STATE OF RHODE ISLAND AND PROVIDENCE PLANTATIONS

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

TOWN OF WEST WARWICK	:	
	:	
v.	:	**C.A. No. T09-0074**
	:	
DENNIS DECORPO	:	

DECISION

PER CURIAM: Before this Panel on September 16, 2009—Judge Almeida (Chair, presiding) and Magistrate Noonan and Magistrate Cruise, sitting—is Dennis Decorpo's (Appellant) appeal from Magistrate Goulart's decision, sustaining the charged violation of G.L. 1956 § 31-27-2.1, "Refusal to submit to chemical test." The Appellant was represented by counsel before this Panel. Jurisdiction is pursuant to § 31-41.1-8.

Facts and Travel

On May 8, 2009, Officer Shaun Lukowicz (Officer Lukowicz) of the West Warwick Police Department watched as Appellant's vehicle drove back and forth over the double yellow divider lines on Main Street in West Warwick. After observing Appellant fail the field sobriety tests, the Officer charged him with the aforementioned violation of the motor vehicle code. The Appellant contested the charge, and the matter proceeded to trial.

Officer Lukowicz began his trial testimony by describing his professional training and experience with respect to DUI-related traffic stops and the administration of standardized field sobriety tests. He has been a patrol officer with the West Warwick Police Department for two and one half years, following his graduation from the Rhode

Island Municipal Police Academy in March 2007. (Tr. at 6-8.) While at the Police Academy, the Officer became a certified breathalyzer operator and learned to administer field sobriety tests, including the horizontal gaze nystgamus (HGN), the walk-and-turn, and the one-leg stand test. (Tr. at 8-9.)

Then, focusing the Court's attention on the date in question, Officer Lukowicz testified that he was on uniformed patrol in a marked cruiser approaching the intersection of West Warwick Avenue and Main Street at approximately 2:15 AM. At that time, he observed a vehicle travel into the left lane and back into the right lane of travel. (Tr. at 11.) The Officer continued following the vehicle north on Main Street; at that time the lane turns into "a double yellow line that divides the southbound lane and the northbound lane." He watched the subject vehicle cross the double yellow line several times. (Tr. at 12-13.)

Officer Lukowicz testified that upon observing the vehicle cross the double yellow lines "approximately three times" before turning onto Legion Way, he activated his emergency lights and initiated a motor vehicle stop. (Tr. at 13, 80.) The Officer approached the vehicle and identified Appellant as the operator. (Tr. at 14.) When questioned as to his observations of Appellant, Officer Lukowicz testified that he observed Appellant's "eyes to be bloodshot and watery" and he had a "strong odor of an alcoholic beverage emanating from his breath." (Tr. at 15-16.)

After Appellant produced his license and registration, Officer Lukowicz asked Appellant to step out of his vehicle. The Officer watched as Appellant appeared unsteady as he exited the vehicle. (Tr. at 16.) Next, he asked if Appellant would submit to a series of field sobriety tests. After agreeing to perform the tests, Appellant informed the Officer

that he did not have any physical defects or impairments that would prevent him from performing the tests.[1] Officer Lukowicz then administered the field sobriety tests in accordance with his professional training and experience, ultimately concluding that Appellant had failed the one-leg stand and the walk-and-turn tests. Evidence of the result of the HGN was not offered by the prosecution. (Tr. at 18 – 27.)

Officer Lukowicz then placed Appellant under arrest and into the rear of his police cruiser. Once he secured the Appellant in the cruiser, the Officer read him the "Rights for Use at Scene" card and then transferred him to the West Warwick Police Station. (Tr. at 27-29.) At the station, Officer Lukowicz apprised Appellant of his "Rights for Use at Station," including Appellant's right to use a telephone within one hour of arrest. (Tr. at 29-31.)

According to Officer Lukowicz, Appellant indicated his understanding of the rights listed on the "Rights" form, as he availed himself of his right to make a phone call. (Tr. at 31.) During the time Appellant was utilizing the telephone, Officer Lukowicz was positioned outside the room where he was not able to see or hear Appellant. The Officer approximated that Appellant made two calls during the five to ten minutes that he was in the room. After making the calls, Appellant indicated to the Officer that he was not able to "get in touch with anyone." (Tr. at 32 - 33.)

After Appellant completed his confidential phone call, Officer Lukowicz requested that he submit to a chemical test of his breath. At this point, Appellant responded that he would like to speak to a lawyer. The Officer gave him an opportunity to "make another phone call to speak with or get in touch with a lawyer or anyone he

[1] Appellant testified that he told the Officer about his "lazy eye" prior to performing the HGN and other field sobriety tests. (Tr. at 111.)

wished to." (Tr. at 33.) Again, Officer Lukowicz left the room while Appellant made his phone calls. After about five minutes, the Officer came back to the room and again asked Appellant to submit to a chemical test. For the second time, Appellant replied that he wanted to speak with a lawyer before responding to the question. (Tr. at 34.) As a result, the Officer left the room and gave Appellant a third opportunity to make additional phone calls. After another five to ten minutes, the Officer returned to the room and asked Appellant to submit to a chemical test. (Tr. at 34-35.) Yet again, Appellant responded that he "would like to speak with a lawyer." (Tr. at 35.) At this point, Officer Lukowicz "took [this response] as a refusal" to submit to the chemical test. Id. The Officer expanded upon his explanation stating, ". . . again, after each time he wouldn't give me a yes or no, I indicated that he needed to give me a yes or a no, which he wouldn't, so I took it as he did not want to take the chemical test at my request." (Tr. at 73.)

During cross-examination by counsel for Appellant, Officer Lukowicz was asked to clarify the circumstances surrounding Appellant's confidential phone calls. According to the Officer, when it was time for Appellant to make his confidential phone call, he provided Appellant with a phone book and the police department phone before leaving the room. (Tr. at 69.) The Officer testified that he stood approximately five feet outside the room while Appellant made the phone calls, and Appellant stood about five to six feet from the door inside of the room. Therefore, according to the Officer there were about ten feet between him and Appellant, while Appellant was making his phone calls. (Tr. at 83.) Again, the Officer noted that he was at such a distance away from the doorway that he was not able to hear any of Appellant's conversations. Id. Officer Lukowicz estimated

that there was a period of twenty-two (22) minutes during which Appellant was making various phone calls. (Tr. at 85.)

The trial magistrate next heard testimony from Appellant. Appellant explained to the Court that on the date in question, he went to a bar in Coventry and then to a friend's house. On his way home from the friend's house, Appellant was text messaging Jessie Burnell (Ms. Burnell), while he was driving. Appellant produced his cell phone records to evidence the text messaging that was taking place between 2:09 AM and 3:35 AM on the date of the charged violation. (Tr. at 107.) Appellant admits that he regularly texts while he is operating his vehicle and that he "could probably drive better if [he was] not" text messaging. (Tr. at 109.)

Appellant testified that he informed the Officer that he has a lazy eye that "points inward a little bit" prior to performing the field sobriety tests. (Tr. at 111.) Appellant asserted that he properly completed the HGN and walk-and-turn tests but during the one-leg stand test he "put [his foot] down a couple of times." (Tr. at 115.) Appellant testified that after the Officer read him the "Rights for Use at Station" form, he was placed in a room and given his own cell phone, the department phone, and a telephone book to conduct confidential phone calls. (Tr. at 117.)

Appellant focused his testimony on the circumstances surrounding his telephone calls, by referencing his cell phone records, and noting that he called a number of friends to give him a ride home from the police station but did not get in touch with any of them until 3:02 AM when he spoke with Ms. Burnell. (Tr. at 121 – 123.) Appellant testified that the Officer "was in the room standing at the doorway" while he was making his calls. (Tr. at 123-124.) After speaking with Ms. Burnell, Appellant continued to make phone

calls to a friend who lived close by the police station and to a lawyer's office. No one answered the telephone. (Tr. at 26.)

Next, Appellant explained that Officer Lukowicz came into the room where he was making phone calls and asked if he would submit to a chemical test. After responding that he was trying "to secure legal representation," the Officer left the room and allowed him to continue making calls. (Tr. at 129.) The Officer returned five minutes later and again asked him to take the chemical test. Appellant responded that he was "still trying to secure legal representation." Id. According to Appellant, the Officer told him that he had given him enough time to conduct confidential phone calls; thus he was going to issue Appellant a ticket for refusing to submit to a chemical test. (Tr. at 130.) Appellant testified that he understood the ramifications of being charged with a refusal. (Tr. at 132.)

During cross-examination, Appellant noted that he had, in fact, been drinking on the night in question. (Tr. at 133.) Additionally, Appellant admitted that he made about eight phone calls before attempting to contact an attorney. (Tr. at 143.) Upon questioning by the prosecution, Appellant confirmed that after Office Lukowicz left the room for the third time to give him a chance to "secure legal representation;" instead of calling a lawyer, Appellant called a friend. (Tr. at 146.)

Subsequently, the Court heard from Ms. Burnell, a witness for Appellant. Appellant called Ms. Burnell on the date of the charged violation from the West Warwick Police Station. Ms. Burnell testified that she did not believe Appellant was at the station when he called her, so Appellant "handed the phone over to the arresting officer" to convince her as to his location. (Tr. at 150.) Ms. Burnell heard Appellant say to the

Officer, "she doesn't believe I'm here" and then the Officer picked up the phone identifying himself as "Lieutenant Lukowicz." (Tr. at 151.)[2]

Following the trial, the magistrate did not issue a decision from the bench to afford himself the opportunity to listen to portions of the testimony again. On June 30, 2009, the trial magistrate sustained the charged violation of § 31-27-2.1 finding that Officer Lukowicz, at the time he made the arrest, had reasonable grounds to believe that Appellant was under the influence of alcohol. The trial magistrate was satisfied by clear and convincing evidence that Appellant was informed of his rights and the penalties that would be imposed if he refused to take the chemical test. (Dec. Tr. at 15-16.)

As to the issue of confidentiality in regard to Appellant's phone calls, the trial magistrate found that Appellant was not prejudiced by any lack of confidentiality because Officer Lukowicz was not in the same room as Appellant when the phone calls took place. The Officer made it clear during his testimony that he could not hear Appellant during any of these phone calls. (Dec. Tr. at 10.) Additionally, Appellant had at least twenty (20) minutes to contact and speak with an attorney about whether or not he should refuse to take the chemical test. Appellant was asked three separate times by Officer Lukowicz to submit to the test, and each time Appellant indicated that he wanted to speak to an attorney before making his decision. (Dec. Tr. at 18-21.) The trial magistrate found that Appellant refused to take the chemical test because at a certain point Appellant's refusal to answer and his subsequent actions were properly deemed a refusal by Officer Lukowicz. (Dec. Tr. at 22.)

[2] It was noted that at the time of this phone call, on the date of the charged violation, Office Lukowicz had not achieved the rank of Lieutenant.

The trial magistrate sustained the charged violation of § 31-27-2.1. It is from this decision that Appellant now appeals. Forthwith is this Panel's decision.

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:
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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, Appellant argues that the civil refusal statute must be read in conjunction with § 12-7-20, a statute that safeguards the right of those arrested for a *criminal* offense to make use of a telephone for the purpose of securing confidential legal advice. It is Appellant's contention that the telephone call afforded by § 12-7-20 must be carried out in absolute privacy so as to protect confidential communications between the arrestee and the attorney-recipient. When the confidentiality of the attorney-client communication is compromised, Appellant asserts that it is impossible for the arrestee to make an informed decision as to whether to submit to a chemical test. Appellant argues that dismissal of the charged violation of § 31-27-2.1 is the appropriate remedy when the police fail to scrupulously observe the confidentiality requirement of § 12-7-20.

Although the State does not dispute the applicability of § 12-7-20 in the context of civil refusal cases, it disagrees with Appellant's proposed remedy. The State argues that this Panel's disposition of Appellant's appeal is governed by our Supreme Court's decisions in State v. Carcieri, 730 A.2d 11, 15 (R.I. 1999), and State v. Veltri, 764 A.2d 163, 167 (R.I. 2001) and their subsequent application within the cases of Town of Warren v. Quatrucci, C.A. No. T08-0057 (R.I. Traffic Trib.) (filed September 8, 2009) and Town of Warren v. Dolan, C.A. No. T08-0075 (R.I. Traffic Trib.) (filed September 9, 2009). Based on the holdings of the enumerated cases, the State posits that the mere presence of Officer Lukowicz outside the room where Appellant used the phone was not a violation

of § 12-7-20. As such, the State maintains that the trial magistrate's decision to sustain Appellant's conviction for violating § 31-27-2.1 was not affected by error of law and should be upheld.

Additionally, Appellant argues that the trial magistrate's postponing of the decision of the trial and failing to deliver the decision until June 30, 2009 violates § 31-27-2.1. Section 31-27-2.1(c) reads in pertinent part: ". . . [a]ction by the judge must be taken within seven (7) days after the hearing, or it shall be presumed that the judge has refused to issue his or her order of suspension." Appellant contends that the trial concluded on June 10, 2009 and the trial magistrate did not issue his decision until June 30, 2009, which was more than seven days after the hearing. According to Appellant, the charged violation and the suspension order should be dismissed due to the delay of the trial magistrate in direct violation of the statutory language set forth in § 31-27-2.1.

I
Confidential Telephone Call

A
"Confidentiality" Defined

Section 12-7-20 provides that "[t]he 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."[3] However, the language of the statute does not define the

[3] Section 12-7-20 reads, in pertinent part:

> Any person arrested . . . shall be afforded, as soon after being detained as practicable, not to exceed one hour from the time of detention, the opportunity to make sue 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

"confidentiality" that must be afforded to arrested persons, and the parties have attached divergent meanings to the term. Therefore, at the outset, this Panel must determine whether the statutory term "confidentiality" is clear and unambiguous or, as the parties seem to indicate, open to multiple interpretations. Based on well-settled principles of statutory construction, if the language employed by the General Assembly in drafting § 12-7-20 is clear and unambiguous on its face, this Panel must give the term "confidentiality" its plain and ordinary meaning. See Gilbane Co. v. Poulas, 576 A.2d 1195 (R.I. 1990).

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 "confidentiality" to mean "[s]ecrecy[,] [or] the state of having the dissemination of certain information restricted." Black's Law Dictionary 318 (8th Ed. 2004). As it applies to protected relationships—including the relationship between an attorney and his or her client—the term means a relationship characterized by "the trust that is placed in the one by the other." Id. Although § 12-7-20 speaks only of "confidentiality," the definition of "confidential" is instructive. Black's defines "confidential" to mean information "meant to be kept secret," or, as it applies to relationships, one that has as its centerpiece "trust and a willingness to confide in the other." Id.

Based on the foregoing, this Panel is as satisfied now as it was in Quatrucci and Dolan,[4] that the language utilized in § 12-7-20 does not require statutory construction as

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a manner as to provide confidentiality between the arrestee and the recipient of the call.

[4] Town of Warren v. Quatrucci, C.A. No. T08-0057 (R.I. Traffic Trib.) (filed September 8, 2009) (Once the decision has been made by the motorist to make a phone call, the confidentiality provisions of § 12-7-20 become fully operative and the police have an affirmative obligation to leave the booking room and to discontinue all audio surveillance for the duration of the confidential call.); Town of Warren v. Dolan, C.A. No. T08-0075 (R.I. Traffic Trib.) (filed September 9, 2009) (The arrestee can expressly or impliedly waive

it is clear and unambiguous on its face. Quatrucci, C.A. No. T08-0057 at 6-8; Dolan, C.A. No. T08-0075 at 8-9. In the context of the "right to use [a] telephone for [a] call to [an] attorney," the term "confidentiality" can only be interpreted to mean a call made in privacy so as to ensure that the information communicated by the arrested person to his or her attorney is not widely disseminated to third parties, including law enforcement.

Based on the plain and ordinary meaning of "confidentiality" and "confidential" supplied by Black's Law Dictionary, the flaws in the Appellant's conception of "confidentiality" become apparent. Appellant's telephone calls attempting to contact an attorney and multiple friends were all made in the privacy of a room provided to him by the police department. The law enforcement officer was outside the door of the room and out of earshot range because he stood approximately 10 feet away from Appellant during the phone calls.[5] (Tr. at 79.) The Officer was at such a distance away from the doorway, that even though the door was not shut, he was not able to hear any of Appellant's conversations. (Tr. at 83.) The members of this Panel are satisfied that there is reliable, probative and substantial evidence in the record to evidence that Appellant's phone calls were made in privacy in accordance with the definition of "confidentiality."

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his or her right to a make confidential phone call pursuant to § 12-7-20; thus the refusal charge was sustained despite the fact that the Officer was present during the phone call. However, the Panel made clear that once the decision has been made to make a phone call, the confidentiality provisions of § 12-7-20 become fully operative, and the police have an affirmative obligation to leave the room, and discontinue all audio surveillance for the duration of the call.).

[5] This Panel also notes that § 12-7-20 requires that the person arrested be afforded the opportunity to contact an attorney, but also contemplates the confidentiality of such a call to a "recipient" who may not be an attorney. While we are mindful that the privileged conversation between an attorney and his or her client may require greater confidentiality than a conversation with a non-attorney recipient, the statute is silent on any distinction to be made.

II
Construction of Section 12-7-20

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)). If we conclude as the Panel did in both Quatrucci and Dolan that the language of § 12-7-20 "is plain and unambiguous and expresses a single, definite, and sensible meaning, that meaning [will be] presumed to be the Legislature's intended meaning and the statute [will be] interpreted literally." Rhode Island Chamber of Commerce v. Hackett, 122 R.I. 686, 411 A.2d 300 (1980). In such a case, "there is no room for statutory construction or extension." O'Neil v. Code Com'n for Occupational Safety and Health, 534 A.2d 606, 608 (1987). 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)).

As the Panel set forth in Dolan and Quatrucci, the statute before us does not require a search for the discernment of legislative intent as we believe the language is clear and unambiguous. Dolan, C.A. No. T08-0075 at 10; Quatrucci, C.A. No. T08-0057

at 8-9. Considering § 12-7-20 as a whole, this Panel is satisfied that the statute, when reduced to its essentials, has at its core a single purpose: "to allow for a meaningful exchange between the arrestee and his or her attorney or recipient." Dolan, C.A. No. T08-0075 at 10. It is well settled that every word, sentence or provision of the statute is presumptively intended for some useful purpose and has some force and effect consistent with the General Assembly's intent. Providence Journal Co. v. Mason, 116 R.I. 614, 359 A.2d 682 (1976). The intent of the General Assembly is to foster an "environment of openness and honesty in which arrestees can speak freely to an attorney or recipient of the call, in confidence, about the important, time-sensitive, and oftentimes life-altering decisions that confront them following an arrest." Dolan, C.A. No. T08-0075 at 11.

Further, the statute's specific use of the term "confidentiality" in describing the telephone call between the arrestee and the attorney-recipient can have only one meaning: "the arrestee should have an objectively reasonable expectation that the conversation is not being overheard or recorded by the police." Dolan, C.A. No. T08-0075 at 11. In this case, Officer Lukowicz did not overhear Appellant's calls because he was positioned outside the room with ten feet between himself and Appellant, nor did he make a record of any of the conversations. (Tr. at 69, 79.) As the attorney-client relationship is built upon a foundation of mutual trust and a willingness to confide sensitive information, we conclude that the General Assembly's intention to promote full and open discussion of the facts and strategies surrounding individual legal matters can be realized only when the arrestee's phone call is made in privacy. Id. As the trial magistrate pointed out and this Panel agrees, Office Lukowicz could have shut the door to the room to avoid the opportunity for the arrestee to question the confidentiality of the calls. However, the

Officer's location out of earshot range did not violate the privacy afforded to Appellant pursuant to § 12-7-20.

As previously established in both Dolan and Quatrucci, broadly construing § 12-7-20 to apply to civil chemical test refusal cases is not only reasonable, logical, consistent with common sense, and "in furtherance of the simple and convenient administration of justice" in refusal cases, Thrift v. Thrift, 75 A. 484, 485 (1910), but is also consistent with the well-established principle of statutory construction that statutes relating to the same or similar subject matter should be construed such that they will harmonize with each other and be consistent with their general objective scope. See Blanchette v. Stone, 591 A.2d 785 (R.I. 1996). Even though §§ 12-7-20 and 31-27-2.1 "contain no reference to each other and [we]re passed at different times," Kaya v. Partington, 681 A.2d 256, 261 (R.I. 1996), the linkage between the statutes is clear: § 31-27-2.1, undoubtedly a civil statute, has as its object the "arrested person"—the same "arrestee" that is entitled to a confidential phone call to the attorney of his or her choosing in the criminal context under § 12-7-20. Simply put, Appellant was charged with violating § 31-27-2.1 and he qualifies as an "arrested" person pursuant to § 31-27-2.1(B). Thus, this Panel concludes that § 12-7-20 is entitled to a generous construction that reaches civil refusal cases under § 31-27-2.1, as this result is consistent with § 12-7-20's reformative mission. See generally Hogar Agua y Vida en el Desierto, Inc. v. Suarez-Medina, 36 F.3d 177 (1st Cir. 1994).[6]

[6] Based on our holding in this case that the right to a confidential phone call attaches in civil chemical test refusal cases, the members of this Panel can envision a situation in which a person arrested on suspicion of driving while under the influence of intoxicating liquor would assume that the "Rights" forms in general, and their mention of the arrestee's right to a confidential phone call in particular, confer upon the arrestee a right to the advice of counsel prior to deciding whether to submit to a chemical test—an impression that is at odds with the bright-line rule announced by our Supreme Court in Dunn v. Petit, 120 R.I. 486, 490, 388 A.2d 809, 811 (1978), that "no constitutional right to counsel adheres at the moment of decision as to

C
Applicability of Carcieri and Veltri to Refusal Cases

Even though this Panel has concluded that the right to a confidential phone call established by § 12-7-20 is applicable in the context of civil refusal cases under § 31-27-2.1, we must consider the scope of the right in refusal cases. The relevant inquiry in the refusal case is whether the arrestee, here the Appellant, when fully apprised of the rights that attach in both the civil and criminal contexts, had a meaningful opportunity to exercise those rights at the appropriate juncture. We look for guidance to our Supreme

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whether or not to submit to [a] [chemical] test." While the members of this Panel are mindful that the "Rights" forms are not models of clarity, we believe that their language easily can be reconciled with the holding and reasoning of Dunn.

When an individual is placed under arrest on suspicion of DUI, he or she may be subject to both civil and criminal proceedings and penalties. For example, the arrestee may be charged criminally under § 31-27-2 for "driving under the influence of liquor" and separately charged under the civil chemical test refusal statute, § 31-27-2.1. Since the arresting officer is unsure at the time of arrest how the arrestee will ultimately be charged, the officer must necessarily advise the arrestee of the rights that attach in both civil and criminal proceedings. The ubiquitous "Rights for Use at Scene" and "Rights for Use at Station" forms were specifically designed with this dual purpose in mind, advising the arrestee of his or her Sixth Amendment right to "the assistance of counsel at all 'critical stages' of the [criminal] prosecution," State v. Oliveira, 961 A.2d 299, 308-309 (R.I. 2008) (citing Iowa v. Tovar, 541 U.S. 77, 80-81, 124 S.Ct. 1379 (2004)), as well as his or her right to a confidential phone call pursuant to § 12-7-20.

The right of an arrested person to place a phone call to an attorney of his or her choosing within one hour of arrest—a right that is specifically enumerated on the "Rights" forms—differs from the right to counsel discussed in Dunn in three important respects: it is not of constitutional origin, applies equally to both civil and criminal cases, and is far narrower in scope. Unlike the sweeping Sixth Amendment right to counsel, the narrowly-tailored statutory right of an arrestee to a confidential phone call exists only within one hour of arrest, and is exercised when the arrestee makes a phone call; it is not necessary that the arrestee actually make contact with an attorney. Section 12-7-20 affords an arrestee—including an arrestee facing the decision of whether or not to submit to a chemical test—with an opportunity to make limited use of a telephone for the purpose of obtaining confidential legal advice; it does not guarantee that such advice will be forthcoming. Simply put, § 12-7-20 allows the arrestee to pick up a phone; it does not guarantee that an attorney will be on the receiving end to take the call and provide timely, helpful legal advice.

The relevant inquiry in the refusal case is not whether the arrestee, when confronted with the decision of whether to submit to a chemical test, was aware that the right that he or she possesses is the narrow statutory right to place a confidential phone call to an attorney and not the more sweeping constitutional right to have the assistance of counsel at all "critical stages" of the criminal DUI investigation. Rather, the relevant inquiry is whether the arrestee, when fully apprised of the rights that attach in both the civil and criminal contexts, had a meaningful opportunity to exercise those rights at the appropriate juncture.

Court's rulings on the issue of the confidential phone call in the criminal context, State v. Carcieri, 730 A.2d 11, 15 (R.I. 1999), and State v. Veltri, 764 A.2d 163, 167 (R.I. 2001).

In Carcieri, our Supreme Court concluded that § 12-7-20 requires that a defendant must be given a "reasonable opportunity" to make a confidential phone call following his or her arrest. Carcieri, 730 A.2d at 15. Although the Court did not define the term "reasonable opportunity" with any degree of precision, the Court indicated that § 12-7-20 is not violated "by the mere presence of the police officer during a telephone conversation . . . that [is] at best . . . one-sided." Id. All that § 12-7-20 requires is that the arrestee be afforded "a telephone call free of charge on an unrecorded line, provided that the call is for the purpose of securing an attorney . . . ." Id. (Internal quotations omitted.) In this case, the Appellant was afforded eight to ten free telephone calls on his own cell phone and the department phone, both of which are unrecorded phone lines.

The Carcieri Court went on to state that "a suspect must be informed of his or her right to a confidential telephone call," and that this notice requirement, while not contained on the face of § 12-7-20, is nonetheless "mandatory." Id. at 15. The Court was satisfied that the "Rights for Use at Station Form"—universally employed by police agencies throughout the State of Rhode Island—provided arrestees with adequate notice of their rights under § 12-7-20.[7] Id. at 16. During the trial, Appellant testified that Officer Lukowicz read him the "Rights for Use at Station" form, thus he was properly informed of his right to a confidential phone call. (Tr. at 117.) This Panel is satisfied that there is reliable, probative and substantial evidence on the record to establish that the Officer

[7] This Panel proceeds on the assumption that the "Rights for Use at Station" form adequately advises arrestees of their right to make a *confidential* phone call, despite the fact that the form does not expressly provide for confidentiality. See State v. Carcieri, 730 A.2d 11, 16 (R.I. 1999).

allowed Appellant ample opportunity to conduct numerous confidential telephone calls in accordance with § 12-7-20.

When an individual is faced with the decision of whether or not to submit to a chemical test, the initial phone call to an attorney is highly significant because many times the motorist is seeking advice as to whether to submit to the test. The prejudice to be suffered is the inability of the motorist to receive confidential advice and make an informed decision about whether to submit to the test. In the present case, Appellant was not able to speak to an attorney prior to Officer Lukowicz's deeming he had refused to take the chemical test. This was not a result of Appellant's inability to receive confidential advice due to police officer action or inaction in violation of § 12-7-20, but rather because Appellant's attempts at contacting an attorney failed when he or she did not answer the telephone. On three separate occasions, for a period of at least twenty minutes, Appellant utilized the phone in an attempt to receive legal advice and to phone friends. (Tr. at 143-146.) Appellant was not able to procure legal advice prior to refusing the chemical test; however this was not due to police presence, but only because the attorney he phoned did not answer.

Section 12-7-20 does not place the burden on arrestees to choose whether or not to speak with an attorney in confidence; rather, the statute places an affirmative duty on law enforcement to provide a confidential phone call within one hour of arrest. Officer Lukowicz not only provided a confidential phone call, he allowed Appellant eight to ten calls. (Tr. at 143.) Appellant spent more of his "telephone call time" contacting his friends then he did attempting to procure legal advice. (Tr. at 143-146.) Actual attorney

contact may have occurred if Appellant had more appropriately used his time.[8] The members of this Panel agree that the level of prejudice necessary to injure the confidentiality of Appellant's phone calls was not established by the facts of this case to warrant dismissal of the charged violation.

Here, there is reliable, probative, and substantial evidence on the record evidencing that Appellant exercised his right to a confidential phone call. We make clear that we are not confronted with a situation in which Officer Lukowicz, having been informed of Appellant's intention to make a confidential phone call in accordance with § 12-7-20, did not leave the room and was able to hear Appellant's phone conversations. On the facts of this case, dismissal of the refusal charge is not warranted. Therefore, this Panel concludes that the decision of the trial magistrate to sustain the charged violation must be upheld.

II

Postponing of the Trial Court Decision

Next, Appellant argues that the trial magistrate's postponing of the delivery of the trial decision until June 30, 2009 violates § 31-27-2.1. Section 31-27-2.1(c) reads in pertinent part: ". . . [a]ction by the judge must be taken within seven (7) days after the hearing, or it shall be presumed that the judge has refused to issue his or her order of suspension." Appellant contends that the trial concluded on June 10, 2009 and the trial magistrate did not issue his decision until June 30, 2009, which was more than seven days after the hearing. Before this Panel, Appellant argues that the language set forth in §

[8] This Panel recognizes that exigent circumstances may make it difficult, if not impossible, to provide the arrestee with a phone call within the statutorily prescribed one-hour period. Accordingly, this Panel agrees with the Carcieri Court that " each alleged violation of § 12-7-20 must be considered on a case-by-case basis. . . ." State v. Carcieri, 730 A.2d 11, 16 (R.I. 1999).

31-27-2.1(c) specifically refers to the penalties of fines, community service, and attendance at driving school that would only apply after a full hearing. Additionally, counsel for Appellant contends that this provision applies not only to preliminary decisions but also to the issuing of trial decisions. According to Appellant, the charged violation should be dismissed because the delay in the issuing of the decision was in direct violation of the statutory language set forth in § 31-27-2.1(c).

This Panel disagrees. Pursuant to the 'raise-or-waive' rule articulated by our Supreme Court, "[i]t is axiomatic that 'this court will not consider an issue raised for the first time on appeal that was not properly presented before the trial court.'" Pollard v. Acer Group, 870 A.2d 429 (R.I. 2005) (quoting State v. Gatone, 698 A.2d 230, 242 (R.I. 1997)).[9] "The importance of the 'raise or waive' rule is not to be undervalued. Not only does the rule serve judicial economy by encouraging resolution of issues at the trial level, it also promotes fairer and more efficient trial proceedings by providing opposing counsel with an opportunity to respond appropriately to claims raised." State v. Burke, 522 A.2d 725 (R.I. 1987); see 3 LaFave & Israel, Criminal Procedure § 26.5(c) at 251 (1984).

In the present case, the Appellant's argument regarding the postponing of the decision beyond the seven days was not properly raised during the trial. The magistrate asked counsel for Appellant, which of two dates would fit into his schedule for the rendering of the decision. At this point, counsel did not raise the issue that the proffered dates set forth by the trial magistrate were more than seven days after the hearing, thus

[9] See also Chase v. Bouchard, 671 A.2d 794, 795 (R.I. 1996) ("One of our most settled doctrines in this jurisdiction is that a matter not raised before the trial court may not be raised for the first time on appeal."); Ferland Corp. v. Bouchard, 626 A.2d 210, 217 (R.I. 1993) ("It is a well-settled rule of appellate practice that matters not brought to the attention of the trial justice may not be raised for the first time in this court on appeal."); Bouchard v. Clark, 581 A.2d 715, 716 (R.I. 1990) ("It is well established rule of law in Rhode Island that this court will not consider an issue raised for the first time on appeal that was not properly presented before the trial court.")

violating § 31-27-2.1(c). In fact, counsel for Appellant agreed to the date of June 30, stating on the record, "[w]ell June 30th I have a trial scheduled, but I certainly don't have to attend that until, say, like, 11:00, so I can come here." (Tr. at 169 - 170.)

Additionally, our Supreme Court has articulated three specific situations in which the appellate court will review questions concerning basic constitutional rights, notwithstanding a defendant's failure to raise the issue at trial: the error complained of must consist of more than harmless error; the record must be sufficient to permit a determination of the issue; counsel's failure to raise the issue at trial must be due to the fact that the issue is based upon a novel rule of law of which counsel could not reasonably have known at the time of trial." Burke, 522 A.2d at 731; see State v. McGehearty, 121 R.I. 55, 62, 394 A.2d 1348, 1352 (1978); see also Reed v. Ross, 468 U.S. 1, 104 S.Ct. 2901 (1984) and State v. Amado, 433 A.2d 233 (R.I. 1981). Since there is nothing especially "novel" about this error—in fact, it falls within the ambit of a harmless error—the members of this Panel agree that this case may not invoke the narrow exceptional circumstances to the 'raise-or-waive' rule.

The members of this Panel follow the general proposition articulated by our Supreme Court "that no issues may be raised on appeal unless such issues were presented to the trial court in such a posture as to alert the trial justice to the question being raised." Pollard, 870 A.2d at 433 (quoting Joseph R. Weisberger, Rhode Island Appellate Practice, Rule 16.5 at 89 (1993)). The members of this Panel are satisfied that counsel for Appellant waived the argument that the postponing of the trial decision from June 10, 2009 to June 30, 2009 violates § 31-27-2.1 by not properly raising the issue during trial.

Importantly, in addition to the 'raise-or-waive' rule, Appellant's argument fails pursuant to § 8-6-2, which states in pertinent part that "[t]he chief magistrate of the traffic tribunal shall have the power to make rules for regulating practice, procedure and business in the traffic tribunal. Such rules, when effective, shall supersede any statutory regulation in conflict therewith." Pursuant to § 8-6-2, the Rhode Island Traffic Tribunal Rules supercede § 31-27-2.1(c). Therefore, in accordance with Rule 25 of the Traffic Tribunal Rules of Procedure,[10] the trial magistrate, for cause shown, enlarged the period within which he would issue his decision. Additionally, under Rule 18 of the Traffic Tribunal Rules of Procedure,[11] the trial magistrate, upon his decision to sustain the charged violation, imposed Appellant's sentence within a reasonable time period. This Panel is satisfied that the trial magistrate's rendering of his decision on June 30, 2009 was a reasonable and justifiable delay, agreed on by counsel for Appellant, in that the trial magistrate wished to review the recording prior to making his decision. This Panel, pursuant to Rule 25, Rule 18, and the 'raise-or-waive' rule, concludes that Appellant's appeal is denied and the decision of the trial magistrate to sustain the charged violation is upheld.

[10] Rule 25 of the Traffic Tribunal Rules of Procedure states in pertinent part, "[w]hen . . . an act is required or allowed to be done at or within a specified time, the court for cause shown may at any time in its discretion with or without motion or notice, order the period enlarged if request therefore is made before the expiration of the period originally prescribed. . . ."

[11] Rule 18 of the Traffic Tribunal Rules of Procedure states in pertinent part, "[u]pon plea or verdict of guilty, sentence shall be imposed without unreasonable delay."

Conclusion

This Panel has reviewed the entire record before it. Having done so, the members of this Panel conclude that the trial magistrate's decision to sustain the charged violation of § 31-27-2.1 was clearly not erroneous in light of the reliable, probative, and substantial record evidence or otherwise affected by error of law. Substantial rights of Appellant have not been prejudiced. Accordingly, Appellant's appeal is denied, and the charged violation is sustained.