Refusal Cases: Beyond the Basics

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For the successful prosecution and defense of refusal cases, prosecutors and defense attorneys need to move beyond basic case components and to consider recent decisions.

Recent cases significantly impact the prosecution and defense of refusal to submit to a chemical test case before the Rhode Island Traffic Tribunal (RITT). In every refusal case, the State must prove, by clear and convincing evidence, four key elements to sustain a refusal charge, these are that:

1. The law enforcement officer who submitted the sworn report to the RITT had reasonable grounds to believe the defendant had been driving a vehicle within the State while under the influence of intoxicating liquor or drugs;
2. The defendant, while under a lawful arrest, refused to submit to a chemical test upon the request of the law enforcement officer;
3. The defendant had been informed of his or her rights in accordance with R.I. Gen. Laws 31-27-3;
4. The defendant had been informed of the penalties incurred as a result of non-compliance with R.I. Gen. Laws 31-27-2.1.[1]

The recent decisions of the RITT at trial level, the Appeals Panel, and the 6th Division District Court address the four above-referenced elements. For the successful prosecution and defense of refusal cases, prosecutors and defense attorneys need to move beyond the basic case components and to consider these recent decisions.

I. Rule 27(a) Dismissal by Municipal Prosecutors

In **State v. Healy**,[2] the State appealed the trial judge's decision dismissing the refusal charge pursuant to Rule 27(a) of the Rules of Procedure of the Traffic Tribunal. The town's prosecutor, as part of a plea disposition agreement before the District Court, signed a Rule 27(a) Dismissal by Prosecution form for submission to the RITT. As grounds for its appeal, the State argued, "that only the Attorney General may dismiss a charged violation of § 31-27-2.1, as the Attorney General is the only official with the statutory authority to prosecute refusal cases."[3] The Appeals Panel, in upholding the trial judge's decision and denying the State's appeal, held that, "[w]hile this Panel fully acknowledges the inherent tension between the Attorney General's prosecutorial role under § 42-9-4 and the role of cities and towns contemplated by Rule 27(a), we nevertheless conclude that Rule 27(a) controls our disposition of the State's appeal."[4]

II. Refusal Statute Requires Compliance with R.I. Gen. Laws 31-27-3

In **State v. Soulliere**,[5] the arresting officer began to administer the field sobriety tests at the scene, but the suspect became uncooperative. The suspect was then arrested on suspicion of driving under the influence of alcohol and transported to the Burrillville Police Department. The arresting officer testified, "that 'about halfway back to the station, [he] realized that [he] did not read [Appellant] his rights for use at scene.'... Before the Officer took Appellant out of the cruiser and into the police station, he read Appellant his rights from a card entitled 'Rights for Use at Scene.'"[6] Upon reviewing the requirements of R.I. Gen. Laws 31-27-3, that a person be immediately informed of their rights, the Appeals Panel held that, "time was 'unreasonably [and] unnecessarily wasted'"[7] and the Appeals Panel overturned the trial magistrate's decision sustaining the refusal charge.

Two older Appeals Panel cases also addressing the requirements of R.I. Gen. Laws 31-27-3 are **State v. Ciccione** and **State v. Joyce**.[9] In **Joyce**, the Appeals Panel held that the refusal statute, "requires compliance with section 31-27-3. To satisfy the requirements of section 31-27-3, the actual Rights for Use at the Scene Card must be admitted into evidence unless the police officer is capable of reciting the language of the Rights for Use at the Scene Card from memory."[10] The Appeals Panel went on to hold, "a bare assertion without introducing the Rights for Use at the Scene Card into evidence does not comply with the statutory mandates required by sections 31-27-2.1 and 31-27-3."[11]

In **Ciccione**, the Appeals Panel held that, "[t]he magistrate noted that the officers were obligated to arrest and immediately Mirandize appellee at the scene in accordance with

§ 31-27-3 if they had probable cause to believe he was driving under the influence."[12]

In **Huntley v. State**,[13] as a result of a tragic automobile accident, the appellant was charged and subsequently convicted of driving under the influence – death resulting and refusal to submit to a chemical test. His conviction for refusal to submit to a chemical test was affirmed by the RITT Appeals Panel and the District Court. As the District Court Magistrate noted "the investigation which led to his being charged...with the civil offense of refusal did not follow the customary course. For instance, he was never asked to submit to field sobriety tests and he was never read the standard 'Rights for Use at the Scene.'"[14]

The District Court Magistrate made the following findings regarding the three issues the appellant raised on appeal. First, the arresting officer had reasonable grounds to believe that the appellant was operating under the influence, as required by R.I. Gen. Laws 31-27-2.1, based on "his admission that he had been driving, together with his presence at the scene of the accident in a bloodied condition."[15] The Court further held that the arresting officer had reasonable grounds to believe the appellant had been driving under the influence of intoxicating liquor despite the absence of field sobriety tests.[16] The Court also held that the arresting officer did not violate the requirements of 31-27-3 (the right to an independent physical examination) when he failed to read the appellant his Rights for Use at the Scene.[17] Finally, the Court held that the arresting officer had not failed to arrest the appellant prior to requesting him to submit to a chemical test.[18]

III. Extraterritorial Arrest Results in Refusal Case Dismissal

In **Jamestown v. White**,[19] the Appeals Panel upheld the trial magistrate's decision to dismiss the refusal charge and the refusal to submit to a preliminary breath test charge based on the non-emergency arrest of the appellee outside of the arresting officer's territorial jurisdiction despite the existence of a mutual aid agreement. In this case, a Jamestown police officer travelling westbound on Rt. 138 observed the appellee's vehicle approaching him from behind at a high rate of speed. The arresting officer, "observed the following while both vehi-

cles were located within the territorial jurisdiction of Jamestown: the suspect vehicle, traveling at a speed in excess of the posted speed limit, drift[ing] over the center dividing line on one occasion and over the fog line on two occasions. Officer Sullivan waited until his cruiser and the speeding vehicle had reached the North Kingstown side of the Jamestown Bridge before activating his cruiser's emergency lights and attempting to initiate a traffic stop."[20] In upholding the trial magistrate's decision, the Appeals Panel stated, "that there are only two recognized exceptions to the bright-line rule established by **Page** and its progeny: the so-called 'hot pursuit' exception and the 'emergency police power' exception."[21] The Appeals Panel found that neither exception existed in the case at bar.

A recent Massachusetts Appeals Court decision in **Commonwealth v. Limone**,[22] also addresses the issue of an unlawful extraterritorial arrest in the context of a drunk driving case and supports the Appeals Panel's holding in **White**. In **Limone**, the Massachusetts Appeals Court reversed the defendant's conviction for a fourth or subsequent drunk driving offense and held that "[a] police officer's power to make a warrantless arrest is generally limited to the boundaries of the jurisdiction in which the officer is employed, and, absent fresh pursuit for an arrestable offense, a police officer is generally without authority to make an arrest outside of his jurisdiction. Outside his jurisdictional boundaries, a police officer stands as a private citizen, and, if not in fresh and continued pursuit of a suspect, an arrest by him is valid only if a private citizen would be justified in making the arrest under the same circumstances. In this case, the defendant was suspected only of a misdemeanor motor vehicle offense. It was subsequent investigation that disclosed the defendant had been convicted on at least six prior occasions of operating while under the influence of liquor. Thus, the seizure of the defendant was unlawful. The remedy for such an unlawful stop and arrest is exclusion of the evidence under the 'fruit of the poisonous tree doctrine.' In this case, since the only evidence would have not been obtained but for the unlawful stop and subsequent arrest, the judgments are reversed, the verdicts are set aside, and judgments are to enter for the defendant."[23] (citations omitted)

IV. Sworn Reports

In **Cohen v. RITT**,[24] the District Court Judge reversed the decision of the RITT Appeals Panel, which previously reversed the trial magistrate's decision dismissing the refusal charge. The District Court Judge, in reversing the Appeals Panel's decision, stated "the evidence in the instant case goes beyond the facts and holding of **Link** regarding the introduction of the sworn report (or defects contained therein): there is no evidence that officer Geoghegan ever produced a report or if such a report was prepared on the date in question or whether that report was properly sworn before a notary. While the court in **Link** held that the technicalities of the report are not an element of the 'hearing' case, it insisted that each of the elements of the 'hearing' case must be proven, one of these is that the 'officer making the sworn report' had reasonable grounds to believe the operator had been driving under the influence. See Section 31-27-2.1(c)(1) and **Link**, *supra*, 633 A.2d at 1349. Because this element was not proven, the motorist's conviction must be set aside. To overlook this omission would completely distil the plain language of Section 31-27-2.1. Accordingly, the decision of the Traffic Tribunal is hereby REVERSED."[25]

V. Discovery Violation Results in Refusal Charge Dismissal

In **Warwick v. Cianci**,[26] the District Court Judge reversed the decision of the Appeals Panel which had upheld the trial magistrate's decision sustaining the refusal charge. The District Court Judge stated "[t]he gravamen of the case is whether the Prosecution, (Police department and Attorney Generals department) acted in bad faith by not affording the appellant her basic rights as a citizen. Also, did this 19 month delay in discovery cause substantial and prejudice prior to and during her trial."[27] In reviewing the history of the case, the District Court Judge determined that the day after the appellant's arrest, her attorney "forwarded a written discovery request to the Warwick Police Department that closely tracked the language of Rule 11 of the Traffic Tribunal Rules of Procedure (Rule 11). After a month had elapsed and without a response, counsel forwarded a second, more explicit discovery request to the headquarters of the Warwick Police..."[28] Eventually, when the Warwick Police Department would not produce the potentially exculpatory evidence, the appellant's counsel filed a motion to compel which was granted by the RITT Trial Magistrate. The District Court Judge held "[i]t is abundantly clear from the record before this Panel that counsel for Appellant did everything that he was required to do pursuant to Rule 11 of the Traffic Tribunal Rules of Procedure to obtain the videotape evidence in possession, custody, and control of the Warwick Police Department. As such, the trial magistrate erred in denying Appellant's dismissal motion on the grounds that counsel should have taken the additional – and completely unwarranted – step of subpoenaing the Warwick Police Department to produce the videotape pursuant to Rule 12."[29] As a result, the decision of the Appeals Panel was reversed.

VI. Silence is Not Golden and Constitutes Refusal

In **North Providence v. Exarchos**,[30] the police asked the motorist to submit to the chemical test and the motorist refused to answer. The police made the request a few times and each time the motorist was

silent. At trial, the magistrate ruled "I don't think it, [the] [refusal] needs to be verbal. I think his actions certainly indicated to this officer that he's refusing a test."[31] The Appeals Panel agreed holding the "silence [w]as a constructive, or conditional refusal, which we have held to have the same legal effect of an actual refusal."[32]

VII. Questioning By Court

In **State v. DiPrete**,[33] the police stopped the motorist based on information from dispatch regarding a possible hit and run accident. A witness to the accident called dispatch and relayed information (make, model, license plate number and location of the vehicle) to the police, including the motorist might be intoxicated. The officer never observed the motorist commit any traffic violations before stopping the vehicle. The motorist was never charged in connection with the accident, but he was charged with DUI and Refusal. At trial, the magistrate asked questions of the officer including detailed information he received from dispatch and why the motorist was stopped. On appeal, the motorist alleged the Trial Magistrate violated the Rules of Evidence, and there was a lack of evidence regarding his alleged impairment. The Appeals Panel held "that Magistrate Goulart's questions clarified previous testimony and is wholly consistent with Rule 614 and the proposals enumerated in **Nelson**."[34] With regards to the reasonableness of the stop, the Appeals Panel looked at the totality of the circumstances known to the officer at the time of the stop. The Panel determined the stop was reasonable because the witness observed the accident and continued to follow the vehicle while talking to dispatch, the officer verified/corroborated aspects of the tip before stopping the motorist's vehicle and the informant was trustworthy by providing a statement to police.[35]

VIII. Confidential Telephone Calls (R.I. Gen. Laws 12-7-20)

In **State v. Quattrucci**,[36] Judge McLoughlin affirmed the decision of the Appeals Panel which upheld the decision of Magistrate DiSandro to dismiss the Refusal charge based on the lack of a confidential telephone call. When asked by the Warren Police if he wanted to make a confidential telephone call, the motorist responded that he "didn't care" and made several phone calls in the presence of the officer. The presence of the officer violated his rights pursuant to R.I. Gen. Laws 12-7-20.[37]

However since **Quattrucci**, there seems to be a shift in the motorist's right to a confidential telephone call pursuant to R.I. Gen. Laws 12-7-20 in the context of refusal cases as demonstrated in the following three cases.

In **DeCorpo v. State**,[38] the Refusal charge was sustained despite the presence of the police during the motorist's telephone call. On appeal to the 6th Division District Court, Magistrate Ippolito held "the right to a confidential telephone call found in § 12-7-20 does *not* apply to those charged with civil violation – 'Refusal to Submit to a Chemical Test.'"[39] (emphasis added). He reasoned that proof the defendant was not afforded a confidential telephone call is not an element of the Refusal statute (31-27-2.1) that must be proven by clear and convincing evidence.[40] In addition, 12-7-20 is part of the criminal procedure/arrest statute which does not include civil violations.[41] Its purpose is to provide a phone call to arrange

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SOLACE

Helping Bar Members in Times of Need

SOLACE, an acronym for Support of Lawyers, All Concern Encouraged, is a new Rhode Island Bar Association program allowing Bar members to reach out, in a meaningful and compassionate way, to their colleagues. SOLACE communications are through voluntary participation in an email-based network through which Bar members may ask for help, or volunteer to assist others, with medical or other matters.

Issues addressed through SOLACE may range from a need for information about, and assistance with, major medical problems, to recovery from an office fire and from the need for temporary professional space, to help for an out-of-state family member.

The program is quite simple, but the effects are significant. Bar members notify the Bar Association when they need help, or learn of another Bar member with a need, or if they have something to share or donate. Requests for, or offers of, help are screened and then directed through the SOLACE volunteer email network where members may then respond. On a related note, members using SOLACE may request, and be assured of, anonymity for any requests for, or offers of, help.

To sign-up for SOLACE, please go to the Bar's website at **www.ribar.com**, login to the **Members Only** section, scroll down the menu, click on the **SOLACE Program Sign-Up**, and follow the prompts. Signing up includes your name and email address on the Bar's SOLACE network. As our network grows, there will be increased opportunities to help and be helped by your colleagues. And, the SOLACE email list also keeps you informed of what Rhode Island Bar Association members are doing for each other in times of need. These communications provide a reminder that if you have a need, help is only an email away.

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for bail and secure an attorney. Bail is a non-issue in a civil violation, and, although motorists are permitted to retain counsel, the "Supreme Court ha[d] ruled that a drunk driving arrestee has no right to consult with an attorney prior to deciding whether to take or refuse a chemical test."[42] The Rhode Island Supreme Court has stated that "misdemeanor and civil alcohol charges are separate and distinct offenses"[43] although they arise out of factually interrelated events. Finally, Magistrate Ippolito stated that even if the motorist could show prejudice due to a lack of a confidential telephone call, the remedy of dismissing the Refusal charge is inappropriate.[44]

A follow-up to the **DeCorpo** case were Magistrate Ippolito's holdings in **Nicholas v. State**[45] and **Eldridge v. State**.[46]

IX. Timeliness of Telephone Calls

In **North Kingstown v. Beiber**,[47] the Appeals Panel analyzed the confidential telephone statute, R.I. Gen. Laws 12-7-20. In this case, the motorist was arrested and, while still at the scene, two different vehicles collided with the police cruiser. As a result, the motorist was transported to the hospital for evaluation. At the hospital, he was given the opportunity to make a confidential telephone call pursuant to R.I. Gen. Laws 12-7-20. However, he made the telephone call three hours after his arrest. The Trial Magistrate dismissed the Refusal charge, holding that "prejudice" resulted for the motorist because he was not given a confidential phone call within one (1) hour of his detention.[48] The Appeals Panel in overturning the Trial Judge's decision reasoned that the purpose of a confidential telephone call is "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."[49] The motorist was given the chance to make a telephone call as soon as possible given the circumstances and the purpose of R.I. Gen. Laws 12-7-20 was fulfilled. Furthermore, 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."[50] The Appeals Panel held "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."[51]

X. Effect of Preliminary Breath Test (PBT) After Arrest

In **Haley v. State**,[52] the motorist was arrested, placed in a police cruiser and read her Rights for Use at the Scene. The officer requested, and the motorist submitted to, a PBT. At the station, the motorist refused to submit to a chemical test.[53] The motorist argued that her submission to the PBT precluded her from being charged with Refusal because she never "refused" to submit to a chemical test. Both the Trial Magistrate and Appeals Panel found the motorist guilty of Refusal. On appeal to the 6th Division District Court, Magistrate Ippolito found the fact that the motorist was arrested *prior* to the administration of the PBT test crucial. This case is unusual because the police did not follow the usual procedure of administering the PBT test prior to arresting the motorist. He held that the motorist agreed to the PBT after she had been arrested and, therefore, she fulfilled "her obligation under the implied-consent law" and "she had no duty to agree to further chemical tests at the station."[54] His reasoning was based on the definition of a chemical test under the Refusal statute and that the PBT could be a defined as a chemical test if the PBT is based on the 'principle of infrared light absorption.'[55] Since there was no evidence on the record regarding the scientific basis of the PBT, the case was remanded back to the Appeals Panel on that issue alone.

XI. Conclusion

These recent decisions of the trial level of the RITT, the Appeals Panel, and the 6th Division District Court address the fundamental elements of refusal cases. Hopefully, the decisions in these cases will provide guidance to prosecutors and defense attorneys involved in the prosecution and defense of these challenging cases.[56]

ENDNOTES

1 *R.I. Gen. Laws 31-27-2.1.*

2 ***State v. Healy**, T08-0110 (RITT Appeals Panel 1/20/09).*

3 *Id. at 3.*

4 *Id. at 5.*

5 ***State v. Soulliere**, T08-0045 (RITT Appeals Panel 11/5/08).*

6 *Id. at 2.*
7 *Id. 5.*
8 ***State v. Ciccione,*** *T02-0076 (RITT Appeals Panel 10/10/02).*
9 ***State v. Joyce,*** *T05-0158 (RITT Appeals Panel 1/31/06).*
10 *Id. at 14.*
11 *Id.*
12 *Ciccione 6.*
13 ***Huntley v. State of Rhode Island,*** *A.A. 10-0157 (6th Division District Court 3/17/11).*
14 *Id. at 1-2.*
15 *Id. at 11-12.*
16 *Id. at 13-14.*
17 *Id. at 14-15.*
18 *Id. at 21.*
19 ***Jamestown v. White,*** *T08-0141 (RITT Appeals Panel 2/19/09).*
20 *Id. at 1-2.*
21 *Id. at 5.*
22 ***Commonwealth v. Limone,*** *09-P-252 (Massachusetts Appeals Court 6/22/10).*
23 *Id. at 2.*
24 ***Cohen v. RITT,*** *A.A. 09-00084 (6th Division District Court 11/19/09).*
25 *Id. 4.*
26 ***Warwick v. Cianci,*** *A.A. 09-202 (6th Division District Court 6/9/10).*
27 *Id. 3.*
28 *Id.*
29 *Id. 4-5.*
30 ***North Providence v. Exarchos,*** *T09-0119 (RITT Appeals Panel 10/13/10).*
31 *Id. at 4.*
32 *Id. at 8-9.*
33 ***State v. DiPrete,*** *T09-0072 (RITT Appeals Panel 8/31/10).*
34 *Id. at 8.*
35 *Id. at 11-12.*
36 ***State v. Quattrucci,*** *A.A. 09-153 (6th Division District Court 1/26/10).*
37 *Id. at 3-4.*
38 ***DeCorpo v. State of Rhode Island,*** *A.A. 10-0052 (6th Division District Court 2/22/11).*
39 *Id. at 9.*
40 *Id. at 10.*
41 *Id. at 11.*
42 *Id.*
43 *Id. at 12.*
44 *Id. at 15-16.*
45 ***Nicholas v. State of Rhode Island,*** *A.A. 10-0208 (6th Division District Court 4/4/11).*
46 ***Eldridge v. State of Rhode Island,*** *A.A. 10-0221 (6th Division District Court 4/14/11).*
47 ***North Kingstown v. Beiber,*** *T08-0098 (RITT Appeals Panel 6/4/10).*
48 *Id. at 4.*
49 *Id. at 10.*
50 *Id. at 13.*
51 *Id. at 17.*
52 ***Haley v. State of Rhode Island,*** *A.A. 10-132 (6th Division District Court, 2/18/11).*
53 *Id. at 3.*
54 *Id. at 10.*
55 *Id. at 14.*
56 *The authors express their deep appreciation for the assistance of Kathleen Child and Jodi Van Sprang in the preparation of this article.* ❖