

STATE OF RHODE ISLAND AND PROVIDENCE PLANTATIONS

CRANSTON, RITT

RHODE ISLAND TRAFFIC TRIBUNAL

TOWN OF WARWICK

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v.

C.A. No. T12-0019  
07203000514

LESLIE HALEY

STATE OF RHODE ISLAND  
TRAFFIC TRIBUNAL  
FILED  
13 APR - 8 AM 8:25

DECISION

PER CURIAM: Before this Panel on May 23, 2012—Magistrate Noonan (Chair, presiding), Chief Magistrate Guglietta, and Magistrate Goulart sitting—is Leslie Haley’s (Appellant) appeal from a decision of Magistrate DiSandro (trial magistrate), sustaining the charged violation of G.L. 1956 § 31-27-2.1, “Refusal to submit to chemical test.” Appellant was represented by counsel before this Panel. Jurisdiction is pursuant to § 31-41.1-8.

Facts and Travel

The facts of this case are recounted in a previous Appeals Panel decision in Town of Warwick v. Leslie Haley, T09-0040 (filed June 9, 2010) and a Sixth Division District Court decision in Leslie Haley v. State of Rhode Island, A.A. 10-132 (filed February 18, 2011). The Panel will only recite the facts relevant to this appeal.

On April 22, 2007, Officer Theodore Bulis (Officer Bulis) of the Warwick Police Department cited the Appellant for the aforementioned violation. Appellant contested the charge, and the matter proceeded to trial.

At trial, Officer Bulis stated that he observed the Appellant driving erratically on Main Avenue. Officer Bulis stopped the Appellant and conducted several field sobriety tests, which the Appellant failed. Then, Officer Bulis placed the Appellant under arrest and called for a

preliminary breath test machine to be brought to the scene of the traffic stop. Sergeant Connors responded with the preliminary breath test and administered it to Appellant. Appellant was then transported to the Warwick Police station. At the station, Officer Bulis asked the Appellant to submit to another chemical test; however, Appellant refused this test. Appellant was cited for violating § 31-27-2.1 because she refused this second chemical test. At the trial, Appellant was found guilty of the violation. Appellant timely filed an appeal.

On appeal, Appellant argued that the trial magistrate committed error of law in finding the Appellant guilty of the violation. Appellant argued that since she consented to the preliminary breath test, then Appellant could not be found guilty of refusing the second chemical test at the police station. The Appeals Panel, in a written decision, rejected this argument. The Appeals Panel held that the trial magistrate did not commit an error of law because the Appellant refused the chemical test at the police station. Aggrieved by this decision, Appellant filed an appeal to the Sixth Division District Court.

The appeal was heard by Magistrate Ippolito. In his written decision, Magistrate Ippolito remanded the matter back to this Court because the first Appeals Panel decision did not address the issue of whether a preliminary breath test given after a motorist has been arrested satisfies the statutory requirement that a motorist consent to a chemical test under § 31-27-2.1. It was Magistrate Ippolito's contention that it needed to be determined whether a preliminary breath test meets the definition of a chemical test as defined by § 31-27-2.1, which is a test based on infrared light absorption. If the preliminary breath test was, in fact, a chemical test under § 31-27-2.1, then the citation should be dismissed; however, if the preliminary breath test was not a test, then the citation should be sustained. With these principles enunciated, the matter was remanded to the trial magistrate for his consideration.

On remand, the State presented additional evidence—mainly the testimony of Al Giusti, the supervisor of the Forensic Breath Analysis Unit for the Rhode Island Department of Health. (Remand Tr. at 19.) Mr. Giusti oversees the “certification and re-certification of operators, instruments, all paperwork pursuant to that, trainings, educational seminars, conferences for law enforcement police academies.” (Remand Tr. at 19-20.) Mr. Giusti is responsible for performing inspections, certifications, and re-certifications of Breathalyzer machines and operators of Breathalyzers. (Remand Tr. at 21.)

Mr. Giusti stated that he is familiar and trained in the operation of the preliminary breath test. (Remand Tr. at 29.) Mr. Giusti described the preliminary breath test machine as a small hand-held unit that is issued to law enforcement agencies within the State by himself and the Department of Health. Id. Mr. Giusti then acknowledged that officers could purchase these machines directly from the manufacturer, but if the machine was being used for law enforcement purposes, then the machine used was the one given to each police department by the Department of Health. (Remand Tr. at 30.)

Mr. Giusti stated that all preliminary breath tests possessed by the police in Rhode Island were the same make and model. This model operated on fuel-cell technology, and not infrared light absorption like the Breathalyzer machines used at the police stations. (Remand Tr. at 33.) In fact, the preliminary breath tests operate solely on fuel-cell technology. (Remand Tr. at 34.) Mr. Giusti stated that the preliminary breath test used on Appellant did not operate on infrared light technology, but rather fuel cell technology. (Remand Tr. at 40.)

On cross-examination, Mr. Giusti stated that he did not have direct knowledge of which preliminary breath test machine was used the night of Appellant’s arrest. (Remand Tr. at 49.) However, Mr. Giusti stated that he was unaware of any preliminary breath that operated on

infrared light absorption. (Remand Tr. at 48.) Finally, the trial magistrate accepted Mr. Giusti's as an expert witness and the matter under advisement for decision. (Remand Tr. at 59.)

Two weeks later, the parties reconvened for the trial magistrate's decision. The trial magistrate recounted the aforementioned facts. The trial magistrate found Mr. Giusti's testimony to be "credible, convincing and clear, irrespective of Defense Counsel's attempts to impeach him." (Decision Tr. at 16.) The trial magistrate then adopted Mr. Giusti's testimony, in full, as the trial magistrate's findings of fact. Id. The trial magistrate further concluded that the preliminary breath test administered to Appellant utilized fuel-cell technology. Id. As a result, the trial magistrate affirmed his previous decision, sustaining the violation, because the preliminary breath test given to the Appellant was not a chemical test within the meaning of § 31-27-2.1. Appellant timely filed this appeal.

### **Standard of Review**

Pursuant to G.L. 1956 § 31-41.1-8, the Appeals Panel of the Rhode Island Traffic Tribunal possesses appellate jurisdiction to review an order of a judge or magistrate of the Rhode Island Traffic Tribunal. Section 31-41.1-8(f) provides in pertinent part:

The appeals panel shall not substitute its judgment for that of the judge or magistrate as to the weight of the evidence on questions of fact. The appeals panel may affirm the decision of the judge or magistrate, or it may remand the case for further proceedings or reverse or modify the decision if the substantial rights of the appellant have been prejudicial because the judge's findings, inferences, conclusions or decisions are:

- (1) In violation of constitutional or statutory provisions;
- (2) In excess of the statutory authority of the judge or magistrate;
- (3) Made upon unlawful procedure;
- (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 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 [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 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 [or magistrate's] conclusions on appeal. See Janes, 586 A.2d at 537.

**Analysis**

On appeal, Appellant argues that the trial magistrate's decision to sustain the charge was not supported by the reliable, probative, and substantial evidence on the whole record.<sup>1</sup> Specifically, Appellant argues—as she did at trial—that she did not refuse a chemical test pursuant to the statute because she consented to the preliminary breath test. Appellant maintains that the State failed to present sufficient evidence that the preliminary breath test given to Appellant used fuel-cell technology and not infrared light absorption.

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<sup>1</sup> Appellant advanced several other arguments in her written submissions to this Panel; however, at oral argument, the Appellant waived these remaining contentions.

A motorist violates § 31-27-2.1 when the motorist, “while under arrest[,] refused to submit to the tests upon the request of a law enforcement officer. . . .” § 31-27-2.1 (emphasis added). Moreover, only one test for the presence of alcohol may be given to a motorist under arrest. See id. (“No more than two (2) complete tests, one for the presence of intoxicating liquor and one for the presence of toluene or any controlled substance, as defined in § 21-28-1.02(7), shall be administered. . . .”) A test for the presence of alcohol is one that “relies in whole or in part upon the principle of infrared light absorption. . . .” Id.

Here, Appellant was under arrest when Sergeant Connors administered the preliminary breath test. The sole issue before the trial magistrate was whether the preliminary breath test was a test as defined by the statute, which is a device that uses infrared light absorption. Mr. Giusti, who the trial magistrate found to be an expert, clearly stated that at the time of Appellant’s arrest all preliminary breath test devices issued to police departments in Rhode Island operated on fuel-cell technology. Moreover, Mr. Giusti stated that he was unaware of any preliminary breath test on the market that used infrared light absorption. While conceding that it is possible for a police officer to independently buy a preliminary breath test, Mr. Giusti concluded that the preliminary breath test used on Appellant operated on fuel-cell technology and not infrared light absorption. Mr. Giusti also acknowledged that he was not present at the time Appellant was administered the preliminary breath test.

Appellant argues that the trial magistrate impermissibly inferred that the test given was not an infrared light absorption test and not a test under the § 31-27-2.1. Appellant argues that the trial magistrate’s decision was based upon a pyramid of inferences. To support this position, Appellant directs this Panel to Waldman v. Shipyard Marina, Inc., 102 R.I. 366, 230 A.2d 841 (1967). In Waldman, our Supreme Court acknowledged that “[a] trier of fact may draw

reasonable inferences from established evidentiary facts that become facts upon which reliance may be placed in the fact-finding process.” 102 R.I. at 371, 230 A.2d at 844. However, the Waldman Court cautioned that a trier of fact may not establish an inference that is based upon another previously established inference. Id., 230 A.2d at 844; see also Industrial National Bank v. Dyer, 96 R.I. 39, 45, 188 A.2d 909, 913 (“[A] reasonable inference drawn from an established fact is itself an inferential fact which may be of probative force, it does not follow that such an inferential fact may then serve as the basis for a further inference that would likewise possess some probative force. A conclusion reached by drawing inferences from inferences is never considered as being probative of an ultimate fact under any proper concept of judicial proof.”). The Court dubbed this practice the pyramiding of inferences and deemed it impermissible for a trier of fact.

Appellant’s reliance on Waldman is misguided. The trial magistrate did not create a pyramid of inferences. At oral argument, Appellant’s counsel acknowledged that the only inference drawn by the trial magistrate was that Sergeant Connors used the department issued preliminary breath test. This Panel agrees. Mr. Giusti testified that he was employed with the Department of Health at the time the Appellant was administered the preliminary breath test. Mr. Giusti also acknowledged that the Department of Health had distributed all of the preliminary breath tests used by the police departments in Rhode Island. Then, Mr. Giusti stated that the preliminary breath tests distributed operated on fuel-cell technology and not infrared light absorption. In sustaining the charge, the trial magistrate found that Mr. Giusti’s testimony was credible, and the test administered to Appellant operated on fuel-cell technology, which does not constitute a test under § 31-27-2.1. The only inference drawn by the trial magistrate was that

Sergeant Connors used the preliminary breath test, which runs on fuel-cell technology, issued by the Department of Health to the Warwick Police Department.

This Panel holds that drawing this inference was reasonable, and therefore, had probative force as it related to the issue of whether Appellant refused a chemical test. The trial magistrate's inference was based upon established facts that went uncontradicted by Appellant. See Fox v. Personnel Appeal Bd. City of Cranston, our Supreme Court stated that "[i]t is well settled that a reasonable inference drawn from an established fact is in itself a fact upon which reliance may be placed by one exercising a fact-finding power." 99 R.I. 566, 570, 209 A.2d 447, 450 (1965). Mr. Giusti bolstered this reasonable inference when he stated that all preliminary breath tests operate on fuel-cell technology, and every department was instructed by the Department of Health to use the department issue preliminary breath tests exclusively. (Remand Tr. at 48-49.)

Therefore, in answering the question remanded to the Tribunal by Magistrate Ippolito, this Panel upholds the decision by the trial judge that the preliminary breath test administered to the Appellant was not one based on infrared light absorption and as a result, the citation shall be sustained and the Appellants appeal is denied.



### 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 supported by the reliable, probative, and substantial evidence on the whole record and not affected by other error of law. Substantial rights of Appellant have not been prejudiced. Accordingly, Appellant's appeal is denied, and the charged violation sustained.

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