STATE OF RHODE ISLAND AND PROVIDENCE PLANTATIONS

CRANSTON, RITT **RHODE ISLAND TRAFFIC TRIBUNAL**

STATE OF RHODE ISLAND	**:**	
	:	
v.	**:**	**C.A. No. T18-0008**
	:	**15001533052**
J. C.	**:**	

DECISION

PER CURIAM: Before this Panel on October 17, 2018—Magistrate Kruse Weller (Chair), Magistrate Goulart, and Magistrate Noonan, sitting—is J.C.'s[1] (Appellant) appeal from a decision of then-Chief Magistrate William R. Guglietta (Trial Magistrate) of the Rhode Island Traffic Tribunal, sustaining the charged violation of G.L. 1956 § 21-28-4.01(c)(1), "Possession of marijuana, 1 ounce or less, 18 years or older." The Appellant appeared before this Panel represented by counsel. Jurisdiction is pursuant to § 31-41.1-8.

I

Facts and Travel

On November 20, 2015, Trooper Damien Maddox (Trooper Maddox) of the Rhode Island State Police pulled over a black vehicle on East Street in West Warwick because the operator did not have on her seatbelt. (Tr. at 26:3-14, October 17, 2016.) Trooper Maddox identified the operator as Chelsie Tague, and the passenger as Appellant. *Id.* at 27:4-18.

Upon approaching the vehicle on the passenger side, Trooper Maddox smelled the "distinct odor" of unburnt marijuana. *Id.* at 28:14-17. After identifying the occupants, Trooper

[1] Rhode Island law prohibits this Panel from revealing to the public any personally identifiable information of an individual accused or found to be in violation of "possession of marijuana, one ounce or less, 18 years or older." Sec. 21-28-4.01(c)(2)(ix); *see* G.L. 1956 § 8-8.2-21. Instead, the initials "J.C." will be used in reference to Appellant.

Maddox asked the Appellant if "there is anything in the car I need to know about." *Id.* at 30:6-7. The Appellant replied that he had marijuana in the car. *Id.* at 30: 8-9. When Trooper Maddox then asked Appellant to step out of the car, the Appellant handed Trooper Maddox a white plastic bag that had three knots tied into it and each knot contained marijuana. *Id.* at 29:11-19. Appellant did not have a medical marijuana registration card at the time Trooper Maddox pulled over the car. (Tr. at 22:6-10, November 14, 2016.)

Prior to patting down Appellant, Trooper Maddox asked Appellant if he had anything on his person that would hurt Trooper Maddox or anything else about which Trooper Maddox should know. (Tr. at 30:18-31:3, October 16, 2017.) Appellant replied that he had pills for which he had a prescription. *Id.* at 31:3-6. Trooper Maddox removed the pills which were in a clear cellophane wrapper from Appellant's pocket, and Appellant stated that he had lost the prescription bottle. *Id.* at 31:6-11. Because Trooper Maddox had no proof that the prescription pills belonged to Appellant, he placed Appellant under arrest. *Id.* at 31:11-18. Trooper Maddox also issued Appellant a citation for possession of marijuana. (Tr. at 31:19-32:1, November 14, 2016.)

In conformance with protocol, Trooper Maddox waited until returning to the Hope Valley barracks to conduct a Narcotics Analysis Reagent test kit (NARK II field test) on the substance that Appellant handed to Trooper Maddox. (Tr. at 32:2-20; 43:2-10, October 16, 2017.) Trooper Maddox testified in detail as to the procedure he used for testing the substance with the field test kit. *Id.* at 15:17-17:5; 39-1-12. The sample on which Trooper Maddox conducted the NARK II field test tested positive for marijuana. *Id.* at 40:2-6. Trooper Maddox testified that in his five years' experience as a Rhode Island State Police Officer, he had never observed a substance that

he believed to be marijuana yield a negative result after conducting a NARK II field test. *Id.* at 40:7-16; 65:6-12.

Trooper Maddox also testified that he graduated from the Rhode Island State Police Academy in 2011 and the Rhode Island Municipal Training Academy in 2003, and he completed a training program at the Federal Law Enforcement Training Center in Artesia, New Mexico in 2001. *Id.* at 8:19-20; 12:1-3; 11:16-19. During each of his trainings, Officer Maddox learned how to identify burned and unburned marijuana through a "controlled burn[.]" He also learned "how to use the testing kits and how [ ] to label it as evidence, weigh it, [ ] take pictures of it, and then when I got on the road with my field training officer . . ., we came across marijuana on several occasions." Id. at 14:2-19. In his sixteen years' experience as a law enforcement officer, Trooper Maddox has dealt with incidents involving marijuana while on duty "[h]undreds, hundreds of times. It could even be close to a thousand. . . . it's quite frequently." *Id.* at 14:20-15:-2.

Next, the State presented Chelsey Danella (Ms. Danella) as a witness. (Tr. 68:23-24, October 17, 2016.) Ms. Danella is employed as a forensic scientist for the Rhode Island Department of Health. *Id.* at 71:1-4. She graduated from Salve Regina University with a Bachelor of Science, and from the University of Florida with a Master of Science in Pharmaceutical Sciences. *Id.* at 71:8-12. The State moved to have Ms. Danella qualified as an expert witness, and the Appellant "ha[d] no objection to her qualifications as an expert." *Id.* at 73:4-11.

Ms. Danella testified that she is trained to use three tests—a microscopic examination, thin layer chromatography, and the Duquenois-Levine test—to test a substance for marijuana. *Id.* at 73:15-21. All three tests must be conducted, and return a positive result, for the scientist to

determine that the substance is marijuana. *Id.* at 76:7-11. When conducting the microscopic examination, the scientist is "looking for cystolithic hairs, which are the bear claw shaped [hairs], which are on top of the leaves." Id. at 74:1-3. Ms. Danella testified that these hairs "contain THC, so it's particular to cannabis and no other plants." *Id.* at 74:24-75:1.

Ms. Danella then described extensively how the thin layer chromatography and Duquenois-Levine tests are conducted. She explained that in the Duquenois-Levine test, the scientist is "looking for the color purple and the presence of chloroform." *Id.* at 77:8-10. The purple color indicates "[t]hat it's positive for cannabis." *Id.* at 82:10-14. Ms. Danella testified that while coffee may return a positive result on the Duquenois-Levine test, coffee returns a negative result on the microscopic examination and thin layer chromatography test. *Id.* at 84:6-86:10; 109:8-22. Therefore, only marijuana will yield positive results on all three tests. *Id.* at 74:14-75:1; 85:1-4. If the results of the three tests are inconsistent, the final result is deemed "inconclusive." *Id.* at 124:14-23.

Ms. Danella further testified that she conducted all three tests on a sample of the substance that Appellant gave to Trooper Maddox. *Id.* at 86:2-24. First, Ms. Danella conducted the microscopic examination, which "was positive for cannabis" because "it had the cystolithic hairs." *Id.* at 89:200-90:3. Next, Ms. Danella performed the thin layer chromatography test, which also returned a positive result for marijuana. *Id.* at 90:4-18. Lastly, Ms. Danella conducted the Duquenois-Levine test on the sample. *Id.* at 90:19-23. The purple color resulting from this test indicated that the substance "was positive for cannabis." *Id.* at 91:3-10. Based on her training, Ms. Danella concluded that the substance was marijuana because "all three tests were positive, so it was positive for cannabis." *Id.* at 91:11-19. Ms. Danella also testified that no contamination occurred in this case. *Id.* at 126:1-8.

Lastly, the Appellant testified on his behalf. (Tr. at 6:7-12, November 14, 2016). At trial, Appellant asserted that the violation should be dismissed pursuant to the affirmative defense provided in § 21-28.6-8 because he was a "qualifying patient" under the statute. Appellant explained that he has "VATER Syndrome," which is a congenital disability that involves several abnormalities within the body. *Id.* at 7:17-15-22. Due to this condition, Appellant has "back issues that cause [him] lots of pain" as well as "nerve damage from surgeries." *Id.* at 9:3-5. This physical pain caused Appellant to visit a physician specializing in medical marijuana in 2014. *Id.* at 9:12-22. Appellant testified that the physician "checked [him] out" and gave Appellant "documents signed by the physician in charge" allowing Appellant to apply for a medical marijuana card. *Id.* at 10:14-21; 11:1-5.

In an effort to demonstrate that he was a qualifying patient, Appellant sought to enter into evidence "the form that the doctor has to sign to give the okay for the card." *Id.* at 12:3-5. The State objected to Appellant's form (the Form), arguing that "everything on the form would be hearsay without someone to testify that it's either some type of record that's kept in the regular course of business or a medical record." *Id.* at 12:12-16. Appellant conceded that "the Medical Records Exception might apply," and further argued that "there's value, even if the Court is not prepared to accept it for the truth of the matter asserted, the Court can accept it as evidence of his visit to this practitioner and his belief . . . that he was eligible at that time." *Id.* at 13:18-24. In ruling on the admissibility of the form, the Trial Magistrate stated, "I'll allow it in for the limited purpose. I believe it is hearsay. I will accept it for the limited purpose of indicating that he applied for a medical marijuana card." *Id.* at 14:1-5.

Appellant testified that he did not submit the Form to obtain a medical marijuana registration card because he could not afford the fee. *Id.* at 11:2-5. Appellant further testified

that he returned to the same physician and obtained another form, which he subsequently sent to the Department of Health, and received a medical marijuana registration card (the Card) in September 2016. *Id.* at 14:19-15:20; 21:10-11. At trial, Appellant did not have the actual Card, but did have a photograph of the Card on his cell phone; the parties stipulated that the photograph was an accurate representation of the Card issued to Appellant, and it was admitted as Defendant's B. *Id.* at 21:14-23.

After hearing all of the testimony and evidence presented, the Trial Magistrate stated his findings of facts on the record. The Trial Magistrate "found both Trooper Maddox' [sic] testimony as well as Ms. Danella's testimony to be highly truthful, professional, and credible." (Tr. at 25:16-19, April 3, 2018.) The Trial Magistrate also found that "there was no evidence presented to this Court that there was any contamination of the substance that was part of this case. . . . [and] no rebuttal to show that the evidence was tampered with." *Id.* at 32:4-18. As such, the Trial Magistrate was satisfied "by clear and convincing evidence that the [Appellant] was in possession of marijuana" based upon "the totality of the testimony in this case, [and] the narcotics field test . . . combined with other facts in this case." *Id.* at 33:1-8.

Regarding the Form, the Trial Magistrate stated, "We did get a printout form from the Defendant; we used Defendant's A, which we took in, in full, that he did, in fact, apply for the medical marijuana card." *Id.* at 20:9-12. The Trial Magistrate went on to state, "Interestingly, enough, we were trying to get things sent from people's phones and make copies of it, but we were successful in putting that in as an exhibit, and we also put in Defendant's B, which was the

card, the medical marijuana card, that was issued to the Defendant on September 30th of 2016." *Id.* at 20:12-19.[2]

The Trial Magistrate found Appellant's testimony "to be truthful and credible." *Id.* at 25:19-20. The Trial Magistrate also found that "it is clear that the Defendant, through Defendant's Exhibit's A[,] . . . went to a doctor and did file the appropriate application, which under the definition of the statute would put him in the position to be a qualifying patient[.]" *Id.* at 21:23-22:4. However, the Trial Magistrate determined that under the statue as it existed at the time of the stop, one must be a registered cardholder in order to qualify for the defense. *Id.* at 22:5-22.[3] As such, the Trial Magistrate ruled that the affirmative defense did not apply to Appellant because Appellant did not have a medical marijuana card issued to him at the time of the offense. *Id.* at 24:15-22. The Trial Judge imposed the minimum fine of $150 against Appellant. *Id.* at 35:10-11. Appellant filed a timely appeal of the Trial Judge's decision. Forthwith is this Panel's decision.

II

Standard of Review

[2] It is important to note that in these two statements, the Trial Magistrate appears to conflate Defendant's A (the Form) and Defendant's B (the Card). As previously discussed, the Trial Magistrate did not accept Defendant's A in full; rather, the Trial Magistrate accepted Defendant's A only for a limited purpose. (Tr. at 14:1-5, November, 14, 2016.) Moreover, Appellant presented the original hard copy of Defendant's A at trial. *Id.* at 13:2-9. It was Defendant's B, not Defendant's A, that Appellant presented as a photograph on his phone, which the Trial Magistrate accepted in full. *Id.* at 20:21-21:23.

[3] The Trial Magistrate was under the erroneous impression that the statute was amended in 2016, subsequent to Appellant's 2015 stop. *Id.* at 22:4-9. However, the statute was amended in 2014—well before the incident at bar—and has not been amended since that time.

Pursuant to § 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:
>
> "(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 Mut. 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." *Id.* (citing *Envtl. Sci. 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." *Id.* Otherwise, it

must affirm the hearing judge's (or magistrate's) conclusions on appeal. *See Janes*, 586 A.2d at 537.

III

Analysis

On appeal, Appellant contends that the Trial Magistrate's decision was "[a]ffected by other error of law" and "[c]learly erroneous in view of the reliable, probative, and substantial evidence on the whole record[.]" *See* § 31-41.1-8(f)(4)-(5). Specifically, Appellant avers that the Trial Magistrate erred in determining (1) that the substance Appellant gave to Trooper Maddox was marijuana, and (2) that Appellant did not qualify for the affirmative defense provided under § 21-28.6-8. *See* Def.'s Mem. of Law.

A

"Clear and Convincing Evidence"

Appellant argues that the Trial Magistrate erred in finding that there existed "clear and convincing evidence" to sustain a violation of § 21-28-4.01(c)(1). *See* Traffic Trib. R. P. 17(a). Specifically, Appellant maintains that the evidence produced at trial is insufficient to support a finding that the substance Appellant proffered to Trooper Maddox was, in fact, marijuana.

Pursuant to Rhode Island Traffic Tribunal Rule of Procedure 17(a), "[t]he burden of proof shall be on the prosecution to a standard of clear and convincing evidence." (Rule 17(a).) Clear and convincing evidence is evidence that "must persuade the jury that the proposition is highly probable, or must produce in the mind of the factfinder a firm belief or conviction that the allegations in question are true." *Cahill v. Morrow*, 11 A.3d 82, 88 n.7 (R.I. 2011) (quoting 29 Am. Jur. 2d *Evidence* § 173 at 188–89 (2008)). However, the standard "does not require that the evidence negate all reasonable doubt or that the evidence must be uncontroverted." *Id.* This

Panel's review of the case is "limited to a determination of whether the hearing justice's decision is supported by legally competent evidence." *See Marran v. State*, 672 A.2d 875, 876 (R.I. 1996). The Trial Magistrate's factual findings are treated with deference and are not to be disturbed by the Appeals Panel, unless the Trial Magistrate "overlooked or misconceived relevant and material evidence or was otherwise clearly wrong." *Brown v. Jordan*, 723 A.2d 799, 800 (R.I. 1998) (internal citations omitted).

This Panel pauses to note that Appellant argues in his memorandum, "Absent either *testimony from a forensic expert* or *evidence of a laboratory report* produced by the Department of Health, the Prosecution did not produce legally sufficient evidence to satisfy its burden of proof by clear and convincing evidence." However, the record clearly reveals extensive testimony from a forensic expert—to which Appellant "ha[d] no objection to her qualifications as an expert"—as well as the laboratory report from the Rhode Island Department of Health—again, to which Appellant had "[n]o objection" to its admission into evidence in full. (Tr. at 73:4-11; 92:2-93:3, October 17, 2016.) Appellant argues *only* that the NARK II field test conducted by Trooper Maddox is insufficient to sustain the charged violation under the "clear and convincing evidence" standard, and entirely ignores other significant evidence that the Trial Magistrate considered; namely, Ms. Danella's expert testimony and laboratory report as well as the Appellant's own admission that the substance is marijuana. As such, this Panel need not consider whether the NARK II field test, standing alone, is sufficient to prove that the substance is marijuana.

In the instant matter, the record is replete with evidence from which the Trial Magistrate could form a "firm belief or conviction" that the substance Appellant gave to Trooper Maddox was marijuana. *Cahill*, 11 A.3d at 88 n.7. First, Trooper Maddox testified that during the motor

vehicle stop, the Appellant "said he had marijuana, and he lifted it up, and he said, I have it on me[.]"[4] *Id.* 29:17-19; *see also State v. Berroa*, 6 A.3d 1095, 1101 (R.I. 2010) ("Proof of the knowledge which is essential to conviction may be shown by evidence of acts, declarations or conduct of the accused from which an inference may be fairly drawn that he knew of the existence of [controlled substances] at the place where they were found."). Moreover, Trooper Maddox then conducted a NARK II field test on the substance, which yielded a positive result for marijuana. *Id.* at 40:2-6. In doing so, Trooper Maddox relied on his sixteen years' experience as a law enforcement officer and his extensive training in recognizing, testing, and packaging seized marijuana. *See id.* at 25:1-2; 65:6-12 (Trooper Maddox testified that he uses the NARK II field test kits "quite often[,]" and that in his experience he never observed a substance that he believed to be marijuana yield a negative result after being testing with a NARK II test kit).

In addition, Ms. Danella's expert testimony supports the Trial Magistrate's conclusion that the substance Appellant handed Trooper Maddox was marijuana. Ms. Danella testified in depth as to the procedures employed by the Rhode Island Department of Heath for testing controlled substances. *Id.* at 73:15-82:14. Based upon her training, Ms. Danella conducted three tests on a sample of the substance seized from Appellant: a microscopic observation, a thin layer chromatography test, and the Duquenois-Levine test. *Id.* at 91:11-19. Ms. Danella indicated that all three tests demonstrated that the substance was "positive for cannabis." *Id.* at 93:8-9. Moreover, the Trial Magistrate accepted into evidence Ms. Danella's laboratory report that she created regarding her testing of the sample. *Id.* at 92:18-93:3; *see State v. Anil*, 417 A.2d

[4] The facts of the motor vehicle stop from which this matter arises are undisputed as Appellant neither testified about nor refuted Trooper Maddox's testimony regarding the stop or Appellant's admission.

1367, 1374 (R.I. 1980) ("On examination of the expert's testimony concerning the tests he made to determine the nature of the substance [ ], we are convinced that there was an adequate foundation for the admission of the report.").

After a thorough review of the record, this Panel finds that the Trial Magistrate's decision is supported by the legally competent testimony of Trooper Maddox, Ms. Danella, and Appellant as well as by the laboratory report admitted into evidence. *See Link*, 633 A.2d at 1348 (citing *Envtl. Sci. Corp. v. Durfee*, 621 A.2d 200, 208 (R.I. 1993)). Appellant's contention, in his memorandum, that the Trial Magistrate's decision rests only upon Trooper Maddox's testimony, which "boils down to nothing more than 'I know it when I see it[,]'" is not supported by the reliable, probative, and substantial evidence of the record whatsoever. As the Appeals Panel "lacks the authority . . . to substitute its judgement for that of the hearing judge concerning the weight of the evidence on questions of fact," this Panel concludes that the Trial Magistrate's decision is not clearly erroneous in view of the evidence within the record. *See* 31-41.1-8(f)(5); *Link*, 633 A.2d at 1348 (citing *Liberty Mut. Ins. Co. v. Janes*, 586 A.2d 536 537 (R.I. 1991)).

B

Qualifying Patient

Appellant also asserts that the Trial Magistrate should have dismissed the charged violation because Appellant demonstrated that he was a "qualifying patient" under § 21-28.6-8 at the time of the stop.[5] Pursuant to § 21-28.6-8, "a qualifying patient may assert the medical

[5] The Trial Magistrate found that Appellant was not a qualifying patient because he was not a registered cardholder, and therefore could not avail himself of the affirmative defense. (Tr. at 24:15-20, April 3, 2018.) Section 21-28.6-8 does not require a qualifying patient to be a registered cardholder; however, for the reasons outlined in this Decision, Appellant has nevertheless failed to establish that he is a qualifying patient.

purpose for using marijuana as a defense to any prosecution involving marijuana[.]" This affirmative 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[.]"[6]

Sec. 21-28.6-8(a) (emphases added). Therefore, a person asserting the defense must show that (1) a physician completed a full assessment; (2) a bona fide practitioner-patient relationship existed; and (3) the practitioner determined that the benefits of marijuana will likely outweigh the risks. Sec. 21-28.6-8(a)(1).

Whether someone is a qualifying patient, and how he or she must prove each of the three elements of § 21-28.6-8, is a matter of first impression in our jurisdiction.[7] In states with similar statutes, the courts have held that the evidence produced at trial supported a finding that a physician approved the medical marijuana use when the prescribing physician testified at trial, or when the defendant proffered an authenticated document from a physician. *See State v. Ginn*, 128 Wash. App. 872, 117 P.3d 1155 (Div. 2 2005) (doctor testified that medical marijuana was more effective in treating defendant's ailments); *City of Garden Grove v. Superior Court*, 157 Cal. App. 4th 355, 68 Cal. Rptr. 3d 656 (4th Dist. 2007) (verified written statement from

[6] The parties do not dispute that Appellant possessed less than the statutorily permitted quantity of marijuana.

[7] Indeed, our Supreme Court has addressed this affirmative defense in only one other case, *State v. DeRobbio*, 62 A.3d 1113 (R.I. 2013). However, *DeRobbio* is not instructive here because *DeRobbio* addressed the quantity prong of § 21-28.6-8(a).

physician stated that defendant had serious medical condition and might benefit from the use of medical marijuana).

The Rhode Island Rules of Evidence apply to "all adjudications of civil violations before the traffic tribunal and the municipal courts." Rhode Island Traffic Tribunal Rule of Procedure 15(b). Rhode Island Rule of Evidence 105 provides, in relevant part: "When evidence which is admissible . . . for one purpose but not admissible . . . for another purpose is admitted, the court, upon request, shall restrict the evidence to its proper scope and instruct the jury accordingly."

Here, Appellant attempted to enter into evidence "the form that the doctor has to sign to give the okay for the [medical marijuana] card." (Tr. at 12:3-5, November 14, 2016.) It is clear that the Trial Magistrate found the Form to be hearsay and thus restricted it to "the limited purpose of indicating that he applied for a medical marijuana card." *Id.* at 14:1-5.[8] As such, the Form does not establish that Appellant is a qualifying patient because the Form was not admitted to prove the truth of the matter asserted, specifically (1) that the physician completed a full assessment of Appellant, (2) that a bona fide practitioner-patient relationship existed, and (3) that the physician determined that Appellant would benefit from the use of medical marijuana. *See* R.I. R. Evid. 802; § 21.28.6-8.

If the Form had been properly authenticated, it could have been admitted, in full, as either a medical record or a record of regularly conducted activity.[9] *See* Rule 803(4); Rule 803(6); § 9-19-27. It is well settled that "[a] fundamental prerequisite to the admission of any business

[8] Although the Trial Magistrate admitted the Form for this limited purpose, by Appellant's own admission, Appellant did not actually use the Form to apply for a medical marijuana card. *See* Tr. at 114:8-18, November 14, 2016.

[9] Of note, the Appellant mentioned that "the Medical Records Exception might apply" to the Form, but did not press the issue further. Instead, Appellant argued that the Form had value as to Appellant's belief of his eligibility as a qualifying patient at the time of the stop. (Tr. at 13:18-24, November 14, 2016.)

record is an adequate foundation[,]'" such as through the testimony of the custodian of the records or some other qualified witness. *Boscia v. Sharples*, 860 A.2d 674, 680 (R.I. 2004) (quoting *State v. Carrera*, 528 A.2d 331, 335 (R.I. 1987)). Similarly, medical records must be authenticated before they can be admitted into evidence. Section 9-19-27(b) allows medical records to be authenticated by an affidavit "subscribed and sworn to under the penalties of perjury by the physician, dentist, or authorized agent of the hospital or health care facility rendering the services . . . as admissible as evidence of . . . the diagnosis of the physician." The purpose of this rule is "to admit what is presumptively reliable medical evidence presented by way of this statutory process without the necessity of calling numerous medical personnel as witnesses." Sec. 9-19-27(a).

While Appellant testified as to his debilitating condition and that he saw a physician for the purpose of obtaining medical marijuana, said testimony is insufficient to authenticate the Form or to otherwise establish that Appellant was a qualifying patient. *See Boscia*, 860 A.2d at 679 ("The plaintiff had no personal knowledge of the making and keeping of medical records and, therefore, was not a competent witness to authenticate them."). Further, there is nothing in the transcript to suggest that Appellant's physician had "subscribed and sworn to" the contents of the Form "under the penalties of perjury." *See* 9-19-27(b).

Therefore, Appellant did not satisfy his burden under §21-28.6-8, and cannot avail himself of the affirmative defense, because the *contents* of the Form were not admitted into evidence.[10] The only evidence tending to show a bona fide practitioner-patient relationship and

[10] Under the statute as it is currently written, if Appellant had proven all elements of § 21-28.6-8(a) at trial, Appellant would have been considered a "qualifying patient"—thereby warranting dismissal of the charged violation—despite that fact that Appellant was *not* a registered cardholder at the time of the stop.

that a physician determined Appellant would benefit from medical marijuana use is the Appellant's testimony regarding his visit to the physician who drafted the Form.[11] This testimony, on its own, is insufficient to meet Appellant's burden under § 21-28.6-8, and it is insufficient to authenticate the Form under Rule 803(4) or 803(6).

[11] The Trial Magistrate also admitted into evidence a photocopy of Defendant's medical marijuana card, which was issued to Appellant in September 2016—nearly one year *after* the incident at bar. (Tr. at 14:19-15:20; 21:10-11, November 14, 2016). However, a medical marijuana card issued after a stop is insufficient to demonstrate that a defendant was a qualifying patient at the time of the stop. *See, e.g., Wilkinson v. Town of North Kingstown*, A.A. No. 2015-128 (2016) ("[A]n issue of fundamental fairness would tend to arise if ex post facto declarations were to be permitted.").

V

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 is neither affected by error of law nor clearly erroneous in view of the reliable, probative, and substantial evidence on the record. The substantial rights of the Appellant have not been prejudiced. Accordingly, Appellant's appeal is denied, and the charged violation is sustained.

ENTERED:

_____
Magistrate Erika L. Kruse Weller (Chair)

_____
Magistrate Alan R. Goulart

_____
Magistrate William T. Noonan

DATE: _____