STATE OF RHODE ISLAND AND PROVIDENCE PLANTATIONS

CRANSTON, RITT **RHODE ISLAND TRAFFIC TRIBUNAL**

CITY OF PROVIDENCE	**:**	
	:	
v.	**:**	**T15-0023**
	:	**07409127394**

M. P.

DECISION

PER CURIAM: Before this Panel on August 19, 2015—Magistrate Abbate (Chair), Judge Almeida, and Magistrate Noonan, sitting—is M.P.'s (Appellant) appeal from a decision of Judge Parker (Trial Judge), sustaining the charged violation of G.L. 1956 § 21-28-4.01(c)(1), "Prohibited acts A—Penalties." The appellant appeared before this Panel represented by counsel. Jurisdiction is pursuant to § 31-41.1-8.

Facts and Travel

On March 6, 2015, Officer Robert Foley (Officer or Officer Foley) of the Providence Police Department charged Appellant with the aforementioned violation of the motor vehicle code. The Appellant contested the charge, and the matter proceeded to trial on May 12, 2015.

At trial, Officer Foley testified that he was on routine patrol in the area of Appleton and Bowdoin Street when he observed the Appellant, who was driving a vehicle with a broken tail light, turn right without using a turn signal. (Tr. at 4-5.) Subsequently, the Officer initiated a motor vehicle stop. Id. at 5. As the Officer approached the vehicle, he could smell marijuana. Id. The Officer asked Appellant for his license and registration, and when he could not provide a license, the Officer ran Appellant's name in the system. Id. at 6. No valid license appeared in the system, and the Officer placed Appellant in custody. Id. The Officer then testified that he searched the car. Id. at 8. In the center console of the vehicle, the Officer found a glass jar of

suspected marijuana and a pill bottle with no prescription label. Id. Next, the Officer testified that he was trained at the Providence Police Academy to conduct a search incident to arrest, which is "why the evidence was found." Id. at 9. The Officer added that he recognized the smell of marijuana because in his eight months on the job he has had numerous encounters. Id. On cross-examination, the Officer stated that he conducted the search incident to the arrest after he placed Appellant into custody in the back seat of his cruiser. Id. at 16.

Thereafter, Detective Charles Vieira (Detective Vieira) of the Narcotics and Organized Crime division of the Providence Police Department testified. Id. at 20. Detective Vieira stated that on March 6, 2015, he was hand delivered narcotics from Officer Foley, and within the suspected narcotics was an amount of suspected marijuana. Id. at 21. He conducted a Duquenois-Levine Reagent Field Test on a small portion of marijuana. Id. Next, Detective Vieira testified that he has been a narcotics detective for approximately four and a half years and a police officer for 12 years with the city of Providence. Id. at 23. He added that he attended a two week certified DEA school after he made his ranks to narcotics, and he was recently recertified. Id. at 23-24.

Subsequently, counsel for Appellant motioned the court to exclude evidence because the Officer's search of the vehicle and seizure of the alleged marijuana was unconstitutional. Id. at 29-34. In the alternative, counsel for Appellant argued that there was no evidence that Appellant possessed the alleged marijuana, and that the prosecution failed to prove by clear and convincing evidence that the substance was in fact marijuana. Id. at 35-37.

After listening to the evidence and arguments presented at trial, the Trial Judge issued a decision sustaining the charged violation. Id. at 40. The Trial Judge determined that Appellant did not have a valid registration and license. Id. The Trial Judge found the Detective was

trained to deal with marijuana and tested the marijuana using a method he was taught at training school. Id. Thus, the Trial Judge sustained the charged marijuana violation. Aggrieved by the Trial Judge's decision to sustain the charge, Appellant timely filed this appeal.

Standard of Review

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

> The appeals panel shall not substitute its judgment for that of the judge or magistrate as to the weight of the evidence on questions of fact. The appeals panel may affirm the decision of the judge or magistrate, or it may remand the case for further proceedings or reverse or modify the decision if the substantial rights of the appellant have been prejudicial because the judge's findings, inferences, conclusions or decisions are:
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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 Insurance Co. v. Janes, 586 A.2d 536, 537 (R.I. 1991)). "The review of the Appeals Panel is confined to a reading of the record to determine whether the judge's [or magistrate's] decision is supported by legally competent evidence or is affected by an error of law." Link, 633 A.2d at 1348 (citing

Environmental Scientific Corp. v. Durfee, 621 A.2d 200, 208 (R.I. 1993)). "In circumstances in which the Appeals Panel determines that the decision is clearly erroneous in view of the reliable, probative, and substantial evidence on the whole record or is affected by error of law, it may remand, reverse, or modify the decision." Link, 633 A.2d at 1348. Otherwise, it must affirm the hearing judge or magistrate's conclusions on appeal. See Janes, 586 A.2d at 537.

Analysis

On appeal, Appellant contends that the Trial Judge's decision was in violation of constitutional provisions and clearly erroneous in view of the reliable, probative, and substantial evidence on the whole record. Specifically, Appellant argues that the Officer's search of the vehicle and seizure of the marijuana exceeded the scope of a permissible search incident to arrest. Moreover, Appellant maintains that there is no evidence that Appellant had possession of the alleged marijuana or that the substance was in fact marijuana.

Rhode Island General Law § 21-28-4.01 reads in pertinent part that "[i]t [is] unlawful for any person knowingly or intentionally to possess a controlled substance, unless the substance was obtained directly from, or pursuant to, a valid prescription or order of a practitioner while acting in the course of his or her professional practice. . . ." Sec. 21-28-4.01 (c)(1). Thus, in order to sustain a possession of marijuana violation, the person must have knowingly or intentionally possessed the controlled substance. See id.; see also Sharbuno v. Moran, 429 A.2d 1294, 1296 (R.I. 1981) (stating "[the] offense of possession of a controlled substance requires guilty knowledge [or] 'conscious possession'") (citing State v. Gilman, 110 R.I. 207, 215, 291 A.2d 425, 430 (1972)) (expressing our Supreme Court's intent to "follow the lead of those jurisdictions who construe the word 'possess' when used in a criminal statute to mean an intentional control of a designated object with knowledge of its nature").

Proof of knowledge of the substance may be shown by "evidence of acts, declarations, or conduct of the accused from which an inference may be drawn that he or she knew of the existence of narcotics at the place where they were found." State v. Kaba, 798 A.2d 383, 391-92 (R.I. 2002) (internal citation omitted). Notably, "the mere fact that the consignee takes possession of the container would not alone establish guilt of illegal possession or importation of contraband." Id. Here, Appellant's knowledge of the nature of the substance is simply not evident from the record. The record illustrates that the Officer searched Appellant's vehicle incident to a lawful arrest. See (Tr. at 17-18.) During this search, the Officer observed a glass jar with a leafy substance inside, located within the center console. Id. at 18. While the record is sufficient in regards to the terms of the search, the record is devoid of "evidence of acts, declarations, or conduct" indicating that the Appellant knowingly or intentionally possessed a controlled substance. Where there is no evidence establishing that the Appellant had knowledge of the presence of the substance, the charged violation § 21-28-4.01, cannot be sustained. See Kaba, 798 A.2d at 392; see also State v. Berroa, 6 A.3d 1095, 1101 (R.I. 2010) (stating "[a]bsent such a consciousness of the presence of the object, the fact that it is located within premises under [defendant's] control does not, of itself, constitute constructive possession").

There is no evidence to establish that Appellant had knowledge that the substance was in the center console, nor is there sufficient evidence to establish that the substance was, in fact, marijuana. Consequently, because there is insufficient evidence on the record to support the Trial Judge's findings, and in extension the charged violation, the decision must be reversed. See Link, 633 A.2d at 1348.

Conclusion

This Panel has reviewed the entire record before it. Having done so, the members of this Panel are satisfied that the Trial Judge's decision was not supported by reliable, probative, and substantial evidence on the whole record. Substantial rights of Appellant have been prejudiced. Accordingly, Appellant's appeal is granted, and the charged violation dismissed.

ENTERED:

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Magistrate Joseph A. Abbate (Chair)

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Judge Lillian M. Almeida

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Magistrate William T. Noonan

DATE: _____