STATE OF RHODE ISLAND AND PROVIDENCE PLANTATIONS

PROVIDENCE, S.C. RHODE ISLAND TRAFFIC TRIBUNAL

TOWN OF SOUTH KINGSTOWN :

v. : C.A. No. T11-0009

MARSHA ROONEY :

DECISION

PER CURIAM: Before this Panel on March 16, 2011—Magistrate DiSandro, (Chair, presiding), Judge Almeida, and Judge Parker sitting is—Marsha Rooney's (Appellant) appeal from a decision of Magistrate Noonan, sustaining the charged violation G.L. 1956 § 31-27-2.1, "Refusal to submit to a chemical test."[1] The Appellant was represented by counsel before this Panel. Jurisdiction is pursuant to § 31-41.1-8.

Facts and Travel

On December 22, 2010, Officer Jerome Gillen of the South Kingstown Police Department (Officer Gillen), initiated a traffic stop of Appellant's vehicle. After witnessing Appellant to be showing the signs of intoxication, the Trooper charged her with the aforementioned violation of the motor vehicle code. The Appellant contested the charges, and the matter proceeded to trial.

The trial began with Officer Gillen offering testimony describing his background in law enforcement and his familiarity with drunk driving related traffic stops. He noted specifically that he had conducted or assisted in a vast number of drunk driving stops and arrests since becoming a member of the South Kingstown Police Department in 2006.

[1] Appellant was also charged with and the trial magistrate sustained a charges under § 31-17-5 "Entering from private road or driveway." Appellant has limited his appeal solely to the refusal charge.

(Tr. at 6-10.) Turning to the events of December 22, 2010, the officer testified that he was on patrol near High Street in South Kingstown when he observed Appellant's vehicle enter the road way from the parking lot of a "private business on the right [side of the road]." (Tr. at 13.) According to the officer, Appellant's vehicle turned onto the street "without stopping[,] [forcing the officer to] slam on his brake[,]... at which point "[the officer] immediately put on [his] emergency lights. . . and [Appellant] pulled over immediately." Id.

After making contact with the Appellant, Officer Gillen testified that he "noticed a slight odor of [an] alcohol beverage coming from the vehicle, and as [he] spoke with her, [he] noticed it getting stronger." (Tr. at 15.) When asked if she had been drinking, the Appellant told the officer that "she did have a glass of wine with dinner." (Tr. at 16.) The officer also recalled that Appellant's speech was "a little mumbled." Based upon these observations, the Officer asked Appellant to perform a series of field sobriety tests. (Tr. at 18.) Appellant performed and failed the "walk and turn test," and then refused Officer Gillen's request to perform the "one legged stand" test. (Tr. at 23.) After Appellant had refused the field sobriety test, Officer Gillen testified that he placed her under arrest, read her the "Rights for Use at Scene," and transported her to the police station. (Tr. at 24-26.)

At the police station, Officer Gillen secured her belongings and proceeded to read Appellant the "Rights for Use at Station" card. (Tr. at 27.) The Appellant indicated that she understood those rights and chose to make a confidential phone call. (Tr. at 28.) After her phone call was completed, Appellant informed the officer that she was not going to submit to a chemical breath test. (Tr. at 29.) Officer Gillen went on to testify he

"was processed for the DUI, refusal and the issued citations. . . and released." Id. Lastly, the officer testified that he prepared a sworn report of those events immediately after Appellant was released. (Tr. at 30.)

Next, counsel for Appellant took an opportunity to cross examine Officer Gillen. Appellant's counsel began by questioning the officer as to why there were certain things missing from his sworn report. For instance, the report contained no mention as to whether or not Appellant had indicated that she understood her rights read to her at the scene or station. (Tr. at 33.) Nor was there any mention of the conditions of the road or that he inquired about the Appellant's medical condition prior to administering the field sobriety tests. (Tr. at 47, 57.) The officer admitted that "[he] could have been more clear on some things, and maybe put in the report things that [he] assumed would be okay[]. . . ." (Tr. at 32.)

Further during cross-examination, the officer testified that when the Appellant pulled onto the road from the private drive, the officer was traveling about 15-20 miles per hour, and that when he slammed on his brakes to avoid rear-ending the Appellant, his vehicle "skidded several feet." (Tr. at 39.) Officer Gillen also indicated that Appellant was compliant with his requests; she did not fumble to retrieve her license or registration information, and that overall, the Appellant had no "problem with her simple motor skill tasks." (Tr. at 42.) The Officer explained that although it was snowing on the night in question, the field sobriety test was conducted in an area that was "just wet and had not accumulated any snow[]. . . ." (Tr. at 45-46.) The Officer reiterated that on the walk and turn test he saw "five or six clues" indicating that the Appellant had failed. (Tr. at 48.)

Lastly on cross examination, Officer Gillen admitted that, due to the "seriousness of the charge on someone and the implications it can have, [he] was wrestling with the decision of whether or not to arrest [the Appellant]." (Tr. at 55.) In the end, the decision was made to arrest her for DUI from which the refusal charge stemmed.

At the conclusion of the testimony, the trial magistrate sustained the charge. He found the testimony of the officer to be credible and that all of the elements of § 31-27-2.1 had been met by the State. (Tr. at 65-66.) The trial magistrate held that "the notion that the things [not included] in the report didn't happen is completely fictitious." (Tr. at 67.) He sentenced Appellant accordingly.

Appellant appealed. On appeal, Appellant argues that the trial magistrate's decision to sustain the charge was clearly erroneous in light of the facts in the record. Specifically, Appellant maintains that the facts do not support the conclusion that the officer had reasonable grounds to believe that Appellant was operating under the influence. Appellant further argues that the trial magistrate's decision should be overturned because he failed to make a specific finding that Appellant did, in fact, refuse a chemical test pursuant to § 31-27-2.1.

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 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:

(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 Mut. 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 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 conclusions on appeal. See Janes, 586 A.2d at 537.

Analysis

As set forth in Link, our Supreme Court has made clear that this Panel, "lacks the authority to assess witness credibility or to substitute its judgments for that of the hearing magistrate concerning the weight of the evidence on questions of fact." Link, 633 A.2d at 1348 (citing Liberty Mut. Ins. Co. v. Janes, 586 A.2d 536, 537 (R.I. 1991)). As the members of this Panel did not have an opportunity to view the live trial testimony of Officer Gillen, we must give great deference to the trial magistrate's "impressions as

he... observe[d] [the Officer] [,] listened to [his] testimony [and]... determine[ed]... what to accept and what to disregard [,]... what... [to] believe[] and disbelieve[]." Envtl. Scientific Corp., 621 A.2d at 206. Thus, we will confine our review of the record to determine whether the trial magistrate's decision is supported by legally competent evidence and unaffected by error of law.

The Rhode Island Supreme Court has held that an administrative judge "shall sustain" a violation of § 32-27-2.1 when the law enforcement officer making the sworn report "had reasonable grounds to believe that the arrested person had been driving a motor vehicle within this state while under the influence of intoxicating liquor . . . ." State v. Bruno, 709 A.2d 1048, 1050 (R.I. 1998). "Under the language of the statute, it is clear that reasonable suspicion is the proper standard for evaluating the lawfulness of a stop." State v. Jenkins, 673 A.2d 1094, 1097 (R.I. 1996). In Jenkins, our Supreme Court observed that reasonable suspicion must be "based upon specific and articulable facts" from which reasonable inferences could be drawn. Id. Some of those "specific and articulable facts" include: erratic movement of the motor vehicle, Jenkins, 673 A.2d at 1097; detection by the officer of an odor of alcohol on the motorist's breath, Bruno, 709 A.2d at 1050 (R.I. 1998); an admission by the motorist that he or she has been drinking; id.; poor performance by the motorist on field sobriety tests, id., exhibition by the motorist of bloodshot eyes, State v. Perry, 731 A.2d 720, 721 (R.I. 1999).

Our review of the record indicates that there was ample evidence before the trial magistrate to conclude that reasonable grounds existed for the law enforcement officer to believe that Appellant was operating under the influence. Officer Gillen testified that Appellant operated her vehicle "erratically," in darting out in front of his police cruiser

on a snowy night in late December. Also, on more than one occasion, Officer Gillen noted that he detected alcohol emanating from Appellant's breath. He also recalled that Appellant's eyes were glossy in appearance and that Appellant had informed him that she had, in fact, consumed alcohol that evening. Lastly, although Appellant refused to complete the "walk and turn" test, Officer Gillen testifies that she failed a field sobriety test known to law enforcement as the "one legged stand test." Based upon that uncontested testimony, and the trial magistrate's determination that Officer Gillen was a highly credible witness, this Panel finds that the trial magistrate's findings were not clearly erroneous

Appellant also argues that the decision of the trial magistrate should be reversed because he failed to make a specific finding of fact that the Appellant actually refused a chemical breath test. Despite no direct language on point, this Panel finds "legally competent evidence and reasonable inferences that may be drawn therefrom to support the [trial magistrate's determination]. Elias-Clavet v. Board of Review A.3d No. 09-152 slip op. at 4 (R.I., March 22, 2011). In articulating his findings of fact, the trial magistrate, indicated the he found the testimony of Officer Gillen credible. He specifically indicated that Appellant was placed in custody and was read the "Rights for Use at Station" form. She indicated, by signature, she was exercising her right to refuse the test. In his decision, the trial magistrate adopted, in entirety, the officer's testimony.

In sum, this Panel finds the trial magistrate "assessed the veracity of the witnesses, drew reasonable inferences from the evidence. . . discussed [his] findings and theory of the case to some length, and categorically rejected [the arguments of the Appellant]." Notarantonio v. Notarantonio, 941 A.2d 138, 148 (R.I. 2008). Despite no

direct finding of fact from the trial magistrate that Appellant refused to submit to a breath test, "[this Panel] is satisfied that [his] findings are sufficient to support [his] legal conclusions. . . ." Id.

Conclusion

Having reviewed the entire record before it, this Panel is satisfied that the trial magistrate's decision sustaining the charged violation of § 31-27-2.1 was not affected by error of law, clearly erroneous based on the reliable, probative, and substantial record evidence, characterized by abuse of discretion, or in violation of constitutional provisions. Finding that substantial rights of Appellant have not been prejudiced, we hereby deny her appeal and sustain the violation charged against her.

ENTERED:

DATE: 4-19-11