STATE OF RHODE ISLAND AND PROVIDENCE PLANTATIONS

CRANSTON, RITT **RHODE ISLAND TRAFFIC TRIBUNAL**

TOWN OF NORTH KINGSTOWN	**:**	
	:	
v.	**:**	**C.A. No. T15-0004**
	:	**14502503460**
A. C.	**:**	

DECISION

PER CURIAM: Before this Panel on March 25, 2015—Magistrate Abbate (Chair), Chief Magistrate Guglietta, and Magistrate Noonan, sitting—is A.C.'s (Appellant) appeal from a decision of Administrative Magistrate Cruise (Trial Magistrate), sustaining the charged violation of G.L. 1956 § 21-28-4.01, "Possession of marijuana, one ounce or less, 18 years or older." The Appellant appeared before this Panel represented by counsel. Jurisdiction is pursuant to G.L. 1956 § 31-41.1-8.

Facts and Travel

On October 17, 2014, Officer Navakauskas of the North Kingstown Police Department charged both the Appellant and the driver of Appellant's vehicle, D. W. (Co-defendant), with the aforementioned violation. The Appellant and her Co-defendant contested the charges, and the matters proceeded to trial on December 5, 2014. The matters were tried together. The Co-defendant's trial was heard first, and Appellant's trial was heard second. See Town of North Kingstown v. D. W., No. T15-0003.

At the start of Appellant's trial, the Trial Magistrate took judicial notice of testimony from the trial of Appellant's Co-defendant. Id.; see also Tr. at 1. Furthermore, because the facts

and circumstances from both matters are the same, the parties stipulated to the testimony presented at the Co-defendant's trial. Id.

At the Co-defendant's trial, Officer Navakauskas testified that on October 17, 2014, he was on uniform patrol at the intersection of Post Road and Newcomb Road in North Kingstown. (D. W.'s Trial Tr. at 2.) Officer Navakauskas testified that while at the intersection, he observed a blue Volkswagen Passat with an inoperable taillight. Id. The Officer ran the registration for the vehicle, and the registration belonged to a 1995 gold Toyota. Id. at 3. Officer Navakauskas followed the vehicle and initiated a traffic stop on Heritage Drive. Id. Officer Navakauskas made contact with the driver, who he identified as the Co-defendant. Id. The Officer advised Co-defendant of the registration violation and the broken taillight, and he replied that he was aware of both violations. Id. The Co-defendant explained that he purchased the vehicle a month prior in Boston and had not had the time to register the vehicle. Id. Officer Navakauskas testified that the plates belonged to another vehicle registered to the passenger in the car, the Appellant. Id.

Officer Navakauskas further testified that while he was speaking with the Co-defendant he could smell a strong odor of marijuana coming from the vehicle. Id. Officer Navakauskas asked the Co-defendant how much marijuana was in the car, and the Co-defendant replied "[j]ust one bag." Id. at 4. Officer Navakauskas requested that the Co-defendant hand him the bag, and the Co-defendant reached under the driver's seat and gave Officer Navakauskas one bag. Id.

Officer Navakauskas stated that at that time back up officers arrived at the scene, including Officer Miatto. Id. Upon arrival of backup, Officer Navakauskas asked the Co-defendant for proof of insurance, his drivers license, and a bill of sale for the vehicle. Id. Officer Navakauskas testified that the Co-defendant informed Officer Navakauskas that his

license was suspended. Id. Thus, Officer Navakauskas asked the Co-defendant to exit the vehicle and he took the Co-defendant into custody for driving on a suspended license. Id. Once the Co-defendant was secured in Officer Navakauskas' cruiser, the Officer approached Appellant who provided him with a bill of sale. Id. at 5. However, the bill of sale had neither the Co-defendant nor Appellant's name on it, and was missing the date of the sale. Id. Officer Navakauskas testified that he advised the Co-defendant that the vehicle was going to be towed because it was unregistered and an inventory search would be conducted. Id. The Officer asked the Co-defendant if there was any more marijuana in the vehicle, and the Co-defendant responded in the negative. Id.

At that time, Officer Navakauskas testified that he and Officer Miatto asked Appellant to step out of the vehicle so that they may conduct an inventory search of the vehicle. Id. at 6. Officer Miatto asked Appellant if she had any weapons on her person, and she replied that there was a knife in her purse. Id. Officer Miatto searched Appellant's purse and identified a pink folding knife, as well as a medicine bottle filled with a green leafy substance, which Appellant identified as marijuana. Id. The Appellant was then secured in the back of Officer Miatto's vehicle, and the officers completed the inventory search. Id. Officer Navakauskas testified that during the inventory search, he found a large purple Crown Royal bag with five additional baggies of marijuana. Id. Officer Navakauskas brought the bag to the Co-defendant. Id. at 7. The Co-defendant admitted the marijuana was in the car and indicated it was for personal use. Id.

After this testimony, the Town entered photographs of the five marijuana bags taken from the car as full exhibits. Id. Officer Navakauskas stated that he conducted a field test on the suspected marijuana using a NARC REGION field kit, and was able to positively identify the

substance as marijuana. Id. at 8. Officer Navakauskas testified that he was trained in the testing of marijuana during field training. Id. After this foundation, a photograph of the substance of the test kit was entered as a full exhibit. Id. at 9. Officer Navakauskas testified that the marijuana weighed .911 ounces. Id.

At Appellant's trial, Officer Navakauskas was called as the Town's first witness to present evidence distinct to the Appellant's case. Specifically, Officer Navakauskas testified about the search of Appellant's purse. Officer Navakauskas testified that Appellant told him and Officer Miatto that she had a knife in her purse. (Tr. at 1-2.) After Appellant stated that she had a knife in her pure, the officers searched the purse for their safety because they were transporting Appellant in Officer Miatto's vehicle. Id. at 2. During the search for the knife, Officer Navakauskas found marijuana in a blue bottle in Appellant's purse. Id. at 3. Officer Navakauskas testified that he used the same field testing process, which he explained in the Co-defendant's trial, to positively identify the substance in Appellant's purse as marijuana. Id. Subsequently, the Town entered photographs of the marijuana and the container found in Appellant's purse as exhibits 1 and 2. Id. at 4. Thereafter, both parties stipulated that Officer Miatto would corroborate Officer Navakauskas' testimony, and the Town rested its case. Id. The Appellant's counsel had no questions for cross-examination. Id. at 5.

After listening to the testimony at trial, the Magistrate found Officer Navakauskas' testimony credible, and adopted the testimony as his findings of fact. Id. The Trial Magistrate noted that the parties stipulated to the testimony presented in the Co-defendant's trial. Id. Additionally, the Trial Magistrate noted that there was no testimony in this trial about Appellant using marijuana for medical purposes. Id. Subsequently, the Trial Magistrate found Appellant was in possession of less than an ounce of marijuana. Id. As such, the Trial Magistrate

sustained the violations of § 21-28-4.01. Id. At the conclusion of trial, Appellant's counsel stated an objection for the record under the medical marijuana defense, and the Trial Magistrate noted the objection. Id. at 6. Aggrieved by the Trial Magistrate's decision, Appellant timely filed the instant 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:
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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 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 Ins. Co. v. Janes, 586 A.2d 536, 537 (R.I. 1991)). "The review of the Appeals Panel is confined to a reading of the record to determine whether the judge's [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 Envtl. Scientific Corp. v. Durfee, 621 A.2d 200, 208 (R.I. 1993)). "In circumstances in which the Appeals Panel determines that the decision is clearly erroneous in view of the reliable, probative, and substantial evidence on the whole record or is affected by error of law, it may remand, reverse, or modify the decision." Link, 633 A.2d at 1348. Otherwise, it must affirm the hearing judge's [or magistrate's] conclusions on appeal. See Janes, 586 A.2d at 537.

Analysis

On appeal, Appellant contends the Trial Magistrate's decision was in violation of constitutional or statutory provisions. Specifically, Appellant argues that she was denied an evidentiary hearing pursuant to § 21-28.6-8. Additionally, Appellant asserts that her purse was searched in violation of the Fourth Amendment.

The Requirement for an Evidentiary Hearing

Appellant argues that she was denied an evidentiary hearing pursuant to § 21-28.6-8. Section 21-28.6-8 requires an evidentiary hearing after a person moves to dismiss a possession of marijuana charge pursuant to the affirmative defense of using marijuana for medical purposes. Sec. 21-28.6-8(b). The affirmative defense can be raised by either the qualifying individual, the primary caregiver, or an individual assisting another with the medical use of marijuana. See § 21-28.6-4(k). However, in order for a person assisting another with the medical use of marijuana to qualify for protection under the statute, the marijuana user must have a valid medical marijuana card. Id.

Here, Appellant never asserted an affirmative defense for using marijuana. See Tr. at 5. There was no testimony that Appellant was a qualifying individual or that she had applied for a medical marijuana card. Nor was there testimony that Appellant needed to use marijuana for

medical purposes. Id. Since Appellant did not raise the affirmative defense, no evidentiary hearing was necessary. See id.; see also § 21-28.6-8. It is an established rule in Rhode Island that "[an appellate court] will not review issues that are raised for the first time on appeal." State v. Goulet, 21 A.3d 302, 308 (R.I. 2011) (quoting State v. Briggs, 934 A.2d 811, 815 (R.I. 2007)). This "well-settled 'raise-or-waive' rule precludes [this Panel] from considering at the appellate level issues not properly presented before the trial court." State v. Merida, 960 A.2d 228, 236 (R.I. 2008); see also State v. Gomes, 881 A.2d 97, 113 (R.I. 2005). Because the Appellant did not raise the affirmative defense at trial and is now asking for an evidentiary hearing for the first time on appeal, this Panel is precluded from considering the issue.

Furthermore, Appellant's Co-defendant was not a valid medical marijuana cardholder. See D. W.'s Trial Tr. at 17. Thus, even if Appellant did raise the affirmative defense that she was assisting the Co-defendant in the use of medical marijuana, Appellant would not qualify for protection for assisting the Co-defendant under § 21-28.6-4(k). See § 21-28.6-4(k) (stating "[n]o person shall be subject to arrest or prosecution for . . . assisting a patient cardholder with using or administering marijuana") (emphasis added). Consequently, the Trial Magistrate was not in violation of the statutory provision because Appellant did not raise the affirmative defense, and, even if Appellant had raised the affirmative defense with respect to assisting her Co-defendant, the defense would not be valid because the Co-defendant was not a patient cardholder.

The Fourth Amendment Search and Seizure

Appellant claims that her purse was searched in violation of the Fourth Amendment. Our State has determined that pat-down searches of passengers in a vehicle are justified when the vehicle has lawfully been pulled over. See State v. Soares, 648 A.2d 804 (R.I. 1994). Additionally, after a lawful traffic stop is made, an officer with probable cause to search a car

may inspect passengers' belongings found in the car that are capable of concealing the object of the search. Wyoming v. Houghton, 526 U.S. 295, 304-305 (1999). Such a search is justified because the Fourth Amendment does not forbid an officer from taking reasonable measures to protect himself or herself. Id. Therefore, a search for weapons is warranted to ensure the safety of officers at the scene of a traffic stop. See State v. Taveras, 39 A.3d 638, 649-650 (R.I. 2012).

Here, the vehicle was lawfully pulled over. See D. W.'s Trial Tr. at 2-3. The Co-defendant was lawfully arrested and an inventory search was conducted of the vehicle subsequent to the arrest and the vehicle was towed. Id. at 6. The Appellant, who was waiting for her ride, was instructed to wait in Officer Miatto's cruiser. Id. In the interest of officer safety, Officer Miatto asked the Appellant if she had any weapons on her. Appellant voluntarily answered that she had a knife in her purse. Id. To ensure the safety of himself and the other officers, Officer Miatto retrieved the weapon from Appellants purse, where he subsequently found a medicine bottle containing marijuana. Id. Officer Miatto employed a less-intrusive search than patting down the Appellant. See Taveras, 39 A.3d at 650. Additionally, Officer Miatto's request was reasonable insofar as it allowed him quickly to confirm or dispel his suspicion that Appellant might be armed without physically touching the Appellant. Id. Furthermore, Officer Miatto's allegedly intrusive search occurred only after the Appellant voluntarily consented to the Officer's search of her purse. (D. W.'s Trial Tr. at 6.)

Regardless of the alleged violation, Appellant did not raise the alleged Fourth Amendment issue at trial. As previously stated, an appellate court "will not review issues that are raised for the first time on appeal." Goulet, 21 A.3d at 308 (quoting Briggs, 934 A.2d at 815). Therefore, this Panel is precluded from considering this issue on appeal. See id.; see also Gomes, 881 A.2d at 113.

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 of record. This Panel is also satisfied that the Trial Magistrate's decision was not affected by error of law. Substantial rights of Appellant have not been prejudiced. Accordingly, Appellant's appeal is denied.

ENTERED:

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Magistrate Joseph A. Abbate (Chair)

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Chief Magistrate William R. Guglietta

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Magistrate William T. Noonan

DATE: _____