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State v. Ricker, 252 A.3d 721 (R.I. 2021)

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Evidence. *State v. Ricker*, 252 A.3d 721 (R.I. 2021). A Rhode Island trial justice’s use of Rhode Island Rule of Evidence 403 does not violate the Sixth Amendment rights of a defendant on cross-examination. Rhode Island trial justices are held to an abuse of discretion standard when dealing with issues on rulings of Rhode Island Rule of Evidence 403 that limit cross-examination, and when facing a motion for a new trial. The Court maintains precedent that attorneys must specifically preserve issues on appeal.

FACTS AND TRAVEL

On May 31, 2016, Officer Jadine Ferri (Officer Ferri) pulled over the defendant, Lisa Ricker (Ricker), during a motor vehicle stop.¹ Prior to the motor vehicle stop, Ricker visited the Coventry Police Department seeking help from the police on several matters.² Ricker and Officer Ferri spoke in the “counsel chambers,” and Ricker left the police station abruptly thereafter.³ Later that day, Officer Ferri, who was preparing to finish her shift, was filling up the gas tank of her police cruiser and spotted Ricker’s car pulling out of a parking lot.⁴ During the motor vehicle stop, Officer Ferri and another officer on the scene performed field sobriety tests and a breathalyzer test on Ricker.⁵ Officer Ferri used the breathalyzer machine twice.⁶ In Officer Ferri’s readings of Ricker’s blood-alcohol content (BAC) the breathalyzer measured .083 grams of alcohol per milliliters of blood and .080, both at or over the legal limit.⁷ As a result of the stop, the Coventry Police Department charged Ricker

1. *State v. Ricker*, 252 A.3d 721, 723 (R.I. 2021).

2. *Id.*

3. *Id.* at 724

4. *Id.*

5. *Id.*

6. *Id.*

7. *Id.*; *see* R.I. Gen. Laws § 31-27-2.

with driving under the influence of alcohol.⁸ Ricker was charged under § 31-27-2.

After being found guilty at the District Court bench trial, Ricker exercised her right to a trial in the Superior Court where the jury found her guilty.⁹ The trial justice suspended Ricker's license for six months, fined her \$100, ordered her to perform ten hours of community service, ordered her to undergo a substance-abuse evaluation, and sentenced Ricker to a one-year term at the Adult Correctional Institutions, splitting the sentence into three months of home-confinement and nine months suspended with probation.¹⁰ Ricker appealed and argued that the trial court erred in limiting cross-examination of Officer Ferri, that the trial justice abused his discretion in denying her a new trial motion, and that a new trial was warranted due to two errors of law having to do with the jury instruction and the verdict form.¹¹

At trial during cross-examination of Officer Ferri, Ricker wanted to introduce a refusal affidavit included in the police report by Officer Ferri.¹² This affidavit stated that the defendant refused to take a breathalyzer test.¹³ The state offered the refusal affidavit for identification purposes; however, Ricker's defense counsel wanted to use the affidavit to show a discrepancy in Officer Ferri's testimony, stating that the affidavit was being offered "[j]ust to point out on that sheet [that Ricker refused], [and the jury] can take it for whatever it is worth."¹⁴ The state objected to other uses of the affidavit by explaining to the trial court that the Coventry Police Department had a regular practice of completing a refusal affidavit in every case no matter whether the defendant actually underwent a breathalyzer test or not.¹⁵ The trial justice agreed with the state and limited the cross-examination of Officer Ferri on the refusal affidavit under Rhode Island Rule of Evidence 403, citing that the refusal affidavit would confuse the jury.¹⁶ Although the trial justice

8. *Ricker*, 252 A.3d at 725.

9. *Ricker*, 252 A.3d at 726.

10. *Id.*

11. *Id.*

12. *Id.* at 725.

13. *See id.*

14. *Id.*

15. *Id.*

16. *Id.*

did not allow further cross-examination on the refusal affidavit, the trial justice did allow further cross-examination of Officer Ferri on other matters.¹⁷

Ricker also objected to the language of the verdict form which she claimed provided two options for a guilty verdict despite her having been only charged with one offense, but the trial justice disagreed, finding that the “complaint could reasonably be read to include both theories.”¹⁸ After the verdict form discussion, the trial justice instructed the jury.¹⁹ During the instruction, there was only one objection to the trial justice’s use of “accident” rather than “motor vehicle stop.”²⁰ There were no other objections made by Ricker.²¹ After the jury found Ricker guilty under the BAC levels charge, Ricker filed a new trial motion that the trial justice heard and denied.²² Ricker submitted a timely appeal of her conviction to the Rhode Island Supreme Court.²³

ANALYSIS AND HOLDING

The Rhode Island Supreme Court held that trial justices are able to limit cross-examination as long as there is an opportunity for sufficient cross-examination to satisfy a defendant’s constitutional rights.²⁴ The Court also held that trial justices are granted an abuse of discretion standard when ruling on issues of limiting cross-examination, as well as when reviewing a new trial motion.²⁵ On the trial justice’s decision to limit the cross-examination of Officer Ferri, the Court maintained its position that “the exercise of discretion by the trial justices in limiting the scope of cross-examination will not be disturbed absent a clear abuse of that discretion.”²⁶ Along with maintaining the abuse of discretion standard for trial justices, the Court also held that while there is a

17. *Id.*

18. *Id.* at 725–26.

19. *Id.* at 726.

20. *Id.*

21. *Id.*

22. *Id.*

23. *Id.*

24. *Id.* at 727 (quoting *State v. Danis*, 182 A.3d 36, 41 (R.I. 2018)).

25. *See id.* at 728–730.

26. *Id.* at 727 (quoting *State v. Ogoffa*, 159 A.3d 1043, 1049 (R.I. 2017)).

constitutional right to cross-examine witnesses, the constitutional right “is tempered by the dictates of practicality and judicial economy; trial justices are authorized to exercise sound discretion in limiting the scope of cross-examination.”²⁷ Because of the ability of trial justices to exercise their sound discretion in limiting cross-examination, the constitutional right “to cross-examine prosecution witnesses, . . . is far from absolute.”²⁸

The Court did not find that the trial justice abused his powers because while Ricker argued that her counsel wanted to use the refusal affidavit to impeach Officer Ferri, the Court found that “the probative value of this inquiry was equivocal at best.”²⁹ The Court held that because Ricker’s counsel did not clearly articulate the purpose of introducing the refusal affidavit, the trial justice was correct in not allowing additional cross-examination based on the affidavit.³⁰ The Court agreed with the trial justice that Ricker’s Sixth Amendment right to cross-examination was not at issue because Ricker’s counsel introduced the refusal affidavit to the jury for the jury to “take it for whatever it is worth.”³¹ Additionally, the Court relied on the fact that the prosecutor had made it clear to the trial justice that it was common practice for the Police Department to create refusal affidavits in every case, yet the defendant “had no response to that assertion.”³² The Court further reasoned that if Ricker had a better response to the prosecutor’s argument, then the limitation of the cross-examination may not have been necessary.³³

Applying Rhode Island Rule of Evidence 403, the trial justice found that allowing cross-examination on the refusal affidavit would confuse the issues and mislead the jury, and the Court agreed.³⁴ The Court found that the trial justice did not abuse his discretion under Rhode Island Rule of Evidence 403 because Ricker’s counsel conducted a cross-examination of Officer Ferri that “successfully raised other examples of discrepancies between her

27. *Id.* (quoting *Danis*, 182 A.3d at 40).

28. *Id.* (quoting *id.*).

29. *Id.*

30. *Id.*

31. *Id.*

32. *Id.*

33. *See id.*

34. *Id.*

reports and her testimony.”³⁵ Moreover, the Court noted that defense counsel was still able to argue to the jury as to Officer Ferri’s credibility.³⁶ Regardless, the Court noted that the overall strength of the evidence was such that even if the jury had “entirely discredited” the officer, there was still sufficient grounds to convict the defendant.³⁷ Based on all this, the Court held that the limitation on the cross-examination “did not constitute an abuse of discretion[,]” and did not violate Ricker’s Sixth Amendment rights.³⁸

With respect to Ricker’s argument that the jury verdict was against the weight of the evidence and the trial justice should grant a new trial, the Court held the trial justice’s finding was proper.³⁹ Ricker argued that the breathalyzer machines had a margin of error, however, the Court reiterated a prior holding that “the state can rely on evidence other than direct evidence as long as the totality of that evidence constitutes proof of guilt beyond a reasonable doubt.”⁴⁰ The Court continued the doctrine of *stare decisis* by stating that a new trial must be ordered when “the trial justice finds that the state has failed to prove the defendant’s guilt beyond a reasonable doubt”⁴¹ When considering a new trial motion the Court’s view is deferential to the trial justice because trial justices are “in an especially good position to evaluate the facts and to judge the credibility of the witnesses.”⁴² Here, the Court reasoned that the trial justice did not err in denying the new trial motion because the burden is on the state to show that the defendant is guilty beyond a reasonable doubt of the charges, and the state was able convince the jury and prove its burden.⁴³ Here, because the jury was convinced—even with the margin of error presented by the breathalyzer—that there was enough credible evidence to charge Ricker, the Court agreed with the trial justice’s denial of the new trial motion.⁴⁴

35. *Id.*

36. *Id.*

37. *Id.*

38. *Id.*

39. *Id.*

40. *Id.* at 729 (quoting *State v. Lusi*, 625 A.2d 1350, 1357 (R.I. 1993)).

41. *Id.* (quoting *State v. Cerda*, 957 A.2d 382, 385 (R.I. 2008)).

42. *Id.* (quoting *State v. Gumkowski*, 223 A.3d 321, 328 (R.I. 2020)).

43. *See id.* at 729.

44. *See id.* at 729–30.

On Ricker's argument that the jury instructions regarding the breathalyzer and the verdict form were errors of law, the Court held that defense counsel failed to preserve these issues.⁴⁵ The Court restated its clear precedent that "a litigant cannot raise an objection or advance a new theory on appeal if it was not raised before the trial court."⁴⁶ The Court also emphasized that a party must make a "specific objection to preserve an issue for appeal."⁴⁷ Here, Ricker failed to object to the ambiguity of the jury instructions at trial, therefore preventing that issue to be appealed.⁴⁸ Furthermore, Ricker chose not to seek a bill of particulars, which the Court has held is to "supply the defendant with such particulars as are necessary in order that judicial surprise is avoided at trial."⁴⁹ The Court has held that when no bill of particulars is sought, "[the] defendant should not be heard to complain about the lack of notice of the specificity of the charge."⁵⁰ Here, Ricker's argument that she read the charges in a certain way "cannot cure the absence of a timely objection prior to the presentation of the verdict form to the jury."⁵¹ Overall, the Court maintained its prior precedents on all the issues presented in this case.⁵²

Justice Robinson's dissenting opinion highlights the trial justice's abuse of discretion when limiting the defense counsel's cross-examination of Officer Ferri.⁵³ Justice Robinson argues that the trial justice should have allowed cross-examination on the refusal affidavit.⁵⁴ Justice Robinson concludes that the refusal affidavit would go toward Officer Ferri's credibility.⁵⁵ He adds that the jury could have used the cross-examination on the refusal affidavit to better judge Officer Ferri's testimony.⁵⁶ Justice Robinson also argues that the state could have explained the Coventry Police Department's procedures that included the signing of refusal

45. *Id.* at 730.

46. *Id.* (quoting *State v. Parrillo*, 228 A.3d 613, 623 (R.I. 2020)).

47. *Id.* (quoting *Parillo*, 228 A.3d at 625).

48. *Id.* at 731.

49. *Id.* (quoting *State v. Hunt*, 137 A.3d 689, 693 (R.I. 2016)).

50. *Id.* (quoting *Hunt*, 137 A.3d at 693).

51. *Id.* at 731–32 (citing *State v. Mendez*, 116 A.3d 228, 245 (R.I. 2015)).

52. *See id.* at 727–32.

53. *Id.* at 732.

54. *See id.*

55. *See id.* at 733.

56. *Id.* at 734.

affidavits even when defendants submitted to a breathalyzer test.⁵⁷ Overall, Justice Robinson disagrees with how the majority opinion upheld the trial justice's ruling by not allowing cross-examination on the refusal affidavit, which could have been another factor for the jury to use to assess Officer Ferri's credibility.⁵⁸

COMMENTARY

This case serves as the Court's warning to all legal practitioners across the state of Rhode Island. Attorneys must make sure they know the proper objections to make and must be able to properly advocate and articulate their objections in front of the courts. Here, the Court held that if defense counsel wanted to use the refusal affidavit to attack the credibility of Officer Ferri during cross-examination, the defense counsel should have articulated this argument more effectively to the trial justice.⁵⁹ An attorney's failure to make an argument does not allow the attorney to get over the hurdle set in Rhode Island Rule of Evidence 403.⁶⁰ The Court maintained that a trial justice "cannot be required to intuitively decipher the unvoiced bases of counsel's objections."⁶¹ Therefore, when advocating in front of a trial justice or any justice, Rhode Island lawyers should clearly articulate the bases for their arguments. Along with knowledge of the Rhode Island Rules of Evidence, Rhode Island attorneys should refresh their knowledge of the rules of appeals, and how to properly preserve arguments for the record to ensure that their objections will not be waived. The Court noted in this case that Ricker was unable to satisfy the requirements for a new trial motion, and the issue could not be appealed to the Rhode Island Supreme Court because "her motion for a new trial cannot cure the absence of a timely objection prior to the presentation of the verdict form to the jury."⁶² Rhode Island attorneys should be wary of how they present their arguments and

57. *Id.*

58. *See id.*

59. *See id.* at 727–28.

60. *Id.* at 728.

61. *Id.* at 727.

62. *Id.* at 731–32 (citing *State v. Mendez*, 116 A.3d 228, 245 (R.I. 2015)).

justifications of evidence in pre-trial hearings and hearings on admittance of evidence.

Regardless of how attorneys present their arguments in front of justices, it is clear that the Coventry Police Department should change their practice of creating a refusal affidavit in all cases involving driving under the influence. The Coventry Police Department should limit the refusal affidavit to cases where there is an actual refusal to submit to a breathalyzer test. The trial justice in this case acknowledged that the practice of the Coventry Police Department is a “strange procedure.”⁶³ It does seem bizarre for an affidavit to state the opposite of what was conceded by the defendant and given as testimony, especially when affidavits are supposed to contain sworn to facts. Black’s law dictionary defines an affidavit as “[a] written or printed declaration or statement of facts, made voluntarily, and confirmed by the oath or affirmation of the party making it”⁶⁴ If affidavits are to be created for the purpose of evidence, they should offer the truth and should not be contradictory to what actually happened. The trial justice was clearly correct when he held that allowing the refusal affidavit would confuse the jury, because the contradictory evidence from the officer would confuse any reasonable jury member, especially when a defendant himself/herself concedes the fact that he/she was subject to a breathalyzer test.⁶⁵

While Justice Robinson’s dissenting argument makes convincing points that the trial justice should have allowed Ricker to cross-examine Officer Ferri on the refusal affidavit, the majority opinion is the better alternative because the jury was still able to judge the credibility of Officer Ferri’s testimony.⁶⁶ Justice Robinson’s most convincing point is that the prosecutor could have easily explained that the policy of the Coventry Police Department.⁶⁷ However, allowing the cross-examination of Officer Ferri to contain information on the refusal affidavit, as the trial justice held and the Court upheld would be confusing to the jury.⁶⁸ Although it is important to establish the credibility of witnesses, especially the credibility of

63. *Id.* at 727.

64. *Affidavit*, BLACK’S LAW DICTIONARY (10th ed. 2014).

65. *See Ricker*, 252 A.3d at 727.

66. *See id.* at 732–33.

67. *See id.*

68. *See id.* at 733.

key witnesses like Officer Ferri, there are other ways for defense counsel to show credibility. The trial justice and jury in this case were able to judge Officer Ferri's credibility based on Ricker's allowed cross-examination of Officer Ferri.⁶⁹ Both the jury and the trial justice determined that Officer Ferri was credible.⁷⁰ Allowing the refusal affidavit in this case where the defendant has conceded taking a breathalyzer would have confused any reasonable jury and was not needed to show the credibility of Officer Ferri.⁷¹

Here, the specific procedure of the Coventry Police Department creating a refusal affidavit even when there is no refusal, creates issues when officers do what is required of them by their superiors in the Coventry Police Department.⁷² Officer Ferri followed the procedure of the Coventry Police Department, and if cross-examination had not been limited, the jury may have been very confused, especially if the jury was unfamiliar with specific procedures of police departments as a whole.⁷³ The Coventry Police Department should consider using refusal affidavits in the proper circumstances as not to create issues of evidence in the future. Overall, it is important for Rhode Island attorneys to brush up on the Rhode Island Rules of Evidence, and for the Coventry Police Department to change their procedure of creating refusal affidavits in all cases involving breathalyzers.

CONCLUSION

The Court held that the Rhode Island Rules of Evidence 403 did not violate the Sixth Amendment's "constitutional right" to cross-examine witnesses because Ricker had an opportunity to cross-examine Officer Ferri, even though the cross-examination was limited on the issue of the refusal affidavit.⁷⁴ The Court also upheld standing precedent that issues must be specifically

69. *Id.* at 728.

70. *Id.*

71. *See id.* at 727–28.

72. *See id.*

73. *See id.*

74. *See id.* at 727.

preserved on appeal and that trial justices are in a good position to determine credibility of witnesses at trial.⁷⁵

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75. *See id.* at 731; *see also id.* at 729.