tr. at 22.) Both Troopers Bergeron and Carvalho reported to the hospital soon after Appellant left the scene of the accident. (Tr. at 20.) Before the Troopers approached the Appellant at the hospital, he asked a nurse at the hospital if they were permitted to speak with the Appellant. (Tr. at 22.) The nurse answered in the affirmative. Id. As the trooper approached the Appellant and asked her a question, he observed that Appellant was slurring her speech, and had glossy and bloodshot watery eyes. (Tr. at 22.) Trooper Carvalho then read her her "Rights for Use at Station/Hospital" and then requested that the Appellant submit to a chemical breath test, but Appellant's response was ". . . no, not at this time." (Tr. at 22-23.)

After Trooper Bergeron's detailed and extensive testimony, assisting Trooper Crystal Carvalho also gave extensive testimony regarding the night of Appellant's car accident. Trooper Carvalho testified that she reported to the scene of Appellant's accident with Trooper Bergeron after they received a call from the 9-1-1 dispatcher reporting a driver traveling southbound on Route 10 north. (Tr. at 58-59.) At the scene, Trooper Carvalho observed Appellant's bloodshot

watery eyes and smelled a moderate odor of alcohol emanating from her person. (Tr. at 61.) Trooper Carvalho further testified that she then reported to Rhode Island Hospital, where Appellant was transported. (Tr. at 64-65.) Once she arrived at the hospital, she asked Appellant a few rudimentary questions. (Tr. at 65.) After observing Appellant's bloodshot, watery eyes, and slurred speech, Trooper Carvalho read Appellant her "Rights for Use at Station/Hospital." (Tr. at 65.) Trooper Carvalho then requested that the Appellant submit to a chemical breath test, but Appellant's response was ". . . not right now, not at this time." (Tr. at 67.)

At the conclusion of the trial, the trial magistrate sustained the charge of § 31-27-2.1. (Tr. at 169.) In coming to this conclusion, the trial magistrate considered the totality of the circumstances, including the Troopers being dispatched to a driver operating their vehicle in the wrong direction, observation of the aftermath of the accident, the driver's odor of alcohol, and her bloodshot and watery eyes. (Tr. at 166.) Aggrieved by the trial magistrate's decision, the Appellant timely filed an appeal.

Standard of Review

Pursuant to § 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:
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> (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 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 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 conclusions on appeal. See Janes, 586 A.2d at 537.

Analysis

On appeal, the Appellant contends that the trial magistrate's decision to sustain the charge was affected by error of law and was in excess of statutory provisions. Specifically, Appellant argues that both Appellant's response to Trooper Bergeron's request to submit to a chemical test—"no, not at this time"—and Appellant's response to Trooper Carvalho's request to submit to a chemical test—"not right now; not at this time"—did not constitute a refusal because her answer indicated that she would be willing to take the test at a later time. Moreover, the Appellant asserts that her responses were not a refusal within the meaning of § 31-27-2.1.

(Tr. at 22-23; Tr. at 67.) Finally, the Appellant avers that the Troopers had the positive duty of informing Appellant that she would not be allowed to take the test at a later time.

The record demonstrates that Appellant's response to both Troopers' inquires was clearly and unambiguously within the meaning of the word "refuses" as contemplated by § 31-27-2.1. Section 31-27-2.1 of Rhode Island General Law, in pertinent part, provides that "[i]f a person having been placed under arrest refuses upon the request of a law enforcement officer to submit to the tests, as provided in § 31-27-2, none shall be given . . . ." (Emphasis added.) "It is well settled that when the language of a statute is clear and unambiguous, this [Panel] must interpret the statute literally and must give the words of the statute their plain and ordinary meanings." Accent Store Design, Inc. v. Marathon House, Inc., 674 A.2d 1223, 1226 (R.I. 1996). Our obligation is to ascertain the legislative intent behind the enactment and give effect to that intent. Kaya v. Partington, 681 A.2d 256, 260 (R.I. 1996). "Because ambiguity lurks in every word, sentence, and paragraph in the eyes of a skilled advocate . . . the question is not whether there is an ambiguity in the metaphysical sense, but whether the language has only one reasonable meaning when construed, not in a hyper technical fashion, but in an ordinary, common sense manner." Garden City Treatment Center, Inc. v. Coordinated Health Partners, Inc., 852 A.2d 535, 542 (R.I. 2004) (quoting Textron, Inc. v. Aetna Casualty and Surety Co., 638 A.2d 537, 541 (R.I. 1994)). While utilizing that standard, this Panel should "refrain from engaging in mental gymnastics or from stretching the imagination to read ambiguity where none is present." Mallane v. Holyoke Mut. Ins. Co. in Salem, 658 A.2d 18, 20 (R.I. 1995). Furthermore in construing the statute, we must adopt a construction that does not effect an absurd result. Rhode Island State Labor Relations Board. v. Valley Falls Fire District, 505 A.2d 1170, 1171 (R.I. 1986) (citing Berthiaume v. School Committee of Woonsocket, 121 R.I. 243, 397 A.2d 889 (1979)).

Here, the plain and unambiguous meaning of the word, "refuses," is "to show or express unwillingness to do or comply with." See Refuse, MERRIAM-WEBSTER, http://www.merriam-webster.com/dictionary/refuse.; see also Refuse, OXFORD, http://www.oxforddictionaries.com/definition/english/refuse (indicate or show that one is not willing to do something). The legislature's intent when drafting and passing section 31-27-2.1 was to reduce "the carnage occurring on our highways which is attributable to the persons who imbibe alcohol and then drive." DiSalvo v. Williamson, 106 R.I. 303, 305-06, 259 A.2d 671, 673 (1969); see also Dunn v. Petit, 120 R.I. 486, 489, 388 A.2d 809, 811 (1978). This Panel will not engage in "mental gymnastics" in order to disregard the plain meaning of the word "refuses" or to eviscerate the clear intent of the legislature. See Partington, 681 A.2d at 260; see also Marathon House, Inc., 674 A.2d at 1226. Accordingly, this Panel finds that each independent response by the Appellant acted as an unequivocal refusal to the Troopers' requests for the Appellant to submit to a chemical test.

Moreover, considering the Appellant's responses—namely, "no, not at this time" and "not right now; not at this time" —to be less than an affirmative expression that she was unwilling to comply with the Troopers' requests to submit would lead to an absurd result. See Valley Falls Fire District, 505 A.2d at 1171. Specifically, it would allow an individual suspected of operating a motor vehicle under the influence of intoxicating liquor to postpone submitting to the chemical test for indefinite duration by qualifying his or her refusal with conditional language. The evanescent nature of evidence sought to establish whether a suspect is under the influence of intoxicating liquor makes it necessary to have a definitive answer regarding whether the suspect will submit to the chemical test within a reasonable time from the law enforcement

official's request.[1] This Panel finds that to hold otherwise would hinder law enforcement efforts to prevent operation of motor vehicles by intoxicated operators, undermine the clear intent of the legislature, and ignore the common understanding of the word "refuse."

In addition, the Appellant avers that the Troopers had the obligation of informing Appellant that she would not be allowed to take the test at a later time. Our Supreme Court has interpreted section 31-27-2.1 and in so doing "identified the information that must be disclosed to an individual before consent to a [chemical] test is deemed valid." See State ex rel. Town of Middletown v. Anthony, 713 A.2d 207, 212 (R.I. 1998). Expounding upon the requirements set out in §31-27-2.1 and § 31-27-2, the Rhode Island Supreme Court explained:

> "an individual charged with driving while intoxicated must be informed of the following: (1) his or her Miranda rights; (2) his or her right to be examined by a physician of his choice; (3) his or her right to refuse to submit to a breathalyzer examination; and (4) the consequences attendant on refusal to consent to the test." State v. DeOliveira, 972 A.2d 653, 660 (R.I. 2009) (citing State ex rel. Town on Middletown v. Anthony, 713 A.2d 207, 212 (R.I. 1998)).

The "Rights for Use at the Scene" [2] and "Rights for Use at Station" forms have been "designed through a combined effort of the Department of Health, Department of Transportation (DOT)

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[1] Several courts have fashioned a bright line rule regarding what constitutes a refusal for the purposes of a breath test. See Welch v. Iowa Dep't of Transp., Motor Vehicle Div., 801 N.W.2d 590 (Iowa 2011); see also Cummins v. Lentz, 813 S.W.2d 822 (Ky. Ct. App. 1991). The bright line rule maintains that, "[o]nce the defendant says anything except an unequivocal 'yes' to the officer's request . . . the defendant cannot legally cure the refusal." State v. Bernhardt, 584 A.2d 854, 859 (N.J. App. Div. 1991). This Panel finds the above-mentioned decisions instructive. In addition, there are decisions from this Panel holding that refusals need not be in the form of words. For example, in New Shoreham v. Netro, T05-0143 (R.I. Traffic Trib. 2005), we held that a motorist "conditionally refused" when he attempted to stall the administration of the breathalyzer exam. In fact, in Netro the record indicated that the motorist actually informed police at the station that he was not refusing the test. Nevertheless his actions were determined to constitute a refusal under the statute. Id. at 10.

[2] The "Rights for Use at Scene" form read as follows:

and the Attorney General's office and [are] distributed to local police departments." See Levesque v. Rhode Island Dept. of Transp., 626 A.2d 1286, 1288 (R.I. 1993). The "Rights for Use at Station" and "Rights for Use at the Scene" reflect the current language of §31-27-2.1.[3] The two forms apprise drivers of their Miranda rights, right to be examined by a physician of their choosing, right to refuse to submit to a breath test, and the penalties incurred by a refusal to submit to a chemical test pursuant to §31-27-2.1. See Gemma v. State ex rel. Town of West Warwick, 655 A.2d 254 (R.I.1995) (Mem.) (denying petition for writ of certiorari to review Appeals Panel's decision sustaining a charge of refusing to submit to chemical testing after the "petitioner was adequately advised of the penalties he would incur if he refused to submit to a breathalyzer test ") (emphasis added.)).

Here, Trooper Bergeron testified that he witnessed Trooper Carvalho read the Appellant her rights at the hospital and observed the Appellant indicate that she understood those rights. (Tr. at 22.) Thereafter, the trial magistrate asked whether "the rights you read at the hospital were the rights for use at the scene or the rights for use at the station." (Tr. at 23.) Trooper Bergeron responded, "[t]he rights for use at the station . . ." and also clarified that the rights for

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> "You are suspected of driving under the influence of intoxicating liquor and or drugs. You have the right to remain silent. You do not have to answer any questions or give any statements. If you do answer questions or give statements, they can and will used in evidence against you in court. You have the right to an attorney. If you cannot afford an attorney, one will be provided to you. You have the right to be examined, at your expense immediately by a physician selected by you. You will be afforded a reasonable opportunity to exercise this right." ("Rights for Use at Station" form.)

[3] Section 31-27-2.1 reads in pertinent part: "that the person had been informed of his or her rights in accordance with § 31-27-3; 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 upon the request of law enforcement officer. . . ."

use at the station also encompass the rights that are typically read at the scene.[4] Id. Based on the Troopers' testimony and his own inquiry, the trial magistrate found that the Appellant had been informed of her rights in accordance with 31-27-3, "Right of person charged with operating under influence to physical examination." Specifically, the trial magistrate stated that the Appellant had been advised of her rights pursuant to section 31-27-3, which provides, any individual being asked to submit to a chemical test with the right to be examined at his or her own expense immediately after the person's arrest by a physician selected by the person. (Tr. at 168.); see § 31-27-3. In addition, the trial magistrate found that the Appellant had been advised of all the penalties that would occur as a result of refusing to submit to the chemical test. (Tr. at 168.) In particular, the imposition of a fine in the amount of two hundred dollars ($200) to five hundred dollars ($500), ten (10) to sixty (60) hours of public community restitution, suspension of driver's license for a period of six (6) months to one year, and attendance at a special course on driving while intoxicated or under the influence of a controlled substance and/or alcohol or drug treatment for the individual. (Tr. at 168-69.) We are satisfied that all of the requirements of section 31-27-2.1 are met in this case and, accordingly, this Panel finds the trial magistrate's decision to sustain the charged violation was not affected by error of law or in violation of statutory provisions.

A suspect believed to be operating motor vehicle under the influence of intoxicating liquor who is arrested has a choice. "[The suspect] may take the test and hope for the best. On the other hand, he [or she may refuse. Once [the suspect] refuses, [the suspect] takes a calculated

[4] The severity of the accident and injuries to the Appellant made it impossible for either Trooper to read the Appellant her Rights for use at the Scene. (Tr. at 16.) In fact, neither Trooper had further contact with the Appellant until she arrived at the hospital. (Tr. at 23.) This Panel finds

risk that he [or she] will have a . . . vacation from . . . driving . . . . The choice is his [or hers]." Williamson, 106 R.I. at 306-07, 259 A.2d at 673. To read into section 31–27–2.1, the added condition that the police must revisit whether the operator will submit, after the operator has already said 'no' adds something that is not found in the plain language of the statute. See id. "Such [an interpretation] could well frustrate the legislature's efforts to promote highway safety." Id.

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 was not affected by error of law. Was not in violation of statutory provisions, and was supported by the reliable, probative, and substantial evidence of record. Substantial rights of Appellant have not been prejudiced. Accordingly, Appellant's appeal is denied, and the charged violation is sustained.

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this omission to be harmless because the Appellant was eventually advised of her rights and indicated that she understood them. (Tr. at 22.)

ENTERED:

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Magistrate Domenic A. DiSandro, III (Chair)

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Judge Lillian M. Almeida

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Magistrate Alan R. Goulart

DATE: _____