STATE OF RHODE ISLAND AND PROVIDENCE PLANTATIONS

CRANSTON, RITT **RHODE ISLAND TRAFFIC TRIBUNAL**

TOWN OF HOPKINTON	:	
	:	
v.	:	**C.A. No. T15-0037**
	:	**15506500643**
DANIEL A. BUCK	:	

DECISION

PER CURIAM: Before this Panel on January 20, 2016—Magistrate Goulart (Chair), Chief Magistrate Guglietta, and Judge Almeida, sitting—is Daniel Buck's (Appellant) appeal from a decision of Magistrate Noonan (Trial Magistrate), sustaining the charged violations of G.L. 1956 § 31-27-2.1, "Refusal to Submit to Chemical Test" and § 31-22-21.1, "Presence of Open Alcoholic Beverage." The Appellant appeared before this Panel represented by counsel. Jurisdiction is pursuant to G.L. 1956 § 31-41.1-8.

Facts and Travel

On July 30, 2015, Sergeant Percival of the Hopkinton Police Department (Sergeant), charged the Appellant with the aforementioned violations of the motor vehicle code. The Appellant contested the charges, and the matter proceeded to trial on October 15, 2015.

Prior to the trial, as a preliminary matter, Appellant's counsel moved for the Court to dismiss the charges on the ground that the Sergeant's sworn affidavit was perjured. (Tr. at 4.) The Trial Magistrate reserved judgment on the motion, pending testimony by the Sergeant. Id.

At trial, the Sergeant began his testimony by describing his roles and responsibilities as a Sergeant, his training in relation to driving under the influence (DUI) investigations, and his experience in administering Standard Field Sobriety Tests. Id. at 7-11. The Sergeant recounted

his extensive training at Police Academy, an Advanced Roadside Detection Impaired Driving Course, and again at Drug Recognition Expert School. Id. at 11-15. He explained that this training in conducting DUI investigations and administering Standard Field Sobriety Tests has assisted him in administering over eighty tests during his time as a law enforcement officer. Id. at 17. The Sergeant noted that out of the approximately eighty tests administered, exactly sixty-four led to arrests. Id. at 19.

After detailing his experience in conducting DUI investigations, the Sergeant recalled the events on the evening of July 30, 2015. Id. at 20. The Sergeant testified that at approximately 8 P.M., he was at a residence, located at 62 Oak Street, responding to the homeowner's call that Appellant was on the front yard "screaming and yelling." Id. at 23. The Sergeant stated that upon arrival at the residence, he was speaking with the homeowner when the Appellant suddenly "drove by in his vehicle, slowed down in front of the house almost to a stop, and then continued up Oak Street toward Chase Hill Road." Id. at 24. The Sergeant recalled getting into his patrol vehicle in order to pursue the Appellant because the homeowner wanted a "No Trespass Order" enforced against the Appellant. Id. at 25.

The Sergeant pulled over the Appellant and asked him to explain his reason for screaming and yelling on the homeowner's lawn. Id. Appellant replied that it was a family problem and declined to speak about it. Id. The Sergeant testified that while speaking to the Appellant, he detected an odor of alcohol emitting from the interior of the vehicle and noticed that Appellant's eyes were moderately bloodshot and his speech was slurred. Id. at 26. He also spotted empty, and partially empty, Heineken bottles inside the vehicle. Id. Based on his observations, the Sergeant asked Appellant if he had been drinking. Id. The Sergeant testified that Appellant denied drinking that evening and stated that he "doesn't really drink anymore, just

wine here and there." Id. Because of his observations, the Sergeant asked the Appellant to exit his vehicle so that he could perform a Standard Field Sobriety Test. Id. at 27.

The Sergeant testified that he began to administer the Horizontal Gaze Nystagmus Test when Appellant "became agitated and was yelling and screaming . . . he said that 'his rights were being violated and he didn't think he needed to do the test.'" Id. at 30. The Sergeant recalled giving Appellant another opportunity to either complete or refuse the test. The Appellant said he was going to refuse the test, and the Sergeant responded "that's fine" and asked Appellant to put his hands behind his back. Id. at 31. Appellant refused to do so and said that he "changed his mind and wanted to complete the test because he hadn't been drinking." Id. The Sergeant then administered the Walk and Turn Test and the One Leg Stand Test. The Sergeant testified that Appellant did not show any "validated clues" as to impairment during the One Leg Stand Test. Id. at 32. He did, however, display two "validated clues" as to impairment during the Walk and Turn Test. Id. At this point, the Sergeant asked Appellant if he would agree to take a Preliminary Breath Test. The Appellant agreed and took the test. Id. Based on his observations and the results of the three tests, the Sergeant arrested the Appellant for suspicion of DUI. Id. at 36.

The Sergeant testified that Appellant was read his "Rights for Use at the Scene" and was then transported to Hopkinton Police Headquarters, where he was read his "Rights for Use at the Station." Id. at 37-40. The Sergeant asked Appellant whether he wanted to take or refuse the Breathalyzer test. Id. at 48. The Appellant indicated that he refused to take the Breathalyzer test and filled out the refusal form accordingly. Id.

After this testimony, the State submitted the refusal form into evidence. Id. at 51. Upon the State's questioning, the Sergeant noted that there is an inconsistency between his narrative on

the refusal form and his testimony presented at trial. Id. The Sergeant clarified that the form states the Appellant displayed "clues [as to intoxication] in all three [tests]." When actually, the Appellant displayed clues in two out of the three tests administered. Id. at 52. The Sergeant explained that the inaccuracy on the form was a mistake and likely occurred because he was "typing too fast." Id. at 55. Counsel for the Appellant objected, arguing that the inconsistency was not a mistake but rather constituted perjury, and therefore, the refusal form is not reliable. Id. at 57. The Trial Magistrate disagreed with Appellant's counsel and determined the inconsistency to have resulted from a mistake. Id. At the close of the State's questioning, the Sergeant reiterated that he arrested Appellant for suspicion of DUI based on the alcohol in the vehicle, the odor of alcohol emitting from his breath, his bloodshot eyes, his slurred speech, his performance on the Field Sobriety Tests and the results from the Preliminary Breath Tests. Id. at 58-59.

On cross-examination, Appellant's counsel questioned the Sergeant regarding Appellant's driving, asking, "did [Appellant] swerve?" and "did the operation of the vehicle [have] anything to do with the charge here?" Id. at 62. The Sergeant denied having any recollection of Appellant's driving but explained that he pulled Appellant over because of a complaint, not because of a moving violation. Id. at 62-63.

Counsel for the Appellant then questioned the Sergeant regarding a video depicting Appellant at the station. The Sergeant indicated that he did not have access to the video and had never seen the video. Id. at 64. Counsel presented the Court with a Compact Disc (CD) version of the video. Id. at 90. After many attempts to play the CD in Court, on the Court's television, the video failed to play. Id. at 90-97. The video was then played on the Trial Magistrate's personal computer, off the record. Id. at 97. After watching the video, the Trial Magistrate

returned to the record, and counsel for the Appellant concluded cross-examination. Id. at 97-98. In closing, counsel concluded that based on the evidence in the video, Appellant was not stuttering, slurring his words, or exhibiting any sign of intoxication. Id. at 100-01. In its closing argument, the State maintained that there was enough evidence to arrest Appellant for suspicion of DUI and that the only issue for the Court to assess is the credibility of the Sergeant. Id. at 108-110.

After hearing both arguments, the Trial Magistrate found the Sergeant to be credible. Id. at 119. Specifically, the Trial Magistrate determined that the Sergeant was "very, very, accurate, I believe, in his description of moderately bloodshot eyes, slightly slurred speech, slight odor of alcohol . . . and the inability to complete the Field Sobriety Tests." Id. at 123.

As such, the Trial Magistrate sustained the charged violations, § 31-27-2.1 and § 31-22-21.1, and stated that this was a minimum sanctions case. The Trial Magistrate then gave the Appellant an opportunity to decide between two potential sanctions: a hard suspension or an Interlock System. Id. Counsel for the Appellant requested a stay of all sanctions pending appeal. The Trial Magistrate denied the request and imposed minimum sanctions. Id. at 125. Aggrieved by the Trial Magistrate's decision, 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:
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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 [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 Trial Magistrate's decision was clearly erroneous in view of the reliable, probative, and substantial evidence on the whole record. Specifically, Appellant argues that the Sergeant did not have probable cause to initiate a DUI investigation, the Sergeant's affidavit was incorrect and inaccurate in respect to the "clues" exhibited by

Appellant during the investigation, and the record is incomplete because he was unable to present the video at trial.

Appellant argues that there was not probable cause to initiate a DUI investigation. Appellant was charged with § 31-27-2.1, "Refusal to Submit to Chemical Test" and § 31-22-21.1, "Presence of Open Alcoholic Beverage." To establish a violation of refusal to submit to a chemical test under § 31-27-2.1 successfully, the state is not required to establish that there existed probable cause in order to meet its burden of proof. See State v. Jenkins, 673 A.2d 1094, 1097 (R.I. 1996) (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).

Section 31–27–2.1 provides in pertinent part:

> "Refusal to submit to chemical test.—(a) Any 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).

Based on the plain language of the statute, the standard for administering a chemical test is reasonable suspicion to believe that the driver is operating the vehicle under the influence of alcohol. Id.

The record before this Panel reveals that the reasonable suspicion standard was appropriately satisfied. The Sergeant testified that he pulled over Appellant in order to

investigate a complaint and enforce a "No Trespass Order."[1] (Tr. at 25.) The Sergeant testified that while speaking to the Appellant, he detected an odor of alcohol emitting from the interior of the vehicle and noticed that Appellant's eyes were moderately bloodshot and his speech was slurred. Id. at 26. He also spotted empty, and partially empty, Heineken bottles inside the vehicle. Id. Based on his observations, the Sergeant reasonably believed Appellant had been drinking. Id. At trial, the Trial Magistrate heard the testimony and determined that the facts presented were sufficient to support a finding by the Sergeant of reasonable suspicion that Appellant had been operating his vehicle while under the influence of alcohol. Id. at 125. This Panel agrees, and reiterates that a law enforcement officer need not make a determination of probable cause before initiating an investigation for driving under the influence. See Jenkins, 673 A.2d at 1097.

Additionally, Appellant argues that the charges should have been dismissed by the Trial Magistrate because of a "perjured affidavit." Specifically, Appellant argues the affidavit provided that the Appellant displayed "clues [as to intoxication] in all three [tests]," when actually, the Appellant displayed clues in two out of the three tests administered. Appellant argues that this difference is more than a mere discrepancy and requires dismissal.

When attacking the validity of an affidavit, "allegations of negligence or innocent mistake are insufficient." See Franks v. Delaware, 438 U.S. 154, 171-72 (1978). There must be allegations of deliberate falsehood or of reckless disregard for the truth, and those allegations

[1] Appellant does not contest the lawfulness of the traffic stop, nor does the Appellant contest the validity or existence of a "No Trespass Order." The prosecution has failed to provide this Panel with a copy of the Order. Regardless, this Panel can conclude, based on the record before us, that the traffic stop was reasonably conducted in furtherance of the investigation of the disturbance at 62 Oak Street. See (Tr. at 120) (Trial Magistrate found that the Sergeant conducted a traffic stop of Appellant's vehicle "'[j]ust because it was in furtherance of the investigation of the disturbance at 62 Oak Street' which he is entitled to do").

must be accompanied by an offer of proof. Id. At trial, Appellant failed to present a scintilla of evidence establishing that the affidavit was perjured. Instead, Appellant points to one inconsistency between the affidavit and the Sergeant's testimony in support of his allegation. The Sergeant conceded the existence of this discrepancy but explained that it was attributable to "typing too fast." (Tr. at 55.) The Appellant did not contest this explanation nor did the Appellant proffer any proof to support his allegation of perjury. This mere discrepancy, without more, does not establish that the Sergeant deliberately or recklessly disregarded the truth. See State v. Roddy, 401 A.2d 23, 29 (R.I. 1979) (finding that despite inconsistencies between testimony and an affidavit, the plaintiff's failed to prove the affidavit was perjured); see also State v. Pona, 926 A.2d 592, 613 (R.I. 2007) (finding that although the affidavit misstated defendant's license plate number, there was no evidence to support allegation that detective deliberately or recklessly intended to deceive the judge with the inaccuracy.)

The Trial Magistrate accepted the Sergeant's explanation, stating "there are mistakes and there are [sic] perjury." Id. at 56. This Panel agrees. A simple mistake as this is not sufficient to justify the harshness of a dismissal. See Pona, 926 A.2d at 613; cf. Shumski v. DiLuglio, 1987 WL 859669 (R.I. 1987) (finding, in the Superior Court, where the complainant mistakes the party defendant, and the defendant moves to dismiss on the basis of the inaccuracy, the mistake is not sufficient to justify the harshness of a dismissal).

Lastly, Appellant argues that the record is incomplete because he was not able to play the video of Appellant at the Hopkinton Police Station. Appellant submits that there is "something in the video" that would change the outcome of this case, and therefore, it is important for this Panel to view the tape. Appellant cites the First Circuit case of Campos-Orrego v. Rivera, in urging this Panel to allow Appellant to supplement the record with the videotape. See Campos-

Orrego v. Rivera, 175 F.3d 89 (1st Cir. 1990) (stating "parties seeking appellate review must furnish the court with the raw materials necessary to the due performance of the appellate task"). Appellant fails to recognize that the Rivera Court further states: "should an appellant spurn this duty and drape an incomplete record around the court's neck, the court in its discretion either may scrutinize the merits of the case insofar as the record permits, or may dismiss the appeal . . . ." Id. at 93.

This Panel, in our discretion, will scrutinize the merits of the case insofar as the record before us permits. We recognize that the Trial Magistrate had the opportunity to view the tape and made his findings of fact after considering the events depicted in the tape. The Trial Magistrate noted for the record that he "had the opportunity to view the videotape" and then confirmed that there were no additional videotapes that should be reviewed by the Court prior to issuing a decision. (Tr. at 97.) The Trial Magistrate asked Appellant's counsel "is that the extent of the videotapes you wanted [this Court] to watch[?]" Id. at 98. Counsel responded "[c]orrect, Your Honor." Id. Accordingly, Appellant's argument that the record is incomplete because he was not able to play the video depicting the events at the Hopkinton Police Station is meritless.

Moreover, the record reflects that Appellant's counsel did not attempt to have the videotape, or a transcribed copy of the video tape, admitted into evidence. If the events in the tape are that substantial, as Appellant suggests, then it was incumbent for Appellant's counsel to move the tape into evidence at trial. See State v. Dominick, 968 A.2d 279, 284 (R.I. 2009) (finding that appellant waived the issue of whether trial justice erred when he precluded a videotape of an incident alleged to have occurred, where proffer of evidence was not transcribed, and there was nothing in the lower court record concerning appellant's attempt to have the videotape admitted into evidence). Regardless, this Panel does not have the ability to review the

video's content, as our review is confined solely to the record. Link, 633 A.2d at 1348. The record clearly reflects that the Sergeant had reason to believe that Appellant was driving under the influence and that Appellant refused the breathalyzer. The Trial Magistrate did not abuse his discretion, and his decision to sustain the charged violations was supported by legally competent evidence and not affected by error of law.

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 violations sustained.

ENTERED:

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Magistrate Alan R. Goulart (Chair)

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Chief Magistrate William R. Guglietta

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Judge Lillian M. Almeida

DATE: _____