STATE OF RHODE ISLAND AND PROVIDENCE PLANTATIONS

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

TOWN OF NORTH KINGSTOWN :
:
v. : **C.A. No. T08-0098**
:
BRENDON BEIBER :

DECISION

PER CURIAM: Before this Panel on October 1, 2008—Judge Ciullo (Chair, presiding), Chief Magistrate Guglietta, and Magistrate Goulart, sitting—is the State of Rhode Island's (State) appeal from Judge Almeida's decision, dismissing the charged violation of G.L. 1956 § 31-27-2.1, "Refusal to submit to chemical test." Brendon Beiber (Appellee) was represented by counsel before this Panel. Jurisdiction is pursuant to § 31-41.1-8.

Facts and Travel

On December 22, 2007, North Kingstown Patrol Officer Adam Kennett (Officer Kennett) recorded Appellee's vehicle speeding down a dangerous roadway. After initiating a motor vehicle stop and subsequently observing Appellee fail all three field sobriety tests, Officer Kennett charged him with violating the aforementioned motor vehicle offense. Appellee contested the charge, and the matter proceeded to trial.

Officer Kennett began his trial testimony by describing his training and experience with regard to DUI-related traffic stops and the administration of standardized field sobriety tests. (Tr. at 6-10.) Then, focusing on the events of December 22, 2007, Officer Kennett testified that at approximately 2:30 a.m., he was on a stationary traffic

post on Route 4 in North Kingstown. (Tr. at 10.) At this time, Officer Kennett observed a vehicle traveling southbound at a high rate of speed. (Tr. at 11.) Upon observing the vehicle, Officer Kennett activated his hand-held radar unit and recorded the vehicle's speed as ninety-two (92) miles per hour (mph) in a posted fifty (50) mph zone. (Tr. at 15.)

Due to the fact that the speeding vehicle was approaching a dangerous curve in the roadway, Officer Kennett activated his police cruiser's lights and began to pursue the vehicle. Id. After passing the intersection of Route 4 and West Allenton Road, the vehicle slowed significantly before coming to a complete stop. (Tr. at 16.)

During his initial encounter with the operator—identified at trial as Appellee—Officer Kennett detected a strong odor of alcohol on Appellee's breath. (Tr. at 18.) Officer Kennett noted that Appellee's bodily movements appeared "lethargic," that he was experiencing difficulty producing his registration and insurance documentation, and that his eyes were watery and bloodshot. Id. When asked by Officer Kennett whether he had consumed alcohol, Appellee responded that he had had three beers earlier in the evening. Id.

Upon observing several indicia of alcohol consumption, Officer Kennett asked Appellee whether he would submit to a battery of field sobriety tests, and Appellee consented. (Tr. at 19.) As Appellee exited his vehicle, Officer Kennett observed that he appeared unsteady on his feet and that he was experiencing difficulty walking. Id. The Appellee failed all of the field sobriety tests that were administered and, upon Officer Kennett's request, refused to submit to a preliminary breath test. (Tr. at 19-25.) At this point, Officer Kennett concluded that Appellee was impaired and advised him that he was

under arrest for suspicion of driving under the influence. (Tr. at 26.) Appellee was handcuffed, placed in the rear seat of Officer Kennett's police cruiser, and read his "Rights for Use at Scene." Id.

At approximately 2:50 a.m., while Officer Kennett waited at the scene for a tow truck to arrive, his police cruiser was struck by another vehicle traveling southbound on Route 4. (Tr. at 29.) The vehicle that collided with Officer Kennett's police cruiser continued southbound before stopping approximately one-quarter mile from the scene of the collision. Id. When he discovered that Appellee was uninjured, Officer Kennett left the scene to speak with the operator of the striking vehicle. Id. Soon thereafter, several other officers from the North Kingstown Police Department responded to the scene. Id. As the operator of the striking vehicle was taken into custody on suspicion of DUI, a second vehicle collided with one of the police cruisers. Id. While the North Kingstown Police and the State Police worked to secure the scene, Officer Kennett decided to transport Appellee to South County Hospital for evaluation purposes. (Tr. at 31.) This decision was made approximately one and one-half hours after the initial traffic stop. (Tr. at 30.)

After Appellee had been assessed at South County Hospital, he was read his "Rights for Use at Station" in the presence of hospital personnel. (Tr. at 31-32.) Officer Kennett then proceeded to ask Appellee whether he wanted to make a telephone call. (Tr. at 32.) Appellee initially stated that he did not want to use the telephone, but upon reading the "Rights" form, he decided to make a phone call. (Tr. at 33.) Officer Kennett testified that he stepped outside the room and closed the door to afford Appellee privacy while he used his cellular phone. Id. Once Appellee had used his phone, Officer Kennett

re-read the "Rights" form. (Tr. at 33-34.) Upon Officer Kennett's request, Appellee refused to submit to a chemical test. (Tr. at 34.)

At the conclusion of the State's case-in-chief, Appellee moved to dismiss, arguing that Officer Kennett failed to afford Appellee with a confidential phone call within one hour of being detained, in accordance with the provisions of § 12-7-20. The trial judge granted Appellee's motion,[1] whereupon a timely appeal was taken to the Appeals Panel. After a hearing, the Appeals Panel issued an order directing the trial judge to make specific findings as to "demonstrable prejudice, or a substantial threat thereof."[2] The trial judge issued a written decision on July 18, 2008, dismissing the charged violation of § 31-27-2.1.[3] It is from this decision that the State now appeals. Forthwith is this Panel's decision.[4]

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[1] The trial judge granted Appellee's motion to dismiss explaining:

> "But certainly the statute is there. It does have the time frame. Its saying as soon as practica[ble], but then it tells you it is one hour. So I mean, you know how sometimes the legislation is drafted and we have to deal with some of the unusual wording in these things, but it is quite clear. . . . [A]nd based on what the officer's testimony indicated, you know, there is no compliance with . . . 12-7-20, and again, through no fault of the officer. . . . It is what it is and it doesn't comply with the § 12-7-20 and . . . so based on what the Court has heard so far, based on the arguments on both sides, the Court will dismiss the refusal charge, based on that argument." (Tr. at 74-75.)

[2] From the Appeals Panel's discussion of "prejudice" resulting from the failure of Officer Kennett to observe the one hour limitation contained in § 12-7-20, this Panel is satisfied that the previously-constituted Panel was applying the legal standard first articulated in State v. Carcieri, 730 A.2d 11, 15 (R.I. 1999), and further refined in State v. Veltri, 764 A.2d 163, 167 (R.I. 2001).

[3] The amended decision of the trial judge dismissing the charged violation reads: "Therefore, based on these findings of fact, this court dismisses the charge on a showing of prejudice to the defendant for not being afforded a confidential phone call within an hour of defendant's detention pursuant to the Statute." (Amended Dec. at 2-3.)

[4] Although, the Panel is mindful of other collateral issues, similar to those present in Dolan and Quatrucci, this appeal is limited to the issue regarding the application of the one hour rule in § 12-7-20. See State v. Dolan, C.A. No. T08-0075 (R.I. Traffic Trib.) (filed September 9, 2009) and Town of Warren v. Quatrucci, C.A. No. T08-0057 (R.I. Traffic Trib.) (filed September 8, 2009).

Standard of Review

Pursuant to G.L. 1956 § 31-41.1-8(f), 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 Appellee 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 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."

In reviewing a hearing judge'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 State argues that the trial judge's decision is affected by error of law, thus warranting reversal. Specifically, the State asserts that the trial judge erred in finding that the failure of Officer Kennett to observe the one hour limitation contained in § 12-7-20[5] substantially prejudiced Appellee. The State posits that Officer Kennett's failure to provide Appellee with a confidential phone call within one hour of taking Appellee into custody was not a *per se* violation of § 12-7-20. Accordingly, the State contends that dismissal of the charged violation of § 31-27-2.1 was an inappropriate remedy. Appellee argues that he was not afforded his confidential phone call within the statutorily proscribed one hour time limit. Thus he maintains his rights have been violated, and the charge against him must be dismissed.

The issue before this Panel—the one hour limitation found in § 12-7-20—is one of first impression. The trial judge interpreted § 12-7-20 to require dismissal of the refusal charge if a violation of the statute's one hour rule was to occur. This Panel must look at the intent of the General Assembly in drafting the statute before we can join the

[5] The printed copy of the statute, § 12-7-20, reads:

> Any person arrested under the provisions of this chapter shall be afforded, as soon after being detained as practicable, not to exceed one hour from the time of detention, the opportunity to make use of a telephone for the purpose of securing an attorney or arranging for bail; provided, that whenever a person who has been detained for an alleged violation of the law relating to drunk driving must be immediately transported to a medical facility for treatment, he or she shall be afforded the use of a telephone as soon as practicable, which may not exceed one hour from the time of detention. The telephone calls afforded by this section shall be carried out in such a manner as to provide confidentiality between the arrestee and the recipient of the call. (Emphasis added.)

trial judge in such a bright line decision. Consequently, we must employ the tools of statutory construction to determine the precise meaning of § 12-7-20. We also look to other jurisdictions and application of their statutes in similar situations. Only then can this Panel conclude whether the trial judge's decision to dismiss Appellee's violation of § 31-27-2.1 was affected by an error of law.

I

Statutory Construction

Section 12-7-20 provides that any person arrested or detained for an alleged violation of the law relating to drunk driving shall be afforded the use of a telephone, "as soon as practicable, which may not exceed one hour from the time of detention." The language of the statute does not define "as soon as practicable"; however, the limitation of "may not exceed one hour from the time of detention" is set forth for arresting officers to follow. Therefore, at the outset, this Panel must determine if the language employed by the General Assembly in drafting § 12-7-20 is clear and unambiguous on its face, giving the language of the statute its plain and ordinary meaning, or of doubtful meaning, thus subject to the process of statutory interpretation. See Gilbane Co. v. Poulas, 576 A.2d 1195 (R.I. 1990); see also 2A Sutherland Statutory Construction § 45:2 (2007).

In reviewing the language of §12-7-20, there are two provisions which on their face seem to conflict or contradict each other. The statute first requires that the person arrested be afforded the use of a telephone "as soon as practicable." This phrase is separated by commas and would lend itself to the reasonable conclusion that there is no identifiable time limit to this process. The statute continues to read that the use of the telephone "may not exceed one hour from the time of detention." The actual language of

this statute appears to conflict, in that, one section has no time limit and the next sentence fragment places a limitation on the time allowed. Moreover, one fragment anticipates the possibilities of exigencies while the other prohibits them. It is with this ambiguity within the actual language of the statute that requires this Panel to employ the tools of statutory construction to determine the legislative intent of §12-7-20.

As such, this Panel's "responsibility in interpreting [§ 12-7-20] is to determine and effectuate the Legislature's intent and to attribute to the enactment the meaning most consistent with its policies or obvious purposes." Brennan v. Kirby, 529 A.2d 633, 637 (R.I. 1987) (citing Gryguc v. Bendick, 510 A.2d 937, 939 (R.I. 1986)). We are bound to "effectuate that intent whenever it is lawful and within legislative competence." Vaudreuil v. Nelson Engineering and Const. Co., Inc., 121 R.I. 418, 420, 399 A.2d 1220, 1222 (1979) (citing Narragansett Racing Assoc. v. Norberg, 112 R.I. 791, 793-94, 316 A.2d 334, 335 (1974).

In ascertaining and giving effect to the intention of the General Assembly with respect to § 12-7-20, this Panel must "consider the entire statute as a whole," Sorenson v. Colibri Corp., 650 A.2d 125, 128 (R.I. 1994), and "view[] it in light of circumstances and purposes that motivated its passage." Brennan, 529 A.2d at 637 (citing Shulton, Inc. v. Apex, Inc., 103 R.I. 131, 134, 235 A.2d 88, 90 (1967)).[6] As our Supreme Court has

[6] In determining whether an ambiguity exists in the statutory language, this Panel turns to the familiar Black's Law Dictionary for guidance. Black's defines the term "practicable" to mean "(of a thing) reasonably capable of being accomplished" and "feasible." Black's Law Dictionary at 1291 (9th Ed. 2009). "Ambiguity exits when a statute is capable of being understood by reasonably well-informed persons in two or more different senses." 2A Sutherland Statutory Construction § 45:2 (2007). As such, this Panel contends that the directions within § 12-7-20 set forth conflicting directions to law enforcement officers. "Because all future circumstances cannot be anticipated by even the most far-sighted legislator the necessity for judicial interpretation can never be completely eliminated." 2A Sutherland's Statutory Construction § 45:2. Thus this Panel is satisfied that the conflicting language of § 12-7-20 lends itself to statutory construction, as it is unclear and ambiguous on its face.

enumerated, "[i]t is . . . [a] fundamental maxim of statutory construction that statutory language should not be viewed in isolation." In re Brown, 903 A.2d 147, 149 (R.I. 2006); see also In re Tavares, 885 A.2d 139, 146 (R.I. 2005) (quoting Park v. Ford Motor Co., 844 A.2d 687, 692 (R.I. 2004) ("[s]tatutory construction is a holistic enterprise[]").

"Before the true meaning of a statute can be determined where there is genuine uncertainty concerning its applications, consideration must be given to the problem in society to which the legislature addressed itself." 2A Sutherland Statutory Construction § 45:2 (2007). In attempting to determine the intent of § 12-7-20, we must look to the Rhode Island case law that discusses the statute's legislative intent. The two cases that address an issue similar to the one before this Panel are State v. Carcieri, 730 A.2d 11 and State v. Veltri, 764 A.2d 163. Both of the cases involve the criminal violation of driving under the influence of drugs or alcohol. While discussing an arrestee's right to a telephone call, our Supreme Court explained that one of the purposes of providing a confidential phone call is to allow for a "meaningful exchange between the suspect and his [or her] attorney." Carcieri, 730 A.2d at 14. The Supreme Court continues to make clear that to enjoy the benefits mandated by § 12-7-20, the defendant must be informed of his or her right to a confidential phone call and in enacting § 12-7-20, the legislature intended that a DUI suspect be afforded an opportunity to exercise the rights contained therein. Id. Additionally, our Court posits that each violation of § 12-7-20 must be considered on a case-by-case basis to determine the appropriate remedy. Id. at 16.

Section 12-7-20 was created by legislative enactment in 1989 as part of the General Laws pertaining to criminal procedure and arrests. In 1991, the statute was amended to encompass violations of drunk driving laws. In reviewing the statute—in

light of Carcieri, Veltri, and the 1991 amendment to the statute—it is clear that the purpose of the law is to ensure that the motorist has a reasonable opportunity to make a confidential phone call, he or she must be afforded an opportunity to exercise his or her rights, and to ensure that the motorist is not unreasonably detained within the course of his or her arrest without access to counsel or to arrange for bail. Furthermore, it is important to note that the General Assembly specifically added drunk driving cases to this statutory scheme in 1991.

While this Panel finds that the Rhode Island Supreme Court analysis of § 12-7-20 in Carcieri and Veltri is important case law impacting the issue before us, we also want to take the opportunity to look at other jurisdictions who have enacted statutes analogous to § 12-7-20 to seek their guidance. Many other jurisdictions employ similar statutes to § 12-7-20, thereby affording arrestees a phone call to their attorney and/or a relative or friend after the person is placed under arrest.[7] Moreover, the language of these statutes is quite similar to that used by our own General Assembly in affording arrestees such an opportunity. The common intent of the legislature behind the employ of such statutes is to provide the arrestee with access to legal representation to ensure that he or she is not arbitrarily detained by law enforcement for long periods of time and to deter police misconduct.

For example, the Massachusetts legislature adopted G.L. c. 276 § 33A, "Use of telephone in places of detention," which states in pertinent part:

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[7] Other jurisdictions do not provide a statute entitling a driver to consult with an attorney prior to taking a breath or chemical test. See Idaho Code § 18-8002; Kan. Stat. Ann. § 8-1001; Utah Code Ann. § 41-6a-520; see also Rackoff v. The State, 281 Ga. 306, 308 (G.A. 2006) (finding that a driver is not entitled to consult with an attorney before taking a breath test in cases involving the suspension of a driver's license and in a criminal context to cases involving driving under the influence); see also State v. Ankney, 109 Idaho 1, 704 P.2d 333 (1985) (Idaho implied consent statute, stating that person has no right to counsel before deciding to submit to chemical test, was held not to deprive defendant of his constitutional right to counsel).

> "[t]he police official. . . wherein a person is held in custody, shall permit the use of the telephone, for the purpose of allowing the arrested person to communicate with family, friends, arrange for release on bail or to engage in services of an attorney. Any such person shall be informed upon arrival at the station, of his right to use the telephone, and such use shall be permitted within one hour thereafter."

In determining whether the police official followed the requirements of § 33A, the Supreme Judicial Court of Massachusetts considered "only whether any noncompliance with the statutory requirements resulted in a substantial likelihood of a miscarriage of justice." Commonwealth v. Jackson, 447 Mass. 603, 614-15 (M.A. 2006) (finding the arrestee was advised of his statutory right to make a telephone call and he made one at the time he was booked for murder, about four hours after his arrest, determining that the "reason for the delay [wa]s apparent from and understandable in the circumstances. . . ." The Massachusetts Supreme Judicial Court determined that the oversight by police officials in biding by the statutorily proscribed time frame was not intentional).[8]

Although the procedure used by the Massachusetts Supreme Judicial Court in applying § 33A is not binding on this Panel's decision, that Court's application of the statute is indicative of the purpose of the statute which is to deter police misconduct or

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[8] See also Commonwealth v. Harris, 75 Mass.App.Ct. 696, 701 (M.A. 2009) (concluding that "[a] defendant cannot seek a remedy under § 33A without this clear showing of intentionality.") The court in Commonwealth v. Harris further explained: "If it was not intentional, the remedy of suppression is not available[;] [thus] [t]here is no substantial likelihood of a miscarriage of justice resulting from any technical noncompliance with the statute. . . ." Id. at 615; see Commonwealth v. Alicea, 428 Mass. 711, 716 (M.A. 1999) (finding that because § 33A does not prescribe any penalty for a violation of its mandate, "[i]f police misconduct deprives a defendant of the statutory right, suppression is required"); see also Commonwealth v. Kelley, 404 Mass. 459, 463 (M.A. 1989) (holding that the remedy for a violation of § 33A is the suppression of unfavorable evidence obtained as a result of denying the defendant's right). The Massachusetts Supreme Judicial Court is "of opinion that, whenever a defendant is intentionally deprived of his statutory right to seek assistance of friends or counsel by telephone, police should be held strictly to account for their conduct in relation to the defendant while he is held incommunicado." Commonwealth v. Jones, 362 Mass. 497, 503 (M.A. 1972).

intentional noncompliance of the statute, and to ensure that a motorist is not unreasonably detained without access to counsel. However, such police misconduct was not present in the case at hand. Officer Kennett did not intentionally hinder Appellee's access to a telephone. Instead, subsequent motorists—allegedly operating their motor vehicle under the influence of alcohol—were the direct cause of the delay. (Tr. at 29-31.)

Furthermore, when an arrestee is not provided a phone call within the statutorily prescribed time period dismissal of the charges against the defendant should not be mandatory. Again relying on the Massachusetts Supreme Judicial Court as guidance, if the "[v]iolation of § 33A, is productive of harm[,] [meaning admissions or confessions were given during the delay,] this might be ground for sustaining exceptions, but should not entitle the defendant to a directed verdict of acquittal." Commonwealth v. Bouchard, 347 Mass. 418, 421 (M.A. 1964); see Commonwealth v. Carey, 26 Mass.App.Ct. 339, 343 (M.A. 1988) (finding that "had the police interfered with communication with a lawyer and thereafter interrogated the defendant beyond routine name, address, age and medical problems" then the delay may have been viewed as intentional, thus warranting suppression of evidence).[9]

In the instant matter, the delay in allowing Appellee his statutorily proscribed telephone call was not intentional. But cf. Harris, 75 Mass.App.Ct. at 702 (finding that "when the denial of a defendant's telephone rights on the part of police was not designed

[9] Similarly, the California legislature adopted Cal. Penal Code § 851.5, which reads in pertinent part: "[r]ight of arrested person to make telephone calls immediately upon being booked, and except where physically impossible, no later than three (3) hours after arrest. . . ." In the application of this statute, the United States Court of Appeals determined that the language of this statute "places a burden on police officers to ensure access to the telephone." Maley v. County of Orange, 224 Fed.Appx. 591, 593 (2007). Section 851.5 clarifies that if access to a telephone is "physically impossible," then the police officers have a valid reason for the delay of access to the arrestee. Id. (finding that "nothing about detention in a hospital makes access to a telephone physically impossible").

to gain inculpatory information, there is no intentional violation" of § 33A). In this case, due to exigent circumstances—namely the two subsequent accidents—out of the police officer and the State's control, Appellee was afforded his phone call approximately three hours after the time of his detention. Thus this Panel finds, similar to that of the Massachusetts Supreme Court, that the delay in the present case was unintentional and no substantial likelihood of a miscarriage of justice resulted from the "technical noncompliance" with § 12-7-20. Jackson, 447 Mass at 615.

The members of this Panel agree that "[t]he holding of an arrestee [and not allowing him or her to make a phone call] without just cause is atypical of post-arrest detention and is a restraint that imposes significant hardship." Carlo v. City of Chino, 105 F.3d 493, 499 (9th Cir. 1996). However, at present, Appellee's phone call was delayed for just cause as two motor vehicle accidents took place on Route 4 at the similar time and exact location where Officer Kennett initiated the stop of Appellee. (Tr. at 29-30.) One of the two accidents happened while Officer Kennett was waiting at the scene for a tow truck to arrive. His police cruiser was struck by a vehicle traveling southbound on Route 4. Subsequently, as the operator of the striking vehicle was taken into custody, a second vehicle collided with another police cruiser. Id. Officer Kennett was not intentionally delaying telephone access to Appellee. Here, it was physically impossible for Appellee to be afforded his phone call while the Officer was securing two separate accident scenes until other police officers and state troopers arrived to help. As soon as was possible, Officer Kennett removed Appellee from the scene, brought him to a hospital, and granted him confidential access to a telephone. Contra Carlo, 105 F.2d 439 (finding that the

plaintiff was arrested for a DUI at midnight and taken to jail and held overnight; during which she was denied a phone call by the officer until the following day at 2:00 PM).

Moreover, the events surrounding the delay of the use of the telephone were not only out of Officer Kennett's control but his reaction to the circumstances at hand was reasonable. "Reasonableness will depend on the circumstances of each case, such as the amount of time between the stop and the transportation to the station. . . ." Copelin v. State of Alaska, 659 P.2d 1206, 1212 (A.K. 1983).[10] As our Supreme Court has held "the dictates of public policy require . . . that police officers who have a citizen in their custody be not deterred from acting to protect the well-being of such person, particularly in circumstances arising out of an emergency" such as those that existed in the present case. Cioci v. Santos, 99 R.I. 308, 207 A.2d 300 (1955); see also State v. Locke, 418 A.2d 843, 847 (R.I. 1980) (finding that an emergency existed that impelled the officer to carry the suspect outside of his jurisdiction to protect the public from a drunken driver and to protect the suspect from himself). Under the present circumstances, public policy required Officer Kennett—in carrying out his professional duties—to delay affording Appellee a telephone call to immediately secure the subsequent accident scenes.

Due to the numerous accidents in this case, the Appellee never arrived at the police station; instead he was brought to a local hospital because of potential injuries from the subsequent accidents. Officer Kennett's reaction to the unusual turn of events was reasonable under the circumstances. It would have been unreasonable for Officer

[10] See also Wetzel v. North Dakota Department of Transportation, 622 N.W.2d 180, 184 (N.D. 2001) (concluding that because circumstances vary, the court declined to fix a certain amount of time for contacting an attorney; instead the standard is reasonableness based on the totality of the circumstance[].); State v. Garrity, 765 N.W.2d 592 (I.A. 2009) (in applying Iowa's version of the statute, § 804.20—affording a phone call to arrestees "without unreasonable delay"—the test for determining whether the evidence obtained is prejudicial is whether it sufficiently appears that the rights of the complaining party have been injuriously affected by the error or that he has suffered a miscarriage of justice).

Kennett to leave the driver of the vehicle that struck his police cruiser at the scene prior to the arrival of fellow police officers, especially if he left the scene for the only reason of ensuring Appellee's phone call took place within the one hour time limitation. Likewise it would have been unreasonable for him to have sped away with Appellee in the rear of his cruiser, after his fellow North Kingstown police officers arrived at the scene, before making certain that the officers were capable of controlling the second accident that took place. (Tr. at 29-31.)

Additionally, the Court of Appeals of Minnesota relies on "a nonexclusive list of factors" that are relevant in determining "[w]hether the officer provides the driver with a reasonable amount of time to contact an attorney." Davis v. Commissioner of Public Safety, 509 N.W.2d 380 (M.N. 1994). "These factors include the time of day, the length of time the driver has been under arrest, and whether the driver made a good faith and sincere effort to contact counsel." Id. (internal citations omitted.) (finding that the arrestee's right to counsel was not satisfied because she attempted to make contact with a friend at 3:05 AM, and although the friend's phone line was active, as evidenced by a busy signal, the officer arbitrarily determined that her ability to make a phone call would be limited to 20 minutes). In the present case, although it was also early morning, Appellee's right to counsel was satisfied because as soon as he was secure in the hospital, Officer Kennett allowed Appellee to use his phone and make calls to an attorney. Officer Kennett left the hospital room while Appellee was conducting the telephone calls, and once Appellee had used his phone, only then did Officer Kennett re-enter the room. (Tr. at 33-34.)[11] This Panel finds that the actions of Officer Kennett in this case were

[11] Furthermore, a similar statute in North Carolina G.S. § 20-16.2(a) reads in pertinent part, "that the testing procedures shall not be delayed for [the purpose of calling an attorney and to select a witness to

reasonable under the circumstances and met the "as soon as practicable" statutory standard of § 12-7-20.

Furthermore, it is unquestionable that the General Assembly enacted the statutes pertaining to drunk driving with the "goal of reducing 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, 305-306, 259 A.2d 671, 673 (R.I. 1969). Section 12-7-20 speaks directly to individuals who have "been detained for an alleged violation of the law relating to drunk driving. . . ." Therefore, "[t]o accomplish th[e] objective [of the General Assembly in enacting § 12-7-20] the state seeks to remove from the highway drivers who in drinking become a menace to themselves and to the public." State v. Locke, 418 A.2d 843, 850 (R.I. 1980); see also Campbell v. Superior Court, 106 Ariz. 542, 546, 479 P.2d 685, 689 (1971). "As we have said so many times in the past, we do not believe that the legislature intends to exercise its legislative power to reach an irrational result." DiSalvo, 106 R.I. at 306. "Neither does this court, nor do we believe the legislature, expect the [law enforcement] officers of this state" to neglect to take care of individuals injured in motor vehicle accidents only to ensure that an alleged drunk driver is allowed a phone call within one hour from the time of detention. Id. After subsequent accidents take place at the exact location of the motor vehicle stop, "it would be the height of folly" to require the police officers to abandon the scene only to rush to the police station to afford the arrestee a telephone call. Id.

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view the procedure for] a period of time of over thirty (30) minutes from the time the accused person is notified of these rights." See White v. Tippett, 187 N.C.App. 285, 290-91 (N.C. 2007) (finding that "[o]nly where a petitioner intends to exercise her rights to call an attorney and expresses those rights clearly to the officer does the thirty-minute grace period apply). At present, Officer Kennett was concerned with Appellee's safety at the scene of the subsequent accidents, and this was the reason behind his mission to bring Appellee to the hospital for testing. (Tr. at 33.) Although the phone call took place after the lapse of the one hour time limit, the testing procedures were also further delayed to allow Appellee to contact an attorney.

The members of this Panel are satisfied that if we simply applied the *per se* rule of § 12-7-20, not only would the goal of the legislature be frustrated, but the result of such an application would be absurd. Instead of accomplishing the objective of the General Assembly by removing inebriated drivers from the highway, we would be allowing these drinking drivers to continue to risk harming themselves and others. See Bush v. Bright, 264 Cal.App.2d 788, 71 Cal.Rptr.123 (Another reason why the police may acquiesce in the refusal of a motorist to take a chemical test is the undoubted legislative aim to avoid the violence which might ensue from all attempts to give a forced breathalyzer test to an obstinate inebriate).

As such, the members of this Panel are satisfied that the trial judge's decision to dismiss the charged violation of § 31-27-2.1 was an error of law in light of our determination that § 12-7-20 only requires that the defendant be afforded a reasonable opportunity to make a confidential phone call but its own language and intent allows for exigent circumstances to satisfy the requirement. The members of this Panel are satisfied that Officer Kennett provided Appellee with his confidential phone call as soon as was reasonably practicable, which only exceeded the one hour time limit due to exigent circumstances outside of anyone's control. The events surrounding the delay of the phone call were reasonable in light of the totality of the circumstances.

Additionally, the trial judge did not find misconduct on the part of Officer Kennett. Therefore, the purpose of deterring police misconduct in withholding the right of the arrestee to contact an attorney was not at issue in this case. Furthermore, Appellee was granted a reasonable amount of time to contact an attorney prior to refusing to submit to the chemical test.

II

Misprint of § 12-7-20

After hearing this case on appeal, the members of this Panel reserved judgment. While conducting legal research to write this decision, this Panel noted an inconsistency in terms on the printed copy of § 12-7-20, which varied from the original enrolled bill[12] signed by the presiding officers of the General Assembly and the Governor of the State of Rhode Island, and deposited with the proper officer in the State House. This issue was researched. The error proved not only important to this case, but also rendered the Appellee's appeal moot.

The printed copy of § 12-7-20 reads in pertinent part,

> ". . . whenever a person who has been detained for an alleged violation of the law relating to drunk driving must be immediately transported to a medical facility for treatment, he or she shall be afforded the use of a telephone as soon as practicable, which may not exceed one hour from the time of detention." (Emphasis added.)

The members of this Panel decided to go back in time to seek guidance from any legislative history of the statute. Although the members of this Panel were mindful that such legislative history is not controlling in our jurisdiction, such history can be helpful in attempting to ascertain why such an established time limit was implemented.

Upon reading the original public law chapter 91-242, the clause "which may not exceed one hour from the time of detention," does not appear in the original enrolled

[12] An enrolled bill is that which "purports to have passed both houses of the legislature in appropriate form and which has been signed by the presiding officers of the two houses." 1 Sutherland Statutory Construction § 15:1 (2009).

act.[13] Instead, the public law signed by the controlling officers of the legislature and the governor, reads: "which may exceed one hour from the time of detention." The incorrect inclusion of the word "not" changed the entire message of the public law. "[W]here there is a variance or repugnancy in terms between the printed copy of a statute and the original enrolled act signed by the presiding officers of the legislature, approved by the governor, and deposited with the proper officer, the original enrolled act controls." 73 Am. Jur. 2d Printed laws; conflict with enrolled acts § 41 (2001).

Section 12-7-20 of the General Laws in Chapter 12-7 entitled "Arrest" was amended by the General Assembly during the January Session of 1991. The floor amendment was introduced by Representatives Boyle and Lamb, by request, and was passed by that body to take effect on passage. The bill was ordered to be placed upon the Senate calendar, where on June 11, 1991, it was read and passed in concurrence, and subsequently approved and signed by Governor Sundlun on June 17, 1991. (See appendix 1). Therefore, the original public law 91-242 reading, "which may exceed one hour from the time of detention," controls in this case. "While the printed session laws are prima facie evidence of statutory law, they are 'not conclusive, but may be corrected by the original acts on file in the secretary's office. It is [appropriate] to go behind a printed statute, and show from the enrolled law that it is erroneously published.'" DiBella v. Cuccio, 15 Ill.2d 580, 583 (I.L. 1959) (quoting Spangler v. Jacoby, 14 Ill. 297, 299)); see also Johnson County Sports Authority v. Shanahan, 210 Kan. 253, 258 (K.S. 1972)

[13]"In most states[,] there are statutes which make it the duty of some state official to assemble and publish the enactments of the legislature after each legislative session or term. The resulting publications are generally known as session laws, and may be declared by statute to be 'official' publications, or to be 'evidence of the statute law of the state.' In any case of variance, between the published session laws and the enrolled bill, the terms of the latter [the enrolled bill] are given effect to override the 'evidentiary' effect of the 'officially' published session laws." 1 Sutherland Statutory Construction § 15:18 (2009).

(holding that the secretary of state in preparing the session laws after each session of the legislature is required to include for printing bills in their enrolled form without deletions or additions). "[T]he printed acts are presumed to be valid enactments." Charleston Nat. Bank v. Fox, 119 W.Va. 438, 194 S.E. 4, 7 (W.V. 1937). "But the strongest presumption is in favor of a bill that has been duly enrolled and bears thereon evidence of the executive's action in regard to it." Id.; see Anderson v. Bowen, 78 W.Va. 559; see also appendix 1. "If there is a variance between the printed acts and the enrolled bill, the enrolled bill controls." Charleston Nat. Bank, 119 W.Va. 438, 194 S.E. at 7.

Therefore, the language of § 12-7-20 reads "whenever a person who has been detained for an alleged violation of the law relating to drunk driving must be immediately transported to a medical facility for treatment, he or she shall be afforded the use of a telephone as soon as practicable, which may exceed one (1) hour from the time of detention." As such, Officer Kennett provided Appellee with a confidential phone call in compliance with the time limit set forth in § 12-7-20. After reviewing the entire record before us, the members of this Panel grant the State of Rhode Island's appeal and find the trial judge's decision to dismiss the charged violation was affected by error of law. Thus, the members of this Panel are satisfied that the appeal should be granted and the charged violation of § 31-27-2.1 must be sustained.

Conclusion

This Panel has reviewed the entire record before it. Having done so, the members of this Panel conclude that the trial judge's decision to dismiss the charged violation of § 31-27-2.1 was clearly erroneous in light of the reliable, probative and substantial record evidence and affected by error of law. Substantial rights of the State of Rhode Island have been prejudiced. Accordingly, the State's appeal is granted.

ENTERED:

State of Rhode Island and Providence Plantations
Office of the Secretary of State / State Archives Division
A. Ralph Mollis
Secretary of State

Annexed is a true copy of an original document held in the custody of the Rhode Island State Archives

C#00210 – Public Law 1991 Chapter 242

1991 H – 5962

An Act Relating to Criminal Procedure – Arrest

State Archives Division

Phone: 401-222-2353
Fax: 401-222-3199

reference@archives.state.ri.us

RI State Archives

Public Records Administration

State Records Center

Local Government Records Program

Administrative Records (Rules and Regulations)

337 Westminster Street
Providence, RI 02903

R. Gwenn Stearn
State Archivist &
Public Records Administrator

June 2, 2010

9 1 --

PD763

STATE OF RHODE ISLAND

IN GENERAL ASSEMBLY

JANUARY SESSION, A.D. 1991

AN ACT

RELATING TO CRIMINAL PROCEDURE -- ARREST

91-H 5962

Introduced By: Reps. Boyle and Lamb

Date Introduced: February 12, 1991

Referred To: Committee on Judiciary

It is enacted by the General Assembly as follows:

SECTION 1. Section 12-7-20 of the General Laws in Chapter 12-7 entitled "Arrest" is hereby amended to read as follows:

12-7-20. Right to use telephone for call to attorney -- Bail bondsman. -- Any person arrested under the provisions of this chapter shall be afforded, as soon after being detained as practicable, not to exceed one (1) hour from the time of detention, ~~and arrival at the law enforcement agency~~ the opportunity to make use of a telephone for the purpose of securing an attorney or arranging for bail; The telephone calls afforded by this section shall be carried out in such a manner as to provide confidentiality between the arrestee and the recipient of the call.

AS AMENDED floor amendment 5-14-91

SECTION 2. This act shall take effect upon passage.

AS AMENDED floor amendment 5-14-91

PD763

"provided, however, that whenever a person who has been detained for an alleged violation of the law relating to drunk driving must be immediately transported to a medical facility for treatment, he or she shall be afforded the use of a telephone as soon as practicable, which may exceed one (1) hour from the time of detention".

AS AMENDED

EXPLANATION

BY THE LEGISLATIVE COUNCIL

OF

AN ACT

RELATING TO CRIMINAL PROCEDURE -- ARREST

***

This act provides that an arrested person be afforded the opportunity to make a phone call within one hour from the time of detention and arrival at the law enforcement agency.

The act would take effect upon passage.

=====
PD763
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PUBLIC LAWS
CHAPTER

s. 91-242 H.

JT COMM. LEGISLATIVE SERVICES
LAW REVISION OFFICE

AN ACT

RELATING TO CRIMINAL PROCEDURE -- ARREST

AS AMENDED

Presented by

IN HOUSE OF REPRESENTATIVES
FEB 12 1991
REFERRED TO COMMITTEE ON
JUDICIARY
Clerk

IN HOUSE OF REPRESENTATIVES
MAR 22 1991
THE COMMITTEE ON JUDICIARY
RECOMMEND THE PASSAGE
91H5962 OF THE WITHIN BILL
91H5962
FOR THE COMMITTEE

IN HOUSE OF REPRESENTATIVES
APR 25 1991
Received and Ordered to be placed upon the
CALENDAR
Clerk

IN HOUSE OF REPRESENTATIVES
MAY 14 1991
READ AND PASSED
Clerk

AS AMENDED

IN THE SENATE MAY 15 1991
Read and referred to
the Committee on
JUDICIARY
Reading Clerk

IN SENATE JUN 06 1991
THE COMMITTEE ON JUDICIARY
RECOMMEND THE PASSAGE IN CONCURRENCE 91-H 5962 22
OF THE WITHIN BILL
FOR THE COMMITTEE

IN THE SENATE JUN 6 1991
Ordered to be
placed upon the
Calender.
Reading Clerk

IN THE SENATE JUN 11 1991
Read and PASSED
IN CONCURRENCE Reading Clerk

READ AND PASSED IN CONCURRENCE
TRANSMITTED TO THE GOVERNOR
JUN 12 1991
SECRETARY OF STATE

EXECUTIVE DEPARTMENT
Received JUN 12 1991
APPROVED
JUN 17 1991
GOVERNOR

A/N
55/0
5-14-91

FLOOR AMENDMENT

TO

(91-H 5962)

Mr. Speaker:

I hereby move to amend (91-H 5962) entitled "An Act relating to criminal procedure -- arrest" as follows:

1. On Page 1, lines 6 and 7, by deleting the words "and arrival at the law enforcement agency"; and

2. On Page 1, line 8, by adding immediately after the word "bail" a semi-colon (;) and the following language:

"provided, however, that whenever a person who has been detained for an alleged violation of the law relating to drunk driving must be immediately transported to a medical facility for treatment, he or she shall be afforded the use of a telephone as soon as practicable, which may exceed one (1) hour from the time of detention".

Respectfully submitted,

Christopher Boyle

CALENDAR

From the Calendar are taken:

(91-H 6450) (Substitute "A") An Act relating to property — landlord tenant.

(Committee on Judiciary recommends indefinite postponement of the original bill and passage of Substitute "A".)

Received and by unanimous consent, ordered to be placed at the foot of the Calendar for today.

(91-H 5888) (Substitute "A") An Act relating to health care — physician involvement in utilization review programs.

(Committee on Health, Education and Welfare recommends indefinite postponement of the original bill and passage of Substitute "A".)

Received and by unanimous consent, ordered to be placed on the Calendar for Thursday, May 16, 1991.

(91-H 6344) (Substitute "A") An Act relating to public officers and employees — code of ethics.

(Committee on Judiciary recommends indefinite postponement of the original bill and passage of Substitute "A".)

Received and by unanimous consent, ordered to be placed on the Calendar for Wednesday, May 15, 1991.

(91-H 5582) (Substitute "A") An Act relating to businesses and professions — Health clubs.

(Committee on Health, Education and Welfare recommends indefinite postponement of the original bill and passage of Substitute "A".)

Received and by unanimous consent, ordered to be placed at the foot of the Calendar for today.

(91-H 5662) (Substitute "A") An Act relating to food — safety by certification of food managers.

(Committee on Health, Education, and Welfare recommends indefinite postponement of the original bill and passage of Substitute "A".)

Received and by unanimous consent, ordered to be placed at the foot of the Calendar for today.

(91-H 5962) An Act relating to criminal procedure — arrest.

(Committee on Judiciary recommends passage)

Representative Brousseau, seconded by Representatives Lamb, Boyle, Lopes, Corkery and Langevin, moves passage of the act.

Representative Boyle, seconded by Representatives Lamb and Dumas, offers the following written motion to amend:

FLOOR AMENDMENT

TO

(91-H 5962)

Mr. Speaker:

I hereby move to amend (91-H 5962) entitled "An Act relating to criminal procedure — arrest" as follows:

1. On Page 1, lines 6 and 7, by deleting the words "and arrival at the law enforcement agency"; and

2. On page 1, line 8, by adding immediately after the word "bail" a semi-colon (;) and the following language:

"provided, however, that whenever a person who has been detailed for an alleged violation of the law relating to drunk driving must be immediately transported to a medical facility for treatment, he or she shall be afforded the use of a telephone as soon as practicable, which may exceed one (1) hour from the time of detention."

Respectfully submitted,

CHRISTOPHER BOYLE
Representative District 99

The motion to amend is read and prevails on a roll call vote, 55 members voting in the affirmative and 0 members voting in the negative as follows:

YEAS — 55: Representatives Alves, Anderson, S., Anzeveno, Barone, Burr, Batastini, Benson, Bianchini, Boyle, Brousseau, Burlingame, Caprio, Caruolo, Clements, Corkery, Dailey, DeLorenzo, Dodd, Driver, Dumas, Faria, Flaherty, Fogarty, Gaschen, Gould, Greene, Hodge, Kelley, Knowles, Kushner, Lafayette, Lamb, Langevin, Large, Lopes, Lowe, Marrapese, McCauley, Metts, Montanaro, Murphy, Pereira, Pires, Quick, Remington, Rossi, Salisbury, Santilli, Simonian, Teitz, Vanner, Walter, Wasylyk, Weygand, Zainyeh.

NAYS — 0.

Read and passed, as amended, on a roll call vote, 61 members voting in the affirmative and 0 members voting in the negative as follows:

YEAS — 61: The Honorable Speaker DeAngelis and Representatives Alves, Anderson, S., Anzeveno, Barone, Burr, Batastini, Benoit, Benson, Bianchini, Boyle, Brousseau, Burlingame, Campbell, Caprio, Caruolo, Clements, Corkery, Dailey, DeLorenzo, Dodd, Driver, Dumas, Faria, Flaherty, Fogarty, Gaschen, Gould, Greene, Hodge, Kelley, Knowles, Kushner, Lafayette, Lamb, Langevin, Large, Lopes, Lowe, Marrapese, McCauley, Metts, Montanaro, Murphy, Newsome, Pereira, Pires, Quick, Remington, Rossi, Salisbury, Santilli, Sherlock, Simonian, Smith, E., Teitz, Vanner, Walter, Wasylyk, Weygand, Zainyeh.

NAYS — 0.

(91-H 6529) (Substitute "A") An Act relating to weapons.

(Committee on Judiciary recommends indefinite postponement of the original bill and passage of Substitute "A".)

Received and by unanimous consent, ordered to be placed at the foot of the Calendar for today.

The Honorable Speaker announces the receipt of the following affidavit.

AFFIDAVIT

I, Brian J. Spero, State Representative, District 93, hereby under oath, depose and say:

1. I expect to be called upon, in my capacity as State Representative, to participate in the consideration of, and vote upon: (91-H 6024).

2. I have the following interest in the matter listed under paragraph 1, above:

Represent Blue Cross and Blue Shield of Rhode Island.

3. In compliance with Section 36-14-6(1) & (2)A of the General Laws, I hereby request the Speaker of the House of Representatives to excuse me from voting on or participating in the consideration of the matter described in paragraph 1, above.

BRIAN J. SPERO
Representative District 93

State of Rhode Island
County of Providence

Subscribed and sworn to before me this 15th day of May, A.D. 1991.

PAUL D. SANTILLI
Notary Public

Representative Spero is excused from voting on or participating in the consideration of the matter described in paragraph 1, above.

JOSEPH DeANGELIS
Speaker of the House
of Representatives

(91-H 6024) An Act relating to reserves of nonprofit and medical service corporations.

(Committee on Corporations recommends passage.)

Representative Weygand, seconded by Representatives Lamb, Boyle, Corkery and Lafayette, moves passage of the act.