STATE OF RHODE ISLAND & PROVIDENCE PLANTATIONS

PROVIDENCE, Sc. **DISTRICT COURT**
SIXTH DIVISION

Dennis Wilkinson	:	
	:	
v.	:	**A.A. No. 2015 - 128**
	:	
Town of North Kingstown	:	
(RITT Appeals Panel)	:	

O R D E R

This matter is before the Court pursuant to § 8-8-8.1 of the General Laws for review of the Findings and Recommendations of the Magistrate.

After a de novo review of the record, the Court finds that the Findings and Recommendations of the Magistrate are supported by the record, and are an appropriate disposition of the facts and the law applicable thereto. It is, therefore,

ORDERED, ADJUDGED AND DECREED that the Findings and Recommendations of the Magistrate are adopted by reference as the decision of the Court and the decision of the Appeals Panel is AFFIRMED.

Entered as an Order of this Court at Providence on this 30th day of August, 2016.

By Order:

___/s/_____
Stephen C. Waluk
Chief Clerk

Enter:

____/s/_____
Jeanne E. LaFazia
Chief Judge

STATE OF RHODE ISLAND & PROVIDENCE PLANTATIONS
PROVIDENCE, Sc. **DISTRICT COURT**
SIXTH DIVISION

Dennis Wilkinson	:	
	:	**A.A. No. 2015 – 128**
v.	:	**(C.A. No. T15-0003)**
	:	**(14-502-503462)**
Town of North Kingstown	:	
(RITT Appeals Panel)	:	

F I N D I N G S & R E C O M M E N D A T I O N S

Ippolito, M. In this appeal, Mr. Dennis Wilkinson urges that the appeals panel of the Rhode Island Traffic Tribunal (RITT) erred when it affirmed a Tribunal magistrate's verdict adjudicating him guilty of "Possession of marijuana, one ounce or less, 18 years or older," under Gen. Laws 1956 § 21-28-4.01, a civil violation for which he had been cited on October 17, 2014 by an officer of the North Kingstown Police Department.

Jurisdiction for the instant appeal is vested in the District Court by Gen. Laws 1956 § 31-41.1-9 and the applicable standard of review is found in

subsection 31-41.1-9(d). This matter has been referred to me for the making of findings and recommendations pursuant to General Laws 1956 § 8-8-8.1. After a review of the entire record I find that — for the reasons explained below — the decision rendered by the appeals panel in this case is not clearly erroneous nor affected by error of law. I therefore recommend that the decision of the appeals panel be AFFIRMED.

I
FACTS AND TRAVEL OF THE CASE
A
Issuance of the Citation

As we shall see, the facts of this case are not in dispute. As a result, the following brief summary of the events in which Mr. Wilkinson was cited for possession of marijuana, will suffice for our purposes:

During the evening of October 17, 2014, Officer Navakauskas of the North Kingstown Police Department spotted a blue Volkswagen at the intersection of Post Road and Newcomb Road which had an inoperable taillight. Trial Transcript, at 2. In addition, the registration on the car belonged to a gold Toyota. Trial Transcript, at 3. Based on this information, the officer stopped the vehicle on Heritage Drive. Id. The operator, Mr. Dennis Wilkinson, said he was aware of the condition of the taillight and admitted that

he had not yet registered the vehicle, which he had purchased the month before. Id.

While speaking with the motorist, Officer Navakauskas detected a strong odor of marijuana coming from the vehicle; when asked, Mr. Wilkinson responded that it was "just one bag," which he produced from under the driver's seat. Trial Transcript, at 3-4. Subsequently, after he admitted he had been driving on a suspended license, Officer Navakauskas placed Mr. Wilkinson under arrest and secured him in the rear of his cruiser. Trial Transcript, at 4.

Because the car was not properly registered, the officer told Mr. Wilkinson that his car would have to be towed. Trial Transcript, at 5. But before that could be done, the vehicle had to be searched. Trial Transcript, at 6. When Officer Navakauskas (along with a colleague who had arrived to assist him) performed the inventory search, more marijuana was found — despite the fact that Mr. Wilkinson had stated that no additional marijuana was in the car. Trial Transcript, at 5-6. Nevertheless, once it was located, Mr. Wilkinson did admit that the marijuana was his and intended for his personal use. Trial Transcript, at 7.

Appellant was cited for, inter alia, possession of marijuana under an

ounce while 18 years of age or older — a civil violation. See Summons No. 14-502-503462, which may be found on page 17 of the electronic record attached to this case. He was arraigned, and the matter proceeded to trial on December 5, 2014 before the Honorable R. David Cruise, Administrative Magistrate of the Tribunal. See Decision of Panel, December 18, 2015, at 1.

B

The Trial

Prior to the formal commencement of Mr. Wilkinson's trial, he made, through counsel, a Motion to Dismiss the citation pursuant to the Edward O. Hawkins and Thomas C. Slater Medical Marijuana Act (the Medical Marijuana Act), Chapter 21-28.6 of the General Laws — particularly Gen. Laws 1956 § 21-28.6-6. Though the Motion was made and denied off the record, counsel noted his objection when the recording was resumed. See Trial Transcript, at 1.[1] In turn, the prosecutor noted that the offer of proof which had been made by the defense had centered on an application for entry into the Medical Marijuana Program accompanied by an attestation by a "qualifying doctor" dated December 30, 2014 — approximately six weeks after the date of the

[1] The Trial Transcript begins on page 22 of the electronic record attached to this case.

incident. Id. Defense counsel acknowledged this fact. Trial Transcript, at 2. With this information on the record, the trial magistrate ordered the trial to proceed. Id.

Officer Navakauskas was sworn and gave testimony which was consistent with the foregoing narrative.

Additionally, the Officer testified that he performed a field test on the suspected marijuana and received a positive result. Trial Transcript, at 8. Based on his testimony that he was trained in the use of the field test kit, photographs of the marijuana were received as full exhibits. Trial Transcript, at 9-10. Then, on cross-examination, the Officer denied that Mr. Wilkinson said he was a medical marijuana user when he was arrested. Trial Transcript, at 13-14.

At trial, Officer Navakauskas testified that the weight of the marijuana seized was, when taken in the aggregate, a bit more than nine-tenths of an ounce. Trial Transcript, at 10, 13.

When Officer Navakauskas's testimony concluded, the prosecution and defense stipulated that the testimony of Officer Miatto, the assisting officer, would be substantially similar to that of Officer Navakauskas. Trial Transcript, at 14. With this, the Town rested its case and the defense did likewise. Trial Transcript, at 15.

C
The Verdict

The Trial Magistrate found Officer Navakauskas's testimony to be credible. Trial Transcript, at 17. He also found the Defendant's affirmative defense (under the Medical Marijuana Act) wanting because the application was dated after the date of violation and because Mr. Wilkinson's application had still not been approved by the time of trial. Id. The trial magistrate therefore found Mr. Wilkinson guilty of the civil violation — "Possession of marijuana, one ounce or less, 18 years or older," as provided in Gen. Laws 1956 § 21-28-4.01. Trial Transcript, at 17-18. He imposed a fine of $150.00 plus costs. Trial Transcript, at 18.

D
The Decision of the Appeals Panel

Believing himself aggrieved by the verdict rendered by the Trial Magistrate, Mr. Wilkinson filed an appeal, which was heard by an Appeals Panel composed of Magistrate Abbate (Chair), Chief Magistrate Guglietta, and Magistrate Noonan, on March 25, 2015. Decision of Appeals Panel, at 1. And, on December 18, 2015, the panel published its decision.

In its decision, the Appeals Panel addressed and rejected two arguments presented by Mr. Wilkinson — first, that he was denied an evidentiary hearing

pursuant to the Medical Marijuana Act, particularly § 28-28.6-8; and second, that his assertion that his case fell within the affirmative defense established in the Act was improperly rejected by the trial magistrate because he misinterpreted the elements required to be proven. Decision of Appeals Panel, at 6.

1

The Hearing Requirement

The appeals panel began its discussion of this point by noting that a person charged under the Act is entitled to a hearing [as provided for under § 21-28.6-8(b)] at which he or she may attempt to prove [pursuant to § 21-28.6-8(a)] that he or she is a patient with a debilitating medical condition [and therefore a "qualifying patient" under § 21-28.6-3(10)] regarding whom a medical practitioner has determined that the medical benefits of using marijuana would outweigh the health risks [as provided in § 21-28.6-8(a)(1)]; the movant must also show that the amount of marijuana possessed was not greater than that permitted under the Act [§ 21-28.6-8(a)(2)]. Decision of Appeals Panel, at 7. The Appeals Panel also asserted that, to succeed under § 21-28.6-8(b), the defendant must show that he or she has been issued an identification card under the Act. Id.

The Appeals Panel found that Mr. Wilkinson was afforded a hearing as required under the Act. Decision of Appeals Panel, at 7-8. In essence, the panel reasoned that although the Motion was denied because his application (for coverage under the Act) post-dated the date of offense, he nonetheless was given a hearing — and so the procedural mandate was satisfied. Decision of Appeals Panel, at 8. Finally, it deemed any distinction between an "evidentiary hearing" and a hearing on a motion to dismiss to be harmless error. Id.

2

The Affirmative Defense

Having addressed Mr. Wilkinson's procedural complaint, the Appeals Panel turned to his substantive assertion of error: that the trial judge misinterpreted the statute by reading into it a requirement that a "qualifying patient" be the holder of a registry identification card. Decision of Appeals Panel, at 8-9. In this, the panel entirely agreed with the trial magistrate, relying for support on our Supreme Court's decision in State v. DeRobbio, 62 A.3d 1113, 1116-17 (R.I. 2013). Decision of Appeals Panel, at 9. Applying the rule which provides that when a statute is clear and unambiguous, it must be interpreted literally, the Appeals Panel held that since Appellant was not the possessor of a marijuana identification card, he could not be deemed to be a

qualifying patient under the Act. Id., citing Accent Stores Design, Inc. v. Marathon House, Inc., 674 A.2d 1223, 1226 (R.I. 1996). And so, the panel affirmed his conviction for the aforementioned civil violation. Decision of Appeals Panel, at 10.

On December 30, 2015, Mr. Wilkinson filed a complaint for judicial review in the Sixth Division District Court pursuant to Gen. Laws 1956 § 31-41.1-9. By order dated January 20, 2016, this Court established a briefing schedule. Helpful memoranda have been received from both parties.

II
STANDARD OF REVIEW

The standard of review which this Court must employ is enumerated in Gen. Laws 1956 § 31-41.1.-9(d), which provides as follows:

> (d) Standard of review. The judge of the district court shall not substitute his or her judgment for that of the appeals panel as to the weight of the evidence on questions of fact. The district court judge may affirm the decision of the appeals panel, or 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 appeals panel's findings, inferences, conclusions or decisions are:
> (1) In violation of constitutional or statutory provisions;
> (2) In excess of the statutory authority of the appeals panel;
> (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.

This standard is akin to the standard of review found in Gen. Laws 1956 § 42-35-15(g), the State Administrative Procedures Act (APA).

Under the APA standard, the District Court "* * * may not substitute its judgment for that of the agency and must affirm the decision of the agency unless its findings are 'clearly erroneous.' "[2] Thus, the Court will not substitute its judgment for that of the panel as to the weight of the evidence on questions of fact.[3] Stated differently, the findings of the panel will be upheld even though a reasonable mind might have reached a contrary result.[4]

III
APPLICABLE LAW

A
The Offense

In the instant matter the Appellant was charged with violating the following portion of the Controlled Substances Act —

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2 Guarino v. Department of Social Welfare, 122 R.I. 583, 584, 410 A.2d 425 (1980) citing Gen. Laws 1956 § 42-35-15(g)(5).

3 Cahoone v. Board of Review of the Department of Employment Security, 104 R.I. 503, 246 A.2d 213 (1968).

4 Id., at 506-507, 246 A.2d at 215.

21-28-4.01 — Prohibited Acts A — Penalties. —

…

(c)(1) It shall be 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, or except as otherwise authorized by this chapter.

(2) Any person who violates this subsection with respect to:

…

(iii) Notwithstanding any public, special, or general law to the contrary, the possession of one ounce (1 oz.) or less of marijuana by a person who is eighteen (18) years of age or older and who is not exempted from penalties pursuant to chapter 28.6 of this title shall constitute a civil offense, rendering the offender liable to a civil penalty in the amount of one hundred fifty dollars ($150) and forfeiture of the marijuana, but not to any other form of criminal or civil punishment or disqualification. Notwithstanding any public, special, or general law to the contrary, this civil penalty of one hundred fifty dollars ($150) and forfeiture of the marijuana shall apply if the offense is the first (1st) or second (2nd) violation within the previous eighteen (18) months.

…

B

Jurisdiction

Jurisdiction to hear and decide charges brought pursuant to § 28-28-4.01(c)(2)(iii) is vested in the Rhode Island Traffic Tribunal by Gen. Laws 1956 § 28-28-4.01(c)(3).

C
The Affirmative Defense

As referenced in subdivision (iii), ante, the provisions of Chapter 21-28.6, the Medical Marijuana Act, provide an affirmative defense in these cases. Generally, these provisions will be quoted and discussed post, as they become pertinent. However, at this juncture, the following provisions are presented — first, the provision which sets out the nature of the affirmative defense established under the Medical Marijuana Act:

A
Defining the Affirmative Defense

First, we present the provision which sets out the nature of the affirmative defense established under the Medical Marijuana Act:

> **21-28.6-8. Affirmative defense and dismissal. —** (a) Except as provided in § 21-28.6-7, a qualifying patient may assert the medical purpose for using marijuana as a defense to any prosecution involving marijuana, and such defense shall be presumed valid where the evidence shows that:
>
> (1) The qualifying patient's practitioner has stated that, in the practitioner's professional opinion, after having completed a full assessment of the person's medical history and current medical condition made in the course of a bona fide practitioner-patient relationship, the potential benefits of using marijuana for medical purposes would likely outweigh the health risks for the qualifying patient; and
>
> (2) The qualifying patient was in possession of a quantity of marijuana that was not more than what is permitted under this

chapter to ensure the uninterrupted availability of marijuana for the purpose of alleviating the person's medical condition or symptoms associated with the medical condition.

(b) A person may assert the medical purpose for using marijuana in a motion to dismiss, and the charges shall be dismissed following an evidentiary hearing where the defendant shows the elements listed in subsection (a) of this section.

(c) ….

B

Definitions of Terms Used in the Act

Second, we set forth several of the most pertinent definitions included in the Medical Marijuana Act:

21-28.6-3. Definitions. — For the purposes of this chapter:

(1) "Cardholder" means a qualifying patient or a primary caregiver who has registered with the department and has been issued and possesses a valid registry identification card.

…

(8) "Practitioner" means a person who is licensed with authority to prescribe drugs pursuant to chapter 37 of title 5 or a physician licensed with authority to prescribe drugs in Massachusetts or Connecticut.

…

(10) "Qualifying patient" means a person who has been diagnosed by a practitioner as having a debilitating medical condition and is a resident of Rhode Island.

…

IV
ISSUE

The issue before the Court is whether the decision of the appeals panel was clearly erroneous in light of the reliable, probative, and substantial evidence in the record. More precisely, did the panel properly affirm Mr. Wilkinson's conviction for possession of marijuana?

V
ANALYSIS

As stated ante, I shall recommend that the instant case be affirmed because it is not clearly erroneous in light of the reliable, probative, and substantial evidence of record; nor was it made in a manner contrary to law. Naturally, I shall fully explain, post, why I believe this to be the correct resolution of this case. But, before doing so, I shall present the positions of the parties.

A
Position of the Parties
1
Appellant's Position

In his Memorandum, Appellant Wilkinson makes four points in support of his argument that he was entitled to acquittal pursuant to the provisions of

the affirmative defense enumerated in § 21-28.6-8.

First, Appellant states that he was in possession of less than one ounce of marijuana. He urges that this assertion is uncontested. Appellant's Memorandum of Law, at 6, citing Decision of Appeals Panel, at 10.

Second, Appellant states that he was a "qualifying patient" based on his presentation of a report from his physician. Appellant's Memorandum of Law, at 6-7. He urges that the language used by his physician was in substantial harmony with that required for a successful application for a card under the Medical Marijuana Act. Appellant's Memorandum of Law, at 6-7 citing http://health.ri.gov/forms/registration/MedicalMarijuanaNewApplication.pdf. Based on this diagnosis Appellant argued that he satisfied the criteria to be considered a "qualifying patient" under § 28-28.6-3(10) and he was entitled to acquittal under § 21-28.6-8. Appellant's Memorandum of Law, at 7.

Third, Mr. Wilkinson argues that the Appeals Panel committed clear error by conflating the terms "qualifying patient" and "cardholder." Id. Consequently, the panel fails to properly distinguish the immunity that cardholders are granted in § 6 of the Act with the affirmative defense provided to qualifying patients (who have been charged) in § 8. Appellant attributes this error to a passage from the DeRobbio case quoted by the panel, in which the

Supreme Court stated that cardholders are all be qualifying patients. Appellant's Memorandum of Law, at 8. But, Appellant urges, the reverse is not true: one can be a qualifying patient even if he or she is not a cardholder. Id. Moreover, Mr. Wilkinson asserts that the DeRobbio Court recognized this distinction. Id., n. 8, citing DeRobbio, ante, at 1116-17. And, Appellant argues (in rather provocative language), the plain language of the statute refutes the panel's conclusion. Appellant's Memorandum of Law, at 10.

Fourth, Appellant asserts that it is illogical to construe the affirmative defense provision of § 8 as requiring the movant to be a "cardholder" since cardholders are granted immunity in § 4.

2

Appellee's Position

Declining to revisit issues considered below, the Town's Memorandum focuses like a laser on what it believes to be the only real issue in this case: can an affirmative defense under § 8 of the Medical Marijuana Act be predicated on a medical opinion formulated after the issuance of a citation? See Appellee's Memorandum of Law, at 6. The Town argues that it cannot, that such a result would fly in the face of the legislature's desire to distinguish between the recreational and medical use of marijuana. Id. It warns that a contrary ruling

would allow individuals to break the law and then be exonerated by a "post-facto diagnosis." Id. It calls this an absurd result, which would result in the complete corruption of our marijuana enforcement laws. Appellee's Memorandum of Law, at 6-7.

Having presented its first argument, the Town calls the Appellant's criticism of the panel's decision — i.e., that it conflated the distinction under the Act between a "cardholder" and a "qualifying patient" — a mere distraction. Appellee's Memorandum of Law, at 7-8. Quite simply, it relies entirely on its assertion that Mr. Wilkinson never proved that he merited the status of "qualifying patient" when he was stopped on October 17, 2014.

B

Discussion

1

The Rule to Be Adopted

I must begin by stating that I am convinced that Mr. Wilkinson is correct on the fundamental point he repeatedly stated in his memorandum — that one need not be a cardholder to achieve "qualifying patient" status and thereby come within the safe harbor provided by the "affirmative defense" provision enumerated in § 8 of the Medical Marijuana Act. The plain language of § 8 requires that result. But, unlike Appellant, I am not confounded by the appeals

panel's decision to the contrary; for me, it is fairly clear what likely happened.

The panel relied on the language of the DeRobbio case, not realizing that the Act had been amended, in the interim, by P.L. 2014, ch. 515, § 2, which became effective on September 1, 2014. While all Rhode Island's trial courts owe a duty of fidelity to the precedential rulings of our Supreme Court, the Appeals Panel's adherence to DeRobbio in the instant case was inappropriate, in light of the substantial changes which had been enacted.[5] Quite simply, the law had been changed.

The harder question is that framed by the Town: can a physician declare a defendant to be a qualifying patient ex post facto? But after some thought I believe we must answer this question in the negative. The Town points out, quite rightly in my estimation, that, under § 3(10) of the Act, quoted in full ante at 13, a qualifying patient is one "who has been diagnosed by a practitioner as having a debilitating medical condition[.]" Appellee's Memorandum, at 6. And therefore, it is the defendant's status on the date of offense which must

[5] I shall cite two at this juncture that are undoubtedly of great significance. First, the 2014 amendment added the term "qualifying patient" to § 8, where it had not been previously employed. Second, it amended the definition of "cardholder" in § 2, which was previously a synonym for a "qualifying patient" became redefined as a qualifying patient who has been issued an identification card.

determine his or her guilt or innocence. Id. By adhering to this distinction, we give due deference to the General Assembly's legislative finding that "State law should make a distinction between the medical and nonmedical use of marijuana." Gen. Laws 1956 § 21-28.6-2(5).

In the criminal law, we strive to avoid uncertainty. Offenses must be defined so that citizens can conform their conduct to the law, otherwise we deem them void for vagueness. While the instant charge is not criminal, it is penal, and such considerations should be applied in a similar fashion.[6]

In sum, I believe that allowing belated declarations of qualifying-patient status would give rise to great uncertainty in prosecutions under the Act.

2

Applying the Rule to the Instant Case

It is established in Gen. Laws 1956 § 8-8.2-1(i)(2) that all proceedings of the Traffic Tribunal are to be recorded by electronic means.[7] But the pre-trial hearing conducted in the instant case (whether denominated an evidentiary

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[6] Moreover, I believe an issue of fundamental fairness would tend to arise if ex post facto declarations were to be permitted. Such a policy would tend to favor the privileged and elite, who tend to have greater access to physicians with whom they have a longstanding relationship. This is, in my view, a result to be avoided.

[7] The municipal courts are subject to this requirement when hearing traffic cases under the State and Municipal Court Compact. Gen. Laws § 8-18-4(e).

hearing or a hearing on a motion to dismiss) was not recorded, even though it is a hearing required by statute. See § 21-28.6-8(b). In addition, the document prepared by Appellant's physician is not present in the electronic record.

Normally, in such a situation we would be required to remand the matter to the RITT for further proceedings, on the ground that the record — as certified to the Court — is unreviewable. Fortunately, that shall not be necessary in Mr. Wilkinson's case because it is clear, from the colloquy on the record at the end of the hearing, that the document prepared by Mr. Wilkinson's physician was created after the date of offense. See Trial Transcript, at 1-2, which may be found on pages 24 and 25 of the electronic record. Based on this fact alone, we may find that Appellant's assertions that his circumstances fall within the ambit of the affirmative defense set forth in § 21-28.6-8(a) are without merit. A remand for further fact-finding will thus be unnecessary.

VI
CONCLUSION

Upon careful review of the evidence, I recommend that this Court find that the decision of the appellate panel was made upon lawful procedure and was not affected by error of law. Gen. Laws 1956 § 31-41.1-9. Furthermore,

said decision is not clearly erroneous in view of the reliable, probative and substantial evidence on the whole record. Id.

Accordingly, I recommend that the decision of the appeals panel be AFFIRMED.

/s/
Joseph P. Ippolito
Magistrate

August 30, 2016